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# Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment

Professor SpearIt

Texas Southern University, [spearit@tmslaw.tsu.edu](mailto:spearit@tmslaw.tsu.edu)

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## Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment

*It is customary for human beings to conventionalize and ritualize their necessities. Punishment becomes a social custom and is conventionalized and a ritual is set up for its elaboration.*

—A. Warren Stearns from *The Evolution of Punishment*

### ***The Problem & Thesis***

The central aim of this chapter is to examine the post-civil rights push toward harsh punishment through the cultural lens of ritual. The United States is one of the most punitive countries on the planet--the country is the world leader in imprisonment and is one of the top five that executes capital defendants. However, determining the catalysts of this turn to harsh punishment has proved vexing. Scholars have adequately explained *how* the end of the welfare state, followed by a proliferation of drug laws, police profiling, plea bargaining, and "tough on crime" law and policy were the major forces behind mass incarceration. This chapter's ritual framework helps explain *why*.

It argues that the spike in incarceration is a response to issues that have more to do with culture than crime; more particularly, with perceptions of danger, impurity, and superiority. This perspective itself is unoriginal, since sociologist Emile Durkheim long ago commented on punishment's social functions, which remains relevant to the present:

In [h]is view, crime and its punishment are a basic part of the rituals that uphold any social structure. Suppose it is true that the process of punishing or reforming criminals is not very effective. The courts, the police, the parole system--none of these very effectively deter criminals from going on to a further life of crime. This would not surprise Durkheim very much . . . . [T]he social purpose of the punishment is not to have a real effect upon the criminal, but to enact a ritual for the benefit of society.

By challenging traditional dogmas, which view punishment as a rational and calculated response to crime, analysis of punishment through a ritual scope can add to the study of law. Sometimes changes that threaten the status quo, such as the passage of civil rights laws and controversial court decisions, produce social crises that lead to eras of harsh punishment, often disparately affecting "other" populations, mainly the poor and ethnic minorities. In these instances, punishment moves beyond the scope of its traditional justifications and becomes a tool for social control, which itself is a function of ritual activity. This chapter shows how the gains purported to have been won in civil rights struggles were forfeited to the criminal justice system in a dynamic interplay of ritual punishment, power, and social control.

The "civil ritual" thesis builds on two important themes. The first is "civil rights" since struggles over civil rights gave birth to the two distinct punishment trends discussed herein. The second theme is the concept "civil religion," which provides a framework for understanding ritual forms in public and political institutions. Together, these themes help to elucidate that "something" that drives Americans toward demanding harsh punishment.

This chapter theorizes punishment, but is not a theory of punishment. It is not about justifications of punishment grounded in legal or social norms. Rather, it is an attempt to articulate the core characteristic of punishment that gives rise to normative justifications. It does not address the classical questions that produce a cohesive punishment theory or attempt to ascertain proportionality, the scale of punishment, or the methods of execution. Rather than address the questions that create a general account of legal punishment, this chapter offers an interpretation of phenomena from a ritual perspective. This approach has largely escaped theoretical consideration by legal scholars, even though legal institutions charged with resolving conflict are entrenched in ritual activity. Its main contribution is to show how some of the harshness of punishment has to do with the strength of American religious and racial traditions.

Although arguing that legal punishment is a civil ritual may face resistance by legal academics on substantive grounds, it may also face opposition by some who think that open discussion of religion is in rather bad taste or represents "esoteric scholarship," legal nihilism, or reversion to mysticism. However, the ideas presented here lead to no such scheme. Instead, this analysis helps answer a more fundamental question--why punishment *in the first place*? Indeed, determining the first principles of punishment is difficult since they are so commonplace so as to be nearly invisible. This chapter's ritual emphasis, rather than leading legal scholarship astray, gets to the heart of why some must suffer so that others may feel secure.

### ***Ritual Theory & Application to Crime***

Broadly speaking, ritual activity might best be conceived in terms of structure and strategy. The structure of ritual performance corresponds to the quality of a particular act, which articulates a distinctive way in which any action may be performed. That any act can become ritualized is important since it "keeps us from thinking of activities as if they either are or are not ritual," and instead, "allows us to specify in what respects and to what extent an action can be ritualized. Ritual is not a 'what,' nor a 'thing.' It is a 'how,' a quality, and there are 'degrees' of it. Any action can be ritualized, though not every action is a rite." This theoretical orientation lays a foundation for understanding imprisonment and capital punishment as viable subjects for ritual inquiry.

The structure of ritual activity is often related to religious narrative and myth. In the religious context, the activity aims to recreate stories from tradition. A simple example is Catholic communion, a weekly reenactment of the "last supper" of Jesus and his disciples. The religious narrative supplies the script and the weekly rite is its recital. Religious narrative informs church doctrine and liturgy, and as will be shown, informs criminal law and procedure as well.

As a strategy, ritual often corresponds to concerns about risk, danger, and impurity; "the need to construct a safe and ordered environment;" and the "potency of disorder." As a psychological mechanism, ritual activity is "geared to the detection of and reaction to particular *potential* threats to fitness." The cleansing function of ritual activity is of critical importance in this respect since "fitness" is often threatened by pollution. Pollution is what compromises purity with dirt and disorder, and must be contained by ritual practice.

In the American context, concerns about racial purity produced the infamous "one-drop" rule and anti-miscegenation laws to combat pollution of the "white" race. Of all

social transgressions, the pollution of the "white woman's purity by the black man's sexual assault was the ultimate contamination--an abomination that polluted the community as well as the woman." The violence of lynching often corresponded to rumors of such rape, which rendered the punishment a ritualistic means of patrolling sexual borders. In later times, the threats of miscegenation reappeared in the civil rights struggles in the 1950s and 1960s, with *Brown v. Board of Education* ending school segregation and *Loving v. Virginia*, another high court decision that struck down anti-miscegenation laws. These threats to white superiority represented some of the driving forces of the ritual punishment that ensued in the 1970s, 1980s, and beyond. As in the era of mass lynching, white purity was at stake, and punishment was used to keep order.

Associations between cleanliness and lawfulness have long historical roots, including the "unclean hands" doctrine, which equated unethical activities and bad faith with being "unclean." Equally ancient are associations between dirt and crime, and in early modern times, cleanliness was an intended goal of legal punishment. The logic was simple:

Low-status persons are polluted persons. Status and pollution in turn are connected to risk: things that we regard as "dirty" or "polluted" are, broadly, things that we regard as freighted with risk. Criminals, of course, are persons whom we regard as presenting us with risk, and it follows that we often tend to regard them as polluted.

Accordingly, for the crime to be adequately punished, it was necessary for wrongdoers to be cleansed of their iniquities before reentering society, and sometimes, there was a cleansing of the location where the crime was committed.

In the modern period, the polluting nature of crime is clearly articulated, particularly in the language of political and law enforcement officials' talk of "cleaning up crime," "cleaning up the streets," or the "crime-scene cleanup," labeling schemes that characterize criminals as synonymous with dirt. Thus, when Jose, the "dirty bomber," Padilla was branded as such, there may have been implications to his name other than nuclear weapons, including crime and the idea of "doin' dirt."

This logic makes it sensible to say that government officials "got off clean" with his imprisonment and torture. Like "dirty criminals" and their "dirty money" that has to be "laundered," crime symbolizes attitudes that are as basic as when a parole officer asks, "keeping clean?" As the rest of this chapter demonstrates, sometimes the best way to keep clean is to keep dirt under control; if cleanliness is about matter out of place, uncleanliness must be approached through order--law and order, to be more precise.

## I. CRIMINAL JUSTICE & CHRISTIANITY

We are a religious people whose institutions  
presuppose a Supreme Being.

—U.S. Supreme Court in *Zorach v. Clauson*

With a ritual studies framework in place, this section excavates what has been designated as a "primal connection between religion and criminal justice." It supports this Chapter's thesis by establishing religion's influence on criminal law, procedure, and

punishment. Christian ideas and rituals informed the common law in general, and ancient ecclesiastical courts produced the basis of criminal laws. However, some argue that *all* the major justifications for punishment can be found in older models of Protestant ecclesiastical law. In America, Christians continued the tradition by passing legislation against behavior offensive to Christian sensibilities and establishing criminal law based on the Bible, as well as instituting penitentiary houses across the country.

### ***Biblical Judgment***

Tracing the origins of criminal justice and Christianity begins in the Hebrew Bible. Typically described as the "Old Testament," the writers of this work shaped three particular images of their God: creator, judge, and redeemer. Of the three, the "judge" imagery is typically associated with the face of God that exhibits justice through reward or punishment. This role was not limited to the earthly judge in the modern world, but was also bound up with the responsibilities of making the law and punishing those who transgress it; the legislative, executive, and judicial functions all rolled into one.

When scripture speaks of God-as-judge, the metaphor corresponds to all three functions. Thus, God as the author of the Ten Commandments is inextricably tied to the judgment of humanity and the discharge of punishment. God's characterization as judge begins in *Genesis* and continues throughout the Bible when God must evaluate an individual's obedience to the law. The book of *Psalms* portrays God as "righteous," and as one who "shall judge the world in righteousness, and shall judge the people with equity." The heavens trumpet his fairness, for "he will judge the world with righteousness, and the people in his truth." God's verdicts never stray from justice because "[r]ighteous art thou, O Lord . . . Thou hast commanded justice by thy testimonies and truth especially."

In scripture, God doles out punishments to individuals or entire peoples; some punishments are even metaphysical. In the story of Adam and Eve, in what has been called the "first reported criminal trial," God punishes this couple for disobeying his orders not to eat from the forbidden Tree of Knowledge. For leading Adam astray with the apple, Eve and all women are forced to bear the pains of childbirth and subjugation by their husbands. Aside from the feminist or metaphysical ideas implicated in this narrative, the biblical story of humankind also offers a model of humans as fallible beings, prone to deviating from God's authority. This remarkable subtext speaks to the general nature of humans: Creation's very first creatures broke the law--far from being ontologically pure and innocent, humans are hardwired to deviance. This story was no fluke since the couple's offspring did not fare better, with their son Cain slaying his brother Abel. From these early episodes, a particular narrative emerges that recognizes God as lawgiver and humans as lawbreakers. The lessons of scripture regarding punishment are unmistakable, and as a result of humanity's will to disobey, punishment is a constant in human existence.

In Hebrew traditions, the model of judicial leadership was the royal court, with the king serving as God's human extension. This ideal is portrayed biblically through King Solomon, the ideal judge and monarch. More practically, there were local judiciaries consisting of village elders, magistrates, and officers. Priests also played a role as judges, and they are described as functioning alongside other royal appointees or the king himself. A monarch's power to punish derived from the theological concept of "covenant," a sacred agreement between God and his people. The model of the covenant transferred godly

power to the rulers such that their authority was seen as ultimately coming from God, which simultaneously implied that a sin against the law was a sin against the deity. From the covenant between God and his chosen people came the Ten Commandments and the many biblical laws based on these precepts. Accordingly, it has been argued that the practice of conducting trials passed from God to humans as reflected in biblical narrative.

Having inherited this portrait in Hebrew scripture, the Christian Bible paints a powerful image of God as Judge. The Christian faith inherited a God who is both a loving father and a righteous judge, who combines mercy and justice; the belief that God is a righteous judge and that Christ will return to judge humanity played a critical role in the development of the legal values of the Eastern as well as the Western Church. For the Gospel writers, Jesus's entire life and ministry are the embodiment of divine justice. According to the traditions of *Matthew*, *Mark*, and *Luke*, Jesus's central mission was the announcement and establishment of the Kingdom of God on Earth. In the book of *Romans*, God's judgment is sharply divided from mere mortal judgment: "But we know that the judgment of God is according to truth against them which commit such things. And thinkest thou this, O thou man, that judgest them which do such things, and doest the same, that thou shalt escape the judgment of God?" Similarly, it is God who judges the "secrets of men," which includes Christians as well, "[f]or we know him that hath said, Vengeance *belongeth* unto me, I will recompense, saith the Lord. And again, The Lord shall judge his people."

Perhaps the most significant images of Jesus's judicial stature are those that describe the second coming when he will judge the whole Earth on the final day of reckoning. "Judgment Day" or "Final Judgment" is the most important event in the lives of believers, which is found in ancient cannon and creeds. The second coming is known by a host of names including the "Last Day," and "Day of the Lord." On this day, Christ returns as the judge of the world: "See, I am coming soon; my reward is with me, to repay according to everyone's work." Although the different authors who write about the Final Judgment focus on different terms and themes, there are nevertheless a number of common convictions that emerge. At the Final Judgment, the close of history, all people, alive and dead, will appear before the judgment seat of God, and they shall receive their payment for their works in the body, whether good or evil. There will be a separation in which the righteous will depart into eternal life and the wicked will go away into eternal punishment. For those excluded from salvation, Jesus repeatedly invokes a place of unquenchable fire where there will be "weeping and gnashing of teeth."

Judgment Day stands as a paramount millennial concept and event-to-come in much of Christian tradition. As described in New Advent's *Catholic Encyclopedia*, "[f]ew truths are more often or more clearly proclaimed in Scripture than that of the general judgment." Within Catholic Church history, this doctrine is found "all times and in all places." In this narrative, however, the Son does not judge alone--he has the help of his twelve disciples: "[v]erily I say to you, that when the Son of man shall sit in the throne of his majesty, ye which followed me in the regeneration, shall sit also upon twelve thrones, and judge the twelve tribes of Israel." Of particular interest here is the translation of "judge" from the word *krinontes*, which is rooted in the Greek word *krino*, and like other words deriving from this root, including "crisis" and "crime," *krino* not only translates to "judge," but also to "accuse" or "condemn." This linguistic connection indicates how the very notion of "crime" and "criminal" link to biblical antecedents.

To the casual observer, this depiction of a judge and twelve jurors bears an uncanny resemblance to practically any criminal courtroom in the United States. Even though some states allow numerical variation, the trend in American trials has been typically to require a judge and jury of twelve to try and convict a criminal. Although the relevance of the number twelve in Western civilization could stem from a number of other concepts, legal commentators themselves attest to its religious origin. While history shows that different numbers have been used at different times, early legal writers repeatedly invoke the number twelve and tie it to Christian origins. Other aspects of religious influence included "prayers for relief," the "witness" who "swore" before giving "testimony," and doing so on the Bible itself. Jury trials were not native to England, but are believed to have been imported by Norman Kings.

The Norman conquest brought the "trial by battle," structured on an adversarial system that gave the legal concept of "defense" a physical meaning and instilled the notion that divine intervention would come from God to make the righteous party victorious. In the English development of the trial system, "[t]he judge presided over a . . . trial that was a symbolic reenactment of the . . . trial by battle." In *History of Trial by Jury*, William Forsyth notes that the ancient Norman monarch, Morgan of Gla, is credited with inventing and adopting the trial by jury around 725 A.D. The king called his brainchild "Apostolic Law": "[f]or, 'quoth our regal and pious namesake, 'as Christ and his twelve Apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men!" In 1164, the *Constitutions of Clarendon* prescribed twelve sworn men to judge disputes between lay and clergy, which has been described as the gradual introduction of the trial jury. By the end of the 1300s, the "necessity for a jury of twelve members was finally regarded as essential . . . The intrinsic merits recognized in the number twelve, and its multiples and submultiples, also undoubtedly played a part in the matter." This would be the rationale given later in the 1600s by jurist and Parliament member, Sir Edward Coke, whose writings on the common law dominated the legal landscape in England for a century and a half:

And it seemeth to me, that the law in this case delighteth herself in the number of 12, for there must not only be 12 jurors for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law in the Exchequer Chamber . . . [T]hat *number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, etc.

This rationale would be echoed a century later in John Proffatt's treatise on jury trials:

[T]his number is no less esteemed by our own law than by holy writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try us in our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve.

The custom of trial by jury was a central element of the American colonists' vision for its legal systems, which highlighted its stature, as the *Commentaries of Blackstone* described: "[T]he liberties of England cannot but subsist so long as this *palladium* remains

sacred and inviolate." For trial by jury, that "most transcendent privilege," he required a jury of twelve.

Despite the long and distinguished career of the number twelve for juries, when the United States Supreme Court confronted the question of how many jurors were necessary for a trial, it claimed that the number twelve was "wholly without significance 'except for mystics.'" Holding that a six-member jury satisfied the requirement, the Court rejected the twelve-person requirement as "a historical accident, unrelated to the great purposes which gave rise to the jury in the first place." Rather than indicate the true significance, the Court discounted religious interpretation as "superstitious."

### *From Sinner to Criminal*

The birth of the modern state took place during the rise of church canon law. Much of the secular legal tradition was built from this corpus. This included adoption of legal metaphors, analogies, and concepts that were chiefly religious in nature, including "metaphors of the Last Judgment and of purgatory," which showed that "basic institutions, concepts, and values of Western legal systems" are rooted in medieval "religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries." Punishment followed the sequence, being established first through the moral law revealed by God in scripture, and further defined by the laws of the church--positive law derived from divine law.

When church power began to decline in Europe, other forms of government and ideology began to compete with the old system of kings, priests, and churches. Of systems, the nation-state gained the greatest prominence, with cultural ideas and identities informing the understanding of "nation," while "state" referred to sovereignty in law and the capacity to rule a particular territory. The "state" stood as something distinct from the "government," as an "abstract" being that "can be neither seen, nor heard." Governments were associated with real individuals, bureaucrats, and leaders alike, while the state was more transcendent, and could not be traced to any being. This tidal wave of change was accompanied by codification of laws and punishments within a secular system governed by legal professionals. Accordingly, leading up to the eighteenth and nineteenth centuries, the policing, prosecution, and punishment of criminals came under increasing monopolization by the state.

The secular state and its institutions developed along the idea that government was divorced from religion, and that religion was a "residue of intellectual backwardness"; however, religion was still central in many ways. Hence, despite the fact that secular humanist Sigmund Freud believed the human race would eventually outgrow the need for this "childhood neurosis," and that by the 1880s, Friedrich Nietzsche's work had announced the death of God, closer inspection reveals that the Protestant Reformation may have directly contributed to our punitive ways, because Luther saw the state as God's agent in distributing punishment. Calvinism similarly tended to emphasize images of God as a punitive judge, and John Calvin's vision aimed to "transform the world into the Kingdom of God." Both Calvin and Luther "maintain[ed] that the state exists because of [original] sin," and that its tasks were to "restrain . . . wickedness and preserve . . . order." Hence, rather than dead, God is very much alive and present, and, most notably, in the punishment of criminals.



***"[S]lavery . . . as punishment for a crime"***

As new hierarchies structured society, the Black Codes of the South were replaced by Jim Crow laws, which permitted authorities to arrest, prosecute, and imprison "coloreds" for behaviors in which whites could freely engage, and as a result, "blacks became a criminalized and demonized people."

Under this system, criminals were exorcised from society, but not from the economic system, since the wedding of slavery and crime gave birth to convict lease schemes, chain gangs, and other various means of exploiting prison labor. Indeed, demonization of ex-slave populations helped to subdue and harness the people as a source of labor:

Imprisonment became an exorcistic ritual practice that removed demonized blacks from society, of which convict leasing became a way to reinsert blacks back into the economic order as slaves. White criminal punishment officials thus served as both exorcists and human resource managers for slavery all at once.

Two hundred fifty years of slavery made Americans proficient in the tactics of bondage and punishment, and "[t]he old slave system provided many traditions and customs for southern penology." As the question of surveillance of slaves was of ultimate concern to slave owners, the need for constant surveillance created systems of identification that would become the precursors of modern day policing. The end of chattel slavery brought surveillance technology to the domain of criminal justice. The plantation gave birth to the "slave pass"--a written permission that slaves were forced to carry when traveling beyond the master's property--among other forms of surveillance, including organized slave patrols and a system of wanted posters for tracking runaway slaves. These three innovations worked in concert to limit slaves' mobility and power; the patrols have been described as an oft "overlooked tributary of modern American policing" and the tags as "an embryonic form of the modern [identification]." These slaving tactics and technologies developed well before state-sponsored policing would begin in 1836, when the city of New Orleans created the first full-time civilian patrol. Thus, as a fully functioning system of criminal justice developed, the first civilian patrol inherited a tactical treasure from centuries of experience in slavery.

Prior to chattel slavery's evolution into penal forms, deep connections were forged between the institution of slavery and religion. For example, in the ancient Near East, slavery was a common practice and the institution had a pronounced presence in the social structure and ideology of the Jewish tradition--a practice that the Hebrew Bible takes for granted. Slaves were among the very first people circumcised under God's covenant with Abraham, were expected to live in fear of their master, and were classified as valuable property like cattle, gold, and silver.

Later in colonial America, Christian slave owners would point to other biblical passages to justify the enslavement of Africans. Justification often rested on a story that became popularly known as the "sin of Ham" or "curse of Canaan," a narrative from *Genesis* about Ham, who comes across his father, Noah, sleeping off drunkenness and in the nude. As punishment for Ham's "sin" of seeing his father nude, Noah curses his own grandson, Ham's son Canaan: "Cursed be Canaan; lowest of slaves shall he be to his [brothers]." In time, the curse was interpreted that Ham was "burnt" and that his offspring had black skin, the mark that evidenced their subservience; how and when this narrative became an invective against Africans is debatable, but what is certain is that nowhere in

the biblical teachings is the practice of slavery explicitly condemned, except that an Israelite could not be enslaved.

Christianity was a primary ideological ingredient that shaped American slavery, which contributed to formal systems of criminal justice. In the history of American punishment, the likening of prisoners to slaves was of central importance. Yet, of all religious influences on criminal justice, a religious experiment called the "penitentiary" would capture the world's imagination by apprehending the bodies of its citizens and illustrating a religious ritual legalized and institutionalized by the state as punishment.

### *The Penitentiary*

The advent of the penitentiary in the United States stands as one of the most significant influences of Christian thought on criminal justice. Moreover, it offers a graphic illustration of how a religious ritual can become the basis of legal punishment. There is no consensus of social histories that led to the implementation of the penitentiary in America. However, the most common argument is that it was largely promulgated by Quaker thinkers as an alternative to the jails and punishments of the time, which were crowded and offered little hope for reformation. Whether the Quaker motives "were more complicated than a simple revulsion at cruelty or impatience" or penal incompetence, its designers claimed that better religious instruction based on Christian doctrine would do more than just reform criminals, but even "open the hearts of [the] wretched . . . to God's grace and forgiveness." Hence, these advocates saw in punishment more than a reaction to crime, but a ritual that could reclaim the souls of their captives.

Although their use was infrequent until the Roman Catholic Inquisition in the thirteenth century, penitentiaries derive from Catholic practices, which go back to the fourth century. By the time Quakers developed Eastern State, the penitentiary already had a long religious pedigree, including the well-known model of solitary confinement at the Hospice of San Michele in Rome, erected by Pope Clement XI in 1704.

The Hospice and others like it were based theologically on the concept of "penance," and should be viewed against the background of this ancient tradition. The Hospice cell design was associated with monastic enclosure and each "inmate[] had a view of the altar" centerpiece from the cell. This facility's reputation was one of the best of the era as far as rehabilitation was concerned, and it is likely that the Americans intended their model to become similarly successful.

Although Eastern State penitentiary traces to Catholic models, there were differences in the Quaker concept. For example, rather than design space around an altar, each solitary cell of the penitentiary was equipped with a skylight dubbed the "eye of God," which served as a reminder that God was constantly watching. Inmates were given no other reading materials besides the Bible, and unlike the original Catholic system of penance through sacrament, the Quaker style emphasized the inmates' personal connection with God and self-reflection on the crime committed. Hence, the Quaker quest to save souls provided the theological foundation of the modern penitentiary. As punishment, and as a spell of solitude aimed at self-examination and soul searching, penitentiaries represent the use of the law to theological ends and reflect a type of "migration of monastic norms into society in general."

As this part shows, there are seemingly unlimited connections between religion and criminal justice as it is known today. What follows examines the broader cultural context

to show that the criminal justice system is not unique in its religious and ritual orientation, but rather, that it is a part of a greater social attitude that has made "God bless America," i.e., the idea that God has blessed America, a defining characteristic of the culture.

## II. THE GOSPEL OF AMERICA: CIVIL RELIGION

Americans so completely confuse Christianity and freedom in their minds that it is almost impossible to have them conceive of the one without the other.

--Alexis de Tocqueville

This part employs the concept "civil religion" to outline the intersection of religious ideals and American identity, including the Supreme Court's claim that Americans are a "religious people." This section supports the civil ritual thesis by situating the Christian-influenced criminal justice system within a broader culture that is deeply entrenched in Christian influenced civil religion.

Although the concept of civil religion is not without its detractors, including those who deem it "idolatry," presently, there is "consensus among social scientists that there is a component of Americanism . . . [that] may be termed *civil religion*." In broad strokes, civil religion can be understood as part of a long-term social response to the problems of modernity. By linking political ideas and institutions to a network of hallowed meanings, civil religion attempts to halt the "dissolution of the . . . unity, solidarity, and hierarchy, cosmic [and] earthly, [which] characterized pre-modern societies."

A closer look at civil religion in American society exemplifies how civil ritual manifests in society, including the notion that America is "God's country." Since the very beginning of the colonial period, Americans have interpreted their history through religion and have seen themselves as being a "people" in the biblical sense of the term. This self-understanding set a foundation for notions like "Manifest Destiny" and "Providentialism," which provided a theological basis to justify the expansion of colonial settlements and played a significant role in the development of colonial economics and cultural identity.

Under such ideologies, it might not come as a surprise to learn that many Americans often understood the Revolutionary War in biblical terms, and according to one scholar, in the atmosphere surrounding the birth of the republic it was common to talk about Britain, or Europe more generally, as Babylon, in contrast to America, or New Jerusalem, as it was called. Unlike most historic peoples, America as a nation began on July 4, 1776, "Independence Day," a date that "fixed a specific, pivotal moment in the past from which to date a national [identity], and against which to assess the [country's] progress." From the beginning, then, as the republic's second president John Adams believed, the occasion deserved sacred status and pompous celebrations:

I am apt to believe that it will be celebrated, by succeeding Generations, as the great anniversary Festival. It ought to be commemorated, as the Day of Deliverance by solemn Acts of Devotion to God Almighty. It ought to be solemnized with Pomp and Parade, with Shews, Games, Sports, Guns, Bells, Bonfires, and Illuminations, from one End of this Continent to the other from this Time forward, forever more.

The Declaration of Independence, which documents the moment, however, declares more than political independence, but also a political theology. For instance, the Declaration makes the core claim "[w]e hold these Truths to be self-evident," a posture that may rightly be seen as anti-secularist, since notions of secularism often challenge Truth in the absolute sense. Yet the American understanding of truth was long ago affirmed by Jesus in the Gospel of *John* that "the truth will [set] you free." "Not only [was] . . . Truth [axiomatically] grounded in religion, but its self-evident quality [was] as well."

One scholar has noted, the "'self-evident' quality of truth is but a reprise of The Letter of Paul to the Romans, 2:15: 'They show that what the law requires is written on their hearts,'" which echoes Jeremiah's prophecy that the new covenant will be "writ[ten] up[on] their hearts." Thus, self-evident truth may have been a part of American politics from the beginning.

The first self-evident truth outlined in the Declaration of Independence is that "all men are created equal." Even though some argued that this was no truth at all, the equality principle is the foundation for the Fourteenth Amendment, which would formally incorporate this ideal into the Constitution through the Equal Protection clause. But why are men equal? The civil religion perspective suggests the answer is also found in *Genesis*: "So God created man in his own image, in the image of God he created him." In other words, all men are created equal because they were equally created by God; thus, the principle of equality appears as theological as it is political.

Like the lasting symbolism of the Declaration of Independence, the country's national anthem, the "Star-Spangled Banner," and other songs are part of civil religious traditions. The Anthem accompanies practically every form of public gathering, from sporting events to official state ceremonies. At most events, however, only the first stanza is sung, to the omission of:

Blest with vict'ry and peace may the heav'n rescued land  
Praise the power that hath made and preserv'd us a nation!  
Then conquer we must, when our cause it is just,  
And this be our motto - 'In God is our trust,'  
And the star-spangled banner in triumph shall wave  
O'er the land of the free and the home of the brave...

Akin in patriotism to the National Anthem are songs like "America the Beautiful," which extols "America! America! God shed His grace on thee," as well as the songs "God Bless America," and "My Country 'tis of Thee," which proclaim God as the original author of liberty and at whom the song is directed:

Our fathers' God! to Thee--  
Author of Liberty!  
To thee we sing;  
Long may our land be bright  
With Freedom's holy light  
Protect us by thy might,  
Great God, our King!

There are a myriad of other civil rites performed in everyday life. One obvious performance is the reciting of the Pledge of Allegiance. The Pledge accords the American flag with the sacredness and formality of a religious artifact, and one scholar has described flag salutes as capturing the "ritualiz[ation] of patriotism in America." The pledge became more sacralized when the term "under God" was added to it in 1954 during the Cold War and in the midst of the communist Red Scare. The addition was a symbolic effort to "distinguish America from its atheistic Cold War rival."

Government functions also indulge in civil rituals. For example, the government has traditionally observed only Christian and patriotic holidays. Moreover, Masonic "cornerstone" laying ceremonies have been performed at building dedications throughout American history, whose concept and practice likely traces to religious roots. Religious conviction also explains why there is no mail delivered on Sundays, since, as the Christian day of the Sabbath, mail service on Sundays came to be scorned, and was eventually stopped. This might not seem surprising since, as the Court has noted, by 1650 the Plymouth Rock colony had laws that proscribed labor on Sundays and by the time the First Amendment was ratified, each of the original colonies had such laws.

As this part shows, these and other artifacts depict the religious side of American polity and the civil rituals they inspire. This cultural backdrop is useful for understanding how a simple function of the state, like the doling of punishment becomes more than merely what happens to convicted offenders, but also, represents the raw exercise of power and social control.

### III. CIVIL RIGHTS TURNED WRONG

The death penalty process displays many features of a communal ritual, and ritual and symbolism are, as we know, intrinsic parts of modern politics.

—David Garland from *The Cultural Lives of Capital Punishment*

Having outlined the influence of religion on criminal justice, as well as having situated the system within the American will toward civil religion, this part turns the ritual scope onto two distinct eras of punishment in America. These eras show the appropriation of punishment toward ritual ends, which, through the process of killing, brings the civil ritual thesis to life. The first examines the phenomenon of lynching in the American South after the passing of the Thirteenth Amendment. The second examines imprisonment trends that followed later civil rights developments. In both periods, issues of purity and superiority were closely tied to legal changes to the status quo that would lead to unprecedented trends in harsh punishment. They reveal the criminal's utility as a social scapegoat, which is particularly necessary during times of turmoil and social crisis.

#### *The Logic of Lynching*

The history of lynching is a lesson in harsh punishment. The peak of the practice came after the passage of the Thirteenth Amendment in 1865, which ended private ownership of slaves. Although the amendment was a major civil rights milestone, it was followed by

what is described as the "lynching era," a five-decade killing spree in which thousands of lynchings were reported in the South, with likely many more going unreported. As emancipation ruptured a centuries-old social structure, "Southern whites--poor and rich alike--were utterly outraged." The southern response to abolition was to inflict terrorism against ex-slave populations through mob violence and riots, most notably through the practice of mass killing of ex-slaves. This volatile social period saw a tremendous spike in lynching against former slaves, and as one scholar argues, during the fifteen-year period from 1865 to 1880, more lynchings occurred than in any other similar time in American history.

Academic inquiry into the ritual aspects of lynching remains limited, but not completely absent. Professor David Garland has argued that lynching is a ritual form of punishment driven by ideals of white power, which:

[E]merged at a historical moment of unusual stress in the racial and class politics . . . a transitional moment in which older mechanisms of racial domination and social control had either been dismantled or else were no longer perceived to be effective, and alternative structures of control had not yet been put in place.

In this era, the social spectacle of bodies being hanged, genitally mutilated, and burnt alive sent messages of power and recemented social hierarchies.

Garland describes the events as:

[C]ollective performances that involved a set of formal conventions and recognizable roles; a staging that was standardized, sequenced, and dramatic; and a recognized social meaning that set the event apart as important, out-of-the-ordinary, highly charged in symbolic significance. Lynchers sought to represent their violent acts as collective rituals rather than private actions--seeking the public authority that came with the crowd--and they used the ritual forms of criminal punishment to do so.

As Garland notes, the lynchers did not choose just any form of violence, but co-opted the legitimate form of criminal punishment, hanging. As the state's mode of execution, the practice of hanging lent legitimacy to activities that subverted the law itself, since they were used to carry out unlawful killing against an individual who had not been tried by a court.

### ***Wrath of the Lash: Prison Expansion Explained***

Like the era of lynching, the era of mass incarceration followed major ruptures in American society. This has been the crux of what is discussed in academic circles as "backlash" theory, which suggests that the civil rights movement catalyzed the modern era of harsh punishment. This section offers a fuller account of this era and attributes the turn to prisons not simply as a matter of "backlash," but "frontlash" as well, which was unleashed when it became clear that the old caste hierarchy was crumbling and that

something new would be required to take its place. As Professor Ian Haney Lopez describes, paradoxically, it was the success of civil rights struggles that created an incentive for its opponents to take crime tropes to the national stage, and soon enough, "political leaders mobilized white opposition to civil rights through a proxy language: 'crime' became a coded vocabulary capable of marshalling racial fears without violating newly dominant egalitarian norms."

While backlash is a familiar, if under-theorized, concept, "frontlash" describes how political elites played a leading role in calling attention to crime and defining these issues as the consequence of insufficient punishment and control. More specifically, the term indicates:

[T]he process by which formerly defeated groups may become dominant issue entrepreneurs in light of the development of a new issues campaign. In the case of criminal justice, several stinging defeats for opponents of civil rights galvanized a powerful elite countermovement . . . . The same actors who had fought vociferously against civil rights legislation, defeated and shifted the "locus of attack" by injecting crime onto the agenda.

The frontlash concept insists that crime rates alone do not account for the dramatic increase in punishment figures. Instead, political defeats catalyze change in law and policy and "provide opportunities to frame the introduction of a new problem, allowing the defeated group to 'propose a new interpretation of events' and 'change the intensities of interest' in a problem." For example, scholars have traced the development of the Federal Sentencing Guidelines in the 1980s to decisions made during the civil rights era. From this critical angle, the Guidelines were promulgated to strip federal judges of their historically broad sentencing discretion to shore up sentencing disparity. Hence, the Guidelines have less to do with sentencing policy than they do with the discontent that developed because judge after judge began loosening the Jim Crow order.

As it relates to mass incarceration, then, frontlash highlights how politicians and other elites responded politically to legal defeats in the civil rights era. These elites pit tough-on-crime policies against civil rights by creating links between civil rights and crime. Frontlash embodies the turn to "law and order" politics of southern officials in the effort to undermine the civil rights movement. It describes how "conservatives systematically and strategically linked opposition to civil rights . . . to calls for law and order, arguing that Martin Luther King Jr.'s philosophy . . . was a leading cause of crime. Other leaders characterized civil rights strategies as criminal and indicated the rise of the civil rights movement as reflecting a breakdown of law, calling for a crackdown on those who challenged the old order of segregation." The entry of crime into political discourse provided a sanctuary that "saved the careers of innumerable politicians who were never forced to renounce disgraced political values but could instead restate them as responses to crime. The war on crime allowed the nation to again turn hostile to racial minorities without having to explicitly break support for civil rights."

Despite the utility of the frontlash concept, it would be an error to assume that the political elite were single-handedly responsible for the creation of the U.S. penal state. There are other factors as well, including what might collectively be labeled "backlash," some of which was the result of economic factors and particular interest groups. Although

backlash has been described as a "pseudo-theory" for describing anti-racial sentiment and its relation to election outcomes, as well as criticized for its lack of clarity to distinguish concepts, the term is still useful for denoting the non-elite forces that facilitated the rise in imprisonment trends. Although the shape of backlash is seemingly amorphous and problematic, it represents the reactive side of social politics that inspires political transformations. Unlike frontlash activism, which is based on a winner/loser model, backlash is the politically expressed public resentment that spawns from perceived racial advances. The critical distinction between the two concepts exists in the nature of the political reaction and the actors who carry that reaction to its logical conclusions:

Backlash is reactive in a conservative dimension . . . . Frontlash is preemptive, innovative, proactive, and above all, strategic . . . . The two conceptions also differ in terms of what might be a catalyst for their activation. For backlash, it is sometimes a policy, sometimes a candidate that stokes fears, sometimes broad civil rights developments that progress to uncomfortable levels for portions of the electorate. The catalyst in frontlash is defeat of longstanding political discourse or elite programs.

When considered in tandem, these concepts show that crime and punishment in post-civil rights America have more to do with politics than penology. The two work together, since "the extent to which the public expresses concern about these social problems and [support for] punitive anticrime policies is . . . linked to the imagery and rhetoric that depict these problems [as resulting from] excessive lenience."

The conflation of color with crime helped to reframe politics in the decades after the modern civil rights movement. The new order put liberals in a classic "catch-22," since they were fated either to be viewed as excusing riot-related violence or as soft-on-crime, which forced them to move closer to the conservative position. And move they did: Democrat politicians embraced "law and order" politics and helped their Republican adversaries write massive crime bills attached to some of the longest sentences in the world and helped to broaden the scope of capital punishment.

As these "lash" theories indicate, crime-policy punishment transcends the instrumental logic of reducing crime, and are better understood as "deeply symbolic." From this perspective, crime is a symbol that stands for other motivations, of which racial perceptions are paramount. These concepts support post-civil rights crime policy as inseparable from political agendas.

As this part demonstrates, the same issues were at stake both in the era of lynching and of mass incarceration. Civil rights legislation and court decisions aroused anger and preoccupations with issues of purity and danger that were resolved by turning to harsh punishment. In these instances, ritual punishment was a tool for social control--on both sides--serving to control broader social impulses toward violence as effectively as it controlled the communities that supplied the victims of punishment.

#### IV. INCENSE & INCARCERATION

In varying sites of struggle, sacrifice, and stigma, legal rituals give flesh to past narratives and new life to the residues of old codes and penal sanctions.

—Colin Dayan from *the Law is a White Dog*



There are two takeaway points that explain why trends of harsh punishment have taken their course. The first is the answer to the question "why punishment in the first place?" As this study has shown, there is a strong indication that Western conceptions of punishment take cue from religious blueprints. Although this may seem like a crude statement, it intends to suggest that punishment itself may be a purely religious form, a model of God-as-Judge issuing and exacting a sentence of punishment. That a criminal court consists of a judge flanked by twelve jurors is no accident when understood alongside Jesus and his twelve disciples on the Day of Judgment. Hence punishment reads as theological, which is perhaps evinced in *Proverbs'* well known "spare the rod, spoil the child" statements. Endorsement of punishment is not merely a corrective for crime control or peaceful coexistence, but also a deeper guide to self-realization: "Withhold not correction from the child: if thou smite him with the rod, he shall not die. Thou shalt smite him with the rod, and shalt deliver his soul from hell."

The second point is that punishment is strategic. It is instrumental for responding to perceived threats, constructing solidarity, and displaying power. In the American context, the main threat has been to white superiority, which has produced social ruptures fueled by fear and the need to maintain order, albeit the old order. As "[p]urity is the enemy of change, of ambiguity and compromise," harsh punishment is a way of keeping things the same, keeping some "down by law."

Lastly, it is worth noting that the underlying connection between ritual and legal punishment depends on constructions of "otherness" for the victim of punishment. In the earliest Christian criminal codes, the ultimate face of the other was seen in heresy, blasphemy, and apostasy. Similar attitudes held sway in the United States in colonial legislation, in the "witch" trials of the Puritan era and in the Communist "red scares." Today's politicized discourse on crime likewise tends to portray crime as amoral behavior of dangerous people who typically belong to racial and cultural groups. The "criminal" is a baseline from which all sorts of provocative labels derive, including "monster," "animal," "predator," and even "super-predator," words which will likely sound tomorrow the way "witch" sounds today.