LAW AT THE MOMENT OF GUILT

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During summer months the 82-year-old retired optician, Louis Feinstein, often rode his ten-speed bicycle along the paths of Chicago's Burnham Park. In late afternoon on Monday, July 2, 1979, near 43rd Street, Mr. Feinstein was resting from the exercise on a park bench, looking at Lake Michigan, when he was struck with a baseball bat. He died at Michael Reese Hospital some hours later.

According to the testimony of a witness to the crime, 11-year-old Lawrence Johnson, testimony reported in both the Chicago *Tribune* and the *Sun-Times,* four attacked Mr. Feinstein. The 13-year-old Calvin Montgomery wielded the bat. He rained several blows on Mr. Feinstein's head and upper torso, while the three others, all sixteen years of age, rode off with the bicycle, taking turns. All four were charged subsequently with juvenile petitions and were tried as juveniles in the court of Judge James Walton in Chicago.

In the course of their investigation, the police obtained a confession of murder from Montgomery that substantively agreed with the account of the act given by the witness, Johnson. Judge Walton, however, found the confession inadmissable to the record on procedural grounds; on grounds, that is, that in accord with what has come to be called the Escobedo Rule questioned the way the account had been taken, but not necessarily the truth of its contents. In the course of his confession, it was held, Montgomery either had not been told of his constitutional rights or he had not had then explained to him, or both; and, apparently, during the questioning Montgomery had twice asked to see an attorney, but the request had not been granted. There was a subsidiary but extremely dark issue, never fully considered in the public record, over whether Montgomery could have understood what his rights as a defendant were, even if they had been explained properly to him. There were also some points of conflict, albeit minor ones, between the police version of the crime and that of Johnson, which caused the 11-year-old boy to be challenged as a

veridical witness. There appeared in bringing this case to trial to be not only error in law but also the possibility of error in fact.

In late September 1979 Judge Walton found that the state had failed to prove beyond a reasonable doubt, as he held was required in law, the guilt of the four defendants; and he ordered then freed. This was clearly not the only course open to the magistrate; and his finding, by virtue of the application of the Escobedo Rule, gives rise to serious questions surrounding the matter of nonage, which, in turn, leads to considerations about the separation of criminal from civil law. Despite the questions that it raises and the considerations to which they lead, Judge Walton's finding, nonetheless, gives new meaning to the old juridical saying, "justice outweighs human life"; and it gives rise to speculation on what is the current state of the law, for Mr. Feinstein's murder remains formally unresolved, his murderer actually unpunished.

I

In the entire realm of law, no other concept approaches in importance that of punishment. Even today, veiled in the ambiguous and uncertain language of sanctions and norms, punishment as a concept has yielded neither centrality nor importance either to other concepts of the law or to those derived from the larger culture. Punishment is the bellwether of the condition of the law; no other legal concept more truly reflects a society's way of thinking and of feeling about moral questions; no other penetrates all aspects of a society's moral development by simultaneously revealing itself and depositing a record of its actions. Because of these aspects of punishment, there is no better measure of the moral state of a culture.

Of the other major concepts of law —property, ownership, agency— in their essence, they remain as they were when formulated and developed two thousand years ago in classical Roman law; and if one hoped to extract an understanding of changes in the values of a society by examining these concepts, one often has to pass over centuries without finding a trace of evidence for change. Such conceptions are to a certain extent fixed and ordinary parts of the legal organism.

Those elements of punishment in criminal law and of indemnification in civil law that involve deprivation of resources, curtailment of liberty, or compensation for physical damages are the most sensitive and tender points of legal feeling. Every pressure on these ganglia, sensitively reflected in the face of the law, are mirrored from a society's

thoughts and sentiments about punishment. The idea of punishment is a symbolic construction, but it has a different kind of temporal depth than other such constructions for the law is directed towards the attribution of concrete causes and concrete effects, not to the consideration of abstract generalities. As an element of the structure of legal action, the idea of punishment has the peculiar dual property of embodiment in the constant features of that structure as well as displaying its characteristics through time. A legal system could not exist without the idea of punishment, but the structure of legal action does not require constancy within the forms of punishment or in the social conception of punishment. Moral properties are attributed to those elements of its social structure, such as punishment, which represent the temporal integration of society, because of simultaneity in revealing and in recording itself.

II

Our present-day division of law into civil and criminal, a separation that appears logical and justified because of our contemporary systematic arrangement of the law, is a result of the changed conception of punishment. This separation has caused us to lose sight of the aspect of punishment in the civil law, and it has darkened our understanding of the importance of the concept of punishment in the criminal law. The diminished understanding, which is evident in our contemporary administration of justice, and which is the inconvenient consequence of the separation of criminal law from civil law —by itself an artificial taxonomic distinction— has left us with a view of punishment in the civil law even more inadequate than that which remains to us in the criminal law. The separation of criminal law from civil law is inconvenient because the criminal law derives from the civil law; the separation of the criminal law from the civil law is inadequate furthermore because the concept of punishment in the modern world has been more and more expelled from the province of the civil law and cast into that of the criminal law. This expulsion of the idea of punishment is a source of some of the present instability of our civil and constitutional law. One has only to think of the troubles surrounding administrative secrets to grasp this point.

The history of punishment is one of its progressive extinction. Punishment has been withdrawing more and more into the past. The more it recedes, however, the greater the likelihood of its eventual re-emergence in one of the sharper and cruder forms to be found in its earlier stages of development, if for no other reason than that there

is no effective law without punishment, and there are no societies without law. Punishment is one of those complex social events, such as revolutions appear to be, that have a fixed sequence in which each stage fixes or determines the next phase, and so on, to culmination. Punishment has duration.

The overcoming of private or individual revenge and the establishment of punishment in its place, until all legal relations are more or less determined by it marks the beginning of law. Legal relations are complexes of rights which arise in the intercourse of persons in their relations to and actions upon one another; and the legal determination and analysis of these relations consists in ascertaining the rights comprised in then, and in defining their effects and modifications in this connection. The progress of law consists in these legal relations in the activity of the person in subjecting himself to external objects. The result of this subjection insofar as it is an emanation from the feeling of right and in conformity with legal rules, is a legal power over such an object —a right in it belonging to another person. Those rights constitute the substance of legal relations. From this arises an understanding of the idea of legal order. But so also do those rights produce a gradual narrowing of the scope of punishment and a continual refining of the concept.

The history of the progress of the extinction of punishment is part of the progress of mankind from a state of wild, blind, avenging passion to a state of despotic mildness —a mildness that is arbitrary and capricious and that entirely undermines the law. This history of extinction, because of the temporal depth of punishment, has involved changes in the purposive concept of punishment; that is, in what punishment was supposed to do. The notions of "social vengeance", of "deterrence", and of "rehabilitation", which is closely allied to the feeling of compassion, are examples of changes in the purposive concept of punishment.

For a proper understanding of this development, it is necessary to formulate a distinction seldom made in contemporary jurisprudence and one often obscured or denied by many current theories of obligation. Consider two cases in which everyone can sense a fundamental difference. In the first case there is the claim of the rightful owner of a good over that good, which is not the same kind of claim as that of one who considers himself the owner because he possesses it in good faith. In the second case there is the claim of the rightful owner of a good over that of a thief who has possessed the good by stealing it. A fundamental difference lies between the claims of the *bona fide* possessor and the thief.

In the first case the question is of the existente of a right to ownership, not just simple possession of a good; and without that right the claim of the plaintiff would yield to a charge of injury before the law, pure and simple. The case is merely one of the unlawfulness of a physical condition —the possession of the good by another person— which finds expression in the person of the plaintiff, the rightful owner. In the second case the matter is quite different. The complaint against the thief touches essentially on the charge of an injury to personal right as well as one to the law. At the moment when the chief steals, the theft violates both the personal feeling of right of the owner, which is invested in the good, as well as a real right, which derives from the positive law of property. These violations are different but inseparable from each other: where the real right is infringed on so also is the personal one, for there is no theft without intention.

In both of these cases the adjudication sustains the claim of the plaintiff, the rightful owner; the judgment that recognizes and reestablishes the law also puts an end to the injustice, which has its origin in the person of the defendant, the thief. But the basis for speaking of an injustice in both cases does not exist; the first case refers to a "law" and its object, while the second one refers to the denial of a "right" to ownership. The question arises that, if the act is not unjust, how is the *bona fide* possessor to be connected to the good which is, in fact, not legally his? Consider the simplest matter of this type, the matter of someone who has "received" a stolen good without knowing that it was stolen. He is not the lawful owner; therefore there is no option but to call him the unlawful one.

It is not clear exactly how the jurist could avoid this connection —but it is so that the use of the word *unlawful* in this sense is as old as the word *lawful* itself. If this means that at the very moment of the "offense" the concept of unlawful arises, then by the same reasoning one must consider the weather as a subject of unlawfulness, because the "offense" in this case is simply the altering of a physical condition and without intention to damage the rightful owner's personal right. If a summer hailstorm devastates my garden, there are no damages to my rights as such, but only to the objects of my rights —the goods in the garden. Inasmuch as the law danies guilt to this occurrence, there exist no grounds for suit against the weather. Similarly, one who possesses my property in good faith acquires use of the property and ownership in the fruits of it. But if I try to recover my property and be refuses its return, then it is an act of a human will, not an act of nature, that stands against me. It is an intentional act that denies me not only my property, but one that also consciously

touches on my rights in a way necessarily counter to the body of legal rules. It is not the struggle against nature, but the struggle of human wills that leads to violations of law and of personal right, for law deals only with the products of human wills, whether they are or are not knowingly intended by the will.

The moment of guilt in the causally impelling sense, in the sense of momentum —the point where one human will consciously recognizes the right of another human will, and then intentionally acts in such a way as to deny or to circumscribe that right— is the decisive point of distinction, and one frequently unrecognized in contemporary legal thought. Because all modern law is directed against the actor, not the act, and this inquires into subjective guilt, *all law is built around the moment of guilt;* and the sanctions that law imposes —punishment— revolve around the meaning and the importance attached to the moment of guilt. Unintentional breaking of a statute is a guiltless weakening of law, but intentional damage to a right not only weakens, it also damages.

From this distinction there naturally follow some considerations that lead to a contrast in actual practice and in administering the law. The consequences of the unintentional unlawfulness of the *bona fide* possessor consist only in restoring the property to its rightful owner, and only so long as the property is away from the rightful owner does a claim in law exist. The claim against the *bona fide* possessor is contingent on his actual possession of it; if he has lost it or given up possession of it, the claim falls away. Equally, the law lays claim to the good only in its present shape; if the *bona fide* possessor has in some way damaged or consumed the good, he has no liability for the altered state: he is justified in the alteration simply because he possesses the good *bona fide*. He is neither charged nor blamed, for he has acted only in accordance with the physical nature of the object and he has not intentionally damaged the claim of rightful owner. The rightful owner bases his claim simply on the law as such, on his real right in the property. It is simply the fact of objective damage that offers him the ground on which to seek remedy before the law. But at that moment when the *bona fide* possessor recognizes he does not rightfully own the property and then refuses to return it, or in the second case at the moment of theft, it is no longer a matter of denying the rightful owner's real right in his property, but one where the thief has violated the owner's right to exercise his will with respect to his property. It is the conscious, intentional violation of right that temporally establishes the moment of guilt. *Actus facit reum nisi mens sit rea.* To a law that is constructed around the actor and subjec-

ted around the actor and subjective guilt, there must also be an insistence on a moral consciousness in criminals as to the rights of others and the wrongfulness of so abrogating then. Law so constructed recognizes the possibility that this consciousness may be imperfectly held and has procedural safeguards for this eventuality by special rules for particular areas such as competence and nonage. The appropriate consequence to the moment of guilt, to the intentional damage of another's right, as well as, possibly, the property in a law so constructed is punishment, not just simple restoration.

III

There is no disorder without guilt. All disorder, both in law and in society, stems from human action that consciously recognizes an infringement on norms and rules. But guilt was not invented at the beginning of history. The origins of law among all peoples show that the propositions and arrangements of law were directed towards the object and the act associated with an unlawful deed, never the actor. From where then did guilt originate or develop? The experience of daily life can furnish an answer. When a child stubs his toe against a rock, he blames the rock. Even an adult, after the first sensation of pain, after unintentionally making an uncontrollable gesture, growls at and blames the innocent source of his agony. Thus it was that the feeling or sense of justice among primitive man arose solely under the influence of pain and suffering. Injustice was not recognized by its source, but by its affect.

Only when this stage of cultural development, one where the sense of justice is still enslaved by raw feeling, has been passed does society begin to develop a genuine standard for an appreciation of injustice and contradiction. We call this standard liability; and it is our feeling about the extent and nature of liability, the strictness of the claim, that determines punishment. Thus the most important task of law is to create an equilibrium between the extent of disorder and that of guilt —that is, justice. The development of a standard of liability is one the surest criteria of progress in the cultural evolution of law, because the unmistakable sign of genuine growth is emotional distance, and the result of that distance is independence of judgment. The most difficult test for putting this doctrine of judgment into practice is direct confrontation with an opponent, where the genuine opportunity occurs to show how the relationship to the opponent is conceived in law. What is true for an individual in this matter is also true for a society.

IV

The impulse that sustains law is generated by actions committed against law. The impulse is the correlative of guilt; and thus it is possible to assert that law is made at the moment of guilt, when "moment" is understood in a causal sense, in the sense of momentum. The questions arise, given the current extent of social disorder, why has the impulse that sustains law become so attenuated, why have our feelings about punishment become so confused, and why are we so uncertain about the meaning of rights and the extension of then that our sympathies now more frequently lie with the debtor than with the creditor? How have we come to believe so strongly that society created the criminal, such that the moment of guilt is more directly precipitated by society than by the murderer at the moment of violating another's right to life?

Society has molded the criminal; society must punish itself for having "committed" the crime and redress the "grievance" fo the criminal which holds society guilty of so arranging itself that he was made into the instrument of its criminal action. This view is widely held and believed; and it is consonant with a closely related belief that there is such a phenomenon or could be such a phenomenon as responsibility and self-governance of action, for inasmuch as society determines both itself and individual arrangements, it renders unnecessary, even senseless, the explanation of action in terms of individual free wills. This belief radically alters the legal interpretation of intentionality. Still, the view that holds society responsible for creating the criminal is not an absolute one, and it is held only imperfectly. Even so, the larger question is seldom addressed of who is the bearer of rights if the individual is "deprived" or "relieved" of responsibility for criminal action by virtue of the society in which he lives, if for no other reason than that an answer would require new or, at least, vastly restructured theories of legal fiction and legal personality. This mixed situation, which has led to an attenuated legal impulse and a blurring of the moment of guilt, permits some observers to argue that the system of criminal justice is, thereby, so shot with inconsistent and contradictory procedures, botched arguments and defenses, and so riven with other flaws as to jeopardize the criminal's rights when subjected to the game of chance embodied in an arbitrary and capricious judicial system.

The result of removing the moment of guilt from the consciousness of the actor and displacing it to that of the society (if what has happened may be characterized in this way) and the attendant argu-

ments are but further developments in the progressive extinction of punishment. Our cultural development in law is now so refined that it has seriously altered our active sense of justice, which means, inevitably, a decline in the rule of law. The law that prevails when tested is the only law that is; and the only test for law, the test that sustains law, is the feeling of legal right and its correlative —guilt.

The feeling of legal right has become disordered by a belief in the immorality of authority and power. As a result of this derangement, the law seems iniquitous, contrary to the feeling of legal right. The criminal, by his actions, does arouse abhorrence, but is given the benefit of the doubt against the claims of authority. From this comes the thought that the criminal is forced to act because he is not responsible for his actions. If the criminal is not responsible, then it is authority which initiates the criminal's repression and injurious action, and thus is responsible. While the criminal is exempted from the obligation of responsibility for his act of crime, the authority is *not* exempted from its act of repression.

This disparaging attitude towards authority is one factor to be mentioned in the current belief that favors the innocence of the criminal —after all, the criminal acts upon the guilty so he must be innocent.

There is more tort than this. "Sociological" doctrine about the influence of "environment" has made it appear that the individual cannot be held responsible for his actions because they are forced in turn by the "environment"; since the individual is created by his "environment", nothing he does can be held against him. Yet the force of his *enrivonment* is regarded as the bearer of guilt, the guilty agent —although, if the "sociological" argument were pressed, it should be clear that the environment is also formed by "environment" and should be exempted from-any possibly wrong actions.

These nonsensical propositions are further complicated by adding to them the notion of original innocence —only authority is wicked— and man is innocent having been led into the fall from grace by authority —priests and princes. The result of this view is a moral judgment that exculpates the criminal for his immoral action. We and our institutions have become deranged by a perverse morality which postulates the unlawfulness of authority. Thus unsustained by feeling of right, much that was law no longer prevails; and much that was thought disorderly is clearly no longer so considered, for it is not accompanied by guilt.

Were this situation not so, and were this thought not pervasive, then "public defenders" would not have arisen in recent years as they

have nor have come to assume a moral weight in the way that they have; and were this situation not so, then there would be an increase in enforcement activity. It is not too much to assert that, for instance, the recent substantial shift of focus of the Federal Bureau of Investigation from crimes of violence to white collar crime is a proof of these assertions, the crimes of violence being the crimes of their victims.

The increase in law and in lawyers is not, then, exclusively a result of increasing efforts to curb criminal acts. The legal system is in the process of overcoming itself. The increase in disorder stems from an altered sense of justice, which, sadly, has helped implant a new order. Crimes of violence against persons have been accompanied by diminished feeling of the sanctity of legal right, a diminution that runs parallel with an heightened belief in the inviolability of the right of the individual to express himself freely, to act with impunity against authority, or any superordinated office or person. These are results from having banished the moment of guilt.

V

An evolutionary development not dissimilar to ours occurred in the Roman law. Although a strict claim of similarity with the two systems of law would be untenable, it is nonetheless true that the essential concepts are the same in both, if for no other reason than that the "reception" of Roman law following the Italian Renaissance permitted over hundreds of years the slow percolation of Roman ideas into, and the subsequent coloring of, our jurisprudence, in common law as well as civil law countries.

Whoever compares the judicial procedures of Justinian's time, the last of three distinct periods of Roman legal development, with those of the classical time, which was the middle period, roughly 100 B.C. to 200 A.D., will not be able to avoid observation of the fact that concepts and arrangements for dealing with criminal actions, which played so great a role in the earlier classical period had almost entirely disappeared by the latter one. Most vanished; those that remained were greatly diluted. These disappearances cannot be regarded as isolated or sporadic events, for they represent manifestations of the same vanishing idea of criminality.

But perhaps that is too frivolously said —when one speaks of an idea, perhaps it is necessary to examine more carefully the basis on which it rests. What, if one holds it up for examination, would have hindered those punishments of the classical period from being absorbed, albeit in altered froms, into the newer procedures? It was

not by means of legislative acts that these forms were eliminated, but on the contrary they fell off the legal tree because of their inability to survive; they fell before the judgment of their time. Why had the times found fault with those punishments, even though the history of Roman private law in this long period of time represents a progressive decline in the concept of punishment? Some elements of those harsh and rough institutions that characterized the old Roman law in the republican period of development had persisted to the classical times. Reclaimed by the stubbornness of the Roman jurisconsults who insisted on then, and shackled by the ironclad forms of the formulary system to the prevailing law, these older elements were transmitted, more or less intact, through the middle, classical period to the radically changed law of the final period of Justinian. Foremost among these surviving elements was the principle, one of the most brilliant services of Roman jurisprudence, that without crime there is no punishment— *sine crimen, nulla poena.*

But it was not this principle that pinched off the forms of punishment in the later law. The fact is that, in the field of civil law in fixing liability for guilt, another form of punishment, that of restitution or compensation, came to supplant the older forms of punishment. The *condenatory* element that was embodied in the older forms of punishment, the most important consideration in deterrence because the punishment simultaneously reaffirmed both the law and personal right by means of the condemnation, was removed. This simple fact opens understanding for us of a development that has been taking place for more than one thousand years.

Upon a finding of guilt, the old Roman law of the first period sought to determine the limits of liability by means of an objective standard. The defendant, after a finding of guilt, typically had to return double the value of the matter in question. The Romans understood at this time, if they did not sharply distinguish, the difference between the injustice that comes from violation of a real right associated with a positive law and the injustice that comes from violation of a personal right. The frequently imposed penalty of double the value of the damage done to an object was regarded and understood as more than just a simple compensation for loss. It was more than just a simple return in state. It was seen as a remedy for both kinds of injustice: restitution of pecuniary loss and redress of personal wrong, although the line conceptually distinguishing the two was blurred and infirm.

Of the principles and provisions of this old law, much of which passed over to the classical law of the middle period, the conception

of then became quite different. Injustice to the object and to the person were sharply distinguished. The objective side of a suit simply entailed compensation for or restitution of the object, in other words, the restoration of the order which had been broken; the subjective side, an additional penalty, something intended to redress the plaintiff for the wrong done and to make amends to the victim for the infringement of his legal right. Just simple material restitution of or compensation for material loss suffered was not adequate for these Romans, according to their understanding of punishment. By virtue of the legal rights enjoyed by an individual, that individual had a corresponding duty not to abrogate another's rights. Eventually, as the law developed, any willful disregard of another's legal personality (this does not refer to a psychological entity, but to the juristic capacity inherent in all legal relations) could be covered by and was actionable under the concept *injuria.* This action could be used in all cases where the defendant could be charged with an intentional violation of another person's right, or intentional injury to another's legal personality. (Due to this concept, even action against the law could be instituted under the law by means of the peculiar and complicated procedure of the *legis actio*.)

Such a violation was considered quite grave by the Romans for every man possessed of legal right defined the conditions of his legal existence by his exercise of those rights: To violate another's right was to violate one's own, which signified extreme moral deterioration. Thus, by the geometry of Roman logic, one was entitled not only to compensation for the affront to legal right, for the infringement on one's legal personality.

The penalties inflicted were, first, infamy, which was severe by Roman standards for it involved, besides social disgrace, which it produced, the loss of all political rights —hence political death— and deprivation of social status. Then came the pecuniary penalties, which were fines, often quite heavy, proportionate to the loss sustained. These were extensively applied. Not only did these penalties serve the *practical ends* of social life, compensation and deterrence, they were also seen to afford satisfaction to the affronted legal right and to reassert the authority of the law by serving a moral object. It is true that both types of penalty were imposed as monetary fines; but in the first type the money was seen as an act of moral condemnation, a genuine punishment, that would serve to restore the moral weight of the law; money was considered only the means to this end.

In the last period of Roman law, in Justinian's time, although much of the serene symmetry of Roman legal institutions survived, a distinct

shift in the feeling of what constituted justice came about. Compensation was substituted for the condemnatory aspect of punishment. Punishment is the expression of an irrepressible and active sense of justice in a society. As the Roman belief in the primacy of legal right became inert and slipped into moral senescence, condemnatory punishment came to be seen as an incomplete, pathological form of the struggle against injustice, justified in past times, perhaps, but inappropriate for the present. Where there is emotion or effect in law, there is also punishment in the condemnatory sense. But when the lean and cold-handed bureaucratic administration of the law gained ascendancy, the old sense of punishment receded and was replaced solely by the idea of compensation. That is, subjective injustice was reduced to objective injustice.

Compensation, by its nature, disregards the distinction between an accidental act and an intentional one. It refuses to recognize the moment of guilt, and emphasizes instead a strict legal materialism –it simply interprets money as a compensation for loss without consideration for shame or satisfaction; and if all injurious actions, whether accidental or intentional, are subject to compensation, it also disregards any special status and, eventually, denies even simple understanding to objective injustice. Compensation transforms individual right (one's moral sense of what ought to be) into a material interest and, therefore, one subject to pecuniary compensation. Compensation, as both a simple negation of objective injustice and a transformation of subjective injustice, strips the feeling of legal right of its peculiar qualities that derive from a personal sense of justice– satisfaction before the law.

Punishment as material compensation alone, as the simple and material remedy of injustice, limits itself strictly to pecuniary claims before the law. Compensation is thus itself an historical form based on the past. But unlike a form of condemnation –punishment, which does contain an element of compensation– compensation alone is a self-isolating form that claims its own standard because, cut off from its concurrent feelings of morality and injustice, it has to. Only when this claim for justification is fulfilled may it be said that the idea of compensation is grasped and realized in its full truth.

Thus it was that the late Roman law exhibited a calm mildness, the emotional element that sought satisfaction for a grievance before the law having been expunged from it. But it was a despotic mildness because it robbed one person of what it gave to another.

VI

The pattern of development in our own law in recent decades is very similar to that of the Roman, where unintentional and arbitrary injustice caused that society extreme moral pain. This pattern of similarity in development adds strength to the proposition that complex social events have a fixed sequence in which each stage fixes or determines the next stage. That the attenuation of punishment has been so gradual, that so much of it has persisted, means that some elements must underlie the constancy of its structure.

If it is so that law is made at the moment of guilt, that is, following an intentional action which is accompanied by the conscious recognition of having violated both right and obligation, then law either definitely prevails when appealed to or it does not exist —at least in a particular setting. If there is recognition of law at the point of a plaintiff's claim, then it can only mean that law does not exist, and thus there is no guilt requiring expiation. Considered from this point of view, the disenchanting conclusion follows that the sharp and recent rise of murder, rape, and robbery in urban America are actions or disorder because *de facto* there is no guilt associated with these actions and thus no law bearing on then. This is an adaptation of Frank Knight's statement that "ethically, the whole process of valuation is literally a 'vicious' circle, since prices flow from demand and demand from prices". And it is an illustration of Dr. Johnson's observation that "the happiness of society depends on virtue. In Sparta theft was allowed by general consent; theft, therefore, was *there* not a crime, but then there was no security; and what a life must they have had when there was no security. Without truth there must be a dissolution of society. As it is, there is so little truth that we are almost afraid to trust our ears; but how should we be if falsehood were multiplied ten times?"

It is, of course, true that written statutes exist which call for treatment of these disorderly actions in ways other than those which presently seem to prevail. But why do these statutes remain dormant instead of venturing out into public life? Further, and more specifically, why do laws of nonage, intended to protect youth from carrying into adult life the consequences of breaking the legal order in adolescence, now act as an asylum for those many adolescents who assault adults? Whatever the answers to these questions are, the experience of the later Roman law teaches us that laws in apparent conflict can exist perfectly well simultanously, side by side, that the law in desuetude is not the law in practice, and thus not the law. In a famous text

attributed to the jurisconsult Salvius Julianus, the proposition is framed in this way: "Ingrained custom is not unreasonably maintained as good as law; this is what is known as the law based on men's habits. For since actual legislation is only binding because it is accepted by the judgment of the people, those things of which the people have approved without any writing at all will justly be binding on everyone. And therefore the following principle is also quite rightly accepted, that legislation can be abrogated not only by the vote of a legislator but also by desuetude, with the tacit agreement of all men." The unhappy truth is that at the present there is insufficient feeling of legal right to call the law in desuetude from its slumbers, nor will there be so long as Morpheus continues to assume compensation as the form of punishment, a form entirely harmonious with the history of the progressive self-extinction of punishment. This chilling conclusion is sustained by the thought that punishment moves in a sequential pattern of extinction in which each stage fixes the next one in the pattern. In society it is the degree of force with which the feeling of legal right reacts against an infringement of legal right that measures the importance which individuals, or a class of people, really attach both to the law in general and to a specific branch of it, for themselves and for their specific aim in life.

It is the idea of legal order that maintains individual legal rights. The discarding of the idea of legal weakens the appreciation for it and thus also weakens the argument for punishment to vindicate the order and not just to restore to an individual property that has been taken from him —which has until recently not been regarded as called for in criminal justice.

The idea of legal order contains the idea of authority, which, in Western discussion, has become offensive, burdensome, and repugnant. The idea of legal order is created outside of the individual —by authority— and now is thought to merit little support or acceptance. The infringement on order of which individual rights were a part yielded to more exclusive beliefs in the value of individual rights; they were given primacy, and *order* as such lost much of its value, at least according to the opinion of the educated. The outcomes of these propositions might better be explored elsewhere; but suffice it to say here that if authority and order are inextricably bound together because they supplement and imply each other, and if individual rights have been given primacy over order and authority, then those individual rights that require order, which is external to the individual, have been weakened in comparison to those rights that seem less dependent on authority and more inherent in the individual. It is

important to recognize that what appears as a comparative weakening of some rights with respect to others is, in fact, an *absolute* weakening of those rights. Rights are either sustained —that is what right means— or they are not. The result of this view is that, for instance, the individual's right to property has been separated from order. Property rights are thus weakened in an absolute sense, which is one way (and an important one) of understanding recent changes in our society. It is not too much to state that authority and order sustain individual right to an object. The separation of authority and order from the individual right leads to redress of violation of the right by means of compensation and thus can also be seen as part of the pattern of the progressive self-extinction of punishment.

It is also part of the pattern of the progressive separation of the penal element from the domain of the civil administration of justice; it is also the outcome of a process of legal differentiation that underlies our law, just as it did the Roman. Indeed, it was with the reawakening of Roman law, that is, with the re-emergence of principles of Roman jurisprudence after the Renaissance that a new phase of the struggle against punishment in the condemnatory sense began in civil law. One may value this development or not; in any case it would be irresponsible to ignore the teaching that history has transmitted to us. In civil law the principle of punishment is regarded as appropriate for a lower cultural stage of development, which the advance of legal development and legal understanding, by substituting in its place the principle of compensation, has decreed inapplicable. Once in place, this principle has had sufficient space to take root and to grow. Generally, it is the concern of these conceptions that the claim of the injured party be regarded as an interest to be compensated, and not as a way in which punishment or revenge is to be sought; nor to accord to the plaintiff more than he would necessarily have had without the illegal actions of the defendant. It is possible, of course, to find some traces of contrary development; but generally this principle of compensation has come to overshadow that of punishment in the same way that a tide not determined by single waves but by the ineluctable rising of the water, completely and entirely.

In this connection the growth of procedural law may be seem as most important. In our present understanding of criminal law, there is a conflict inherent in the judicial process itself that may be clearly seen in criminal trials. The rules of procedure aim, in general, to establish "intention" and "motive", that is "cause", by a historical recreation of events and facts. Historical "cause inquires into the "objective" causes of concrete events and the outcome of concrete

"actions", but does not wish do sit in judgment of the "agent". But modern law is directed against the agent, not the act, and inquires into subjective "guilt". Jurisprudence, thus, is troubled by its own special problem of this antinomy, peculiarly prominent in the criminal law, because of the emergence of the question whether and when the objective, purely causal, attribution of the effect to the action of an individual also suffices to qualify it as subjectively "guilty". This antinomous question is no longer purely a causal problem to be settled merely by establishing facts "objectively" discernible by observation and analyses. It defies resolution without recourse to moral or other values. The objective, historical recreation of events in criminal policy required by trial procedure is thus at odds with the requirements for establishing subjective guilt in a law that is directed against the agent, not the act. Still, if the larger requirements of the law are to be met, if sentence is to be pronounced, a connection must be made. Thus there have arisen new modes of understanding to make this connection possible, to bind together the subjective and the objective at least for the purposes of sentencing. What one finds then is the "objectification" of subjective states, such as "abstract possibility of influence" or "not of sound mind". The logic of this resolution may be questionable, but it does serve the requirements of the law. It serves also the principle of compensation by refusing to recognize, in the subjectively causal sense, the moment of guilt. Naturally, this view had to struggle to free itself from a strongly resistant older conception of law.

By the underlying process of legal differentiation, with the retreat of punishment and with the simultaneous shrinking of the sphere of penal law, certain other related phenomena have appeared which demonstrate, curiously, a debilitated legal will in the defense of law and right. This process, a necessary outcome apparently of legal development, is a further contradiction of it because it has caused law nad rights to come apart. A right detached from law, through which the right gains expression and derives its life and being, is unthinkable. Thus, where there is no law, there is no right, and no guilt, no law.

The idea that there may be a penal violation of a right which does not come into contact with law is absurd. An essential distinction between civil and penal wrongs is impossible, but it is one, nevertheless, which our law strives to make absolute. The distinction between civil and penal wrong is real and so also is the progressive detachment of right from law —all the result of regarding rights as interests subject to compensation, which, in turn, is a result of the progressive extinction of punishment and the attenuation of guilt.

These results of the process of legal differentiation affect a guilty defendant and a victorious plaintiff equally. The wronged plaintiff is seen to have an interest entitled to compensation. The old law that held that a debtor in default could be executed did not aid the interest of the right of repayment. Similarly, capital punishment, generally, is not seen to aid the interest of the right of compensation by rehabilitation —a right upheld by the underlying view that society has created the milieu and thus has shaped the criminal.

A further aspect of the weakening of law is the question that has arisen over the ability of the law to be universal, to provide "equal" justice under "law;" and this doubt taken in connection with the many inspired social movements of our age will prevent, or at least impede, a reversion to the former legal attitude, if for no other reason than that the "extension of rights" taken in combination with the derogation of authority and order has served to denature rights of their truer meaning and to reduce them to a species of interest entitled to compensation.

A reaction to this doubt over the ability of the law to be universal has been a further retreat from punishment by erecting the concept of rehabilitation as an ideal. In this view, it is society which has "caused" someone to stand against the law. By imposing economic and social "disadvantage", society is seen to have created the criminal by virtue of society's own pathological condition. This person, the victim of society, "frightened" into crime, is now the claiment against society, which is to compensate him by providing economic and social advantage. That this may leave the interests of both the injured party and society unsatisfied is another matter, but it is nonetheless a curious result that if society is the source of social disease, it sees a greater interest in compensating its victims than in curing itself. That magistrates and judges sometimes say that the task is to cure society, not to maintain legal order, is an indication of the extent of aberration caused by the disorder. This curiosity is a joint product of concurrently solipsizing and reifying the "social"; it denies any real content to either society or to the individual.

The law, increasingly disassociated with right, has become perverse and out of harmony with itself, and viceversa. The thought of defending one's person and one's right has now vanished from the law to such an extent that the submission to injustice almost resembles a duty. A law that protects the guilty and leaves the injured party unprotected shows into what a deep abyss the sentiment of legal right may sink and how degenerate the feeling of personality may become when the moment of guilt is banished from it.

Still, the thrill, the sensation of right which we feel when, occasionally, an individual successfully responds to and overcomes an injustice, or when an act avenges a violation of personal right, instills in us the hope that one day soon, set anew on its cycle of progressive self-extinction, punishment will re-emerge as a rougher and cruder force, and thereby will settle social disorder by restoring the law that is found at the moment of guilt. This hope, it should be understood, neither sustains nor fulfills nobler human aspirations.