

## **“Be Instructed, All You Who Judge the Earth”: The Dialectic of Law and Love during the World, according to Augustine**

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(For Pepperdine Conference on “Love and Law,” February 2014)

### ***Introduction***

Thank you for having me out to Pepperdine. [tk]

My theme is the dialectic of law and love, during the world, according to Augustine. That has three parts to it, and in a way they will structure my talk. Ultimately I want to talk about the *dialectic* of law and love as Augustine understands it. But before that I should say something about what I take to be the context in which this issue presses upon us, and so I will start by saying something about this odd phrase “during the world”. Then I will introduce why what I call our predicaments regarding the ideas of judgment and authority present us with a distinct form of this challenge, in this time and place. Then, finally, I will turn to Augustine’s thoughts on this subject, drawing out several lessons from his work that may I hope be of interest to this group.

### ***I. During the World***

The phrase “During the World” may seem an odd neologism, but in fact it’s very old. I cite it in my book *A Theology of Public Life* (which I actually wanted to title *During the World*). It appeared as long ago as 1435, in the will of one Richard Beauchamp, Earl of Warwick, who asked therein that a chapel be built with money from his estate, and “that there be said every day, during the Worlde...three masses” in the chapel (Holmes 1962: 180). And the idea behind it is older still. The struggle to grasp the idea expressed by that phrase has been one of the primary tasks of Christian thought from its beginnings.

A whole cosmology is packed into those three words, one suggesting that our immurement in the world as we find it is in some way then not the whole story about us, that our earthly condition is crucially contingent—at least in the sense that our lives’ significance is not absolutely determined by the immanent forces that both press upon us and (seem to) sustain us. It underscores that we live not simply in the created order, but the *factitious* order: that there is a difference between the “world” and “creation,” and that even as we inhabit our worldly situation, this situation is contingent. Yet it insists that the right language in which to register that contingency is not most fundamentally *spatial* (as if there were some *other place* to which we could flee) but rather *temporal*. It is worth recalling that the Latin word that often gets translated as “world” (along with *mundus*) is *saeculum*, and *saeculum* was originally an era (still visible in the French *siècle*). The phrase “during the world” powerfully reminds us to temporalize (instead of spatialize) “the world,” to see our situation as inhabiting an *era* more relevantly, and more fundamentally, than a *place*.

And in this recognition of the world’s temporal structure, we find a wise

recommendation that our mode of inhabiting it should be one of *endurance*. We cannot expect our moral and spiritual lives to be ones of accomplishment; rather, we should expect our lives to be marked by various forms of suffering, including, we hope and pray, suffering the mercy of grace. Our agency is primarily responsive, not pro-active. This is why, to depict the church, Augustine chose the metaphor of the hospital over against the Pelagians' gymnasium, and grace he depicted as *medicine*, opposed, one imagines (perhaps anachronistically) to the Pelagians' temptation to think of grace as a steroid. Successful human life is marked more by waiting, watching, and enduring than by accomplishment. "In this life," Augustine said, "justice...consists more in the forgiveness of sins than the perfection of virtue."<sup>1</sup> Yet this emphasis on forgiveness of sins should not blind us to the real presence of genuine goods in our world (**emphasize sacramentality here**).

In these ways, the phrase "during the world" encapsulates an attitude that I want to call paradigmatically Augustinian. (This is perhaps a "new" Augustine to you, emphasizing more vigorously both sides of the dialectic between sin and grace, not simply sin, and thus splitting the difference between the more establishmentarian and integralist "political Augustinianism" of several generations ago and the more Niebuhrian and apophatic "realist Augustinianism" of the past generation; but I trust you don't want to get into the Okefenokee of Augustine exegesis in this setting.<sup>2</sup>) Furthermore, this Augustinian recommendation of endurance suggests that we inhabit a perennial crisis, not a historically contingent one. Whether we live in modernity, or post-modernity, or late modernity, or some other description of our situation, the crucial part of our address is that it is East of Eden, and has been ever since Adam and Eve. Augustinians are in this way not declensionist historicists: declinist narratives that suggest a substantial collapse from an earlier age of virtue are always selling us some dubious bill of goods, and we will always do well to open the packages and inspect them before signing the invoice and letting the deliveryman leave. (*See Augustine's unmasking of the Roman Republic.*) That is nostalgia, and dangerous in its own ways.

Nonetheless, the manifestations of our permanent crisis, during the world, will take different forms in different contexts, as different ages, equipped with different material and cultural capacities and habits, will manifest our fundamental pathologies in markedly different configurations. Because of this, we always need some relatively fine-grained language of theo-political social criticism indexed to our particular place and time. We simply don't need that language to go full-apocalyptic, and seduce us into thinking we stand at Armageddon and we battle for the Lord. So even while we eschew Manichean MacIntyrean or Milbankian (or John Pauline and Benedictine) jeremiads against an age after virtue, or nihilism, or a culture of death, we will still need something like Charles Taylor's critique of contemporary liberalism's "ethics of inarticulacy" in order to help us see, and attempt to confront, some of the most obvious manifestations of our problems today. (**A big argument packed in there, maybe expand?**) In our context, it does seem to me that a reading of the signs of the times suggests a particular configuration of our

predicament. For our purposes, the most marked facet of our age is what I want to call the “crisis of judgment and authority” that we currently face.

## ***II. Predicaments of Judgment and Authority***

In this talk I want to use Augustine, and his attitude of “During the world”, to talk about some of the ways he sees this attitude manifest in the act of political judgment in his day, and to suggest that he may have lessons for our age as well.

I could have framed this around Bill Stuntz’s remarkable *Collapse of American Criminal Justice*. Or I could have framed this around the ongoing work of Oliver O’Donovan, in my view the greatest living theologian of political order (even though I don’t always agree with his deeply well-considered views), especially his reflections in his work *The Ways of Judgment*. But instead I will take a more proximate provocation, Richard Posner’s recent, more ephemeral, but still quite clever book *Reflections on Judging*. Posner’s full argument is, for an outsider, not entirely legible, but it seems clear to me that he worries about the danger that what he calls “complexity” presents to the future success of the law. Most basically, he worries that judges increasingly “escape from complexity into complexity.”<sup>3</sup> He blames this on technical factors related to changes in legal and broader social institutions, and in particular law schools, on which he is interesting (and says things of relevance to training in theology and ethics, too).

But I think it is also the case, though Posner does not mention this, that two other factors are worth considering. The first is the question of whether, in our day, the criminal justice system is fair, and thus whether the crisis of judgment has something to do with a larger and more fundamental crisis of civic justice (such is partly the case that Bill Stuntz made in *Collapse*). The second is the question of whether we as a culture face an even deeper crisis, whether we have any confidence in judging at all (which is largely the case O’Donovan makes). I think these two are importantly right, and I would put my formulation of their worries—and thus make a general point of culture-criticism—this way: *we live in a culture where justice is increasingly hard to articulate as a moral source independent of aggrieved self-interest, and we face this difficulty because our overall moral languages offer fewer and fewer ways to acknowledge extra-subjective moral authorities in general; so that, while this conceptual inhospitality to authority is the setting in which our own more specific anxieties about judgment participate, we yet live in a culture where authority of various sorts is ever-more pressing upon us, as we grow ever more reliant upon others as regards their special forms of expertise over ever-larger dimensions of our lives*. Given all these facts, we can see that we’re in for a bit of a puzzle: for what are we to do with the growing *fact* of authority in our lives, even as the languages we have for describing our lives offer ever more marginalized ways of recognizing and discussing the fact of our need for authority?

That judgment is a human practice that partakes of ultimate significances is not something that I hope I must spend much time on in this setting. Let me say only this: that it seems clear to me that there are not just moral, but even theological dimensions latent in

the practice of judging; that judging is a matter of legal ultimacies, and that these ultimacies have something to do with other ultimacies, and so judging is a particularly charged, particularly obvious moment of civil religion; hence we should, and typically do, approach judging—however tacitly, however inarticulately—with a certain civic piety.<sup>4</sup> We recognize the need for sobriety in this act. Yet we seem to lack the ability to do honor to what the act implies, in our vocabulary for talking about it. Ironically, when we take up the question of authority, we typically do so under the very different sociological category of “expertise”. Posner is a terrific example of this. He is very clever, but he fails to see something fundamental, the way that complexity is different from not only difficulty but profundity. He is in a way tone-deaf to authority. And his tone-deafness bespeaks a larger problem, as I’ve tried to say. How can we best try to confront this problem today, during the world?

### *III. Sermon 13 and the Dialectic of Law and Love for Augustine*

This is where Augustine comes in. What does he have to teach us? I want to use one relatively unknown sermon on judging that Augustine gave, the one named as Sermon 13 in contemporary scholarship. This sermon speaks of how to how to be a judge, how to exercise political power, and most generally how to be an authority, in a way that may be of interest today.

#### *A. The Sermon*

A bit of background for the sermon may be in order. The sermon was given in a setting that was redolent of authority, triumphant and also complexly compromised. First of all, Augustine gave it, we believe, on May 27, 418 AD, in Carthage, at the Basilica of St. Cyprian, built on the site where he had been martyred in 258, during the Valerian persecution. Cyprian had been martyred because he refused to sacrifice to the Emperor, as many Christians refused. The Basilica was a Christian building, standing on the spot where Cyprian had been executed by the worldly authorities, and where his shrine had become a particular locus of theological density, of salvific energies for faithful and unfaithful alike.

Now, a century and a half later, as he sat in the shrine’s throne before the crowd of (mostly standing) congregants, Augustine was himself an *auctoritas*, at the height of his authority in North Africa, for the Christian community and the political order alike.<sup>5</sup> It may well have been that his sermon was preached to some of those *viri illustris* who held the offices once occupied by Cyprian's killers. There were still Caesars, and still an *imperium Romanum*, though now of course Rome was Christian. Yet no one in the service of the Emperor, whether sitting in a chair or standing at the front of the congregation, could have missed the complex situation in which representatives of the *imperium* were put, by being in that place.

The structure of the sermon says something as important as its explicit argument. First of all, the pattern of Biblical texts cited in the sermon is unusual and significant. Augustine spends the first part of the sermon talking about the general story of sin, grace,

and redemption, in which all humans should be involved. In this story we are all, at best, co-workers with God in our own journey back to God, and secondary co-workers at that, for God gives us the will to do good, Augustine insists; so we are to work out our redemption, he reminds us in an explicit echo of Paul, in fear and trembling (Ps. 2:11 and Phil. 2:12), working under God's guidance, "that you might find yourself in him, as you have lost yourself in yourself" (*Sermo* 13.3). Hence his first interpretation of the text he is using--"Be instructed, all you who judge the earth" (Ps. 2:10)--is to interpret it in terms of humanity's common struggle with our inherited sin from Adam.

Then, and only then--fully a third of the way into the sermon--does he turn to what he calls the "everyday understanding" of the phrase, namely, the political sense. Certainly such judging, the mark of real political rule, is inevitable; but such judging is immediately fraught, for kings are no closer to God than anyone else; "the earth itself is judging the earth, and when earth judges earth it ought to fear God who is in heaven. It is indeed judging its own equal, a human judging a human, a mortal judging a mortal, a sinner judging a sinner." (*Sermo* 13.4)

Why is this so fraught for Augustine? Because, he says, Christ tells us that only the sinless should judge. And the one sinless man who could judge, chooses *not* to do so. At a minimum, then, in political action, we should be merciful, as Christ demonstrated in his dealings with the woman caught in adultery. Politics is simply too tempting an arena for humans, with our ever-ready longing for glory, which is inevitably just a polite mask for our desire to dominate one another; we need to be reminded continually of this fact, and checks should be put in place to protect us from our own proclivities.<sup>6</sup>

And yet politics is inevitable and necessary; the point of political judgment is found in its salvific benefits, its ability to serve the redemptive purposes of God.<sup>7</sup> Political authorities are put in their offices (*officium*, "duty" is the revealing root sense of the word Augustine uses) to secure justice and be merciful in their dealings with those who are subject to their authority--as God surely is with them when they do that. But the problem is, from their perspective, God doesn't look away to let them do injustice either. They must remember that *all* will be judged, even those—perhaps especially those—who exercise authority during the world, and all must act in fear and trembling. So now he turns directly to the authorities (one can imagine him literally turning towards them, were they in church that day) and says "judge yourself first" (13.7) in all things, and understand that such a duty is not to be enjoyed, but something to be endured, to be experienced as being tortured "on the rack of your heart" (13.7). "If, then, you don't want to exercise your authority unjustly, all you human beings who wish to have authority over human beings, well, *be instructed*, so that you avoid judging corruptly, and perishing in your soul before you manage to destroy anyone else in the flesh" (13.7). If you seek authority, you must pay bribes, Augustine says, adding (somewhat impishly) "I'm not criticizing you--yet." (*Sermo* 13.7)

Only after this last, chastising swipe at political rulers, does Augustine turn to the text that had already become one of the most fundamental texts for Christian political

understandings, namely, Romans 13 ("let every soul be subject to the higher authorities, for there is no authority except from God," etc.). Even here, however, even after all the framing given before, Augustine still hedges the glorification of political authorities in interesting ways. For in such offices, sinful humans do not exhibit glory or splendor or authority in themselves; whatever authority they have comes from God, as vehicles of justice, and so they will "praise" their subjects in their dealings with them, either by properly honoring those subjects' justice (most likely simply by leaving them alone), or by honoring their justice with persecution.

So here again Augustine further complicates the authorities' authority by recalling his congregation's attention to where they physically are--"think of the blessed man whose blood was shed on this very spot." In light of this, he urges on his audience a moderation and a mercy in exercising the awesome duty of judgment; he urges them to avoid passing judgments which are by nature irrevocable, and so to avoid, whenever and wherever possible capital punishment (13.8), and always in their judgments to look for ways to exhibit, and recursively participate in, the mercy which is a perpetual mark of God's character as revealed in Jesus Christ.

### ***B. The Dialectic of Law and Love***

All of this—the locale, the progression of Scriptural passages discussed, and the argument itself—reinforces Augustine's basic message, which is that to exercise authority is a grave, terrible, and always potentially presumptuous thing, to be undertaken only when necessary, and then in fear and trembling.

Yet in no way is he saying we *should not* exercise such judgment, when it is necessary. For there are times when it is, he thinks, quite clearly necessary.<sup>8</sup> Human society needs people to decide—to engage in the act of judgment. Now, he did not distinguish between that judgment as a political matter and that judgment as a *judicial* matter. But in refusing to see a firm distinction there, perhaps he is not entirely mistaken. Perhaps such a distinction is finally more hazy than we wish to think. Perhaps the problem even with judicial judgment is precisely that it remains, ultimately, in this dispensation, *one* person's judgment—unable to hide behind other methods or algorithms to apply principles, or any form of virtuoso expertise. Perhaps there is some value in thinking of working out judgment in fear and trembling

How, then, should we best perform judgment, exercise power, and inhabit authority, according to Augustine? His solution seems to be to engage in a dialectical practice of affirming law and love, justice and mercy, and insisting that judges, and all political authorities, undertake both sides of this dialectic. Such a practice is useful both as a counteracting force against the seductions into pride that are faced by our own souls when tempted by justice (and thus it is an *ascetical* practice), and as a way to teach others about the peculiarly distended way in which God's love, and God's law, are manifest during the world (and thus it is a *pedagogical* practice). In both ways, it relies upon our insisting to

ourselves and to others that this world is a partial and provisional place, where full justice cannot be accomplished, and the realization of what justice there *can* be is always a murky and tragedy-laced endeavor, and yet our longing for justice speaks of a deeper and higher justice yet to come, a justice that we are promised will be riddled with mercy and forgiveness, on the judgment day (and thus it is finally an *evangelical* practice).

How would it do these things? In several ways. First of all, the very character of the judge should matter. The judge should speak modestly, and minimally, being chaste in his or her words, refusing invitations to speculate or indulge in hypotheticals, a hesitancy in what one says and in the practices of reason giving—they should work on a case-by-case basis, and not lay down a marker for all eternity in their words. A judge’s words matter, and so they should be used sparingly, lest the coin of their voice be debased.

Furthermore, the judge should exhibit humility—humility in not offering too determinate and fixed a vision of what is going on, nor in the ultimate metaphysical propriety of their own judgments as replacing God’s right to judge.

Furthermore, the judge must exhibit a properly courageous, or perhaps faithful, insistence on the necessity of judgment, and a willingness to face the winnowing pressures that must be faced if one is to undertake this particular office.

All this is part of the practice of judgment, of meting out judgment, as our common life necessitates. And yet the fact of this necessity should be lamented, and the need for judging bewailed, as the judge cries out, in another famous Augustine text, “from my necessities deliver me!” (DCD 19.6) And finally, it seems the judge must be engaged in a persistent seeking out of opportunities for mercy—for opportunities and reasons (I almost say excuses) to exhibit mercy. Whether this is done (as it was urged by Augustine) by a strict avoidance of the death penalty, or by a refusal to engage in certain kinds of prosecutions, such a practice of seeking mercy is, both civically and theologically, a very powerful good that we ought to promote.

## Conclusion

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## Endnotes

<sup>1</sup> *De civitate Dei* 19.27: *Ipsa nostra justitia, quamvis vera sit propter veri boni fidem ad quem refertur, tamen tanta est in hac vita, ut potius peccatorum remissione constet quam perfectione virtutum.*

<sup>2</sup> This is an Augustine who is profoundly worldly, yet deeply insistent that the world as we find it is still systematically flawed, a site of real, though always fugitive, “sacramental” goodness, before the eschaton. (maybe “worldly Augustinianism” here?)

First, there was Henri-Xavier Arquillière’s idea of a “political Augustinianism.” **Explain** Then there was the “realist” reaction to that—**Niebuhr, Deane, Markus**. Now, most recently, there has been a counter-reaction, begun by figures like Oliver O’Donovan, John Milbank, and Rowan Williams, but reaching its most lucid and historically well-sourced summa in the work of Robert Dodaro... For more see H.-X. Arquillière. *L’Augustinisme politique. Essai sur la formation des théories politiques du moyen âge*. Paris, Librairie philosophique, J.Vrin, 1934, 1955, 1972. For a helpful summary of the reception of Arquillière’s thesis, see the dissertation of Michael Bruno, “Political Augustinianism”: A study of the interpretations of Augustine’s political thought from 1900 to the present.” Pontificia Universitas Lateranensis, pp. 30-35.

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<sup>3</sup> *Reflections on Judging* (CITE), p. 14. More generally, Posner argues that the law is becoming ever more complicated, both because of the sheer complexity of the cases that come before judges, which is itself a reflection of the sheer complexity of the world, a complexity that is increasingly a relevant part of the cases that judges must confront. The vast elaborations of law, especially the regulation of an ever-more complicated and multilayered governmental-regulatory structure, the enormous technical complexity of many of the situations or issues under judgment, the increasingly byzantine pandaemonium of the legal precedents that may be engaged in any given situation—all of this presents itself as urgent and worthy of the judge’s serious cognitions. Posner calls this “external complexity.” Now this complexity is not simply difficulty, but is due to the complicated interdependence of mutually influencing factors within a whole system. Thus in addressing complexity, we are dealing with “a system not a monad” (pp. 45-55) It is complex because of the incredible sensitivity of the outcomes to initial conditions and to the various inputs and influences of multitudinous variables along the way. The phenomena may well be incalculably complex, and hence strictly unpredictable.

This is challenging enough—it is, as Posner sees it, the fundamental legal challenge of our time. But then the sociology of the legal profession piles complexity on complexity, by creating internal complexity to mimic external complexity. The increasingly Alexandrian rules of interpretation, obtuse and solipsistic citation structures (something ominously called the Blue Book), as well as the creeping, or perhaps galloping, infestation of legal prose with jargon that closes off the prose from outsiders’ assessment, but only at the cost of shutting down insiders’ comprehension as well.

Furthermore, the widespread use of clerks to write opinions strengthens the likelihood of abstruse formalistic arguments, both because clerks don’t have a lot of experience or wisdom (something judges are supposed not only to *possess* but actually, you know, to *use*), and also because clerks are picked for cleverness in law school, which is not necessarily a good context in which to determine what we may call—let’s just say it—*judiciousness*, but is a fine context for sorting people on how well they regurgitate back what law professors tell them is important.

Posner doesn’t quite come out and say it, but I think he wants to say that the problem is that judges simply aren’t willing to call a spade a spade—that they are, effectively, afraid to judge, because they are taught how to analyze, but not assess. Confronted with the increasing complexity of the cases that come before the bench, judges quail at the prospect of genuine understanding. So they respond in predictably defensive and deeply counterproductive ways, and “escape from complexity into complexity.”

“I’m not trying to turn judges into scientists communicating in symbols and jargon. I’m urging greater judicial recognition of the ever-increasing complexity of the factual underpinnings of modern federal litigation...judges have to learn to write about complexity in ways that they and their audience...can understand. Law must come to terms with modernity but will remain a humanity, and should” (p. 355). (I don’t quite understand what that last sentence is gesturing at, but I suspect Posner writes it as an impatient hand-waving figure at those who see him as an anti-humanist.) For my money what’s interesting but almost left out in this quote is the idea that in a democracy, the judiciary, and thus the law, gains legitimacy by being understood and at least tacitly affirmed (the philosophical complexities of such a legitimation process needn’t concern us here) by the people in whose name they purport to judge.

He is such a virtuoso that he may be tone-deaf to the sheer difficulty of some of the challenges ordinary judges face. Just as hard cases make bad law, maybe supra-genius judges give bad judgmental advice.

<sup>4</sup> Question of Schmitt here, and “political theology” more broadly.

<sup>5</sup> The struggle against the Donatists had propelled him to close contact with the authorities, and they had supported his every move. Among the populace of Carthage he likely had all the glamour of a great man with none of the over-familiarity of a prophet in his own country; Hippo was close enough for him to have been here innumerable times for important matters, yet far enough away that he always seemed fresh and new. The sermon is given by a man who is profoundly authoritative, yet suspicious of authority; and not surprisingly, given the speaker and his audience, it concerns most fundamentally what it means to exercise authority, and specifically the authority of judgment.

<sup>6</sup> *City of God* 19.15—no *dominari* (political lordship) was intended as part of the created order; lordship is part of the consequences of the Fall.

<sup>7</sup> This is how he understands the Caesar’s coin story: “just as the image of Caesar on the coin is restored” to Caesar, Augustine says, so we should “restore to God the image of God in the human being” (*sermo* 13.4).

<sup>8</sup> Not afraid of paternalism, it is a necessary thing, and for one in authority over others, the exercise of discipline is necessary, and the ignoring of discipline would be cruel (13.9).