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Cain's Law

Elizabeth Mensch*

In the heady days of Critical Legal Studies (CLS) conferences, we rarely discussed Bible stories. I am going to start, however, with Cain and Abel, or at least with an amateur Augustinian take on Cain and Abel. As Oliver O'Donovan has pointed out, the story provides a useful metaphorical frame for considering the task of human judging.¹ My goal in starting with this story, and then moving on to some Christian theology, is to suggest that the classical period of the High Middle Ages, which is Steven Smith's primary historical reference point, has never been the only Christian view of how divine justice relates to human judging. While many did strive to find continuity between human law and the law of God during that classical period, a long and vibrant Christian tradition instead stresses rupture and discontinuity. That tradition's more deconstructive zeal, now revived by post-modernist forays into Christian theology, is not unlike the old CLS spirit, despite the Christian vocabulary. Many in CLS would have found that downright peculiar.

Cain, seizing for himself an absolute power over the life of his brother, slaughtered Abel in a fit of self-centered rage, and Abel's blood cried out from the ground.² It still cries out, one might say, as the cry of all the numberless victims of human violence and domination.

So what happens? Cain, guilty of wanton slaughter, is exiled from the presence of God, but he is also given divine protection;³ indeed, he becomes the metaphoric founder of human civilization,⁴ including the civilizing task of judging. Following Cain, people begin to seize authority over other people, no longer, Augustine says, man over beast, as God intended, but now

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1. See OLIVER O'DONOVAN, *THE WAYS OF JUDGMENT* 27 (2005) (discussing the story of Cain and Abel as it relates to judgment).

2. *Genesis* 4:8–10.

3. *Genesis* 4:10–16.

4. *Genesis* 4:17–22.

man over man.⁵ Cain now sarcastically claims that authority over Abel. Those of us who deal in law are thus all the children of Cain, in penal exile from God and inevitably tainted by law's violence. Steven Smith quotes Robert Cover for a similar point: inevitably, "[law] takes place in a field of pain and death."⁶ Nor, of course, could the law that was metaphorically instituted by Cain really provide justice for that primal, infinite crime that lies at the heart of its own founding. What could be a "just" legal response to centuries of bloodshed?

In Augustinian Christian terms, the answer could lie only in a messianic justice antithetical to the traditional modes of Cain's legalized human administration of law. It would lie in the infinite gift of forgiving love instead of the finite calculation of debts that are owed. It would lie in the self-emptying renunciation of power rather than its self-centered seizure. Hence, Augustine's famous juxtaposition of Cain as the founder of the City on Earth and Christ as the founder of the City of God.⁷ There could be no smooth continuity between the two cities because the nature of human law, with its limits, liabilities, and assumed scarcities, operated to deny the super-abundant reciprocity of love which was the promise of the City of God. In effect, every legal norm is an act of alienating separation and is complicit in the crime it names. Every legalized obligation to the other necessarily presumes, simultaneously, a self-protective limit to obligation, contrary to that boundless, selfless love and forgiveness which is really owed to the neighbor. As Martin Luther helped to explain the point, in Christ we look forward in love while in law we look backward in judgment—a relation of disjuncture, not just of pale reflection.⁸

For Augustine, the City of Earth was represented by Rome, with its Ciceronian promise of law's rationality and its commitment to giving each his due, under an assumed mutual agreement—the rudiments of current social contract theory. Rome celebrated a manly reason which guarded the self as against the threat of unruly inner passion, just as it seized "reasoned" authority over potentially unruly women, children, slaves, and animals in the household, and just as it exercised reasoned discipline over the unruly lower classes—indeed, just as it kept the barbarians at the gates. It was a jurisprudence of boundaries, defended by a propositional logic which, said Augustine, could never be more than partial, contingent, and ultimately self-contradictory, as well as foundationless; and it was based on legal rhetoric

5. SAINT AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS 874 (Henry Bettenson trans., Penguin Classics 2003) (1467).

6. Robert M. Cover, *Violence and the World*, 95 YALE L.J. 1601, 1601–02 (1986).

7. SAINT AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS 647 (R.W. Dyson ed. & trans., Cambridge University Press 1998) (1467) [hereinafter AUGUSTINE, THE CITY OF GOD].

8. Susan R. Martyn, *Commentary: The Lawyer in the Religious Traditions: A Lutheran Finds Commonality*, 21 J.L. & RELIGION 299, 299 (2005–2006).

deployed as weaponry, a weaponry which both concealed and proved the conventionality and alienation of language.

Augustine undercut law's central premise of Reason by locating human sin, not simply in the passions, but in that deeper dislocation of the will which led to the prideful, self-aggrandizing assertion of self over neighbor in the first place—as with Cain's slaughter of Abel, which then, said Augustine, was replicated in Romulus's slaughter of Remus, the mythic founding of Rome's legalized empire.⁹ What is any polity, asked Augustine, but fratricidal seizure, a pirate's bounty writ large?¹⁰ We should not beguile and delude ourselves with language which obfuscates the reality of conflict and bloodshed. "Let us not allow the edge of our attention to be dulled by the splendid names of things," he warned—an early version of CLS's critique of legal rhetoric's reification, its constant productions of "splendid names."¹¹

Augustine is also well-known, of course, for affirming the tragic necessity of legal coercion. The peace it brings to an imperfect world, in this non-messianic age of purely secular, penal time, is better than the chaos that would follow its dissolution. We need the peace of Babylon, he said, even if we are delivered from Babylon by faith. And peace, no matter how imperfect the form, is still a positive good, even if it is a merely imperfect human good, cobbled together by exiles. Hence, the dialectical relationship between the two cities: the relationship between the City on Earth and the City of God is not *just* a relationship of opposition. To affirm the peace of Babylon, however, does not allow one to pretend that it is other than the work of Cain. The peace of Babylon depends upon the coercive control over others that it is designed to contain.¹² The hospitality that its city, the City on Earth, offers is a hospitality that begins and ends in boundaries, and the gift it offers always comes in the form of exchange.

Augustine's influence continued throughout the Middle Ages. It was revived in the Reformation, and came to the fore again in Colonial America, when people seriously pondered how they could possibly reconcile the exercise of legal authority with their efforts to found Christian communities.

Indeed, quite apart from Augustine, Christianity has always had an untidy relationship with law. The tension is rooted partly in the stark fact of a messiah who is crucified under the forms of Roman justice. Moreover, the

9. AUGUSTINE, *THE CITY OF GOD*, *supra* note 7, at 639–40.

10. *Id.*

11. *Id.* at 146.

12. *See id.*

synoptic gospels contain explicit antinomian currents. Although Harold Bloom (a good reader of texts) argues that the gospels are not purely antinomian, but rather usurpations in relation to law, admonitions like “turn the other cheek” are hardly a celebration of law as a mode of human relationship. New work on Paul, some by Jewish scholars, has emphasized the fact that Paul, especially in that complex and influential epistle directed right to the heart of Roman rule, was effectively bringing all law and political authority into question. Human law had collided with a new messianic reality, and that fact served to challenge Caesar himself. Hence the repeated dualities: Letter and spirit, death and life, bondage and freedom, text and faith, law and grace. (For instance, Anne Hutchinson got herself exiled from the Massachusetts Bay Colony by claiming she was only under the second word in each of those pairings, and therefore not under the legalized authority of the Colony’s magistrates.)¹³ Thus, according to Paul, even in this present age, when law and political rule would not disappear, law would be open to new critiques.¹⁴ It had become deconstructable, so to speak. Its boundaries, divisions, and coercions had been overturned by a messianic justice that existed in ontological priority to law. Existing in Abraham before the law, messianic justice was outside the law and apart from the law. It was this messianic reality that Augustine would later locate only in the City of God.

The ontological priority that Augustine affirmed was challenged during the High Middle Ages when it came to be said that some form of natural law governance actually existed in the Garden of Eden. (Arguments about prelapsarian reality are no longer common in legal discourse, but they are not necessarily unimportant. Such metaphors can be useful.) The same classical period, relying on the mediation of natural law, strove to ease contradiction and synthesize antitheses. That process provided law with a good deal of Christian metaphysical content, which secular princes would then appropriate for the sake of legal legitimacy even while rejecting the theology that gave it meaning.

We still depend on some of those constructs, basic even to such vaguely mystical notions as “representation” and “corporation.” Steven Smith is surely right to suggest that the vocabulary of law is often metaphysical, although most modern jurists, even while using that vocabulary, claim no longer to believe in metaphysics.¹⁵ In Felix Cohen’s well-known phrase, which Smith aptly quotes, we still speak “transcendental nonsense.”¹⁶ I do

13. See generally EVA LAPLANTE, *AMERICAN JEZEBEL: THE UNCOMMON LIFE OF ANNE HUTCHINSON: THE WOMAN WHO DEFIED THE PURITANS* (2004).

14. See MARION L. SOARDS, *THE APOSTLE PAUL: AN INTRODUCTION TO HIS WRITINGS AND TEACHING 180–81* (1987).

15. STEVEN D. SMITH, *LAW’S QUANDARY* 164 (2004).

16. *Id.* at 13.

not think that vocabulary means that human law is “really” grounded on the foundation of divine law. It only shows the continuing influence of the conceptualism of the High Middle Ages, with its extraordinary effort to integrate pagan natural law thought, Roman jurisprudence, and Christian theology.

Thus, I think that CLS did a valuable, Augustine-like task in exposing the power relations which legal language tends to obfuscate, and in puncturing the reifications that are so pervasive in law's language. CLS undercut the inflated claims of law to be the embodiment of Reason, to be the inevitable deductions from propositional truth, or the outcome of neutral process, or the historical wisdom of the common law, or whatever. Law was all much more contingent, more provisional, more self-contradictory, and much more human than it had been made out to be. And as Peter Gabel kept insisting, law is also rooted on the premise of human alienation—which is to say that law, even at its best, is the sober work of Cain, in exile from the presence of God.¹⁷

Peter's insistence on the reality of alienation left unanswered whether, once exposed, the forms of alienation could be overcome and a truly transformative politics emerge—one that was about unmediated human intersubjectivity, not about limits and boundaries.¹⁸ Peter says yes, and his spirit has been inspiring.¹⁹ On the other hand, I was often grateful for the silence that others kept about such a possibility. Silence seemed an appropriate recognition of the fact that law is, by its nature, rooted in human limitation. It represents the inevitable fact of our incapacity to serve the neighbor with the boundless responsibility we owe, an impossibility that becomes abundantly clear with the simple introduction of a third person, as Emmanuel Levinas points out.²⁰ Silence recognizes how impossible the messianic possibility really is in a fallen world. We may have a transcendentally-based obligation to try to do law well, but to find in law the shimmering presence of the transcendent, or even the promise of its potential realization, is to reduce paradox to linearity and to leave us in the clammy

17. See Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1564–65 (1984) [hereinafter Gabel, *Phenomenology*]; see also Peter Gabel, *Panel Discussion: Does Religious Faith Interfere with a Lawyer's Work?*, 26 FORDHAM URB. L.J. 985, 1000 (1999) [hereinafter Gabel, *Panel Discussion*].

18. Gabel, *Phenomenology*, *supra* note 17, at 1566.

19. Gabel, *Panel Discussion*, *supra* note 17, at 1001–02.

20. See ADRIAN THEODOOR PEPPERZAK & EMMANUEL LEVINAS, *TO THE OTHER: AN INTRODUCTION TO THE PHILOSOPHY OF EMMANUEL LEVINAS* 229 (1992), available at <http://books.google.com/books> (search “Search Books” for “To the Other: An Introduction to the Philosophy of Emmanuel Levinas”; then follow “To the Other” hyperlink).

middle of the night that Levinas once described, where we confront what only is.