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On the Book of Job, Justice, and The Precariousness of the Criminal Law

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The criminal law has been subject to both increased demands in the societal functions that it is expected to perform, and heightened scrutiny for those points at which it fails to achieve these ends. The resulting pressures put into question the criminal law's capacity to perform justice. Rather than turning to contemporary sources to assess the criminal law's relationship to claims of justice, the author uses an analysis of the ancient myth found in the Book of Job as a means of exposing the irresolvable tensions at the core of the criminal law system's quest for justice. In the end, injustice manifests as senseless suffering. The profound precariousness of contemporary criminal law is that its prescribed task is to make sense of suffering but it is always unable to wholly achieve this goal and is, indeed, always on the precipice of making things worse.

Enormous demands are made of the criminal justice system. The criminal law is asked to establish a safe society, to express social disapprobation for immoral acts, to punish offenders, and to vindicate victims. Criminal law is asked not only to instantiate values, but to change them; not only to be scrupulously fair, but to be efficient; to do violence in order to stop violence. One wonders if the demands made upon the criminal law are more than it is able to bear.

In a lecture given in Argentina in 1987, Owen Fiss warned of "The Awkwardness of the Criminal Law."¹ Fiss was concerned with the use of the criminal law to redress the human rights abuses committed by the junta in the period of the military dictatorship that ruled Argentina from 1976 to late 1982. He argued that there was a certain awkwardness in the criminal law's capacity to speak to human rights issues; the criminal law, Fiss claimed, is a poor fit for the kind of justice that post-dictatorship Argentina needed. Human rights abuses are characteristically systemic failures and, as such, resist ready attribution of the kind of individual responsibility upon which the criminal law depends. Moreover, the criminal law enforces and protects clearly articulated rights, whereas human rights are often more

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1. Owen Fiss, "The Awkwardness of the Criminal Law," in *The Law as it Could Be* (New York: New York University Press, 2003).

inchoate and require contextual concretization before they can be vindicated. For Fiss, these two mismatches between human rights and the criminal law – the criminal law’s demand for individualism and clearly articulated rights on the one hand, and human rights’ systemic and inchoate nature on the other – both arise from the “distinction between the ordinary and the extraordinary, the banal and the demonic.”²

Yet the ordinary and the banal in the criminal law are themselves afflicted by a kind of awkwardness. This affliction is not born of the functional incongruities that Fiss describes. Rather, it is a precariousness that arises from inherent tensions in the criminal law’s effort to achieve its avowed purpose – to do justice. Despite society’s expectations, the criminal law is always unable to wholly achieve this goal and is, indeed, always on the precipice of making things worse. This awkwardness plagues even, or perhaps especially, the quotidian; this precariousness is a brooding, relentless companion to the criminal law.

The purpose of this piece is to draw out this precariousness indigenous to the criminal law. Since the source of this awkwardness is to be found in the concept of justice, illumination will not come from criminal law doctrine because the criminal jurisprudence is always already committed to faith in its capacity to achieve justice – within its own imagination, the law always “wins.”³ Instead, the starting point in this piece is in the domain of myth. This article will use the understanding of justice and injustice in the Book of Job – an understanding with senselessness and disorder at the core of injustice and reason and order as the aim of justice⁴ – to illuminate the precariousness of the criminal law.

I. Injustice, Disorder, and the Book of Job

In some respects the Book of Job resembles a Greek or Shakespearian tragedy. Job is presented as upright and blameless. He is righteous and pious in ways far beyond what one could reasonably demand of a person. The myth takes pains to establish – indeed, through words uttered by God

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2. Fiss, “Awkwardness,” p. 147. The place of the ordinary and the extraordinary in the criminal law is a deep question. Fiss implicitly assigns the “normal” criminal matter to the realm of the banal, whereas human rights abuses fall to the “demonic.” This is not a necessary or stable characterization. Part of the function of the criminal law is precisely to define the socially extraordinary.
 3. See Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (New Haven: Yale University Press, 1997), 167 (“Law never explicitly concedes defeat; it never admits powerlessness.”).
 4. Compare Robert A. Burt, “Disorder in the Court: The Death Penalty and the Constitution,” *Michigan Law Review* 85 (1987): 1741. (Suggesting a different, oppositional relationship between order and justice as disclosed in the U.S. Supreme Court’s death penalty jurisprudence. Burt argues that this body of jurisprudence betrays a conviction on the part of the judges that, in the case of capital punishment, the demands of Order are incompatible with the demands of Justice and that one must be selected over the other. Burt disagrees, asserting that the very nature of the judicial role demands that judges proceed on the basis of the proposition that the demands of Justice and Order can be reconciled, or at least mutually accommodated, through social deliberation.)

Himself – that “[t]here is no one like him on earth, a blameless and upright man who fears God and shuns evil!”⁵ Similarly, there is no-one like Oedipus; none like Macbeth. In short, the book introduces Job as a hero. And the hero falls. He suffers intensely. He is faced with the loss of his wealth, the death of his children, and an unimaginably painful physical affliction. Job’s world falls apart. And when it does, he is met with friends who treat this course of affairs as a tragedy. They search for his tragic flaw. “You must,” they say, “have done something wrong – something horribly wrong – to have brought this upon yourself.”⁶ “Perhaps,” they say, “you are not even aware of it. Perhaps it is something lurking in your character – in your heart or your head – that had brought your world down around you.”⁷ Oedipus’ fall could be explained by his own heinous, albeit unintended, deeds. As the world breaks down around Macbeth, we see that it is caused by the dark side of his warrior’s ambition. Seeking a way to understand Job’s downfall, the friends search for Job’s essential flaw. In so doing, they treat him as a tragic figure.

Job, however, had no such flaw.⁸ He is not a tragic figure and the Book of Job is not a tragedy. It would be a far easier book if it were. Instead, the Book of Job is the most profound tale of victimization in the Hebrew Bible. The startling fact – the truth that creates the true dramatic force and difficulty of the myth – is that, inasmuch Job fills the role of consummate victim, God fills the role of the victimizer. Job’s victimization is at the hands of God. Readers are told early on that this suffering is victimization, not justice, because God has allowed Job’s suffering on a dare from the Adversary.⁹ Job’s suffering is decidedly *not* punishment. In one of the most chilling statements in the Hebrew Scriptures, God praises Job for having maintained his piety, though the Adversary “incited Me against him to destroy him for no good reason.”¹⁰ *For no good reason.* Job suffers the wrath of the heavens – his children are killed and his body abused – for no good reason.

This tension between victimization and punishment is the source of the dramatic irony of the Book. The reader knows that it is victimization; that there was no good reason for the suffering that Job endures at the hands of

5. *Job* 1:8. All quotations from the Book of Job are based on the Jewish Publication Society translation of the Tanakh, checked against the author’s reading of the Hebrew text.

6. *Job* 8:3–6; 36:6–17.

7. *Job* 22:5–7.

8. There is an interpretive tradition that does locate a flaw in Job. Maimonides took the view that the text’s focus on Job’s character traits and the comparative absence of mention of intellectual virtues meant that Job was intellectually deficient. From this starting point, Maimonides reads the Book of Job as a psychological story about learning to bear suffering with equanimity. See Robert Eisen, *The Book of Job in Medieval Jewish Philosophy* (Oxford: Oxford University Press, 2004), 48–71.

9. The translation “Adversary” is the most grammatically consistent translation from the Hebrew. In English editions of the Christian Bible, such as the King James Bible or the New Revised Standard Version, the Hebrew word appearing in the text, transliterated “HSTN”, is often translated as a proper name, “Satan”. However, in the Hebrew, the letters STN are preceded by “H”, the definite article. If STN is a proper name, the correct English translation would be “the Satan”, which makes no more sense than speaking of “the Elliott” or “the Graham”. The Hebrew meaning of STN is “adversary” and, thus, the word HSTN reflects a role, “the Adversary”, not an individual, “Satan”.

10. *Job* 2:3.

God. The characters in the *fabula*, however, do not. Job's struggle, and the struggle of his friends, is to figure out which it is – reasoned punishment or mere caprice. The reader watches as the friends increasingly understand this horror as an instance of inscrutable justice and unrelentingly press this understanding upon Job. Job, by contrast, progressively realizes the truth that is already clear to the reader: that it *is* caprice; that Job's suffering *is* unjust. In as much as the friends assert that there is order and sense to these events, they embrace Job as a tragic figure. On this view, Job – who all thought was of unimpeachable character – is suffering the inexorable results of a heretofore unrecognized fault. On this view, God and the universe still make sense: He is the God of Justice and, under His curatorship, the world is ultimately a place of justice. In contrast, Job is unable to find reason for his misfortune and, accordingly, understands himself more and more in the idiom of victimhood. He is suffering for no good reason, cosmic or personal. Concomitantly, he increasingly sees God as a perpetrator, not a judge, and the universe as arbitrary, not ordered and sensible.

This concern with an absence of reason and order is what makes the story one about justice and injustice. In the Book of Job, justice and injustice map on to order and disorder.¹¹ The Book of Job is engaging the tradition of viewing justice as order, a tradition that is established in the stories of the Pentateuch and in many of the prophetic writings. In this way, the notion of justice as order is very much the Book of Job's inheritance and serves as conceptual backdrop for the story. This link between justice and order is at the core of the first parable of justice in the larger biblical narrative – the story of Cain and Abel in the Book of Genesis. In response to Cain's dismay at God's failure to recognize his gift, God responds with a simple lesson: "Surely, if you do right, / There is uplift. / But if you do not do right, / Sin crouches at the door; / Its urge is toward you, / Yet you can be its master."¹² With his punishment for the murder of Abel, God bears this lesson out on the body of Cain.¹³ Genesis' account of the ordering of the universe is, thus, by no means complete after the story of creation; rather, the question of justice, which is both reflective and constitutive of this order, remains to be worked out over the course of the biblical narrative.

Through the life of the Patriarch, Abraham, the intimate relationship between order and justice is also sown into the tale of the origins of the Jewish people. When faced with God's plans for Sodom and Gomorrah,

11. See Edwin M. Good, *In Turns of Tempest: A Reading of Job* (Stanford: Stanford University Press, 1990), 162. (Arguing that the word *mispal*, usually translated as "justice," is best translated as "order," so as to emphasize the close relationship between justice and order in the Book of Job.)

12. *Genesis* 4:7.

13. Cain's punishment is, however, a strange one. He is marked by God, but also protected from human vengeance and goes on to found a great city and, through his children, establish the early elements of civilization.

Abraham, who declares himself to be “but dust and ashes”,¹⁴ seeks to hold God to the promise of justice:

Far be it from You to do such a thing, to bring death upon the innocent as well as the guilty, so that innocent and guilty fare alike. Far be it from You! Shall not the Judge of all the earth deal Justly?¹⁵

What is justice here? It is a twofold order: the guilty are punished whereas the innocent are spared. In this account of justice, God, the curator of this order, honors this scheme. Justice classifies rightly and in a way that makes sense of suffering: from bad deeds follows suffering; righteousness will protect. This principle at the foundation of both humanity and the Jewish people becomes a sacred promise when it is inscribed in the covenant between God and the People of Israel. When God speaks to the People of Israel through Moses, setting out the terms of their relationship, he makes a vow. “If [the Israelites] follow [His] laws and faithfully observe [His] commandments,”¹⁶ God promises, He will reward the people with prosperity, security, peace, favor, and His own presence among them. “But if you do not obey Me and do not observe all of these commandments,” God warns, “if you reject My laws and spurn My rules so that you do not observe all My commandments and you break My covenant . . . I will wreak misery upon you”.¹⁷ This is the order of justice in the Torah. It is an order predicated on fault, augmented by the procedural guarantees of notice and predictability. The promise of God, the God of Justice, is of suffering that always makes sense.

The Book of Job inherits this conception of justice as order from the larger biblical narrative found in the Pentateuch and many of the prophetic writings. Call it the “conventional account” of justice. This conventional account is what makes the Adversary’s proposed test a test at all – it is the experience of senseless suffering that is meant to strain Job’s faith. If Job were flawed or evil, it would be a test of endurance, but not a test of faith. The explanation would be apparent: Job would understand that his iniquities had simply come home to roost. But the conventional account of justice is most apparent in the friends’ counsel. When faced with Job’s seemingly senseless suffering, it is to this convention that the friends turn to make sense of what they see. Remember how surprised by Job’s condition they must have been. He is righteous and blameless – a beacon to those around him. Yet there he sits suffering. So the conventional biblical account of justice – a kind of syllogism – emerges: God is a God of justice who created and maintains a world in which only the blameworthy are punished; Job is suffering what appears to be a tremendous punishment;

14. *Genesis* 18:27.

15. *Genesis* 18:25.

16. *Leviticus* 26:3.

17. *Leviticus* 26:14–16.

ergo Job must be blameworthy.¹⁸ By leaning on this conceptual model, the friends are not being naïve; they are asserting God's promised order of things.¹⁹

But the friends are wrong. This was made apparent in the prologue of the Book of Job: God is afflicting Job *for no good reason*. In this story, justice is not the order of things.²⁰ Whimsy and dares, not order and reason, prevail in God's treatment of Job. This dissonance between the conventional account of justice in the biblical tradition and Job's lived experience is the deep psychological significance of Job's suffering. Job tries the conventional biblical account of justice on for size – he asks what he has done to deserve his misfortune. But the conventional account does not work because Job knows, as God and the reader do, that he is utterly blameless.²¹ As he realizes this truth, Job begins to see his own suffering as senseless and, with this realization, the order of things is shaken; the syllogism unravels. Job *is* blameless and he *is* suffering, so much is clear. The first premise – that only the blameworthy are punished – must be false. Sometimes the blameless are made to suffer. God's statement to Cain becomes deeply ironic: "Surely, if you do right, / There is uplift. / But if you do not do right, / Sin crouches at the door." Job's experience exposes this statement as false. The universe does not always deliver justice.

As Job begins to understand this, as the injustice of it all becomes increasingly clear, he imagines the undoing of creation . . . his own and, symbolically, that of the universe.²² He experiences injustice as disorder. There is darkness. There is chaos. Sometimes God will be arbitrary; sometimes God will act senselessly. Job's experience now resists conformity to the reasonable, ordered, conventional account of the world. He rejects the

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18. The most powerful such expression lies in the mouth of Elihu son of Barachel the Buzite, who has undergone a substantial transformation over the course of the friends' conversation with Job: "Therefore, men of understanding, listen to me; / Wickedness be far from God, / Wrongdoing, from Shaddai! / For He pays a man according to his actions, / And provides for him according to his conduct; / For God surely does not act wickedly; / Shaddai does not pervert justice." Jb. 34:10–12. See also the speech of Eliphaz the Temanite at Jb. 22:3–5 ("Does Shaddai gain if you are righteous? / Does He profit if your conduct is blameless? / Is it because of your piety that He arraigns you, / And enters into judgment with you? / You know that your wickedness is great, / And that your iniquities have no limit.").
19. See *Job* 8:3–6 (Bildad the Shuhite arguing "Will God pervert the right? / Will the Almighty pervert justice? / If your sons sinned against Him, / He dispatched them for their transgression. / But if you seek God / And supplicate the Almighty, / If you are blameless and upright, / He will protect you, / And grant well-being to your righteous home."). Of course, we know precisely that Job *has* been blameless and upright.
20. Good takes this message about disorder to be the central proposition in the Book of Job. See Good, *Turns of Tempest*, p. 355 ("The world's order entails both regularity and irregularity, both law and lawlessness, both order and disorder.").
21. *Job* 23:10–13 ("But He knows the way I take; / Would He assay me, I should emerge pure as gold. / I have followed in His tracks, / Kept His way without swerving, / I have not deviated from what His lips commanded; / I have treasured His words more than my daily bread. / He is one; who can dissuade him? / Whatever He desires, He does.").
22. *Job* 3:3–26 ("Perish the day on which I was born, / And the night it was announced, / 'A male has been conceived!' / May that day be darkness; . . .").

friends' explanation, grounded though it may be in all that they are told to believe about the human condition. And so he puts the proposition to God: "Your universe is unordered, unfair, and You act unjustly."²³ Job calls on God to face this charge and disabuse him of this idea.²⁴ He asks God to explain. Remarkably – breathtakingly – God appears and answers . . . twice. His first answer, which is no answer at all, is that He is powerful and that the universe is magnificent.²⁵ It is an answer aptly given from within a whirlwind, for it is powerful but without substance. God asserts His right to do what He will, with or without reason. In this sense, God's speech from the whirlwind offers a kind of answer to Job, but an answer appealing to an unfathomable order of authority, rather than one based on the order of justice. This answer can do nothing to make sense of Job's experience of disorder and injustice. Job "recant[s] and relent[s]"²⁶ in the face of these blustering assertions of power and images of violence. But this apparent recanting is not really a surrender at all, for Job leaves God with a piercing reminder that brings home his point – Job says that he is "but dust and ashes."²⁷ These words must reverberate in God's ears, recalling another man who said that he was "but dust and ashes,"²⁸ Abraham. Abraham spoke these words having just challenged God in the terms of the conventional account of justice: "Shall not the Judge of all the earth deal justly?"²⁹ "Far be it from Me," God must think, "far be it from Me, yet I have done this." And so God gives His second and final answer to Job's

23. *Job* 27:2–6 ("By God who has deprived me of justice! / By Shaddai who has embittered my life! / As long as there is life in me, / And God's breath is in my nostrils, / My lips will speak no wrong, / Nor my tongue utter deceit. / Far be it from me to say that you are right; / Until I die I will maintain my integrity. / I persist in my righteousness and will not yield; / I shall be free of reproach as long as I live."). Note that, with the words "far be it from me" Job claims the mantle of justice that Abraham had accorded to God when, in the Sodom and Gomorrah story, he said to God, "far be it from you." The Prophet Habakkuk makes a similar accusation: "You whose eyes are too pure to look upon evil, / Who cannot countenance wrongdoing, / Why do You countenance treachery, / And stand by idle / While the one in the wrong devours / The one in the right?" *Habakkuk* 1:13.

24. *Job* 31:35 ("O that I had someone to give me a hearing; / O that Shaddai would reply to my writ, / Or my accuser draw up a true bill!").

25. *Job* 38–41.

26. *Job* 42:6.

27. In this way, I resist the conventional reading of Job's final speech as a retraction of his indictment. See Robert Gordis, *The Book of Job: Commentary, New Translation and Special Studies* (New York: Jewish Theological Seminary of America, 1978), 491 ("The Lord's Second Speech has taught Job to recognize both the mystery and the harmony of the world."). Job's response is far more complex and leaves a strong air of condemnation for God's conduct in the story. See Kevin Snapp, "A Curious Ring in the Ears: Ambiguity and Ambivalence in the Conclusion of the Book of Job," *Conservative Judaism* 53 (Fall 2000): 34 and 41 ("Job's final speech need not be read as pathetic submission, but may be read as an anguished cry invoking the covenant of Abraham."). Snapp surveys a number of textual arguments to this effect at 37ff. See also Good, *Turns of Tempest*, pp. 377–78 (arguing that Job's words here are not an acceptance of God's answer *per se* but, rather, an acceptance that "the world spins on its own kind of order, of which Job had very little sense." Good asserts that "to 'repent of dust and ashes' is to give up the religious structure that construes the world in terms of guilt and innocence. It is to repent of repentance.").

28. *Genesis* 18:27.

29. *Genesis* 18:25.

challenge: speaking to one of the friends, Eliphaz, God says the following: “I am incensed at you and your two friends, for you have not spoken the truth about Me *as did My servant Job*.”³⁰ To what truth is God referring? The gravamen of Job’s indictment lies in an assertion of disorder. Out of his experience, Job declares that the world is not a reasonable, predictable, and ordered realm in which the upright are spared the suffering reserved for the wicked. Job has impugned God’s promise of justice and has claimed that He acts arbitrarily and without reason. To this indictment, God responds that Job spoke the truth about Him – God is not always just and the world is not always one of order. God gives Job new children, more than restores his wealth, and Job grows old. But we are left wondering whether, having learned that the order of the universe is sometimes radical disorder, and having lived through this injustice, the rest of Job’s days are blessed or cursed.³¹

The Book of Job takes up the conventional account of justice in the Western religious tradition – that if you do good, you will be rewarded, and if you do evil, you will be punished – and tests it against the experiences of a character who is mythic but also everyman.³² In so doing, the Book explores the idea that there is a durable gap between the undeniable presence of injustice in the world and the profound desire to make sense out of experience. The philosophical and psychological power of the Book of Job is that it acknowledges and sustains this double-edged existential insight, this irony of ironies.³³

We crave justice because it reflects order. Justice is a means of making sense of experience, of giving reason to the seemingly arbitrary and bringing method to the madness of life. Justice is our fondest hope and deepest desire because justice makes a little bit of sense of the world. The Book of Job demonstrates this longing through the speeches of the friends; and, to a point, the reader forgets what he or she knows and is seduced by the friends’ words. The words are seductive because they are comforting –

30. *Job* 42:7.

31. The antiphrastic use of the term “blessed” throughout the book impregnates the final use of that word – “And God blessed the rest of his days” – with a deep ambiguity. On the antiphrastic use of the Hebrew word BRK, see Michael Cheney, *Dust, Wind and Agony: Character, Speech and Genre in Job* (Stockholm: Almqvist & Wiksell International, 1994), 58–77.

32. See Snapp, “Ambiguity and Ambivalence,” p. 35 (“The prologue places Job in a never-never-land, and the apparent absence of references to the Sinaitic covenant or late patriarchs makes it appear that Job was intended to be a universal figure on the order of the generic ‘wise man’ of the wisdom literature.”); John E. Hartley, *The Book of Job. New International Commentary on the Old Testament* (Grand Rapids, MI: Eerdmans, 1988), 66–67. (“A patriarch is usually introduced in the biblical text with a full genealogy . . . thus it is noteworthy that Job is introduced without genealogy and without reference to his tribe or clan. There is also no specific reference to the time when Job lived. The author thereby masterfully composes a literary piece in which Job is representative of all who suffer.”) See also Good, *Turns of Tempest*, pp. 189–90.

33. One sees this sense of a lack of existential reason – a feeling of cosmic senselessness – in the Book of Qohelet. For a discussion of existential absurdity in *Qohelet*, see Benjamin Lyle Berger, “*Qohelet* and the Exigencies of the Absurd,” *Biblical Interpretation* 9 (2000).

no matter how badly it hurts, no matter how deep the suffering, the conventional account asserts that there is, at least, *a reason*. But the Book of Job doesn't let one take comfort in aphorism. Through the narrator, Job's insights, and the mouth of God, the Book also demonstrates that the world resists order and reason. Entropy is not just a physical reality, but characterizes existential reality. Neither God nor the world He created, the Book says, can be *explained*. Experience is always a little more than reason can account for and, when suffering is the result, one encounters injustice. Injustice speaks to an abiding disorder in human experience. To recognize injustice is to acknowledge a deep instability and disorder in life, to acknowledge that the world and suffering *is* sometimes senseless. This, *Job* teaches, is the deeper despair of injustice. Both the piercing harshness and the profound honesty of the Book of Job lie in its recognition that injustice is an inalienable condition of human life.

So read, the Book of Job is a deep mythic account of the nature of injustice. Does it say anything about modern struggles with social injustice? Can a story about cosmic justice afford helpful resonances now that justice is sought from human institutions?

II. The Precariousness of Denunciation

One role of the criminal law is to confront the existential inexplicability of victimhood. Victims often describe their experience of crime as "senseless."³⁴ They are unable to account for the violence that they have endured, unable to tell a story in which their suffering or the suffering of their loved ones is precipitated, provoked, or deserved in some way. The media speaks similar words, characterizing the worst destruction or violence as "senseless" or "random." There is something deep and resonant about speaking of crime in this way. The resonance comes from the fact that disorder and meaninglessness is the essence of victimhood. Victims of crime suffer a disruption of order and integrity in their worlds. This is to say more than that the given act of violence or crime is inexplicable, unanticipated, or resistant to the logic of cause and effect. Some crime will, of course, be characterized in this way; however, as a growing understanding of the nature of domestic violence has made clear, far too much crime occurs between intimates, can be traced to causes like jealousy or rage, and assumes patterns that make the violence all-too predictable. To speak of the "senselessness" of victimhood is to say something more.

34. See Marilyn D. McShane and Frank P. Williams III, "Radical Victimology: A Critique of the Concept of Victim in Traditional Victimology," 38 *Crime & Delinquency* (1992): 258 and 261. ("Removed from the reality of crime as an endemic feature of American life, most middle-class citizens can only understand crime, and their own victimization, as irrational, senseless phenomena.") For a discussion of the effects of victimization, and an empirical study of the criminal justice system's capacity to speak to these effects, see Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Oxford University Press, 2002).

Senselessness lies in the existential inexplicability of finding oneself in the position of victim. Victimhood inheres precisely in the inability to provide an account whereby one “deserves” to have been the victim of suffering. “What has happened is not,” one is provoked to say, “fair.” Society joins the victim in alleging that this is not the way the world is meant to work, that this is not the true order of things.

One role of the modern criminal law is to respond to this indictment. The criminal law is asked to declare that there has been a gross deviation from the way in which things are supposed to work. In assigning blame, the criminal law declares to society that the perpetrator has inflicted undeserved or senseless suffering. And in a ceremonial reaffirmation of the conventional account of justice, the criminal law is charged with responding to this blameworthiness with appropriate punishment: those that do wrong will suffer; the perpetrator has done wrong and, as such, deserves to be punished. In this, its denunciatory role, the criminal law seeks to reintroduce reason and order into an otherwise senseless act. With the imposition of criminal punishment upon the perpetrator, the victim is vindicated in his or her assertion that what happened was unfair and unjust. The criminal law declares that disorder is not the natural way of things and that if, for a time, it may have looked as though senselessness would prevail, that was just a transient appearance. In the end, justice will triumph. The blameworthy will be identified and punished and the victim’s suffering acknowledged. This is the denunciatory role of the criminal law: it renders the world a little less senseless by creating a narrative in which the senselessness of crime, albeit disturbing, does not characterize the world.³⁵ Justice, order, and reason – in the form of the righteous being protected and the wicked being punished – ultimately reign.

There is, however, an apparent difficulty with this denunciatory function of the criminal law: whatever reason or order is restored in this ritual affirmation of the tenets of the conventional account of justice, there is an inexorable residue of disorder and senselessness to which justice is intrinsically unable to respond. The criminal law can assign some sense to otherwise senseless acts by fixing blame and following it with punishment. Yet there is an enduring shortfall between the restorative potential of the criminal law and the experience of the senselessness of victimhood. The criminal law can speak simply and resoundingly to the meaning of the perpetrator’s

35. See, for example, Emile Durkheim, *The Rules of the Sociological Method*, trans. S.A. Solovay and J.H. Mueller (New York: The Free Press, 1964) (arguing that the criminal law’s response to crime and deviance defines society’s notion of acceptable behaviour. For Durkheim, the criminal was, thus, an “exemplar”). See also Joseph R. Gusfield, “On Legislating Morals: The Symbolic Process of Designating Deviance,” *California Law Review* 56 (1968): 54 and 57. (“Government actions can be seen as ceremonial and ritual performances, designating the content of public morality. Law is not only a means of social control but also symbolizes the public affirmation of social ideals and norms.”) Durkheim and Gusfield resonate with theorists who assert a communicative or expressive role for criminal law punishment. See Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993); David Garland, *Punishment and Modern Society: A Study in Social Theory* (Oxford: Clarendon Press, 1990); R.A. Duff, “Penal Communications: Recent Work in the Philosophy of Punishment,” *Crime and Justice* 1 (1996).

act. The act was wrong, evil, and, under the prevailing logic of justice, it ought therefore to be punished. It is imperative that society denounces this conduct, if only to assert the normal order of justice and to affirm the victim's sense of having been wronged. The criminal act is marginalized as aberrant, the criminal is chastised in a rational way, proportional to his or her blameworthiness, and the breach is, thereby, assimilated into the reasoned order of justice. Yet, whereas the perpetrator can be processed by the logic of justice, the victim cannot. Punishment does not speak to *why* the act happened in the first place, so the senselessness of victimhood remains untouched. The criminal law cannot speak to the enduring "why me" and, although the law is able to denounce the perpetrator and his conduct, this "why" lurks largely and disturbingly intact. The point here is that the gravamen of victimhood lies in the senselessness of suffering, not in the fate or blame of the perpetrator. Criminal law can speak to the latter, but has nothing useful to say about the former.

The Book of Job illuminates this difficulty. When Job's suffering has come to an end, when the discussions have ceased, there is a kind of justice achieved in the Book of Job. Most significantly, blame is laid. God tells the friends that they were wrong and that Job spoke rightly. Implicit in this concession is God's acceptance that, indeed, He had acted wrongly towards Job. Job accused God of inflicting suffering on him for no good reason; God admits that Job spoke rightly.³⁶ So just as the friends are condemned and God admits responsibility for acting capriciously and wrongfully, Job's victimhood is acknowledged; thus, a form of reason, a sense of just order, is re-established. As the guilty party, however, God is not punished; instead, alongside the assignment of guilt there is a sort of compensation or restoration. God gives Job twice his original riches, new and wonderful children, and a long and contented life. The fact of victimization, however, cannot be redeemed by these means. Concretely, Job's new children are not his old children. That loss is irredeemable. This truth points to a deeper one. The experience of enduring senseless suffering at the hands of God is indelible. Job now knows something profoundly disturbing about his world that he did not before; namely, God can and will act arbitrarily and the aphoristic vision of justice that the friends pressed upon him and he himself struggled with does not accurately describe the whole of experience. Irrespectively of how closely God attends to Job's suffering through compensatory or reparatory means, this dimension of Job's suffering cannot be undone. His loss is a loss of wealth and health but, more pressingly for the Book of Job, a loss of philosophical

36. There is textual support for the proposition that what God declares to be "truthful" is not Job's final recantation but, rather, his strident condemnation of God and the absence of justice in the world. One such point of textual support is that, in transitioning to the epilogue, the text begins with a reference to God's speech from the whirlwind even though the last speech was Job's apparent recantation. See Snapp, "Ambiguity and Ambivalence," p. 38 ("By ignoring Job's reply to God, the author hints that it is Job's words uttered in his dispute with the friends, not Job's supposed recantation, that meet with divine approval.").

comfort. No form of reparation or restoration speaks to the intense existential discomfort minted by Job's experience of victimhood. The spectre of disorder and senseless suffering, once felt, is always present.

The victimhood produced by crime is no different. All victimhood is, in a strong sense, indelible. The victim must always live with the knowledge that disorder and senseless suffering can exert itself without notice. Criminal justice can say nothing to this existential realization. As a result, the criminal law is put in an intensely awkward and precarious position. On the one hand, the criminal law has the capacity to make some sense of the situation, at least insofar as it can make the normatively denunciatory claim about the status of the offender and can gesture towards acknowledging the suffering of the victim. Furthermore, endowed with this capacity, it *must* respond to the fact of crime and disorder by meeting it with justice. If the criminal law fails to respond, the disorder is deepened. The conventional order of things is not reasserted, the blameworthy goes unblamed, and the victim is unacknowledged by the community in his or her experience of senseless suffering. However, the criminal law operates with an inexorable deficit. It can acknowledge the suffering, but it can't explain it. It can renounce the disorder, but it can't deny its existence. So, though embedded in the pursuit and affirmation of justice, the gesture of recognizing the victim is always also a gesture towards recognizing its own inability to speak to the gravamen of crime, the experience of senseless suffering. In seeking to restore order and reason, the criminal law inescapably exposes the chaos and injustice of experience.

III. The Precariousness of Blame

The previous section argued that the criminal law has an awkwardness or precariousness that arises from the fact that, although it is capable of making sense of the senseless by assigning blame, in so doing, it also highlights the existence of an indelible aspect of injustice and disorder incumbent on every act of victimization. The criminal law, though able to restore reason and order by reasserting the conventional account of justice through blame and punishment, is unable to erase the fact of disorder that crime asserts in the life of the victim. In this, there is a kind of awkwardness to the criminal law. Yet even the first part of this equation – even the assignment of blame and the exaction of punishment – is afflicted with its own precariousness, a precariousness clearly seen through the lens of the insights about injustice and disorder found in the Book of Job.

The criminal law's constructive capacity, its brand of justice, lies precisely in blame and punishment. However, the criminal law assumes a posture of profound forbearance – a near timidity – in fulfilling this function. There is a common aphorism in the criminal law: “the law holds, that it is better that ten guilty persons escape than one innocent suffer.”³⁷

37. William Blackstone, *Commentaries on the Laws of England* vol. IV, ch. xxvii (1769), 352.

From the perspective of the last section of this article, which emphasized the precariousness that occurs when blame is not laid and victimhood not acknowledged through the criminal law, this aphorism makes little sense. The central role of the criminal law is to assert and affirm the conventional account of justice – that if you are blameworthy, you will be punished, and if you are guiltless, you ought not to be harmed. Why, then, does this aphorism – truly central to the imagination of the criminal justice system – weigh so heavily only on one side of the scale?

The reticence implied by this aphorism reflects a deep anxiety in the criminal law about the precariousness of blame. This anxiety is not just distilled in an adage, but permeates the criminal law. This angst is most palpable in the presumption of innocence and the requirement for proof beyond a reasonable doubt.³⁸ Nowhere else in the realm of political, or for that matter personal, decision-making do we self-consciously espouse such a powerful presumption, rebuttable only by satisfying this extremely onerous standard of proof. The tentacles of this posture reach deeply into the law of criminal evidence, prohibiting the jury from drawing inferences that would be eminently reasonable in everyday life³⁹ and withholding evidence from the jury that would sensibly inform any other decision.⁴⁰ The anxiety that moulds the criminal justice system in this way is a product of an acute awareness that human justice is flawed and prone to error, combined with the sense that there is no injustice quite as profound as the injustice of wrongful blame and punishment. The criminal justice system works in the shadow of the fear of wrongful conviction.⁴¹

To understand the gravity of this fear, one has to return to the sense of justice and injustice as order and disorder. When the criminal justice system seeks to punish crime, it is trying to re-assert a form of social order that makes sense of the act in question, rather than allowing an order based on sheer power to reign. Chaos in the form of undeserved, irrational suffering has occurred, and the criminal law has a role to play in categorizing it as such. By so doing, the rational state, through the power of the criminal law, constructs a narrative in which the *normal order of things* – the conventional account of justice – prevails. It is far from incidental that it is the *rational state* charged with confirming and repairing this order. The politics of the modern nation state are closely tied to the rise and dominance of

38. See *Woolmington v. D.P.P.*, [1935] A.C. 462, 481 (H.L.) (“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt. . . . If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.”).

39. For example, the prohibited character inference that, based on certain traits, an accused is “the type of person” more likely to have committed the crime in question.

40. One thinks of hearsay evidence and past criminal convictions as examples of evidence frequently excluded in criminal trials, despite the fact that we often use such information to make other very important decisions.

41. This spectre is clear when one looks to the extent to which wrongful convictions are now the focus of attention in media and in the arts. For popular culture examples, see the recent movie *The Life of David Gale* or *The Hurricane* and the recent play *The Exonerated*.

rationalism.⁴² In this context, the criminal law is a functional extension of the presumption that the humanly constructed world is founded on reason and order. The criminal justice system is playing a role in affirming this foundation by marginalizing those human activities that don't make sense – that defy the logic of reciprocity reflected by the conventional account of justice. This is the way in which criminal justice is tied to order.

The criminal law, however, acts in the shadow of its own fallibility. The criminal law is always in danger of misassigning blame. This danger is the reality of wrongful convictions.⁴³ The criminal law's connection to reason and order gives form and depth to this anxiety. When a wrongful conviction occurs, the criminal law has failed to create its intended order. The act in question and the person who perpetrated it remain unpunished and, therefore, unassimilated by the conventional account of justice. But more than this, the criminal law has compounded victimhood with victimhood. In response to the suffering of the victim of a crime, the state has created another victim who is himself thrust into senselessness. Rather than beating back the realm of disorder, the criminal law has, thus, contributed to it. But the effect is more than additive. As the agent of justice for the rational state, when the criminal law imposes senseless suffering, it threatens to make a parody of the system as a whole. The powerful gears of the rational administrative state have been set in motion by an instance of crime – of disorder; and what is the output of this great rational machine? More disorder and meaningless pain. This result is intolerable because it implicates the great institutional force of order and reason in senseless suffering. This association of the promise of meaning and the production of disorder explains the criminal law's deep anxiety about blame and punishment.

The Book of Job reflects precisely this dynamic. Much of the poignancy of the Book inheres in the source, not just the fact, of injustice. The existential injury to Job is more grave because the suffering comes from God Himself. It is not another evil or misguided person that has perpetrated the injustice (as disturbing though this may be). Rather, the agent of disorder and senselessness is the promised source of order and meaning itself. In this respect, Job's experience is that of a profound breach

42. See Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Press, 1991), 5 (“By one road or another, by conviction, by its supposed inevitability, by its alleged success, or even quite unreflectively, almost all politics today have become Rationalist or near-Rationalist.”). For Oakeshott, one of the characteristics of this modern rationalist politics is a commitment to, what he calls, “the evanescence of imperfection”. (*Rationalism*, p. 10). This “faith in the sovereignty of technique” is put profoundly in jeopardy in the criminal law (*Rationalism*, p. 28).

43. This reality has become more apparent with high-profile instances of wrongful convictions and the commissions of inquiry that have investigated them. In Canada, these include the inquiries into the wrongful convictions of Thomas Sophonow and Guy-Paul Morin. High-profile institutions have also emerged to address suspected cases of wrongful conviction. In the U.S., the Innocence Project, run out of New York, is one of the most visible examples; the leading organization in Canada is The Association in Defense of the Wrongfully Convicted, based in Toronto.

of existential trust. The fact that, in Job's suffering, the God of Justice is revealed as unjust shakes Job's world and challenges the friends in a way that other experiences of suffering cannot. It is for the same reason that wrongful convictions are such grave instances of injustice. This brand of injustice indicts the system – it suggests that even the rational state participates in creating disorder and needless suffering. For many moderns, the sacred has been translated into the political.⁴⁴ Accordingly, having the state perpetrate injustice sounds in the existential register of Job's suffering – it is disorder at the very foundation of things.

This is the precariousness of blame in the criminal law: in the necessary, demanded effort to restore some sense to the world of the victim (and of society), the criminal justice system faces not just failure, but a much darker result in the form of wrongful convictions. If it inflicts suffering where none is due, the system has created senselessness instead of reason; it has become an agent of disorder. Thus, the criminal law sits in precarious tension with the prospect of creating more and graver injustice and, in doing so, throwing into question the rationality and order of the state at large. The edge is thin, always extant, and deeply salient.

IV. The Precariousness of Victimhood

Contemporary experience is beginning to demonstrate, however, that even when the law has resolutely condemned an act as aberrant and even when it is reasonably certain that blame and punishment has been assigned accurately, the criminal law suffers from an abiding precariousness. The source of this precariousness is the ready elision between the status of victim and that of perpetrator. In particular, and in a way intimately linked with the rationalized nature of the modern state, there is an increasing difficulty in trying to maintain a stable sense of the criminal as perpetrator rather than as victim. At the same time, the contemporary approach to understanding the criminal can cast victims and, ultimately, society itself in the role of perpetrator. Sensitivity to this profound awkwardness in the criminal law throws into question the sense and order of the criminal law as a whole; drawn into clear view, this awareness threatens to impeach the whole endeavour as essentially unjust.

The last two sections showed two forms of deep awkwardness that afflict the criminal law: the precariousness of denunciation that arises out of the indelibility of victimhood and the precariousness of blame that manifests as

44. See Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: Chicago University Press, 1999), 42. ("A secular conception of the state does not invent a new politics stripped of any taint of the religious tradition. Rather, it appropriates concepts that are already present and gives them a secular cast."). See also Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA: MIT Press, 1985), 36 ("All significant concepts of the modern theory of the state are secularized theological concepts . . ."). Schmitt and some of his ideas are, of course, themselves deeply associated with tremendous senseless suffering.

the risk of wrongful convictions. These two forms of awkwardness are inherent in the project of criminal justice. The subject of this section, the precariousness of victimhood, is a more contingent expression of a particular modern trend in understanding the criminal and the nature of criminality. When crime was still seen as a product of evil, the last two sources of instability in the criminal law existed, but not this third one. When society used the criminal law to punish some absolute moral shortfall in the perpetrator, there could be no sense of this particular awkwardness. But with the rationalization of the world came the attenuation of notions of evil or inherent moral deficit as the source of social ill. The contemporary view is that the state no longer engages in battles of good over evil but, instead, searches for reasonable accounts of and sound responses to disorder, inefficiency, and irrationality.⁴⁵ Similarly, in contrast to earlier conceptions, in the contemporary state the citizen is no longer understood as endowed with a good or bad spirit and determined by that moral valence but, rather, as a morally free and instrumentally rational actor.⁴⁶ In the realm of criminal justice, those assumptions translate into a new sense of the aetiology and nature of the criminal. The modern liberal state no longer accounts for the criminal in terms of evil; with the de-sanctification of politics, evil is banished from the realm of legal discourse. Instead, the criminal is a constellation of defects of reason, to be explained by a set of economic, social, and cultural determinants.⁴⁷ Now more like the national deficit than the devil, the criminal is viewed by the modern state as a distorted product of social failures and is increasingly reacted to as such.

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45. See Charles Taylor, *The Ethics of Authenticity* (Cambridge: Harvard University Press, 1991), 5 (“sweeping away the old orders has immensely widened the scope of instrumental reason. Once society no longer has a sacred structure, once social arrangements and modes of action are no longer grounded in the order of things or the will of God, they are in a sense up for grabs. They can be redesigned with their consequences for happiness and well-being of individuals as our goal. The yardstick that henceforth applies is that of instrumental reason.”).
46. See Taylor, *Ethics of Authenticity*, p. 3 (“Modern freedom was won by our breaking loose from older moral horizons. People used to see themselves as part of a larger order. . . . Moral freedom came about through the discrediting of such orders. . . . But at the same time as they restricted us, these orders gave meaning to the world and to the activities of social life. . . . [T]he rituals and norms of society had more than merely instrumental significance. The discrediting of these orders has been called the ‘disenchantment’ of the world.”). Taylor does not call for a retreat from this achievement, but does note that this disenchantment of the world “flattened and narrowed” our lives and our worlds. (*Ethics of Authenticity*, p. 4.) For a consideration of Taylor’s notion of disenchantment, see Quentin Skinner, “Modernity and disenchantment: some reflections on Charles Taylor’s diagnosis,” in Good and Velody, eds., *The Politics of Postmodernity* (Cambridge: Cambridge University Press, 1998), 49.
47. Thomas Green finds precisely this shift in thinking about the criminal in Roscoe Pound’s work on criminal law. In Pound’s criminal theory, which was responding in part to the increasing influence of the social sciences, “offenders were the product of social forces that were subject to change by an educated public.” Thomas A. Green, “Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice,” *Michigan Law Review* 93 (1995): 2017. See also George P. Fletcher, *With Justice for Some: Protecting Victims’ Rights in Criminal Trials* (Reading, MA: Addison-Wesley, 1996), 17. Fletcher describes the shift from a sense of moral condemnation in the criminal law to one in which “[t]he wisdom of the times became understanding crime not as an expression of evil but as the acting out of mental illnesses.”

The introduction of a therapeutic and restorative dimension into the modern criminal law of Western due-process oriented states reflects this reconfiguration of the criminal from an agent of evil into the explicable product of environment. Although the ebb and flow of the practical manifestation of this theoretical and rhetorical shift in modern criminal law is complex and varies with the changing political winds of a given society,⁴⁸ it is now commonplace to speak of *rehabilitation* as at least one of the objectives of the criminal law in modern Western systems of justice. Yet one does not rehabilitate evil – one overcomes, conquers, or redeems someone from it.⁴⁹ Rehabilitation is for someone who, as a result of poverty, abuse, exclusion, genetics, or a host of other external forces, is pushed off the path of his or her otherwise natural (read “rational”) development. As opposed to being somehow intrinsically “bad” or “evil,” most offenders are, instead, to be understood as products of some set of distorting influences.⁵⁰ Part and parcel of the rationalization of the world, criminals are now, thus, persons with deep stories that make sense of their deviance. Social science, not theology, is the field of inquiry that now helps society to understand crime.

However, the introduction of this rationalizing trend in the vision of the criminal introduces a profound awkwardness in the whole system. Although the criminal’s status as perpetrator in a given criminal act is secure, the impetus to rationalization places him or her in a larger context, one in which the criminal’s own “badness” is understood, in its own way, as reasonable. With these contextual determinants, such as poverty or psychological trauma, in sight, the criminal law finds itself on shifting ground. It becomes difficult to sustain a stable sense of the criminal as perpetrator rather than as a victim in his or her own right.⁵¹ Though a perpetrator in the context of the discrete act of violence under the scrutiny of the

48. For example, over the course of the last decade, whereas Canada has introduced amendments to the *Criminal Code* that explicitly list rehabilitation, reparation, and the encouragement of responsibility as objectives of sentencing (*Criminal Code of Canada*, R.S.C. 1986, c. C-46, s. 718), one can observe, since the 1970s and 1980s, a powerful trend in the United States towards a more retributive and punitive approach to criminal justice and sentencing. See, e.g., Beale, “Still Tough on Crime,” 413; Kathy Elton and Michelle M. Roybal, “Restoration, a Component of Justice,” *Utah Law Rev.* (2003): 47–8.

49. See Charles Taylor, *The Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989), 520 and 12–13 (arguing that the modern “stripped-down secular outlook” has made us particularly sensitive to suffering because it has made untenable this notion of punishment as a form of redemption. “The whole notion of a cosmic moral order, which gave this restoral its sense, has faded for us. The stress on relieving suffering has grown with the decline of this kind of belief.”).

50. See James L. Nolan, Jr., *The Therapeutic State: Justifying Government at Century’s End* (New York: New York University Press, 1998), 9. (“[A] defining feature of the therapeutic ethos . . . is the growing tendency to define a range of human behaviors as diseases or pathologies. With the therapeutic enterprise the therapist is, of course, concerned with healing or curing the patient. As the therapeutic perspective has spilled into the culture more broadly, so has the belief that a growing number of human actions represent diseases or illnesses that need to be healed. Behaviors that were formerly described at face value or interpreted in moralistic terms have increasingly been portrayed as pathologies.”). For Nolan’s take on the influence of therapeutic ideas in the criminal law more generally, see pp. 77–127.

51. See Nolan, *Therapeutic State*, p. 15 (“The tendency for individuals and groups to understand themselves as victims of their abusive pasts or of the oppressive social

criminal law, viewed more broadly through the rational/therapeutic lens, the criminal is also profoundly a victim of the familial, economic, or societal context in which he found himself. His victimhood is as senseless as that of the victim of violence. He, too, did nothing to deserve his suffering, this time his entire lot in life. He, too, is entitled to ask “why me” and will receive no satisfying answer.

Furthermore, this view complicates the status of the complainant as victim. To the extent that he or she may have acquiesced to or participated in the system that “produced” the rationally distorted individual who has become a criminal, the subject of violence or suffering in the discrete circumstance in question might him- or herself be a kind of perpetrator, understood in the broader context. Yet if one follows this rationalized understanding of the criminal to its fullest implications, the precariousness is revealed to be even deeper; society itself, not just the victim, comes to look like a perpetrator. Society seeks to blame the acts and to punish the body of the accused individual. However, this individual was produced on the anvil of both public equanimity in the face of private injustices and society’s construction of or acquiescence to poverty, exclusion, and inequality. In this way, criminal law gives a perpetrator society the chance to re-victimize the offender. One need look no further than instances of personal violence in Apartheid South Africa,⁵² the American treatment of its Black population,⁵³ or Canadian criminal justice’s relationship to the Aboriginal Peoples of Canada⁵⁴ to find dramatic illustrations of precisely this point. To take up just the last example, as one probes the aetiology of criminality in a given Aboriginal accused, one is frequently confronted with Aboriginal communities that have been economically and socially marginalized and a society that has failed to meaningfully attend to the pressing health, poverty, and education issues of these communities. These conditions, which might help to explain why a given accused now finds him- or herself drawn into the criminal process, are themselves the product of historical injustice characterized by a long string of broken promises on the part of the Canadian state. Set within this horizon, Canadian society is a perpetrator, not an agent of justice, and the criminal’s status as perpetrator is suddenly far more complex.

environment that surrounds them appears to be on the rise. The victimized mentality, of course, closely relates to the central place of the self and the growing cultural proclivity to interpret behavior in pathological terms. The self is not the perpetrator but the victim of a disorder. Implicit in the very definition of a disease is the belief that it is not the individual’s fault but that someone or something else is to blame.”)

52. See generally James Midgley *et al.*, eds., *Crime and Punishment in South Africa* (Johannesburg: McGraw-Hill, 1975).
53. See David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: The New Press, 1999). For an account of the treatment of black people in Britain, see Paul Gordon, “Black People and the Criminal Law: Rhetoric and Reality,” *International Journal of the Sociology of Law* 16 (1988): 295.
54. See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communications Group, 1996); Law Reform Commission of Canada, *Report 34: Aboriginal Peoples and Criminal Justice* (Ottawa: Law Reform Commission of Canada, 1991).

The point is that once a rationalized view of crime, and its concomitant therapeutic understanding of the criminal, is assumed, even the roles of the victim and the state become unstable. Operating under a social scientific, rather than normative, explanation of criminality, modern criminal law is caught in a vision of subjectivity whereby it assumes its own society to have always already become a perpetrator. Even when it seems to “get it right” at the level of a discrete instance of crime, when this crime and its players are set within a broader “explanatory” context, the criminal law appears to be acting as a tool of a perpetrator society, inflicting further suffering on social, economic, and historical victims.

The purpose in identifying these tensions in the posture of modern criminal law is decidedly not to condone a view of crime and criminals as the product of evil or irrational forces. This understanding had its own pathologies including, but by no means limited to, a lack of compassion on the part of the system; societies are well-served to be rid of this theory of criminality. Instead, the point is that every approach to criminal justice will suffer from its distinctive maladies. This set of insights about the instability of notions of victimhood in the modern, rational criminal law reveals a peculiar affliction: a startling precariousness at the core of our current approach. Because it is enamoured with a rationalized and therapeutic conception of the subject, the modern criminal law is locked in categorical confusion among victim, perpetrator, and society itself. In this way, instead of bringing order to the senseless, modern criminal law is very much at risk of making no sense at all. This ever-present risk creates an abiding state of disorder in which the criminal law is always inadequate and, worse, senselessly violent. Under the shadow of this precariousness, the criminal justice system, even at its best and most accurate, begins to feel deeply unjust. In this way, the modern criminal law is on a collision course with itself. As the rationalist understanding of crime grows, the order and justice of society itself becomes deeply problematic.

V. Conclusion: Suffering, Senselessness, and the Challenge of Criminal Law

The great challenge for the criminal law is that it acts in a field of suffering. Suffering triggers the criminal law, but it is also the response of the criminal law; and in every instance of suffering, there is the seed of injustice. Injustice, as the Book of Job dramatizes, is the disordering experience of inexplicable suffering. Justice is the sense that the world is as it should be; injustice prevails where the answer to why suffering has occurred is “for no good reason.”

The various forms of precariousness described in this article are all symptoms of the criminal law’s burden of confronting suffering and seeking to do justice. Viewed in the terms suggested here, the task that the criminal law sets for itself is to make suffering sensible. But there are a number of ways in which the criminal law finds itself always rubbing up against the prospect of not just failing to accomplish this goal, but of creating and uncovering other instances of irrational victimhood. This risk

is exposed when the criminal law seeks to acknowledge the unjustness of the victim's suffering, because the criminal law cannot answer the inexorable "why me." This risk is exposed when the criminal law seeks to blame and punish because this violence is always deployed with the knowledge that it might be misdirected; it might turn out to be senseless violence – suffering without reason – and this is cataclysmic in the rational state. Common to these two forms of awkwardness is the danger that the criminal law may not be able to provide sufficient *reason*. The criminal law is, however, in an even deeper bind. It is in a bind because in its very effort to satisfy this search for reason – a project that it must undertake – it uncovers the overarching senselessness of crime and punishment. As it starts to explain the world, it must explain the perpetrator; and as the perpetrator begins to make sense, he begins himself to appear as a victim who has suffered at the hands of a perpetrator society. So the ultimate precariousness of the criminal law is this: to avoid injustice, it must find reasons; yet, as it finds reasons the criminal law begins, itself, to look unjust.

Robert Cover saw a similar problem from a different perspective. For him, the salient relationship was not between law and suffering, but law and violence.⁵⁵ Legal interpretation, Cover wrote, was unique in that its interpretations perpetrate and justify acts of violence. "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."⁵⁶ Law is violence,⁵⁷ and the essence of violence is its capacity "to destroy the victim's normative world and capacity to create shared realities."⁵⁸ For Cover, the quintessential example of law's violence, and the concomitant disruption of the normative world of the "victim," is the act of criminal sentencing. The prisoner's world is undermined by the violence that defines the law. In Cover's view, the exceptional torturer-victim relationship and the ordinary judge-prisoner sentencing relationship were, in this respect, indistinguishable. This was Cover's version of the awkwardness of the criminal law.

Yet, as this exploration of injustice in both the Book of Job and in the criminal law demonstrates, it is senseless suffering, not simply violence, that serves this normatively disruptive role. Accordingly, what is unique about the criminal law is not that it deploys violence – violence and its consequent suffering have multiple sources. What distinguishes the criminal law is that it seeks to make sense of the suffering produced by violence even as it creates and reveals more suffering. The terrible challenge

55. Robert M. Cover, "Violence and the Word," *The Yale Law Journal* 95 (1986): 1601.

56. Cover, "Violence and the Word," p. 1601.

57. Cover, "Violence and the Word," pp. 1606–07 ("it is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes legal interpretation from the interpretation of literature, from political philosophy, and from constitutional criticism. Legal interpretation is either played out on the field of pain and death or it is something less (or more) than law.")

58. Cover, "Violence and the Word," p. 1603.

of the criminal law is produced by its mandate to bring reason to an unstable terrain of suffering that its own movements create. As such, the burden of the criminal law is not the violence that it creates; the great risk is that it will fail to *make sense* of the suffering with which it is inextricably engaged. As the Book of Job dramatizes, suffering without order – pain without reason – is the disturbing essence of injustice.

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