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### Sheathing the Sword: Augustine and the Good Judge

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## Sheathing the Sword: Augustine and the Good Judge

In this article, I offer a reading of *City of God* 19.6 that is newly consonant with Augustine's message to real judges. Often read as a suggestion that torture and execution are judicially necessary, I argue that 19.6 actually calls such necessities into question, though this is not its primary purpose: first and foremost, 19.6 is an indictment of Stoic *apatheia*. Situating 19.6 within Augustine's larger polemic against the Stoics, I find that it presents the Stoic judge as a man who lacks fellow feeling, and therefore, has only a parodic happiness: costly to himself and those he judges. A new look at Augustine's letters to judges confirms this reading, and shows that, for Augustine, the man of *humanitas* is the true model for the good judge, not the man of *apatheia*.

Keywords: Augustine, Stoicism, judicial ethics, *apatheia*, *humanitas*, capital punishment.

### Introduction

On September 29<sup>th</sup>, 2015 the Georgia Board of Pardons and Paroles denied a last minute plea for clemency in the capital case of Kelly Gissendaner, a woman who had conspired with her lover to murder her husband in 1997 (Connor, Shepherd and Gutierrez 2015). By her own admission, Gissendaner entered prison a "self-centered and bitter person," but now, her supporters said, Gissendaner was a changed woman, and deeply remorseful for her crime (Casey and Bennett 2015, 3). Alongside pastors, prison staff, and members of the public, these supporters included her once estranged children, as well as fellow inmates, who recounted how Gissendaner helped transform their lives (Casey and Bennett 2015, 45-8, 17-28). As her execution date loomed, they began to write, petition, and call the parole board, petitioning for clemency on Gissendaner's behalf

(Connor, Shepherd and Gutierrez 2015).<sup>1</sup> They also used media and social media to spread the word about her case, such that it even caught the attention of Pope Francis, who echoed their plea for clemency—a plea ultimately denied. The first woman to be executed in Georgia in 70 years, Gissendaner touched the hearts of many who dared to hope that September 29<sup>th</sup>, 2015 would end with something other than an execution.

Though they did not manage to shake the judgment of the parole board, in arguing for clemency on the grounds of her rehabilitation, her advocates tapped into an ancient argument against capital punishment: that of St. Augustine's. Perhaps this is surprising, given that Augustine's intervention in capital cases are not well known. Yet, his efforts to temper the violent judicial culture of his day, mainly through letter writing, are worth recovering as we debate the role of the death penalty in contemporary American society. Looking at his letters to Christian judges, we discover a compelling case as to why punishments ought to be ordered towards rehabilitation, and why this emphasis should give the judge pause in sentencing anyone to death.

However, if we are to bring this aspect of Augustine's episcopal activity to light, we must first address the reputation that has obscured it. This reputation is rooted in a

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<sup>1</sup> Her counsel's application for clemency included, among others, the following justifications: that she accepted responsibility for her actions and was deeply remorseful for her crime, that she earned the "support and respect" of the staff and volunteers at her correctional facility "as a result of her positive impact" on those around her, and that she displayed "a commitment to seeking redemption through spiritual growth and serving others" (Casey and Bennett 2015, 2). I highlight these to indicate that three of the chief arguments made on her behalf were on the grounds of her transformation. By presenting Gissendaner as rehabilitated to such an extent that "the person she was no longer exists," her legal counsel appealed to the idea that punishment is ultimately ordered towards rehabilitation; on this reasoning, if there was any case in which the parole board ought to "exercise its power to bestow mercy," it was in case like hers (Casey and Bennett 2015, 53). In this way, the Gissendaner appeal foreshadows the major claim undergirding Augustine's appeals for clemency, namely that "punishing and pardoning are done well only in order to correct the life of human beings" (EP=Augustine 2003, 153.19).

certain reading of *City of God* 19.6: Augustine's so-called meditation on the wise judge. Here, Augustine describes a judge who does not find it 'an "unthinkable horror" that innocent witnesses are tortured in cases in which they are not accused, or that prisoners should be driven to make false confessions through torture...' (Parrish 2005, 232).<sup>2</sup> According to the predominant reading, Augustine admires this judge (Parrish 2005, 232–235; Markus 1970, 99–100; Niebuhr 1995, 124–5; Burnell 1995, 40; Deane 1995, 64; Scott 1995, 153; and Rist 1996, 215). In my reading, it is the Stoics who do: the predominant interpretation conflates Augustine's voice with the Stoic voice.

Reading 19.6 in context, a larger difficulty with the predominant interpretation also emerges. It mistakes the purpose of the passage and, indeed, of book 19 as a whole. 19.6 has repeatedly been interpreted as a passage about judicial ethics, often in a way that stretches to political ethics more broadly. To many, it seems to advocate a politics of necessity (Deane 1963; Markus 1970; Niebuhr 1995; Burnell 1995; Kaufman 2007; 2009). John Parrish summarizes this perspective well, arguing that Augustine highlights "the opacity of human moral existence" in order to show that our fallibility "requires and excuses the brutality of our actions" (2005, 233).

However, I find it difficult to attribute such an opinion to Augustine for two reasons. First, Augustine's goal in book 19 is not to communicate a theory of political necessity, but to challenge "the arguments advanced by mortals in their efforts to create happiness for themselves in the midst of the unhappiness of this life" (CD=Augustine

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<sup>2</sup> See, especially, the first footnote in Kaufman, where he notes that "the problem most cited in studies of such tensions [that is, the difficulties faced by Christian public servants] is that of Christian magistrates obliged to torture witnesses as well as the accused to get to the truth. Augustine counsels judges to bear with the system yet to pray for their deliverance from its more onerous and morally dubious tasks" (2010, 701).

1998, 19.1).<sup>3</sup> The vignette in which the judge appears, like the others that surround it, is chosen precisely for its ability to do this. The difficulties the judge faces are not grounds for sweeping claims about Augustine's abandonment of politics to the blunt instruments of necessity; they are signs of the inescapability of suffering.

Second, because of the way Augustine is demonstrating the inescapability of suffering in book 19, it is difficult to claim that he brings up the judge to excuse his use of violence. In fact, this claim would go against an important thread in Augustine's argument, namely, his criticism of Stoic *apatheia* in 19.4-7.<sup>4</sup> While Augustine approves of true *apatheia*, which he has already defined as "a life without those emotions which arise contrary to reason," he thinks this kind of *apatheia* is impossible in this life (CD 14.9). The Stoic attempt to force *apatheia*, he argues, leads them to feign it—to turn *apatheia* into the suppression of emotion *per se*. For Augustine, such a suppression of emotion is tantamount to a loss of one's humanity (*humanitas*). Thus, when he brings up the judge in 19.6, his goal is to question the quality of happiness that Stoic *apatheia* yields, and his strategy is to problematize the judge's serene prescription of torture and execution. Thus, at the end of the chapter, we find him reflecting,

...[i]t would be more compassionate and more worthy of the dignity of man if he were to acknowledge that the

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<sup>3</sup> Of course, the other side of the coin to this argument is that his also showing what it means to live in hope. In this way, his criticism is ultimately ordered towards his construal of the Christian vision of pilgrimage, which increasingly takes central stage as book 19 progresses. While this aspect of book 19 is worth exploring, and perhaps even sheds light on certain facets of 19.6, the goal of this paper is to focus on Augustine's criticism of Stoic *apatheia* insofar as it reveals the impossibility of the conventional reading of the passage, and then to inform our understanding of Augustinian judicial ethics by examining his letter to judges.

<sup>4</sup> There is a long-standing debate as to whether Augustine really understands the Stoic position. Richard Sorabji, for one, has argued that he does not (2003, 372–84). Rist and Byers disagree (Rist 1996; Byers 2012 and 2013).

necessity of acting in this way is a miserable one: if he hated his own part in it, and, if, with the knowledge of godliness, he cried out to God, 'From my necessities deliver Thou me' (CD 19.6).

Having re-interpreted *City of God* 19.6, in the second half of the article, I will turn to Augustine's correspondences with Roman judges. It is in these letters, I argue, that we find Augustine's explicit position on the good judge: the good judge does what he can to avoid torturing and executing those he tries. Examining Augustine's letters, what we find is a constant exhortation to *humanitas*, which he associates with the recollection of our own humanity and the humanity of others.<sup>5</sup>

What is more, in reading Augustine's letters, it becomes clear that, for Augustine, the man of *humanitas* is the true model for the good judge, and not the man of *apatheia*. Though *apatheia* was celebrated by Stoic judicial culture as a way to mitigate the judge's tendency towards anger, Augustine contended that it has a severe flaw: it left no room for compassionate discretion. As long as judges remained rooted in a Stoic conception of duty, Augustine would face an uphill battle in his efforts to plead for mercy: it would always seem like he was asking them to neglect their duty. Thus, in order to make room for mercy in justice, Augustine had to reframe judicial duty in light of a new ideal.

Thus, one letter at a time, Augustine embarked on the work of persuading judges to think of their duty in a new light. Though his primary concern was always the particular case at hand, it is clear that Augustine also aspired to reach the judicial world more broadly. As we will see, he took strategic advantage of his most prominent

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<sup>5</sup> For Augustine, *humanitas* in its fullness is always associated with *caritas*, the form of true virtue (CD 14.9). While he does praise pre-Christian figures for displaying *humanitas*, he also believes that it is Christ who shows us what human nature really is, and our participation in Christ that restores and heals this nature.

interlocutor's status to spell out his case for *humanitas* most fully. In disseminating his new judicial ideal through this letter and others, Augustine did not ask judges to “bear with the system,” as Peter Kaufman has suggested, but gave them a reason to limit their use of torture and execution (2010, 701).

### Contextualizing the Just Judge Passage

Before we look at Augustine's letters to judges, we must first do the work of rehabilitating *City of God* 19.6. To do this, it is necessary to read the passage in context. As Augustine explains in many places, the *City of God* can be split into two volumes—the first, primarily a critique of the pagan worldview; and the second, primarily a defense of the Christian worldview [Augustine 1989, EP 1A\*; 1998, 10.32, 11.1, 18.1; 2004, EP 184A; 2010, 2.43(70)]. Augustine achieves the latter by documenting the origins, progress and ends of the two cities, the earthly and the heavenly, over the course of the last twelve books. Book 19 holds an interesting place in this arrangement. In one sense, it is about the progress of the two cities, analyzing, as it does, life in the *saeculum*. Yet, Augustine does not characterize it in this way. He categorizes it as the first book on the *ends* of the two cities (CD 19.1). For our purposes, this categorization is important because it highlights the very tension that divides the two cities: the dispute as to where the end, or *telos*, of human life actually lies. If Augustine thinks that the earthly city ‘immanentizes the eschaton,’ as Voegelin puts it, then book 19 is where he comes to meet the *defensores* of the earthly city on their own terms. It is where he asks the world's philosophers: can you really be happy *here*?

Turning to the internal structure of book 19, we see that Augustine's goal is to contrast the "hollow realities" of those who have endeavored to "create happiness for themselves amidst the unhappiness of this life" with the hope that "will be fulfilled in the true blessedness which He [God] will bestow on us" (CD 19.1). Below, we will see Augustine present the judge's happiness as one of these hollow realities. First, he listens in on the debates of those who "have made the pursuit of wisdom their profession in the midst of the vanity of this world"—that is, the philosophers (CD 19.1).

Entering their world, we hear that philosophy is the pursuit of the Supreme Good. It is a way of life ordered towards happiness.<sup>6</sup> The question that divides the philosophers is what this happiness actually *is*, and what way of life promotes it. Augustine demonstrates his grasp of the intricacies of these debates by reiterating Varro's categorization of the nearly three hundred philosophical sects. From within, their disagreements seem monumental. Is the *beata vita* active or contemplative? Can we have certain knowledge of the Supreme Good or only probable knowledge? Is virtue the whole of happiness or merely a part? What kind of part?

Stepping back from these debates, Augustine suggests with Varro that philosophy actually only gives three possible answers to the question of the Supreme Good: the human being, made up of body and soul, must either find happiness in the goods of the soul or the body, or both—either in virtue or pleasure, or both. According to Varro, the answer can really only be that we are happy if we have virtue, and happier still if we have other good things as well. Augustine also seems to endorse this as the common sense solution to the puzzle; if virtue is the good without which other things cannot be truly

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<sup>6</sup> To my mind, Hadot is the greatest expert on the Hellenistic experience of philosophy as a way of life (1995; 2002).



good for us, virtue is the prerequisite for whatever happiness we have. Other goods only add to it.

However, Varro's position only stands if we take his presuppositions as our own, which Augustine does not. Over and against the philosophers' project of looking inward—to qualities of soul and satisfactions of body, Augustine looks upwards—towards the divine gift of eternal life. For Augustine, the truly Supreme Good is eternal beatitude. From the perspective of the debate we have just heard, this answer comes out of left field. It is supposed to feel this way: Augustine has intentionally structured his inquiry so that his readers experience a dramatic shift in perspective. What was, until a moment ago, common sense is now called into question.

For the philosophers of Augustine's day, the entire pursuit of philosophy was wrapped up in the idea of a happy wise man. He was the goal to which they aspired; he was whom they wished to be. Here, Augustine uses their preoccupation with the wise man to ask whether any human being can really be satisfied in this world: "...is there any pain, any disquiet...that cannot befall a wise man's body?" Deformity, ruin, sickness, weariness, lethargy: "...is there any of these which may not assault the flesh of the wise man?" (CD 19.4). If Augustine can have his readers admit that even the wise man suffers, then he has shown that true happiness lies beyond this life.

I have already suggested that 19.6 is best read as part of an ongoing polemic against Stoic *apatheia*; now, we are in a position to see why. Augustine's goal in the first chapters of book 19 is to call the philosophers' *summum bonum* into question, and he does this by presenting the happy wise man as the product of perniciously wishful

thinking. Because the Stoics go farther than any other school in defending the complete happiness of the wise man, they are, as it were, low hanging fruit:

They believe that their wise man, that is, he whom, in their amazing vanity, they describe as such, even if he becomes blind, deaf and dumb; even if he is enfeebled in limb and tormented with pain; even if he falls victim to every other ill that can be described or imagined; even if he is compelled to put himself to death: that such a man would not shrink from calling a life, beset with such ills, a happy one! (CD 19.4).

The Stoics, in other words, believe that the wise man is perfectly happy, not only when he undergoes extreme pain at the hands of others, but even when he takes his own life! Calling the Stoics shameless for making such claims, Augustine spends the next few chapters working out the tragic consequences of their position.

First, Augustine challenges the Stoic conceptions of virtue and evil [*nefas*]. Essentially, Augustine thinks, the reason why the Stoics are able to maintain that their wise man is always happy is that they only recognize moral evils as evil. Virtue, they say, protects their wise man from this kind of evil, and therefore, from unhappiness. His wisdom protects him from mistaking bodily pains for true evils, while his temperance, fortitude, and justice protect him from committing the moral evils that would rightly sadden him.<sup>7</sup> Not so, Augustine retorts. In this life, virtues can only help people endure suffering; they cannot protect people from it—and sufferings really are evils.

Lambasting the Stoics for exalting a sham virtue that promises too much, Augustine begins to build a case as to why such this false promise is so dangerous. In doing so, Augustine taps back into an idea that he began developing back in book 14.

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<sup>7</sup> For scholarship on the concept of *nefas* in Stoic philosophy see Long 1968 and Christopher 2010. For an excellent summary treatment of Stoic ethics on its own terms, see Annas 2007.

There, he argued that while true *apatheia* will follow upon the peace of the saints, the only *apatheia* that this life can offer is a parody. Rather than avoiding irrational emotions, those who seem to have achieved this blessed state have actually rendered themselves unfeeling: they “are not stirred or excited or swayed or influenced by any emotions at all” (CD 14.9). How are they able to achieve such an un-human state? They are, he says, “entranced by their own self-restraint” (CD 14.9). This, he warns, is a parodic peace of mind, and everything parodic comes at a cost. It yields an “entire loss of humanity [*humanitatem*]” instead of “true tranquility” (CD 14.9).<sup>8</sup>

Carrying this critique of *apatheia* into book 19, Augustine strives to show that a virtue bound up with it is incompatible with a robust social life. Oliver O’Donovan has also noted this, writing that “Augustine seizes on the social question” in order to highlight the inadequacy of the wise man’s “solitary pursuit of his own happiness” (1999, 111). The Stoic wise man, Augustine will contend, claims he can be happy anywhere because his happiness is divorced from the fate of others. He has constructed a protective shell around himself. Organizing the next three chapters around the Stoic division of society into the household (19.5), the city (19.6), and the world (19.7), Augustine presents the Stoic wise man as an alienated figure, incapable of empathy (Hughes 2005, 148).

Beginning with the household, Augustine asks, can anyone really be happy here? Examining the possibility of finding happiness in our closest relationships, Augustine

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<sup>8</sup> Peace (*tranquilitas*) is arguably one of the most important themes of book 19 and undeniably sheds light on the ultimate purpose of 19.6. By presenting the *tranquilitas* of the Stoic wise man as a state only achieved by the suppression of his humanity, Augustine prepares the reader to see why earthly peace must be ordered towards heavenly peace if it is not to become parodic. Augustine develops his theory of peace throughout book 19, but most especially in chapters 11-14 and 27.

reminds us that those we love also have the most power to hurt us. Posturing himself as a man of compassion, Augustine writes that he hears of such evils with a “great sorrow of heart [*magno dolore cordis*]” (1995a/CD 19.5). Folding the standard Stoic objections into his analysis—the wise man can bear any ill with equanimity; the wise man is prudent enough to avoid taking up with the wicked—Augustine insists that, even with these caveats, the question remains: does the wise man feel anguish at the treachery of others?<sup>9</sup> If so, he cannot be happy; if not, he cannot be good:

...even if someone is strong enough to bear these ills with equanimity, or vigilant enough to guard against the malice of false friendship with foresight and prudence, nonetheless, if he is a good man, he cannot but be grievously pained [*grauiter excrutietur*] by the perfidy of wicked men...” (1995a/CD 19.5).<sup>10</sup>

In book 14, Augustine has already supplied his answer: if the wise man had sin, he would grieve, but, the Stoics say, since he is “neither subject to sin, for which he might have repented and grieved, nor to any other evil which it might grieve him to undergo or endure...[he] cannot experience such grief” (CD 14.8). There is, it seems, a glaring absence in the Stoic account: if sins are evil, why does the wise man not grieve for the sins of another?<sup>11</sup> Surely this is a failure on his part. Harkening back to his earlier

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<sup>9</sup> We should note that in 19.5, Augustine chooses his example with care (contrasting the “sweetness” of a friendship that was “reckoned genuine” with the bitter discovery that it was “in fact only a clever pretense”) (CD 19.5). False friends are not the only ones being accused of pretense here: the Stoics also are. What is more, insofar as the Stoic wise man has the characteristics the Stoics exalt, it is not clear that he can be a true friend in Augustine’s eyes.

<sup>10</sup> 1995a refers to the Latin from the *Corpus Augustinianum Gissense*.

<sup>11</sup> Byers makes a parallel argument in her discussion of *City of God* 9.5, writing that Augustine thinks that the Stoics “hold an arbitrary distinction between the virtue of others and the virtue that is one’s own” (2012,134).

allegation that the seemingly equanimous build a shell around themselves, Augustine presents the solitary happiness of the wise man as, indeed, inadequate.

Having failed to find genuine peace and happiness in the household, Augustine turns to the city. Unsurprisingly, there is less peace here. The city's forum is "filled with civil law-suits and criminal trials" (CD 19.5).<sup>12</sup> As Brent Shaw explains, the courtroom drama was "arguably *the* quintessential civic experience" in the late Roman Empire, so it is fitting that Augustine zeroes in on the judge as the quintessential public figure (2003, 535). The same limitation that tainted the judge's personal life, we now find, also plagues his public life: he is still vulnerable to betrayal and deception. He still cannot penetrate people's consciences.<sup>13</sup> On top of this, he may well convict the innocent. Augustine thinks that this is—or rather, *should* be—distressing.

### Interpreting the Just Judge Passage

As we begin to scrutinize 19.6, it is worth recalling the claim I am at pains to refute: the idea that Augustine thinks sin "requires and excuses" the brutality of Roman legal practices (Parrish 2005, 233). I have already suggested that I do not think 19.6 is an apology for the politics of necessity. If anything, it calls predominant views on judicial necessity into question. Therefore, in this section, I will first treat 19.6 in terms of Augustine's immediate goal, which is to present the wise man's happiness as parodic.

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<sup>12</sup> Legal historian Jill Harries writes that much of the law in the late empire was "concerned with how the state regulated disputes between its citizens and punished those who offended against social norms" (1999, 99).

<sup>13</sup> All this is said against the background of Augustine's theory of communication, in which *logos* and self-disclosure are deeply intertwined. The human ability to communicate the truth about ourselves is an important part of what constitutes the *imago Dei* in human beings.

Following this, I will examine what the passage implies about Augustine's own views on necessity.

Perhaps the reason why 19.6 poses so much difficulty for the modern reader is that Augustine never explicitly mentions the Stoics in it. Indeed, in asking whether this judge can bear to take his seat with so little assurance that his judgment is correct, Augustine does not spell out whose judge he is discussing. While Bettenson misleadingly translates the passage as asking whether "our wise man [will] take his seat" (Augustine 1972, 19.6), Augustine merely mentions 'the' wise man [*ille sapiens*] (1995a, 19.6). Yet, context makes a strong case that the judge in question is a Stoic. Not only is Augustine in the process of engaging with the Stoics, but his readers would have associated the judge with Stoicism; it was their philosophy, of all the philosophies, that most influenced judicial culture (Thorsteinsson 2010, 13).

In order to get a better sense of the Stoic judicial culture that Augustine is addressing in 19.6, it is helpful to consider the following excerpt by Susanna Braund:

According to orthodox Stoic belief, punishment was a matter of applying strictly the penalty decreed by law, with no room for discretion in either direction. The ancient evidence is unequivocal, for example (Diogenes Laertius 7.123=*SVF* iii.640): "They [the Stoics] say that the good man is not lenient, for the lenient man is critical of a punishment that is deserved; and they identify being lenient with assuming that the punishments fixed by law are too harsh for wrongdoers and with thinking that the law-giver is distributing punishments contrary to what is deserved..." (Braund 2009, 66-7).

For the Stoics, justice *was* the punishment of crime, and the judge's duty was to administer the law's penalties with strict precision;<sup>14</sup> this is why Augustine's fictitious judge approves of citizens who want to benefit society by "ensuring that crimes do not go unpunished" (CD 19.6). This attitude towards law and order was deeply linked with the Stoic vision of who the judge ought to be: a civically-engaged wise man who "would disdain emotional turbulence and grand rhetorical bombast, but still lead through his trained wisdom" (Inabinet 2011, 16). In short, the Stoics celebrated a judge who could remain stalwart and composed, regardless of the suffering around him.

Yet, will the wise judge take his seat? Returning to Augustine's question with this in mind, we can begin to guess how Augustine wants the drama to play out. He will rehearse his case as to the judge's plight, and the judge will remain unmoved by it, just as he must remain unmoved in every case. Augustine will argue that the judge's situation is to be "greatly lamented" and even "bathed in a fountain of tears," and the Stoic will respond that "the wise judge does not act in this way through a wish to do harm" (CD 19.6).<sup>15</sup> This, as a re-affirmation of the judge's happiness, should appear to miss the point. It is far too abstract.

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<sup>14</sup> That said, Seneca's views do "run counter to the conventional, hard-line Stoic position" on this point (Braund 2012, 93; cf. Byers 2012, 135-7). In *De Clementia*, Seneca argues that clemency, the capacity to dispense with legal precisions when the principles of justice had been satisfied, is a virtue (Byers 2012, 135). Compassion, however, remains suspect, even in his modified Stoicism; as an emotion, it undermines *apatheia* and therefore, clear thinking about justice.

<sup>15</sup> While in a number of English translations, the one who reflects is the "philosopher," in the Latin critical edition, Augustine does not actually refer to philosophers in 19.6 at all. Here, he merely writes, "*haec tot et tanta mala non deputat esse peccata; non enim haec facit sapiens iudex nocendi uoluntate, sed necessitate nesciendi, et tamen, quia cogit humana societas, necessitate etiam iudicandi*" (1995a, 19.6). In this way, it is unclear whether Augustine is addressing a Stoic philosopher who analyzes the wise judge from without, or a Stoic judge who imitates the wise judge, and thereby takes him as his point

Enacting this drama, Augustine presents the judge's self-assessment:

*He does not think it a wickedness [nefas] that innocent witnesses should be tortured... or that the accused... are so often overcome by such great pain that they make false confessions... Nor does he think it a wickedness [etsi] that, ... they very often die under torture or as a result of torture... [italics mine] (1995a/CD 19.6).*

In having the wise judge pass over such terrible tragedies unmoved, Augustine depicts his thought process as clinical, harsh. He seems to have reduced his entire consideration of evil [*nefas*] to a consideration of his own sin. By rooting his happiness in his own moral rectitude, he thinks, as long as I apply the law with precision, I am doing my duty, and am, therefore, happy. Perhaps not.

Moreover, by inverting the classic Stoic scenario, Augustine brilliantly accentuates the wise man's terrible alienation. Here, the wise man is not happy while being tortured or as he is putting himself to death, he is happy while he is imposing torture on *another* and putting *another* to death. The judge of 19.6 may not "wish to do harm," but he clearly has rendered himself unable to acknowledge the suffering of others (CD 19.6). He cannot call upon his pity because he has suppressed it, and he cannot call upon his reason because it is entirely focused on own interior state.<sup>16</sup> In the end, 19.6 means to leave us with the terrible sense that Stoic happiness has been bought at a high price. While Stoicism may allow the judge to take his seat with equanimity, it is only because he has abstracted himself from the tragedy that surrounds him.

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of departure in considering his own situation. Regardless, the Stoic judge/philosopher and the wise judge blend into each other, likely suggesting that the wise man is the Stoic's idealization of himself, and that the Stoic easily conflates himself with his ideal.

<sup>16</sup> Susanna Braund writes in her introduction to Seneca's *De Clementia* that although Stoic morality values "justice and equity and respect for one's fellow human beings on the basis of our shared humanity," it puts the greatest emphasis on "an individual's internal moral state" (Seneca 2009, 9).



In the preceding section, I have argued that 19.6 belongs most proximately to a tri-partite argument designed to show that Stoic *apatheia* hardens the wise man to suffering instead of making him truly happy. Looking to the home (19.5), the city (19.6) and the world (19.7), Augustine attempts to convince his readers that no human can escape suffering without cost, even the wise man. Having seen the wise man in his home life, we have now also seen him in his public life: as judge. "...[C]ompelled to seek the truth by torturing innocent people," yet, never quite sure that he avoided executing the innocent, Augustine wants to ask, can this judge really be happy (CD 19.6)?

Nevertheless, it is the case that Augustine thinks it necessary for the judge to take his seat.<sup>17</sup> Therefore, we must examine whether Augustine thinks that necessity "requires and excuses" the judge's use of torture and execution (Parrish 2005, 233). While Augustine does not outright condemn the Stoic judge for committing an injustice, this does not mean that he is simply excusing the judge's use of torture and execution.<sup>18</sup> Rather, I will argue, Augustine's indictment of Stoic *apatheia* calls the very terms in which the Stoics think about necessity into question. While Stoics have an unquestioning attitude towards necessity, considering it the judge's duty to apply the law with exactitude, Augustine strongly objects to this attitude, writing:

...It would be more compassionate and more worthy of the dignity of man if he were to acknowledge that the necessity

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<sup>17</sup> Perhaps one can turn to Augustine's correspondence with Boniface in which he explains how one can be at once a soldier and a Christian to work out the logic Augustine is following here (EP 189). It may be true that it would be anachronistic to claim that Augustine saw torture as always and everywhere wrong. As Jill Harries puts it in her commentary on letters 133-4, "Nowhere, in this extended reflection on the injustice of the *quaestio*, does Augustine object to the infliction of pain as a matter of principle. His argument seems to leave open the option that, if it could be guaranteed that torture would be inflicted only on the guilty, this could be acceptable" (Harries 1999, 133).

<sup>18</sup> I would like to thank Nicholas Ogle for helping me clarify this point in my argument.

of acting in this way is a miserable one: if he hated his own part in it, and, if, with the knowledge of godliness, he cried out to God, 'From my necessities deliver Thou me' (CD 19.6).<sup>19</sup>

What we must determine, therefore, is whether this new attitude towards judicial duty ultimately leads to a different outcome.

From this passage alone, we might be tempted to conclude that Augustine thinks that the difference between the good judge and the Stoic judge is merely his ability to grieve. Michael Walzer interprets *City of God* 19.7 to be saying something of this effect with regards to war. He writes:

Augustine did not believe that it was wrong to kill in a just war; it was just sad, or the sort of thing a good man would be saddened by (Walzer 1973, 167).

If Walzer is right, then we would be right to conclude that Augustine does not think torture or execution wrong, but only sad. Augustine's judge would always make the same choices as the Stoic wise man. His compassion would be fruitless. What is more, if Walzer is right, then Parrish is also right: Augustine still thinks necessity requires and excuses the standard judicial use of torture and execution.

In order to resolve this problem, we must look at 19.7 for ourselves. Here, Augustine is still in conversation with the Stoics, this time about world peace. Walzer is not alone in taking this passage as an apology for just war; many have (Langan 1984; Epp Weaver 2001; Syse 2012; Kellison 2015). Yet, reading it as a continuation of the

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<sup>19</sup> As one of my reviewers astutely noted, another important thread in Augustine's argument is his message to Christian readers: those who already believe that this world is not their home. In book 19, Augustine does go to some lengths to point out that Christians can and should invest in their political community. They should not abandon it. For this reason, it is significant that Augustine's praying judge does also take his seat. Augustine's point, as we will see in his letters, is that there is a way to do one's civic duty with *humanitas*.

argument we have already been exploring, a different interpretation emerges: the Stoic wise man cannot be genuinely happy as friend, judge, or general. He is always surrounded by tragedy; he just fails to acknowledge it. By now we should notice the pattern in Augustine's approach. Grieving over the bloody cost of the *Pax Romana*, Augustine punctures his own impassioned lament with the cool logic of the Stoic voice: "But the wise man will wage just wars" (CD 19.7). Again, the Stoics appear unfeeling, abstract. If their wise man only "remembers that he is a human being," Augustine retorts, "he will be much readier to deplore the fact that he is under the necessity of waging even just wars" (CD 19.7).

Here, we see that 19.7 rounds out the point Augustine has been making since 19.4, namely that we suffer, in no small part, *because* we are social—and that we can only protect ourselves from suffering by becoming less social.<sup>20</sup> In this way, 19.4-7 prepares us to make a choice: we must either accept the grief that comes with real relationships, or we must "prohibit and extinguish affection" and "with ruthless disregard, sever the ties of all companionship..." (CD 19.8). The Stoics have chosen the latter, but at great cost.<sup>21</sup> In stifling the pain that comes with others' sins, sufferings, and failures, they have aspired, not to true happiness, but to a sort of amputation of consciousness. The one who can think about the evils of war without anguish, Augustine

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<sup>20</sup> "...By nature the most social creature, and by fault, the most discordant" (CD 12.28).

<sup>21</sup> It is not, however, as though the Stoics think of themselves as having done this. In fact their philosophy puts great emphasis on friendship and civic harmony. What Augustine is pointing out is that their resistance to mercy undercuts their verbal acknowledgment of friendship as a good (Dodaro 2000, 245; Gregory 2008, 276, 83, 87–91).

concludes, “thinks himself happy only because he has lost all human feeling [*se putat beatum, quia et humanum perdidit sensum*]” (1995a/CD 19.7).<sup>22</sup>

With this reading in mind, we can ask, is Walzer right? Walzer’s claim could be tenable, if not for the way Augustine presents compassion [*miser cordia*] in 9.5. Having just recounted Aulus Gellius’ tale about a rough sea voyage taken with a famous Stoic philosopher, Augustine remarks how much better it would have been for the Stoic to have been “disturbed by compassion for a fellow man,” *so that* he could “comfort him…” (CD 9.4). While Gellius’ Stoic gave a quick-witted defense of his pallor (which was merely bodily) during the storm, it is clear that Augustine thinks the energy he spent maintaining his mental composure could have been better used.

Calling Cicero’s praise of Caesar’s compassion “far better and more humane [*humanius*]” than the Stoic praise of equanimity, Augustine goes on to highlight the importance compassion has in motivating human beings to humane action. Calling it “a kind of fellow-feeling [*compassio*] in our hearts,” Augustine explains how this feeling draws our attention to another person’s “misery” in a way that “compels us to help him if we can” (1995a/CD 9.5). In this way, compassion acts as helper to right reason, moving us to consider how we can best alleviate another’s suffering. Here we find the answer to our question; *if* Augustine’s “melancholy soldier” really does hate the fact that he is under the necessity of waging war, he will not rest in the satisfaction that the war is just

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<sup>22</sup> Here again, Augustine alludes to his earlier suggestion that those who “are not stirred or excited or swayed or influenced by any emotions at all” achieve an “entire loss of humanity [*humanitatem*]” instead of “true tranquility” (CD 14.9).

(Walzer 1973, 167).<sup>23</sup> Instead, he will actively look for ways to alleviate suffering, and, importantly, he will avoid causing *unnecessary* harm.

Having established that Augustine praises compassion for its ability to move us to humane action, we can ask what this implies about the judge who also hates necessity.<sup>24</sup> Perhaps the most important piece of evidence that Augustine's compassion yields a fresh perspective on necessity is his assessment of torture. As Jill Harries has noted, there was a longstanding belief in Roman culture that only torture guaranteed truth (1999, 123). Indeed, centuries earlier, Seneca describes the role of torture in the Roman judicial system from a Stoic point of view:

Our judicial procedure is a spectacle that surrounds itself with fiery torches, iron chains, and the claws of wild animals...So it isn't surprising, is it, that there is such a great fear of all this process in which there is such wonderful variety...The torturer does not have to do much more than simply set out the instruments of pain. The defendants are mentally overcome...In fact, the instruments with which the tortures subjugate and dominate our minds are more efficient to the precise degree that they are simply displayed (Seneca, Epistle 14.2 in Shaw 2003, 539).

Seneca is not troubled by the role torture plays in the Roman judicial procedure. In fact, he finds it salutary because it intimidates the weak-minded and, therefore, lends itself to

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<sup>23</sup> Joseph Clair has made a similar argument based on a close reading of letter 229 to Darius, writing, "This letter suggests that virtuous military officials have a responsibility to try to avoid the necessities of war and bloodshed that is not altogether unlike the call to avoid capital punishment that Augustine urges upon Macedonius" (2010, 102).

<sup>24</sup> As we will see below, in his letters to judges, Augustine continues to affirm the necessity of the judge's duty, but reinterprets this duty through the lens of *humanitas*. The practical upshot of this is that torture and execution are no longer necessary (cf. Clair 2016, 100).

the judge's discovery of the truth.<sup>25</sup> Because the Stoics associate weak-mindedness with vice, they condone the pageantry of violence; it helps to terrify criminals into confessing.

Yet, in 19.6, Augustine breaks with this cultural truism by suggesting that *Stoicism itself* advises people to make a false confession. He writes, "if the accused has followed the wisdom of our philosopher friends in choosing to escape rather than endure those tortures any longer, he confesses to a crime he has not committed" (CD 19.6). If this is true of the Stoic, how much more true is it of everyone else? If most people are likely to say whatever is necessary to stop the pain, torture may not help the judge discover the truth at all.<sup>26</sup> As we will see below, Augustine takes this doubt as grounds for caution, writing counseling one judge it is not humane to impose "certain punishment for uncertain" crimes (EP 153.20). In the end, the judge's uncertainty is not, *pace* Parrish, a good reason to use torture, but a good reason to avoid it. In this way, we gain a glimpse into how Augustine's compassion will yield a critical attitude towards judicial necessity, and will help him reexamine the status quo.

Here, I have argued that a contextualized reading of *City of God* 19.6 gives us sufficient grounds to part ways with the idea that necessity requires and excuses brutality. Having explored what it would mean for Augustine's judge to hate the necessity he is under, we can conclude that there is a significant difference between the social

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<sup>25</sup> Augustine explores Stoic views on weak-mindedness in book 9 of the *City of God*. The Stoics, he argues, think that the difference between the weak-minded [*stulti*] and the wise man [*sapiens*] is precisely that the mind of the former "yields to ... passions and adapts itself to them, whereas the wise man, though he experiences them of necessity, nonetheless retains with mind unshaken a true and steadfast perception of those things which he ought rationally to seek or to avoid" (1995a/CD 9.4).

<sup>26</sup> As we will see below, this is not Augustine's only reservation when it comes to torture. He is also worried about the torture of innocents, stressing that it is not humane to impose "certain punishment for uncertain" crimes (EP 153.20).

implications of the Stoic commitment to *apatheia* and those of Augustine's commitment to *humanitas*, grounded in *caritas*. Simply put, the judge who is compassionate will look for ways to alleviate suffering, and will avoid causing unnecessary harm. The one who is not will not. This cannot but make a difference in outcomes.

### A Fuller Picture of *Humanitas*: Augustine's Intercessory Letters to Judges

In the introduction, I suggested that the *City of God* 19.6 only hints at Augustine's views on judicial ethics and that he only lays them out explicitly in his correspondence with judges. While we do not have access to every letter, we do have a remarkable volume for a premodern figure, and one, I would suggest, that yields a remarkably consistent emphasis on *humanitas*. Reflecting on this set of letters, Robert Dodaro writes that "one is struck by how much of his political activism is largely focused on the defense of persons accused or convicted of crimes" (2005, 106). Dodaro is right. Augustine is constantly writing letters to intercede for such persons, whether they be poor tenant-farmers exploited by their landlords, stewards convicted of heinous crimes, riotous Donatists, or violent Circumcellions.<sup>27</sup> While these letters do not make for conclusive evidence that Augustine tried to revolutionize judicial culture *per se*, they do make for compelling evidence that he did what he could to move real judges towards clemency.<sup>28</sup>

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<sup>27</sup> Cf. *inter alia* eps. 14\*, 15\*, 91, 100, 104, 133, 134, 138, 151, 153, 247. What John Matthews wrote of Symmachus' letter writing is equally true of Augustine's: "his aim was the pursuit and cultivation of *amicitia*: and his letters were primarily intended not to inform but to manipulate, to produce results" 1974, 64. Cited by Ebbeler 2007, 230.

<sup>28</sup> In his own way, even Kaufman admits this, writing that though Augustine does not think the political world will ever improve such that it will be free of corruption, Augustine does his part to help the victims of corruption (2009, 54). Moreover, Augustine has a number of letters and sermons that corroborate Augustine's activity as intercessor, but none that undermine it. As he writes to Nectarius in letter 91: "We try to

Before we turn to these letters, it is helpful to pause on a certain sermon that foreshadows their message and suggests why Augustine places such emphasis on letter writing in the first place. In this sermon, we find Augustine admonishing his congregation for having lynched a corrupt soldier:

...you vent your rage on him to the point of death. And what about after death, where none of your punishment now reaches that bad man, and only the malice of another bad man is finding expression? That's mindless madness, not avenging justice (Augustine 1994, sermo. 302.2).

Going through the list of grievances they had against the soldier, Augustine highlights the degree to which his parishioners forget their own guilt in emphasizing his. This, he thinks, is a dangerous tendency must be mitigated by *humanitas*. Later, he will tell a judge the same thing. He will also add that “it is easy and natural to hate evil persons because they are evil, but it is rare and holy to love those same persons because they are human beings” (EP 153.3). Hatred for criminals, Augustine stresses, is not justice.

In fact, he tells his parishioners, the judicial system exists because human beings have a tendency to judge their enemies too harshly. While the people “vent their rage” on their enemies, the judge is “compelled” by his office to “unsheathe the sword”, though “he would prefer not to strike” (Augustine 1994, sermo. 302.16). Here, we glimpse a new kind of judge; this is a judge who prefers *not* to strike. He is not neutral. Like the Stoic judge, he is compelled by a duty to uphold the law, but unlike the Stoic judge, his refusal to hate the criminal is grounded in something other than *apatheia*.

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observe this norm unconditionally so that no one is punished by a more severe penalty, either by us or, at our intercession, by anyone else.” (Augustine 2001, EP 91.7). Cf. Dodaro 2000, 232–3.



Finally, Augustine argues, instead of judging the deceased soldier, his parishioners ought to “feel pity” for him [*dolere ergo ad vos pertineat, fratres mei, dolere ergo ad vos pertineat, non saeuire*] (Augustine 1994/1995a, sermo. 302.18). Again, this pity ought to inspire action; it should lead them to do everything in their power to prevent vigilante justice:

I am not saying, brothers and sisters, that any of you can go out and just tell the populace to stop; that's something not even I can do. But each one of you in his own house can prevent his son, his slave, his friend, his neighbor, his apprentice, his ward from taking part. Work on them so that they don't do these things. Persuade those you can; and be firm and severe with others, over whom you have authority...(Augustine 1994, sermo. 302.19).<sup>29</sup>

Significantly, the action Augustine has in mind is the work of persuasion. What increases the power of persuasion, Augustine thinks, is the influence that comes from social bonds. He, as a bishop, has this kind of influence with his flock, just as his parishioners might have it with their family and friends. If Augustine thinks that social ties are *the* privileged avenues for cultivating *humanitas*, we can see why Augustine considers it his duty as a bishop to write letters to Christian judges.

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<sup>29</sup>Augustine's relationship to slavery is perhaps as complicated as his relationship to judicial authority. One thinks of 19.15 of the *City of God*, where Augustine urges that, if it is not possible for one to free his slaves, that he treat them well, emphasizing that the *paterfamilias* has a greater responsibility to care for his slaves than they do to obey him. Elsewhere, we find Augustine working to stop the slave trade in Africa, calling for Alypius to bring the problem to the attention of the Imperial Court in Ravenna (*EP 10\**) and using his own powers as a judge to hear cases where loopholes in Roman law might allow for the liberation of some slaves (*EP 24\**). That said, Augustine was not an abolitionist. Discussing this, Dodaro writes that though Augustine “often drew from his church's treasury in order to purchase the freedom of slaves,” he sometimes thought it better for slaves to remain as such, given the economic conditions of the time and the difficulty of paying taxes. (2005, 102)

Turning to the first of our letters, we find Augustine congratulating the newly-minted Proconsul of Africa, Donatus, on his posting. Rejoicing that the Catholic Donatus is someone with whom he has clout, Augustine explains that his pleasure at having a fellow Catholic in office is not what the Proconsul might think.<sup>30</sup> Writing at the height of the Donatist controversy in 408, Donatus might imagine that his position should be used to punish the Donatists. Yet, Augustine actually writes to temper Donatus' severity: the Catholic bishops, he explains, "do not seek vengeance" upon their enemies (Augustine, 2003, EP 100.1). Fearing that Donatus might judge the Donatists "in accord with the immensity of their crimes" rather than "in accord with...Christian gentleness," Augustine begs him to "forget" that he has the power to take life at all (EP 100.2). Consonant with his advice above, Augustine makes sure to invoke his authority as a bishop:

...if you think that human beings should be put to death for these crimes, you will make us afraid that something of the sort might come to your court by means of our effort. And once this has been discovered, those people will roam about seeking our destruction with greater audacity since we will be compelled to choose even to be killed by them rather than to denounce them to your courts to be put to death...

That is, if Donatus is too harsh on the Donatists, the bishops will not cooperate with him, and this will undermine his authority as the new Proconsul.

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<sup>30</sup> As recently as a decade ago, there was a consensus that, in the Donatist controversy, Augustine had succumbed to the temptation of using torture and political power to coerce people into the Church, paving the way for the inquisition (von Heyking 2001, 222). For von Heyking's challenge to this narrative, see pages 222-57. He also notes that Augustine's famous change of mind on prosecuting the Donatists occurs in 408, contemporaneous with or before the letters we are studying were written (2001, 235-9). Gregory, citing epistle 187, also notes that Augustine was always firm that "Christian gentleness" must be maintained and that capital punishment never be imposed (2008, 297-306).

Three years later, we find Augustine penning a similar letter to Marcellinus, the Imperial Commissioner to North Africa. Again, the question on the table is Donatist violence. Again, he writes of his fears: “[A] very great worry has come over me that Your Eminence might perhaps judge that they should be punished with such great severity of the laws that they suffer the sort of punishments they inflicted” (EP 133.1). It is not that he wants to “prevent criminals from losing the freedom to commit crimes,”—rule of law, after all, is necessary—it is that he wants to prevent inhumane applications of the law. Over and against the Stoic paradigm in which “punishment was a matter of applying strictly the penalty decreed by law, with no room for discretion...” (Braund 2009, 67), Augustine presents a different paradigm: for the law to be upheld in a humane fashion, it must leave the convict “alive and with no part of the body mutilated” (EP 133.1).

Significantly, the Christian Marcellinus already has chosen to be creative in how he applies the law so that he might avoid torture. By choosing to extract the Donatists’ confession through the kinds of tactics used by “teachers of the liberal arts ... parents” and even bishops, he has already demonstrated his *humanitas* (EP 133.2). However, Marcellinus has yet to sentence these Donatists, and Augustine worries that the pressure to punish with severity might still overtake him. To strengthen him, Augustine exhorts Marcellinus to remain firm in his *humanitas*:

Let the power to punish, therefore, not make you harsh, since the need to carry out an inquiry did not banish your gentleness. Do not, now that the crime has been discovered, look for an executioner, since in its discovery you were unwilling to use a torturer.

Again, we see Augustine providing his judge with an alternative to Stoicism: like the Stoic judge, Marcellinus is to avoid acting on revenge. Unlike the Stoic judge, he is to avoid it by remembering to be humane:

Carry out, O Christian judge, the duty of a loving father. Be angry at wickedness in such a way that you remember to be humane [*ut consulere humanitati meminervis*], and do not turn the desire for revenge upon the atrocities of sinners, but apply the will to heal to the wounds of sinners. Do not undo your fatherly diligence that you preserved in the inquiry when you obtained their confession of such great crimes not by limbs stretched upon the rack, not by iron claws furrowing the flesh, not by burning with flames, but by a beating from rods (1995a/EP 133.2).

In this passage, we also glimpse how Augustine is thinking about *humanitas*: to remember to be humane is to “heal the wounds of sinners” (EP 133.2). In encouraging Marcellinus to posture himself as a loving father, Augustine redirects Marcellinus’ focus towards the person behind the crime and gives him a reason to mitigate the severity of the law. Just as a father seeks the true good of his son, so Marcellinus should seek the true good of the criminal. As before, Augustine ends his letter by invoking his authority as a bishop: a son of the Church, Marcellinus would do well to heed his counsel.

Next, we encounter Augustine writing to African Proconsul, Apringius, also in 411, but this time regarding the Circumcellions.<sup>31</sup> Knowing that their sentencing would fall under his jurisdiction, Augustine echoes the same plea we have already heard.

Fearing that Apringius may condemn them to death, he begs as a Christian that this not

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<sup>31</sup> Regarding the violence of the Circumcellion rebellion, Augustine writes, “[t]hey not only beat us with clubs and kill us with the sword, but they have also thought up an incredible crime and hurl lime mixed with acid into our eyes in order to put them out. Moreover, they pillage our homes, and they fashion for themselves huge and terrifying weapons. And armed with them, they run off in different directions, threatening and breathing slaughter, robbery, fires, and blindness.” (Augustine 2001, EP 88.8).

happen, and warns as a bishop that it had better not happen (EP 134.3). If he were writing to a non-Christian judge, Augustine explains, he would take a different approach, but would plead for mercy just the same. On human grounds, he could at least say that the victims' suffering would only be "marred" by more spilling of blood (EP 134.3). Yet, for a son of the Church like Apringius, it should be enough that Augustine exhorts him as a bishop. Again we see Augustine using his clout to promote clemency.

Turning lastly to Augustine's 414 correspondence with Macedonius, we should begin by noting how rare it is that Augustine writes to such an important political figure; Macedonius was the highest-ranking Roman official in Africa. Accordingly, it is not surprising that there is an abundance of scholarship on this exchange (Lamoreaux 1995; Raikas 1997; Kaufman 2003; Dodaro 2005; Clair 2016; Humfress 2011). What is surprising is that so little has been said about the importance of *humanitas* in the first of Augustine's responses to him.<sup>32</sup> Indeed, as Joseph Clair notes, "what is most striking in Letter 153 is Augustine's continuous appeal to Macedonius' humanity, the humanity of the criminal, the fellowship of humanity that exists between them, and the role that Augustine assumes this shared sense of humanity will play in Macedonius' decision" (2016, 95). Though Clair does not develop this thought in great detail, much can be

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<sup>32</sup> That is, this is the first extant response. From letter 152, it is clear that Augustine has already written to him. With regards to the importance of *humanitas* in this letter: Augustine uses cognates of *humanitas* or *inhumanitas* in EP 153 8 times (though there are 19 references to the human, a not unrelated fact). He also speaks of the attribute of humanity in letters 17.2, 22.9, 33.6, 82.1, 87.1, 114, 133.2 171a.1, 204.3 and 266.1. In these letters, the meanings range from a reference to a general reputation of kindness or friendliness, to a particular, and perhaps more serious virtue: the disposition of humaneness through which a person recognizes the fellow humanity of others and responds accordingly.

gleaned from letter 153 as to why *humanitas* is ultimately the ground of Augustine's appeal for clemency (cf. 2016, 100).

Perhaps the reason why Augustine took so much time to flesh out his vision of *humanitas* to this particular judge is that he knew that the letter would be widely read by magistrates across North Africa (Ebbeler 2012, 19). Indeed, Augustine indicates as much himself (EP 153.26). What is more, Macedonius also gave him the perfect prompt: he asked why the bishops insist on interceding in criminal trials. Does this not make them “accomplices in guilt?” (EP 153.1). If Macedonius thought that Augustine's intercession amounts to an *endorsement* of criminality, such that any judge who would fold in the face of his pleas would be failing in his office, he held a view of justice in which the good judge is the one who cannot be moved. Like the Stoics, he believed that “an act of mercy involved failure to impose a justly deserved penalty and therefore was itself less than just” (Braund 2009, 60).

For Augustine, this is an un-Christian idea, and, the reason why Macedonius was “deeply in doubt” that Christianity justified the bishop's intervention was because he had not really applied Christian principles to his understanding of the judicial office—there was an older account in the air, and he had not broken free from it (EP 153.1). What is at stake in letter 153, then, is whether or not Christianity can replace the Stoic foundations of the Roman judicial culture. Over and against the Stoic vision, in which mercy is “based upon an emotional impulse” and is “therefore undesirable or even reprehensible” Augustine presents one in which the good judge allows himself to be moved by the intercessor towards benevolence (Braund 2009, 60). In this vision, mercy and justice are complimentary; the intercessor and judge work together for the good of society.

Pushing back against the accusation that he condones laxity, Augustine assures Macedonius that he believes in law and order. Yet, even if “the power of the sovereign, the judge’s right over life and death, the executioner’s instruments of torture, the weapons of the soldier, the discipline of the ruler, and the severity of a good father,” were all instituted for a reason, they have their limits (EP 153.16). Namely, they must be limited by *humanitas*. Here, Augustine employs a historical argument. While the severity of the punishments in the Old Testament showed that “punishments were rightly instituted,” now that the world has been “taught to pardon,” things have changed. It no longer “counts as a failure in their office” if judges “act mercifully...towards those over whom they have the legitimate power of death” (EP 153.17). Instead, it is Christ-like to do so.

For Augustine, one of the central implications of the Incarnation is that the mercy we have received must be passed on. Indeed, he reminds Macedonius, the only reason there are any “good people” is that God has been “merciful to sinners” (EP 153.26). Accordingly, the Christian judge must reconceive his duty in light of God’s mercy towards him:

Since, then, God has such great patience and such great mercy for sinners that, if they have corrected their conduct in this life, they are not condemned for eternity, though God does not look for mercy to be shown him from anyone, since no one is more happy, no one more powerful, and no one more just than he, how should we human beings behave toward other human beings? (EP 153.8)

If God perseveres in patience so that human beings might repent, how much more should Christian judges do the same?

What is more, presenting Christ as the truly just judge, Augustine reminds Macedonius that when he spoke to the women caught in adultery, he did not condemn her, even though he could have condemned her with “full justice” (EP 153.15). Through Christ, Augustine presents a new rule: the freer from sin a person is, the more merciful he or she is. The more displeased by sin a person is, the less he or she wants the sinner to perish “without having been corrected” (EP 153.3). Here is Augustine’s response to the allegation that the one who spares the guilty approves of their sin.

Reinterpreting the judicial office in this light, Augustine’s counsel is twofold. First, he encourages Macedonius to imitate God’s patience by allowing criminals time to change. Second, he encourages him to extend Christ’s forgiveness to criminals so that they might have occasion to change. Lest this seem too idealistic, Augustine stresses that he is not asking Macedonius to ignore justice, nor is he asking him to expect criminals always to change—“Who can fail to know that many have misused this leniency and gentleness to their own destruction?” (EP 153.4). What he is asking is that Macedonius *hope* for this change.

Practically, what Augustine is asking Macedonius to do is to prioritize rehabilitation over retribution. Macedonius, like Marcellinus before him, is to reconceive his commitment to justice in terms of discipline. Again, Augustine draws the connection between the good father and the good judge, this time making its implication clear: discipline “should not be carried to the point of death in order that the person may still live who may benefit from it” (EP 153.17). If we were to summarize Augustine’s position in one quote, it would be that “punishing and pardoning are done well only in order to correct the life of human beings” (EP 153.19). If Macedonius is to reconceive of his



office in this way, Augustine promises, he will be acting “as a companion not in injustice [*iniquitatis*],” but “in humanity [*humanitatis*]” (1995a/EP 153.3).

By suggesting that the judge who listens to the intercessor is not weak, but humane, Augustine, moreover, makes room for his own voice in the judge’s decision-making process. Having presented the good father as a model for the Christian judge to follow, Augustine reminds Macedonius of the gap between the father’s natural love for his son and the judge’s supernatural love for the criminal: “it is easy and natural to hate evil persons because they are evil, but it is rare and holy to love those same persons because they are human beings” (EP 153.3). That judge has to work to keep the humanity of the condemned in view, and for this, he should be glad of the intercessor’s help.

Thus, in response to Macedonius’ allegation that bishops interfere in the judicial process, Augustine manages to argue that they are actually indispensable to it. Reminding Macedonius of the many structural reasons that can cause a judge to “lose his humanity,” Augustine shows how important it is that the bishops help preserve the humanity of the judge (EP 153.20, 19). First, because of his status, it is very easy for the judge to imagine that he already *is* good and, therefore, licensed to condemn another. It becomes easy to begin thinking of criminals as “the very worst kind of human beings for whom the remedy of repentance is absolutely useless” (EP 153.20). Augustine warns Macedonius that he hears this tendency in his suggestion that criminals only ever pretend to be remorseful.

While it would be wrong, Augustine admits, to intercede for someone whom he knows is lying, it is also wrong to presume that all criminals are lying. By reminding the judge that he is only a human being, and has as much capacity to be deceived as anyone

else, Augustine seeks to mitigate Macedonius' presumption. He is as likely to be taken in by the prosecution as the intercessor is by the defendant: sometimes, the unbelievable is true and the believable false. Often, money and power taint the judge's judgment. When a landlord brings a case against a tenant, for example, whose word and character are usually trusted in court?

In fact, Augustine reminds Macedonius, the whole legal system is filled with injustices that are tolerated by custom:

What shall I say about the interest that the laws and the judges themselves command to be repaid? Or is he more cruel who steals or snatches something from a wealthy man than he who ruins a poor person through usury? (EP 153.25)

If debtors are considered criminal, questions remain as to why they required loans in the first place. Why are we supposed to restore the property of another that was taken secretly by theft, but not the property obtained by deceiving the judge? These discrepancies make the bishops' intercession all the more necessary.

One could say, then, the role of the intercessor is to remind the judge that his situation is also not as black and white as he thinks. Expressing concern that the judicial world can too easily split the world into the innocent and the guilty, Augustine reminds Macedonius that God does not divide the world into the good and the evil, but "calls the same people evil on account of the sins of human weakness whom he calls good on account of their participation in divine grace..." (EP 153.13). Thus, in order to break down the division between the just and the unjust that seems so visible along the lines of criminality, Augustine shifts the focus from criminality to sin:

... we, though not criminals, often intercede even for criminals, and... we, though sinners, intercede for sinners,

... and I think that you understand that we said truthfully rather than insultingly that we intercede before sinners. (EP 153.15)

By helping Macedonius see that he is one sinner with the provisional authority to correct another sinner, Augustine makes room for him to judge from a place of *humanitas*. It is only by putting himself back on the same level as the one he judges that Macedonius can he really act out of an awareness of his humanity, the criminal's humanity, and "the fellowship of humanity that exists between them" (Claire 2016, 95).

Practically speaking, Augustine explains, the central way that the intercessor "breaks down the indignation of the prosecutor and the rigor of the judge" is by reminding them of their "common weakness" (EP 153.10). Here again, Augustine invokes Christ's example. Not only did Christ exhort his followers to love their enemies, he also gave them a reason to forgive other sinners. Supposing that the husband of the adulterous woman had been present at her stoning, Augustine imagines how he would have been "filled with fear" upon being reminded of his own sins, so that he would have "turned his mind away from the desire for vengeance to the will to pardon" (EP 153.9). By reminding the judge and the prosecution that they are not without sin—even if the law does not accuse *them*—the intercessor breaks the illusion that they are the just standing in judgment on the unjust.

Finally, Augustine explains how the intercessor can step in when a judge, who wants to be humane, is put in a difficult position. Returning to the case of the debtor who claims he cannot pay, Augustine explains the judge's bind. Though he might believe the debtor, the judge is obligated by law to torture him as long as the plaintiff demands it. If he wants to be humane, he cannot uphold the law, but if he is to fulfill his office, he must

uphold the law. This is where the intercessor steps in. Writing that it is more appropriate for the bishops “to intercede with those who are seeking a return of their money rather than with the judges,” Augustine explains how the bishops use their authority to urge plaintiffs to be merciful, stressing it would be better for them lose money than to “torture or kill [the debtor] if he does not” (EP 153.20). In a system stacked against mercy, the intercessor is vital. He helps the humane judge “maintain his integrity” (EP 153.20).

Through this series of letters, we have seen how Augustine considers *humanitas* to be the lynchpin in his appeal for clemency. His perennial exhortation was this: “Spare the evil, O good man. Be gentler the better you are. Become humbler in piety to the extent you are higher in power...Let nothing be done cruelly, nothing inhumanely” (EP 153.19). In arguing for *humanitas*, Augustine liberated judges from the antinomies of a Stoic mindset, bringing mercy and justice together in the humane work of correcting human beings.

### Conclusion

To summarize our study, we have seen that Augustine cannot be the promoter of judicial *apatheia* he is reputed to be. Instead, we have seen, he is a constant promoter of *humanitas*. Despite this, we can still ask whether Augustine is guilty of a failure of imagination in not imagining a justice *system* without torture and execution.<sup>33</sup> However, Augustine did not even need to imagine this: he was a part of it.<sup>34</sup> As Peter Brown has

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<sup>33</sup> For a treatment of Augustine’s own activity as an agent for social change, see Dodaro 2005. For an alternative reading, see Kaufman 2009.

<sup>34</sup> Since the days of the early Church, Christians had taken seriously Paul’s command that they not take their cases to the secular court, but settle them within their own community (1 Cor. 6:4-6; Brown 2001). This was the practice that, by Augustine’s time, developed

explained, by the fourth and fifth century Rome, bishops had become “agents of change,” providing new avenues of advocacy for the poor (Brown 2001, 8).<sup>35</sup> Significantly, the Bishop’s Court (*Audientia Episcopalis*) did not use torture or collect the ‘tips’ (*sportulae*) that were customary in the secular courts.<sup>36</sup> What is more, during Augustine’s lifetime, the decisions of this court could not be appealed (Lamoreaux 1995, 147).<sup>37</sup> This was in contrast to the costly procedure in the courts of secular judges, whose decisions could be appealed (and billed) until they reached the court of the emperor—Rome’s *iudex maximus* (cf. EP 138.25).<sup>38</sup> Together, these factors made the bishop’s court incredibly popular, and not only among Christians (Augustine 1989, EP 8\*).<sup>39</sup> The Bishop’s Court was an alternative justice system that strove to operate on the principle of *humanitas*.

Yet, in the end, what is most important about Augustine’s contribution to Rome’s judicial culture is the vision he sought to share. Like the supporters of Kelly Gissendaner, Augustine saw punishment as fundamentally ordered towards rehabilitation. By

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into the *Audientia Episcopalis*. Though its practices grew up organically and separately from imperial procedure (Harries and Wood 1993; Harries 1999; Humfress 2007; Humfress 2011), in 318 Constantine incorporated it into the Roman system such that the secular authorities had to enforce its decisions.

<sup>35</sup> See also Harries 1999, 97.

<sup>36</sup> Lamoreaux 1995, 151. Cf. EP 133.2 in which Augustine writes that in the episcopal courts, corporal punishment is limited to the use of rods also used by parents and teachers. This is drastically different than the methods of secular torturers.

<sup>37</sup> Under Roman law, it had long been the case that people could opt into having a bishop as arbiter in a civil suit, just as they might agree to have any respected citizen mediate their dispute according to the Roman law.

<sup>38</sup> As Harries explains, secular judges in the “court of first resort” were usually the provincial governors (*praesides*) or the proconsuls (*consulares*), though sometimes, small claims cases were delegated to deputies (1999, 53–4).

<sup>39</sup> Augustine 1989, EP 8\*, *The Fathers of the Church, a New Translation: Letters 1\*-29\**, trans. Robert B. Eno, vol. VI, (Washington: Catholic University of America Press, 1989). In this letter, Augustine discussing how a Jewish man, Licinius, would likely bring his interlocutor to the bishop’s court over a land dispute if Augustine cannot convince him that he has, in fact, swindled Licinius out of property.

grounding good judgment in *humanitas* rather than *apatheia*, he helped Christian judges reconceive their judicial duty, and, importantly, made room for compassion. Far from finding an Augustine who abandons judicial culture to necessity, in these letters, and even in *City of God*, I would argue that we find an Augustine who did a great deal to mitigate the violence of Roman judicial culture—and, in ways from which we, too, can learn.

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