

---

# Faith and Law

*How Religious Traditions from Calvinism  
to Islam View American Law*

EDITED BY

*Robert F. Cochran, Jr.*



*New York University Press*

NEW YORK AND LONDON

---

# Contents

<i>Acknowledgments</i>	xii
Introduction <i>Robert F. Cochran, Jr.</i>	1
PART I The Augustinian Framework: The City of God and the City of Man	11
1 <i>Augustine</i>	13
Augustine and Law <i>Elizabeth Mensch</i>	
PART II Reformation Faiths	31
2 <i>Calvinists</i>	33
Neo-Calvinism and Science: A Christian Perspective on Post- <i>Daubert</i> Law/Science Relations <i>David S. Caudill</i>	
3 <i>Lutherans</i>	48
A Lutheran Perspective on Legal Ethics <i>Robert W. Tuttle</i>	
4 <i>Anabaptists</i>	64
Anabaptist Law Schools <i>Thomas L. Shaffer, in conversation with John Howard Yoder</i>	
5 <i>Baptists</i>	77
Toleration and Dogmatism: The Contribution of Baptists to Law <i>Timothy L. Hall</i>	

PART III	Home-Grown American Faiths	89
6	<i>Evangelicals</i>	91
	Evangelicals, Law, and Abortion <i>Robert F. Cochran, Jr.</i>	
7	<i>African-American Churches</i>	116
	“Go Down, Moses!”: Law through the Eyes of the African-American Religious Tradition <i>Anthony V. Baker</i>	
8	<i>Churches of Christ</i>	130
	Reason, Freedom, and Apocalyptic Vision: Churches of Christ and the Practice and Teaching of Law <i>Thomas G. Bost</i>	
9	<i>Latter-Day Saints</i>	149
	Footings of Mormon Conceptions of Law: Vantage Points for Understanding Constitutional Law and the Law of Religious Freedom <i>W. Cole Durham, Jr., Michael K. Young, and Brett G. Scharffs</i>	
PART IV	Catholicism	173
10	<i>Catholic Natural Law</i>	175
	Sovereign States? The State of the Question from a Catholic Perspective <i>Patrick McKinley Brennan</i>	
11	<i>Catholic Social Thought</i>	195
	Catholic Social Thought and Immigration <i>José Roberto Juárez, Jr.</i>	
PART V	Judaism	209
12	<i>Orthodox Jews</i>	211
	Self-Incrimination in Jewish Law, with Application to the American Legal System <i>Samuel J. Levine</i>	

13	<i>Reform Jews</i>	223
	Reform Judaism, <i>B'tzelem Ehlohim</i> , and Gay Rights <i>Ellen P. Aprill</i>	
PART VI New Immigrant Faiths		239
14	<i>Hindus</i>	241
	A Hindu Perspective on Euthanasia and Physician-Assisted Suicide <i>Kisor K. Chakrabarti</i>	
15	<i>Buddhists</i>	254
	Interdependence and Victim Compensation: Views from Buddhist Tibet and Post-9/11 United States <i>Rebecca R. French</i>	
16	<i>Muslims</i>	272
	Enhancing Democracy, Respecting Religion: A Dialogue on Islamic Values and Freedom of Speech <i>Anver M. Emon</i>	
	<i>Contributors</i>	291
	<i>Index</i>	295

---

# Introduction

*Robert F. Cochran, Jr.*

In his book *American Lawyers and Their Communities*, Thomas Shaffer envisions a downtown street. On one side of the street is a house of worship; on the other is a courthouse. According to Shaffer, law schools train lawyers to look at the religious congregation from the courthouse—that is, to analyze the problems that the religious congregation creates for the law. Law schools ignore the possibility that there might be a view of the courthouse from the house of worship—that the law might create problems for the religious congregation.

Prophetic witness is discounted in law teaching. Our part of the academy, more than any other, has systematically discouraged and disapproved of invoking the religious tradition as important or even interesting. It ignores the community of the faithful so resolutely that even its students who have come to law school from the community of the faithful learn to look at the [religious congregation] from the courthouse, rather than at the courthouse from [the religious congregation].

Shaffer encourages lawyers to “walk across the street and look at the courthouse from the church.”<sup>1</sup>

In the United States, of course, there are many churches and many synagogues, and increasingly many temples and mosques, at varying distances from the courthouse, with quite different perspectives on it. In this book, authors from a wide variety of religious traditions walk across the street (or down the street or across the railroad tracks) and look at the courthouse from our religious congregations.

Our primary goal is to be faithful to our own religious traditions. Most of us believe in a God who is concerned about the things of this world,

and we want to be faithful to his teaching. We write in the hope that readers will think more deeply about the way that their own religious traditions view law. Each author provides a summary of the way that his or her religious tradition looks at law and the way that his or her religious tradition might approach one legal issue currently facing the United States. Few of us would claim to present *the* approach that our tradition takes on the issue we address. We acknowledge that within each of our religious traditions there are other people who would reach different conclusions. There are different views of the courthouse from within each religious congregation.

### *A Prophetic Voice*

Though our primary goal is to be faithful to our own traditions, we also believe that bringing religious perspectives to law will be good for law. While we acknowledge that great evil can be done in the name of religion—most of us confess that great evil has been done at times in the name of our own traditions—we believe that the religions that are likely to influence American law are likely to have a positive influence on law. The central moral teaching of most faiths is something like the Golden Rule—“do unto others as you would have them do unto you.” The moral teachings of our religious faiths encourage justice and care for the neighbor, and though they may have greatly differing visions of justice and care, those goals are a better starting point for law than the likely alternative, selfishness. Religious understandings of law are especially important for the sake of the powerless. On many issues, from slavery to child labor to civil rights to immigrant rights, religious congregations have served (with others) as a check on the state. Some of history’s greatest social evils arose because religious believers failed to view law through the critical vision of their faith. In Nazi Germany and the Jim Crow South, the great fault of many Christians was their failure to act on the basis of their religious values. If law is to be humane, it may need divine guidance.

At times our traditions have served as a corrective to the state, but at other times they have served as tools of law. There is a danger that religious faith will be co-opted by the state. It is important that religious congregations remain independent—that they remain able to serve a prophetic role to the state. We need authentic religious faith to act as a check on civil religion (a “faith” that too often merely supports the status quo).

There is a danger that in the prayers and songs for our nation, “stand beside her” will drown out “and guide her, through the night with the light from above.”

### *Religious Convictions in the Public Square?*

Some argue that basing laws on religiously grounded values is incompatible with liberal democracy. For example, John Rawls suggests that citizens set aside every aspect of their personality before considering public policy issues.<sup>2</sup> Such proposals are contrary to our history and undemocratic. The founding of the United States was based on the belief that tyranny violates “the laws of nature and of nature’s God.”<sup>3</sup> Tocqueville recognized a few decades later that religion is the foremost of our political institutions. Under Rawlsian rules of public discourse, we would have been deprived of Lincoln’s second inaugural address and Martin Luther King, Jr.’s “Letter from a Birmingham Jail.”<sup>4</sup>

It is also undemocratic to suggest that religious people should enter the public square as other than who they are. In a democracy, law is supposed to be the product of a conversation based on who people really are. Religious discourse may be heated, but identifying differences and addressing them frankly is what democracy is all about. To exclude some people from the discussion is to abandon the hope of democracy. As Kent Greenawalt has noted, at the roots of positions on all sides of many public policy matters are nonrational convictions.<sup>5</sup> To exclude holders of religious convictions, but not holders of secular convictions, would be mere prejudice.

Some argue, however, that though it is appropriate to base one’s positions on religious convictions, religious language should stay out of the public square.<sup>6</sup> Public argument should take place in a form of moral Esperanto, a language that is accessible to all citizens. For some, this is a matter of democratic conviction—religious discourse excludes those who do not share the religious language. For others, the argument for secular language is pragmatic—we are unlikely to persuade fellow citizens in language that they do not understand.

But limiting public discourse to secular terminology will severely limit the conversation in the public square in several ways. First, such a limit will exclude some people from the public square. Some citizens are not bilingual; some never learned to speak Esperanto. To exclude those citizens who cannot express their ideas in religiously neutral terms would be

inconsistent with the democratic desire to include all citizens in the conversation.

In addition, requiring citizens to speak a form of moral Esperanto in the public square will limit the sort of ideas that can be expressed. Some deeply held viewpoints can be expressed best in religious terms. Just as Esperanto was based on European language, moral Esperanto generally is the language of the European Enlightenment—the language of rights, equality, and individualism. It is not neutral language, and he who controls the language controls the debate. Secular public policy discourse generally becomes a matter of “rights talk”<sup>7</sup> and utilitarian balancing of material interests. Ideas always lose something when they are translated from one language into another. For example, it is difficult to justify the dignity of the individual person in other than religious language—the person is sacred, a child of God, a bearer of the divine image. A “secular language only” rule might ultimately diminish the value of the person.

Finally, there is a danger that requiring that all argument be expressed in secular language will limit the development of religious understandings of law within congregations. If some ideas are not easily expressed in secular language, a requirement that people speak only in secular language will lead religious groups to develop only those aspects of their tradition that can be expressed in such language.

We agree that religious argument should aspire to express itself in ways that can be understood by others—indeed, that is one of the purposes of this volume—but it is better that the public understand the underlying religious bases for an argument than that such justifications be stifled. We may need to understand one another at a deeper level in order to find common ground or a basis for compromise.

### *Candid Discourse and Mutual Understanding*

We write in the hope that this book will generate conversations among those of various religious traditions and that those conversations will yield mutual understanding. Thoughtful commentators have expressed varying views of the possibilities of such a conversation. As George Marsden has noted, “Ultimately we do not solve all of the rules of pluralism by better communication and more ‘dialogue.’ The more we understand each other the more likely we are to also discover some fundamental differences.”<sup>8</sup> Alasdair McIntyre notes, “From our rival conclusions we can argue back



to our rival premises; but when we do arrive at our premises argument ceases and the invocation of one premise against another becomes a matter of pure assertion and counter-assertion.”<sup>9</sup>

But it may be that there will be more agreement on premises than McIntyre suggests. C. S. Lewis identifies a common Tao, a set of moral values shared across cultures. As he demonstrates, there is broad agreement among cultures on many basic issues of morality.<sup>10</sup> Many common values are so well established (e.g., the value of human life, the dignity of the human person) that we overlook them. As Jeffrey Stout notes, “overlapping consensus” does a substantial amount of “ordinary justificatory work.”<sup>11</sup>

When we look at our present disagreements, we may see little hope of resolution. But when we look at our history—the civil rights movement being a notable example—we can see areas where common understandings have emerged. As Anthony Cook said of Martin Luther King, Jr., “He showed us that as we go deeper into our traditions, we discover commonalities.”<sup>12</sup> Some religious traditions have been persuaded by the others. Calvinists came to support religious freedom; Catholics came to support democracy. Our history also shows, however, that these conversations are not easy. It took hundreds of years of conversation and struggle within and among religious traditions to resolve questions about race, slavery, civil rights, religious freedom, and democracy.

For such a conversation to be effective, participants must respect one another, seek to understand one another, and seek to persuade one another.<sup>13</sup> Note that respecting one another does not preclude attempting to persuade one another—engaging in thoughtful argument with someone can be one of the foremost signs of respect. Participants must be willing to think critically about their own traditions—whether religious or secular. With dialogue may come empathy and a new appreciation of the other. Religious discussions may lead to mutual understanding and common ground; a deeper understanding of one another’s positions may lead us to identify unseen possibilities; reflection may yield transformation.

The success of this conversation is extremely important. The eruption of terrorism and violence throughout the world is, in part, the result of the lack of democratic dialogue across religious boundaries. Secularization is not the answer. Many (most) of the people in the world see the world through religious lenses. Secularization, which by some readings served to stop the wars of religion, may now serve as a catalyst to new wars of religion. In Western Europe, the most secular region of the world, excluding and ignoring religious voices now serves as a cause of violence. That is not

to suggest that interreligious discourse is a panacea. Many religious voices are intolerant and seem to have no interest in religious dialogue. Many of the issues in this book have no apparent solution that will be satisfying to all concerned. If there is to be a clash of civilizations, let us pray that it will be a clash of words, in democratic dialogue, rather than a clash of arms.

As to some issues, we may just need to muddle through. Philosophers and theologians can talk forever at a theoretical level about morals, but voters, lawyers, judges, and legislators must make decisions. Ideally, discourse will build consensus, but if consensus about some area of law cannot be reached, decision-makers may have to resort to other options. One option is to leave law out of an area of life, to leave an issue to private decision. Private individuals can choose whether to go to church, whether to own slaves, whether to pollute, whether to have abortions. Removing law from an issue leaves it to private conscience and persuasion. To take law out of an issue promotes freedom, but it may yield injustice. Hopefully, at the end of the day, conversation about public issues will yield consensus. If not, in a democracy, we vote. In one sense, voting is the last resort in a democracy, but in another sense it is not—after the vote, we begin the conversation again.

### *The Authority of Law*

The future of our democratic republic may turn on its ability to involve people of various faiths in a discussion of law and our common life. Law in the United States relies primarily on voluntary compliance. As Arthur Leff noted in his classic law review article, when someone (whether private individual or governing authority) makes a demand on people, they reasonably respond, “Sez who?”<sup>14</sup> If law is not based on the moral and religious beliefs of people, obtaining compliance with it becomes merely a matter of force.<sup>15</sup> If law is contrary to the deepest beliefs of a people, they will not support it. As occupying forces have learned in India, Vietnam, Afghanistan, Northern Ireland, and elsewhere, even overwhelming military force will not easily establish the rule of law over a people who have not bought into it. As many of these examples illustrate, legitimacy is likely to be in part a matter of *religious* legitimacy.

If the state does not reflect the deepest values of its people, there are three unpleasant possibilities. If the state is weak, it will be unable to enforce the law; there will be anarchy. If the state is strong, Big Brother will

be everywhere; there will be a police state. Finally, if the state is seen as unconnected to its constituents, people will retire to their separate communities, with little sense of commitment to the commonweal. When times are good, such a society can maintain an uneasy tension. But during times of war, economic crisis, or civil disturbance, it will be difficult to rally the nation to necessary sacrifice. For people to support the civic order, they must believe that it reflects their values. Of course, in a state made up of diverse religious communities, like the United States, finding agreement may be difficult. It is our hope that this book will assist the search for common ground.

### *Repression?*

Some people fear that attention to the religious bases of law will lead to an intrusive, repressive, totalitarian regime. They can certainly point in history to periods of religious oppression. Many religious people came to America to escape persecution at the hands of other religious people. Unfortunately, the first thing that many of them did when they arrived on these shores was to deny freedom of religion to others. But it was through religious discourse that first free exercise and then nonestablishment became the norm. What emerged in the early years of the republic were states that protected the free exercise of religion and rejected established churches but adopted laws built on religiously-grounded moral values. At times those values worked to the benefit of the needy, but at other times they served the cause of oppression—some Christians used religiously grounded moral values to justify slavery, racial discrimination, and religious discrimination. But in many cases it was through thoughtful analysis within religious communities that the current consensus opposing these injustices developed. Martin Luther King, Jr.’s “Letter from a Birmingham Jail”—written to a group of that city’s religious leaders—is an example of such religious discourse. We hope that this book will encourage thoughtful—rather than unthoughtful—evaluation of law by religious communities.

### *This Book*

Selecting the religious traditions to include in this book was a challenging task; there are over one thousand religious denominations in the United

States. But many of our religious traditions draw from the same sources in their views of law. For example, most of the mainline Protestant groups are heavily influenced by John Calvin in their view of law.

The choice of traditions to include in this volume was based on several factors. In part it was a matter of numbers—in a democracy, numbers are a gauge of political strength, and political strength is likely to have a big impact on law. Most of the groups represented in this volume have a significant number of members in the United States.

I also wanted to include the broad range of positions that American citizens take toward law. Where there is a range of views on a particular issue, I tried to include groups on opposite ends of that range. For example, on the question whether Christians should attempt to influence law, Calvinists advocate that religious faith control law, Anabaptists are reluctant to use law, and other Protestants fall somewhere in between; this book contains essays on Calvinist and Anabaptist views. On the question of the centrality of Jewish scripture as a source of guidance, Orthodox Jews look most strongly to the Torah, Reform Jews look to a broad range of other sources, and other Jews fall somewhere in between; this book contains essays presenting Orthodox and Reform views.

I could have attempted to arrange the essays in this book in any of several patterns. Political inclination did not work well, because within many religious traditions there are people with widely varying political commitments. For example, many political activists at the front of each American political party are motivated by a Calvinist vision of transforming the state to reflect God's priorities. Baptists, who at one time wanted merely to be left alone by the state, are now much more politically engaged. Though this is not a book about history, I decided to place the traditions roughly in the order in which they first came into a position where they could have a significant role in the American conversation about law (whether or not they actually did). Historical order has the added benefit of breaking the essays roughly into Protestant, Catholic, Jewish, and new immigrant faith sections.

Readers will note that the essays have very different styles. To some extent, the styles reflect the different styles of the religious traditions represented. Augustinians, Calvinists, those within the Churches of Christ, Orthodox Jews, and Natural Law Catholics tend to be analytical. Other traditions tend to be more relational, more conversational. These essays reflect both the variety of styles and the variety of positions found within American religious faiths today.

## NOTES

1. Thomas L. Shaffer, *American Lawyers and Their Communities* (South Bend, IN: University of Notre Dame Press, 1991), 209–10, 214.
2. See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971).
3. The Declaration of Independence, para. 1 (U.S. 1776).
4. See Jeffrey Stout, *Democracy and Tradition*, cited in Gilbert Meilaender, “Talking Democracy,” *First Things* 25 (April 2004): 26.
5. Kent Greenawalt, “Religious Convictions and Lawmaking,” 84 *Mich. L. Rev.* 352 (1985).
6. *Ibid.* at 359.
7. See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).
8. George Marsden, *The Outrageous Idea of Christian Scholarship* (New York: Oxford University Press, 1998), 58.
9. Jeffrey Stout, *Ethics after Babel* (Princeton, NJ: Princeton University Press, 2001), 210–11, quoting Alasdair MacIntyre, *After Virtue* (South Bend, IN: University of Notre Dame Press, 1984), 263.
10. C. S. Lewis, *The Abolition of Man* (Basingstoke, UK: Macmillan, 1975), appendix.
11. Stout, *Ethics after Babel* at 213.
12. Comment at Critical Legal Studies “Forum on Spirituality,” San Francisco, California, January 9, 1998.
13. The Williamsburg Charter, available at <http://religiousfreedom.lib.virginia.edu/const/Willburg.html>.
14. Arthur Leff, “Unspeakable Ethics, Unnatural Law,” 1979 *Duke L.J.* 1229, 1249 (1979).
15. *Ibid.*

## Augustine

### AUGUSTINE AND LAW

*Elizabeth Mensch*

The Augustinian perspective on justice raises paradoxes deeply rooted in Augustine's description of self, society, and world. Augustinian reality is darkly tragic, inevitably riddled with signs of human sin; yet it is also, simultaneously, a world shot through with surprising signs of abundant grace. For the Augustinian, this radical intermixture of sin and grace marks every aspect of human life.

Augustine points to an unrelenting darkness of indescribable depth. "Whose eloquence," he asks, could "number and weigh the woes of this mortal condition?" (CG XIX 4).<sup>1</sup> Deformity and disease sap strength from mind and body; treachery and cruelty may lurk beneath the tranquil surface of family life; friends may be enemies, and enemies friends. This gnawing uncertainty which undercuts trust "is a kind of ignorance similar to madness," Augustine comments (CG XIX 8). Even true affection brings anxiety and loss, since disasters and death stalk those we love. Similarly, the external peace of the city is fragile and deceptive: legal trials both signify and intensify internal divisions, implicitly representing, in muted form, the ever-present threat of civil war. Huge empires achieve broad unity, as with the Pax Romana of Augustine's day, but their supposed universality rests on a foundation of suffering: "how many great wars, what slaughter of men, what outpouring of human blood have been necessary to bring this about?" (CG XIX 7).

In the midst of this darkness, however, signs of God's love and peace abound, often in unlikely places: "What tigress does not purr softly over her cubs and lay her fierceness aside while she caresses them? What kite, solitary as he is while he hovers over his prey, does not take a mate, make a nest, help to hatch the eggs, rear the chicks, and preserve with the mother

of his family, as it were, a domestic society which is as peaceful as he can make it?" Even within the grim physicality of death, inside a decaying carcass itself, insects busily eat the remains and "all those little bodies . . . serve their little spirits in the peace that preserves their lives," while the carcass, "particle by particle," unites with the elements and "passes away into this peace" (CG XIX 12).

Although Augustine's thought thus defies linear description, this most irreducibly Christian of the major political theorists has exerted an unshakable influence on centuries of legal thought, secular as well as Christian. That legacy, however, eludes categories. For example, Augustine helped to lay the foundation for a highly institutionalized and politicized Catholic authority, but his writing helped to inspire Luther's challenge to that authority, and also subsequent experiments in church/state separation. His analysis of knowledge and language ranks Augustine among postmodernists in epistemological sophistication, yet he found in the human mind tools for understanding even divine mysteries like the Trinity. Although he seemed to counsel submission to all government, including tyranny, some have found in his work hope for human freedom, and for defiantly new beginnings even in the face of numbing totalitarianism.

Beneath these contradictory directions lies a unifying problem, the "Augustinian dilemma." That dilemma has two sides: first is the inescapable need for legal authority in an imperfect world where sin is always pressing human reality; second is the equally inescapable Christian illegitimacy of every exercise of domination over others, an illegitimacy that deflates any human claim to be doing real "justice." For Augustine, the exercise of legal force, never untainted by the evil of coercion, is at best only a tragic necessity, a sad reminder of sin; yet the peace it brings, though tainted and imperfect, is nevertheless a real good, an instance of the harmony willed by God, and therefore a sign of grace.

Therefore, scholars after Augustine who attempted to construct an unassailable ethical foundation for the legitimacy of legal force (from Thomas Aquinas in the Middle Ages to John Rawls in recent times) were writing in implicit response to the Augustinian critique of law. Conversely, utopians who proposed the perfectibility of society without law (from millennialist Christian sects of the Middle Ages to secular Marxists) were in effect trying to counter the Augustinian insistence on sin's inevitable power and the need to contain it. Indeed, our own constitution can be read as Madison's Augustinian concession to political reality: the natural Eden of the New World had produced, not new Adams, but divisive, self-

ish factions that, Madison concluded, could not be transformed into a model of perfect political virtue—only channeled and balanced within an artificial framework of legalized institutions.

Augustine thus stands as a brooding presence in the history of legal thought. He posed dilemmas that remain at the core of any definition of “justice,” yet he also found hope even (and precisely) in our inability to find certain answers. Augustine wrote during the waning of the Roman Empire, and legend has it that this linguistic skeptic wrote more than any one person could ever read. Before his conversion, the restless quest for both philosophic truth and success in Roman public life had led, by his own admission, to inflated pride, but also to mounting discontent. With sadness he had given up a woman he loved, the mother of his son, because as a “concubine” (a semilegalized but inferior status) she could not be a respectable wife; yet he could not renounce his search for sexual pleasure. Only conversion to his mother’s Christianity, a faith he had previously rejected as insufficiently philosophic, brought the promise of peace, of finally coming to “rest” in God (Conf. 1, 5).

After his conversion, as bishop in North Africa of the established Church, Augustine exercised quasi-judicial as well as religious authority. From the Romans he inherited a model of justice drawn in its general assumptions from the Greek celebration of reason and strikingly similar to modern accounts. As recounted by Augustine, that model presupposed, in the admired words of Cicero, the true commonwealth as “a group of rational beings bound together by a common rule of right and a community of interests.” Within the commonwealth, reasoned justice meant giving to each “his or her due” (CG XIX 22).

That Roman definition foreshadowed modern social compact theories of justice: people unite to protect their interests, joining a polity pledged to protect those interests according to a principle of “right.” John Locke drew on ancient models when he described the protection of our rights to life, liberty, and property as the just aim of government—an aim that with Jefferson became protection of “life, liberty, and the pursuit of happiness.” Such rights-based social contract models are, arguably, implicitly retributivist: criminal punishment is what the criminal is “due”—even *owed*—by the state, as a matter of right.<sup>2</sup> Violating the rights of another person means violating the norms of one’s own reason, which require equal respect for the autonomy of the other; the criminal is legitimately punished for, in effect, violating the “right” of each party to the crime.



For the Romans, however, the self was not quite an originally “private,” pre-political individual who joined a “public” state but whose rights remained essentially private, as we tend to conceptualize the relationship. Instead, the relation was one of microcosm and macrocosm: the citizen was an inner version of the polity, and politics defined the self. By Greco-Roman tradition, within each well-ordered citizen reason governed disruptive passions, like lust or rage, which threatened the calm discipline of virtue. Similarly, within the well-ordered household the citizen-father imposed the reasoned calm of male discipline on the potential irrationality of wife, children, slaves, and animals. So too, within the polity virtuous authority meant the imposition of reason and structure on the otherwise diffuse, threatening masses.<sup>3</sup> Discipline of self and family was thus reciprocally related to legality within the polity. In every case the boundary of reason protected an inner order against an ever-present presupposed threat, just as the internal order of Rome itself required territorial defense against the hordes at the outposts.

Augustine argued by reference to the micro/macrocosm model but also dramatically disrupted its terms and thereby undercut the Ciceronian definition of justice. To state his analysis in broad terms, Augustine challenged the Roman model of the self, with its focus on reason’s struggle against the passions. After intense self-examination, as recounted in the *Confessions*, he concluded that the problem of sin lay not in the passions but in the internal divisions of the will, where the prideful preference for self over God dislocated the once perfect alignment of Adam’s will with God’s. This original dislocation, he insisted, reproduced itself in divisions that marked every aspect of inner and outer life, including the exercise of a never unsullied “reason.”

Reaching outward from the self, Augustine argued that the same dislocations replicated themselves in inevitable divisions within family and polity. Human societies began with Cain’s jealous slaughter of Abel, and Rome was founded when Romulus murderously seized power from his twin brother. Mindful of the power of those myths, Augustine described politics as a history of conflict, a history obfuscated by bland Ciceronean accounts of reason and common interest. He refused, too, to be beguiled (as were many Revolution-era Americans) by legends of Rome’s golden age of robust republicanism, as if the problem of political legitimacy could be ascribed to modern corruptions of earlier idyllic political virtue; and he resisted terms that implied false unity:

For the Romans always lived . . . surrounded by the disasters of war and the shedding of blood which, whether that of fellow citizens or enemies was human nonetheless. The joy of such men may be compared to the fragile splendor of glass: they are horribly afraid lest it be suddenly shattered. . . . [Therefore let] us not allow ourselves to be swayed by idle bombast. Let us not allow the edge of our attention to be dulled by the splendid names of things when we hear of “peoples,” “kingdoms,” and “provinces.” (CG IV 4)

If the problem of self and polity lay in sin as an original dislocation of the will, the solution did not lie in summoning up yet more heroic reasoned virtue, to do more violent battle within self or polity. It lay instead only in the healing power of grace—in the experience of a supra-abundant love of God and neighbor which alone brought both inner peace and outer harmony. Once capable of such healing, however, the self became a citizen, not of this earthly city, with all its boundaries, defenses, and divisions, but of the City of God. This heavenly City, this mystical unity that could never be institutionalized on earth, was characterized by a continual reciprocity of love and therefore by true peace and real “justice.” Its foundation lay not in the exercise of power and “reasoned” legal violence but in the self-sacrificial powerlessness and boundless (*unjustified, unreasonable*) forgiving love of Christ.

Acceptance of that love, through grace, began the Christian’s release from inner division, but it also made the Christian an alien to the legal forms of earthly justice—estranged from its harsh relations of power and coercion. In Augustine’s famous formulation, drawn from John 17, the pilgrim on earth was “in” but not “of” the world. Nevertheless, to be “in” the world meant being dependent on its outward, legalized forms—needing “the peace of Babylon” even while being “delivered from Babylon by faith” (CG XIX 26).

Therefore, the peace offered by the polity would never replicate the peace of the City of God. As an artificial human construction, designed to perpetuate power, the polity was marked by inevitable self-contradiction: for purposes of governance it summoned up and depended on the same prideful lust for power (as in the politician’s ambition for office and influence) that, unchecked, threatened precisely the peace that the polity claimed to preserve. Nevertheless, in the face of unrelenting human sin—even the pilgrim was not completely healed—that artificial peace was preferable to the violent chaos that would follow its dissolution. Thus, in

contrast to many early Christian pacifists, Augustine allowed that the city on earth, whatever its form, could claim the loyalty of Christians, even in warfare. The concession was striking because Augustine abhorred war, not only for its bloodshed but also because it did violence to the sensibilities even of victorious rulers, who perversely long to discover the wickedness of others in order to justify combat, for they must “have someone to hate or fear in order to have someone to conquer” (CG IV 16).

Augustine’s formulation of two cities, in contrast to the one all-defining polity of Roman jurisprudence, set in motion the famous dialectical relationship between the City of God and the earthly city, a dialectic that dominated political thought for centuries, as theorists struggled to defend the legitimacy of cities on earth, which could never quite be the City of God. That dialectic also meant that the Christian stood in paradoxical relation to existing legal forms—bound even by love of neighbor to serve the earthly peace that law brought but acutely aware that its legitimacy was provisional, contingent, and inevitably rooted in sin.

The same dialectic meant that the church played an ambiguous role. Clearly the church was “in” the earthly city and, even, “of” it: in a world characterized by an intermixture of sin and grace, no institutional church could claim to be the City of God. Indeed, Augustine denounced (even labeled heretical) the divisive goal to achieve complete ecclesiastical purity: since nobody is sinless, Augustine insisted, only God could separate the wheat from the tares; attempting such separations on earth represented prideful failure of Christian charity. Moreover, as an earthly institution, the church could never be unsullied by politics. Augustine himself summoned, albeit reluctantly, political authority to help quash influential, disruptive outbursts of heresy; partly because of Augustine himself, therefore, Christian doctrine could never claim autonomy from coercive power relations. Nevertheless, equally clearly, the peace that the church offered, when it held out the model of Christ and the means of salvation, was the antithesis of the peace of the earthly city—as antithetical as the contrast between the humility of Christ’s self-emptying renunciation of power (the founding moment of Christian freedom) and Romulus’s proud and fratricidal seizure of power (the founding moment of Roman justice).

A broad description of his analysis cannot capture the complexity of Augustine’s commentary; it does not even quite explain his rejection of Cicero. A fuller (although still superficial) explanation requires that we move back to the Augustinian description of the self, which was the starting point for his analysis of family and polity, even as politics would then

move back to implicate the self. Specifically, Augustine's understanding of sin and redemption determined his understanding of justice and led to his conclusion that the law of the polity could never achieve real justice.

Augustine is well known for citing sexuality as a sign of original sin. "Sign" did not mean "cause," however. The troubling force of sexuality was not "passion" overcoming "reason" but was simply an outer, visible sign of deeper inner dislocations and divisions. The capricious nature of sexuality intrigued Augustine because its pesky, persistent insistence on having a will of its own in defiance of the self's own highest yearnings replicated the original human choice to disobey God. Such perversity was a sign of a will at every level deeply divided even against itself. As Augustine described his own yearning to serve God, "it was I myself who willed it and I myself who did not will it. It was I myself. . . . Therefore, I was at war within myself, and I was laid waste by myself" (Conf. 8, 10).

Memory, for Augustine, was at least as mysterious as sexuality. Existing in time, the self knew its own identity as self only by its own memory, yet memory was as variable and unstable as sexuality, as prone to frustrating lapses and obsessive intrusions. Much remained hidden in the mind's murky, cavernous depths, beyond the willed capacity for retrieval. We were thus always hidden from ourselves, yet aware of ourselves at the same time. No less than modern philosophers and scientists, Augustine knew that understanding the mind was a prodigious challenge: "Lord, I truly labor at this task, and I labor upon myself. I have become for myself a soil hard to work and demanding much sweat. . . . Consider: the power of my own memory is not understood by me, and yet apart from it I cannot even name myself" (Conf. 10, 8). However elusive and changeable, memory seemed to Augustine a prison because there was no "self" to be located apart from it. Whereas some scholars, including Christian Gnostics, had described the materiality of the body as a prison within which the mind or soul was trapped, seeking escape to a more ethereal existence, for Augustine the mind was the self's own prison.

This confinement was intensified by the limits of language, which Augustine found an obvious sign of a fallen world. Babel was a metaphor for the way language, a social construct, separated cultures from one another. As Augustine commented, a person could more readily hold a "conversation with his dog" than with one speaking another language (CG XIX 7). Language separated us not only from other cultures but from the external world, from one another, and from our own experience—none of which could be known as they were but only as we described them to ourselves

in words. Trapped within the forms of language, we were encased in layers of separation, with access, through memory, of only a mediated, conventionalized account of our own lives.

Moving outward from self, Augustine recognized that language was also a tool of public power. Once, in the quest for a successful career, he had taught rhetoric to young lawyers and learned to treat language as a weapon to be manipulated to achieve legal victories. Foreshadowing George Orwell, he also noted that the manipulability of language also made it a powerful tool for political domination. Therefore, paradoxically, the diversity of languages in the world, a punishment and a sign of sin because it was a sign of division, was also a gift: language difference, which could be overcome only by conquest, by “outpourings of human blood” (CG XIX 7), at least obstructed totalizing power.

Given his analysis of both self and language, Augustine refused to adopt Rome’s confidence that reason, whose dictates were always expressed in the forms of language, could be a dependable source of truth, and therefore of justice. Since human knowledge of the world was always incomplete, no judge could confidently tell the guilty from the innocent: knowledge of the truth at the factual, evidentiary level is always uncertain, as is knowledge of the defendant’s conscience; moreover, inevitable human ignorance also precluded certain knowledge at the initial propositional level of defining reasoned standards. Later Catholic thinkers, most notably Thomas Aquinas, would elaborate a theory of natural law based on the supposed congruence between nature, human reason, and the mind of God. Luther’s dramatic repudiation of that natural-law tradition of “reason” represented a return to Augustine’s conviction that no effort to “know” what reason requires can ever escape the initial problems of sin, language, self, and power.

Thus, power over others, Augustine thought, was never wholly legitimated by “reason.” Instead, the existence of power relationships was a problem, not a solution. He believed the problem was located deep in the recesses of memory, in habits of finding inner peace and satisfaction by making demands on others (as in the simple example of the infant demanding food from the mother). Before people quite knew what had happened, the habit of using others for the material goods of the world became deeply engrained. Forms of legalized servitude were only obvious examples of such daily objectification. In effect, Augustine identified the problem of alienating commodification long before Marx, and he recognized it as a pervasive sin of social life.

The longing for inner peace became a struggle not just for material goods but for knowledge that can ease doubt and nagging uncertainty. To satisfy this form of hunger people latched onto propositional truths, to human linguistic formulations, and proudly defended them as complete truth. As with all human formulations, such truths were destined to be partial; but the longing for certainty was so great that, habitually, people took partial and contingent truths to be whole truths and then proclaimed them with pride.

Extended outward, habits of proud self-assertion became the habit of dominion in household and polity. Pride “hates a fellowship of equality under God, and wishes to impose its own dominion upon its equals” (CG XIX 12), and that quest for dominion, justified by reason, became social habit. Although Augustine warmly described the possibility of true sociability within families and among friends, he refused (unlike later natural-law theorists) to find in that sociability the justification for political authority or inequality. Liberty, Augustine insisted, “belongs to man’s nature,” and servitude was “introduced by sin.” It was thus “that God created man . . . not man over man, but man over the beast” (CG XIX 15). Hierarchy, rulership, and legalized relations of power, like property and forms of servitude, might be inevitable in a fallen world, but they were still a sign of sin, a “bad habit” in the deepest sense.

Although habits seemed to be habits before they were self-conscious choice, their repetition was always, Augustine insisted, an act of free will. Moreover, habits could be broken. New beginnings were possible. In this promise, which was the promise of grace, Augustinian paradoxes abounded; sin and grace were inextricably interrelated in the process of redemption, a process that undercut all arguments for Roman justice. For example, Augustine argued, the same remembered inner peace that came from satisfying physical hunger was a real peace, an undeniable “good,” even though it was also a source of sin. Augustine drove the point home with his description of Cacus, the mythological half-human monster who lived alone in a cave that “reeked with the blood of recent butchery,” butchery of all the people he had devoured. Even Cacus, Augustine said, loved peace; the inner harmony he achieved by gnawing on human flesh was a real harmony (CG XIX 12). The restless search to renew inner peace usually led people to further predations and then elaborate self-certainties, but the same search might instead lead toward recognizing the pervasive gaps and errors in human knowledge. At that point the mind began to recognize itself, not through proud commitment to false certainties but

rather through its own awareness of error. As Augustine stated in a passage elusively foreshadowing Descartes: “For if I am mistaken, I exist. . . . And since, if I am mistaken it is certain that I exist, how can I be mistaken in supposing that I exist?” (CG XI 26).

In a parallel move, remembered contentment based on material satisfaction pressed itself forward as demand for future happiness; yet the future held only the stark reality of death, one’s inevitable end within the terms of the perishable world. Confronting the reality of death might occasion just more frantic greed for wealth and power, but it could instead occasion a deeper move back, so to speak, to real origins, to the fact that we are not our own creator but rather the creature of a Creator God. Thus, the self, driven by its own remembered satisfactions, might find itself encountering the reality of God. Moreover, in Christ through grace, that encounter with the Creator was an encounter with boundless love and mercy, not reason and justice. People experienced their own “justification” (salvation) *not* through the norms of justice (by which all were equally condemned) but only through the infinite, freely given self-sacrifice of Christ.

At that point the memory of the past, which seemed to imprison the self, became, paradoxically, a source of freedom: moving back through memory, by confession, people could take responsibility for themselves—in effect, “recollect” themselves from earlier dispersion in the world, from misdirected loves and false certainties. Then selfless humility finally replaced the prideful claim of self-mastery, so that even where the world allowed dominion, as with the father’s role in the household, the actual relationship was transformed: in the household of one who lives by faith, “even those who command are the servants of those whom they seem to command. For it is not out of any desire for mastery that they command; rather, they do so from a dutiful concern for others: not out of pride in ruling, but because they love mercy” (CG XIX 14). Thus, whereas external relations of power remained and, as structures, could not be redeemed, the individuals destined to live within those structures could be redeemed through grace.

That individual transformation held the key to the Augustinian critique of reasoned justice. Conversion, which occurred through grace, confession, and the gradual release of old habits, was a *redirection* of desire, not its obliteration. *Cupiditas* became *caritas*—still “desire” but now a desire transformed into the selfless, boundless love of God and neighbor exemplified by Christ. This redirection of love healed the old Roman conflict

between duty and desire, between reason and passion. The human will re-aligned with God's through Christ *meant* boundless love, a "desire" that was also the only possible definition of Christian "duty," or justice.

The key question about the self became, then, not the rigor of one's reasoned virtue but the direction of one's love. Extended outward, this emphasis on love meant, first, that the Roman definition of a commonwealth explained nothing because it did not address the question of love. Many disreputable groups met the Roman definition of commonwealth, Augustine pointed out. A robber band might join together in unity of interest and develop reasoned norms of "right" for allocating plunder, thereby constituting a commonwealth. Robber bands earned our contempt not because of any irrationality or injustice in their distributional norms but because of the deficiency in what they loved. That same deficiency might exist in a powerful nation:

The band itself is made up of men; it is governed by the authority of a ruler; it is bound together by a pact of association; and the loot is divided according to an agreed law. If, by the constant addition of desperate men, this scourge grows to such a size that it acquires territory, establishes a seat of government, occupies cities and subjugates people, it assumes the name of kingdom more openly. For the name is now manifestly conferred upon it not by the removal of greed, but by the addition of impunity. (CG IV 4)

Augustine maintained that Rome, despite its size and legalized administrative bureaucracy, was not inherently a better polity than that of a robber band. The definition of a "people," he said, should be a multitude "bound together by a common agreement as to the objects of its love." Therefore, to discover the character of a commonwealth one must look not to its norms of justice but to "what it loves. . . the better the objects . . . the better the people; and the worse the objects, the worse the people" (CG XIX 24). Qualitative judgment, therefore, could only result from a nuanced analysis of cultural values, not of formal law, and Augustine's own description of Rome was itself nuanced, filled with shades of gray.

Augustine assumed that a government of people liberated from selfishness by their love of God and neighbor would be superior to governance by people still enslaved to love of self. (Thus, following an Augustinian impulse, early New Englanders required that voters be church members, having shown evidence of conversion.) Nevertheless, Augustine disavowed hope of a Christianized, redeemed polity. Moreover, despite his careful



attention to Rome's political history, Augustine never considered true enslavement to be personal servitude or enslavement to bad government but rather enslavement to sin. Thus, the "good man, though a slave, is free; the wicked, though he reigns, is a slave . . . to as many masters as he has vices" (CG IV 3).

The problem with the implicitly retributive Ciceronian account of justice, however, was not just definitional. It lay instead in Augustine's absolute (some would say maddening) insistence that justice be defined strictly in Christian terms, an insistence that led to a radical separation between divine justice and human law. Divine justice related to human law only in the structural sense that every instance of ownership or domination was a sign of God's retribution, a sign that all were condemned in this world never to escape the effect of sin and therefore condemned to live in conditions of inequality, under some form of political rule. As originally created, no person was "the slave either of another man or of sin" (CG XIX 15), but servitude was now tragically embedded in human life.

That structural reality, however, did not mean that the human exercise of justice was ever a reflection of God's justice or that God's justice was explicable in human terms. Many Christians, influenced by classical culture, have wanted to see exactly such an analogical correspondence: God's law and human law both impose reasonable demands and then inflict punishment as a "just" response to the freely willed refusal to obey. The later Augustine repudiated the correspondence. Indeed, he pointed out that God distributed political power with flagrant randomness, "to both good men and bad," for reasons "hidden from us" (CG IV 33)—just as the good often suffered while the bad flourished with outrageous impunity. Although these distributions seemed arbitrary and therefore unjust in human terms, that very "injustice" precluded our supposing that the powerful and wealthy had triumphed because God favored their virtue. So too, political and military successes were unconnected to divine justification. This reality served to admonish the childish desire for worldly rewards from God and also operated to check the equally childish tendency to idolize power, to give it the ultimate trust and allegiance that it falsely claimed for itself.

Legalized worldly power and Christian justice, in Augustinian terms, were thus unrelated terms, existing in different realms. Augustine's conception of Christian redemption underscored the unbridgeable gap between them. The Roman model defined the nature of justice to be about the defense of boundaries, a defense inevitably couched in terms of exclusions and limitations. Such exclusions, however, were contradicted by the

*only* example of divine justice that God held out to imperfect humanity: an example not of retribution (by which all would be justly condemned to exclusion) but of Christ's boundless, merciful love. Christ's own "justice" in relation to the believer was *not* about rights—measured, bounded entitlements and exclusions—but about radically unlimited inclusion.

A person conscious of redemption through Christ experienced, therefore, a reciprocal humility and spirit of forgiveness, not a commitment to the norms of retribution by which he or she would have been condemned. Thus, neither the structural reality of sin in the world nor the radical nature of grace could be captured by reasoned human norms. The relation of earthly justice to the justice that prevailed in the City of God, which was the justice of unbounded love, was a relation of antithesis, not analogy.

An Augustinian Christian judge, therefore, faces a wrenching quandary, posed especially starkly by criminal prosecutions. The act of judging and sentencing perpetuates the usurpations of political dominion and runs counter to the spirit of forgiveness that should fill the heart of the godly judge. Nevertheless, Augustine affirmed, love of neighbor also requires that peace be kept in the earthly city, and that peace is threatened by criminality. Therefore, a person who answers the "claims of human society" by judging should not on that account alone be considered wicked (CG XIX 6).

How, then, should judging be done? Obviously there are no easy answers, but it is tempting to look to Augustine's own experience as a bishop for hints. Although the precise reach of his civil jurisdiction is uncertain, bishops' ecclesiastical tribunals were often preferred to the slower and more corrupt legal courts, and Augustine was authorized to hand down sentences of fines and floggings, as well as ecclesiastical punishments, and heard disputes involving property contract, slavery, theft, and murder. As bishop he also oversaw church members and those in orders, a responsibility that, like other Christians of the period, he viewed in family-like communal terms—the line seemed to blur between the communalism of the church as household, on the one hand, and civil authority, on the other.<sup>4</sup>

In judging the legitimacy of corrective action, Augustine's standard was the elusive one of "love." He used metaphors of a physician's efforts to heal (a comparison that he also used to describe the effect of grace, as a "healing" of division) and of familial protective correction. He often quoted 2 Thessalonians 3:15, "I do not mean to treat him as an enemy, but reprove

him as a brother,” and he saw his task as described by 1 Thessalonians 15:14–15: “Rebuke those who are unruly, comfort the apprehensive, care for the weak, be patient with everyone. See that nobody render to someone evil for evil.” The legitimacy of punishment was thus determined not by norms of retribution but by the spirit of the sentencer—control of sin should be an act of love and service, not self-righteousness. Augustine himself agonized over his own doubts:

I doubt that many have become better for fear of impending punishment, or have gone away worse. . . . If you punish people you may ruin them. If you leave them unpunished, you may ruin others. I admit that I make mistakes in this matter every day. . . . What trembling, what darkness. (Ep. 95.3)

As pastor Augustine preferred to deal privately with infractions that were not yet publicly known, even in serious cases like murder, and at least within the religious community advised following the sequence outlined in Matthew 18:15–18: those who sin should first be confronted alone and “regained” as members of the community; only if they are stubborn should others be brought as witnesses; public community action would follow only if absolutely necessary.

Evidence suggests that Augustine was more tolerant of sins of passion than those of calculated self-interest and looked more to motive and moral effect than to formal legal definitions, but Augustine was careful to know Roman law and sometimes urged strict enforcement—as with legislation forbidding slave traders from stealing African children, a practice usually protected by corrupt public officials. Augustine defended church sanctuary (at the time important for debtors faced with high taxes) and urged the appointment of officials (*defensores*) whose role was to protect the legal rights of the poor, arguably an early version of publicly funded legal aid. For punishment, Augustine generally urged mere verbal admonition, and reconciliation whenever possible, without bloodshed. He nevertheless ordered floggings with some frequency, but not with the commonly used lead-tipped whips; and he pleaded against the death penalty, which foreclosed the possibility of redemption (ep. 100.2), although he recognized the polity’s authority to impose it.

Despite some positions now viewed as “progressive,” however, Augustine was not simply a cuddly bishop who helped to humanize Roman law. His views on the role of criminal punishment were complex and, some would argue, contradictory. At one level, he seemed to suggest that crimi-

nal prosecution was justified only by deterrence—by the need to keep an always fragile civil peace. In his role as bishop, however, Augustine saw himself as required to name and confront sin, not just offer forgiveness. Since awareness of sin was part of the process of redemption, Christians were obliged to offer familial “correction” to each other, and those in ecclesiastical offices were sometimes required formally and publicly to apply sanctions. The correct spirit was a merciful desire for community instruction and the sinner’s reconciliation. Within his quasi-civil jurisdiction, Augustine seemed to extend the notion of Christian correction to civil prosecutions, implying that the polity’s law (however crudely) served a valuable function in helping to instill an awareness of sin (epp. 153, 185, 134). In seeming to draw this correspondence between (communal) church procedure and (retributive) civil justice, Augustine was, with typical paradox, suggesting a relationship that at another level remained utterly antithetical.

The difficulty in interpreting Augustine was never clearer than during the early colonial period in America. The Reformation had brought Augustinian political thought to the fore, supplanting Catholic confidence in natural law, and in their New Eden many colonists, in Augustinian terms, felt a new freedom from past, imprisoning “habits” of domination and structures of servitude. That impulse toward realizing, in concrete form, a new Christian communitarian liberty, however, coexisted with dark and very Augustinian ironies. Like the Roman colonies Augustine had described, the Americans would build their new empire on a foundation of bloody conquest and would sometimes find themselves strengthening, not weakening, the alienating, commodifying boundaries (often of race) by which they justified using others for their own material needs.<sup>5</sup>

Colonists found, moreover, that even their best-intentioned Augustinian sensibilities led in wildly different directions, often with resulting conflict, not peace. The Mennonites sought separated communities altogether unsullied by the coercive legalities of the earthly city; the same communal practices of forgiveness and reconciliation Augustine advocated wholly replaced law.

Some Rhode Island Baptists, banished from Massachusetts Bay, interpreted Christian liberty to mean a flamboyant freedom utterly unfettered by law. Under Roger Williams’s guidance, however, Rhode Island eventually enacted a legal code as necessary to contain sin but scrupulously avoided any claimed connection between secular law and Christian legitimacy; individuals could be redeemed, but never the polity. By contrast,

most New England communities, seeking greater divine legitimacy, used many of the specifics of Old Testament law as a primary source and limit, but they did so in complex interrelationship with a household model of Christian communal oversight, clergy arbitration of conflict, and paternalistic magistrate discretion. Public criminal penalties, New Englanders thought, helped to shape conscience, which was a public task, but were incapable of forcing conversion—which, following Augustine, was a (voluntary) transformation of desire and an unearned gift of grace. The most astute New England theologians, however, recognized in New England the tendency to claim on behalf of reasoned, coerced legality a fusion with Christian redemption.

In the South, meanwhile, Christian love was invoked expansively to justify an interlocking of household paternalism with discretionary gentry authority and thereby to justify the most brutal slave laws of the colonies. Therein, of course, lies the danger: Augustine insisted on love as providing a limit to what a Christian judge might legitimately do; ironically but easily, love became an excuse for pretending to do God's own (paternalistic) justice, a claim totally undercut by Augustine's monumental effort to show the ultimately unbridgeable gulf between divine and human justice. Perhaps it is not surprising, therefore, even if paradoxical, that the origins of a modern return to a retributivist theory of criminal punishment seem to lie in Immanuel Kant's pietist Augustinian roots—in the humility of his acknowledgment that *because* human ethics can never claim to be a reflection of divine law, people must rely on their own unaided human reason.<sup>6</sup> As against the complacent cruelties of unbounded paternalistic authority, retribution seemed to recognize the dignity of both victim and accused. Augustine had also argued, however, that an inevitably flawed human reason could not cleanse of sin the always inherently illegitimate exercise of coercive legalized power. As with Cicero, the invocation of reason, like the invocation of love, can serve to gloss over the real “wretchedness” (CG XIX 6) of criminal justice realities and the darkness of the judge's role. Augustine did not offer a solution to that darkness; he only insisted that the judge stare it in the face and then somehow, with humility, try to proceed responsibly, with love.

## NOTES

1. For the sake of brevity, quotations from Augustine are cited in the text, by book and chapter number for *The City of God*, ed. and trans. R. W. Dyson (Cam-

bridge: Cambridge University Press, 1998) (cited as CG), and *The Confessions*, ed. and trans. John K. Ryan (New York: Image Books, 1960) (cited as Conf.), and by number for the letters, as cited and described in *Augustine through the Ages: An Encyclopedia*, ed. Allan D. Fitzgerald (Grand Rapids, MI: Eerdmans, 1999). Accordingly, the first citation refers to *The City of God*, book number 19, chapter number 4. Given centuries of his influence, it seems impossible to read Augustine except through the lens of history, interpretation, and modern times. My own view of Augustine has been influenced most recently by Peter Brown, *Augustine of Hippo* (Berkeley: University of California Press, 2000), Jean Bethke Elshtain, *Augustine and the Limits of Politics* (South Bend, IN: Notre Dame Press, 1995), John M. Rist, *Ancient Thought Baptized*, rev. ed. (Cambridge: Cambridge University Press, 1994), H. Jefferson Powell, "The Earthly Peace of the Liberal Republic," in *Christian Perspectives on Legal Thought*, ed. Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella (New Haven, CT: Yale University Press, 2001), Hannah Arendt, *Love and St. Augustine*, ed. Joanna Vecchiarelli Scott and Judith Chelius (Chicago: University of Chicago Press, 1998), Garry Wills, *Saint Augustine: A Penguin Life* (New York: Viking, 1999).

2. See Markus Dirk Dubber, "The Right to Be Punished: Autonomy and Its Demise on Modern Penal Thought," 16 *Law and Hist. Rev.* 113 (1998).

3. For a vivid description of this relationship, see Peter Brown, *The Body and Society: Men, Woman and Sexual Renunciation in Early Christianity* (New York: Columbia University Press, 1998), 10–12, 62, 83–84.

4. For the centuries of continuing influence of household as model, see Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

5. Notably, Pocock's description of the republican tradition locates these ambiguities explicitly within the Augustinian framework: his last chapter, about the early American experience, ends by invoking Augustine. J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1998). See especially 31–48 and 506–52. See also Mark McGarvie and Elizabeth Mensch, "Law and Religion in Colonial America," in *The Cambridge History of Law in America*, ed. Christopher Tomlins and Michael Grossberg (Cambridge: Cambridge University Press, forthcoming).

6. See generally Walter Lowe, *Theology and Difference: The Wound of Reason* (Bloomington: Indiana University Press, 1993).