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SpearIt

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LEGAL PUNISHMENT AS CIVIL RITUAL: MAKING CULTURAL SENSE OF HARSH PUNISHMENT

SpearIt[*]

INTRODUCTION

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.[1]

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[*] Assistant Professor, Saint Louis University School of Law. The author would like to extend special thanks to Professors Angela Harris and Carlton Waterhouse and Dean Varun Soni for their insightful responses to this article. Thanks also to Nandini Patel, Kati Williams, Leslie Dunlap, and Gillian Boscan for their research assistance. Gratitude also to the Washington University School of Law Junior Faculty Workshop and to the faculty of the University of Buffalo School of Law, which were both invaluable for the development of this paper. Also, special mention to Leno Rose-Avila and the Latino Equity Initiative in Seattle, the ACLU of Washington State, and Dean Michele Storms at the University of Washington School of Law for helping to put this thesis into the hands of the people—thank you deeply.

[1] A. Warren Stearns, *The Evolution of Punishment*, 27 J. CRIM. L. & CRIMINOLOGY 219, 220 (1936).

A. The Problem & Thesis

The central aim of this Article is to examine the post-civil rights push toward harsh punishment through the cultural lens of ritual.[2] 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[3] were the major forces behind mass incarceration. This Article employs a ritual framework to help explain *why*.

The Article 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

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[2] Use of "culture" takes a cue from MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO 38-39 (1984) ("Culture, in the sense of the public, standardized values of a community, mediates the experience of individuals. It provides in advance some basic categories . . . in which ideas and values are tidily ordered. And above all, it has authority, since each is induced to assent because of the assent of others.").

[3] *See* Isaac Unah & K. Elizabeth Coggins, *Punishment Politics: Gubernatorial Rhetoric, Political Conflict, and The Instrumental Explanation of Mass Incarceration in the American States* 1 (Univ. of N. C. at Chapel Hill Dep't of Political Sci., Working Paper Series, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1870385 (arguing that "aggressive political rhetoric by state governors to communicate the crime problem is an important correlate of mass incarceration boom."). *But see* Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 731-32 (2010) (Schoenfeld argues that "prison conditions litigation that aimed to *reduce* incarceration was translated in the political arena as a court order to *build prisons* . . . . [M]ass incarceration is also a result of policies that *complied with* civil rights litigation.").

> 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.[4]

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,[5] which itself is a function of ritual activity.[6] This Article 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.[7]

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.[8]

This Article theorizes punishment, but is not a theory of punishment. It is not about justifications of punishment grounded

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[4] RANDALL COLLINS, SOCIOLOGICAL INSIGHT: AN INTRODUCTION TO NON-OBVIOUS SOCIOLOGY 109 (1992); *see also* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893).

[5] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010) (noting that sociologists have long ago "observed that governments use punishment primarily as a tool of social control, and thus the extent or severity of punishment is often unrelated to actual crime patterns").

[6] CATHERINE BELL, RITUAL THEORY, RITUAL PRACTICE 169 (1992) (describing how ritual functions as an instrument of social control).

[7] *Id.* at 170; James H. Ware Jr., *Legislating Religious Rituals: How Communion is Regulated in Some Protestant Denominations*, *in* RITUAL AND SEMIOTICS 171, 171 (J. Ralph Lindgren & Jay Knaak eds., 1997) ("Enactments of rituals by their very nature involve the exercise of power.").

[8] JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 6 (2003).

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 Article 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.[9] This Article's 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[10] or represents "esoteric scholarship,"[11] legal nihilism,[12] or reversion to mysticism.[13] 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.[14] This Article's ritual emphasis, rather than leading legal scholarship astray, gets to the heart of why some must suffer so that others may feel secure.

What follows offers a primer in ritual theory, which will be the main interpretive scheme for the data presented. The civil ritual thesis unfolds in the next part, *Criminal Justice &*

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[9] Peter A. Winn, *Legal Ritual in* READINGS IN RITUAL STUDIES 552, 552 (Ronald L. Grimes ed., 1996).

[10] Jeffrie G. Murphy & Patrick McKinley Brennan, *Introduction: Religion and the Criminal Law: Legal and Philosophical Perspectives*, 5 PUNISHMENT & SOC'Y 259, 259 (2003).

[11] *See* Katherine Mangan, *At Meeting, Federal Judge Hands Down a Sharp Opinion About Law Schools*, THE CHRONICLE OF HIGHER EDUCATION (Jan. 8, 2012), http://chronicle.com/article/Federal-Judge-Hands-Down-a/130264/.

[12] *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

[13] Williams v. Florida, 399 U.S. 78, 102 (1970).

[14] LEN TRAVERS, CELEBRATING THE FOURTH: INDEPENDENCE DAY AND THE RITES OF NATIONALISM IN THE EARLY REPUBLIC 5 (1997).

Christianity, which establishes the nexus between religion, ritual, and criminal justice, including religion's influence on substantive and procedural law. Next, *The Gospel of America: Civil Religion,* contextualizes American criminal justice within a grander scheme of civil religion in America and illustrates how the "secular" criminal system sits within a society saturated in civil religion, whose lifeblood is ritual performance, hence the term "civil ritual." Building on this cultural backdrop, the following part, *Civil Rights Turned Wrong*, maps ritual theory onto discrete eras of harsh punishment in America. Beginning with the post-Reconstruction era of lynching and moving on to the modern era of mass incarceration, these periods depict punishment as ritualized payback against ethnic minorities and civil rights progress. The conclusion, *Incense & Incarceration*, offers some final remarks that underscore how penal policy corresponds to more than crime and elaborates on what happens to convicted offenders. There is indeed more at stake—including derailing civil rights and furthering political agendas.[15]

B. Ritual Theory & Application to Crime

This section outlines basic concepts of ritual studies as a theoretical backdrop for interpreting punishment practices. Academic study has no unified definition of "ritual," but instead, there are competing accounts in social science, anthropology,[16] psychology,[17] and religious studies,[18] among other disciplines

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[15] MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 41 (2006).

[16] This area of study has contributed to ritual theory through various approaches, some examples of which will suffice. Structural anthropologists have approached ritual from the human understanding of binaries, including such appositional placements of life and death, pure and impure, etc. *See* EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 199 (W.D. Halls, trans., The Macmillan Press Ltd. 1982) (1982); DOUGLAS, *supra* note 2.

[17] Behavioral psychologists like Pascal Boyer and Pierre Liénard explain cultural rituals as hazard-detection and precautionary systems which have core commonalities: *compulsion* (there is danger in not performing), *rigidity* (the practice must adhere to a particular way or method), *goal-demotion* (actions are divorced from the normal goal), *internal repetition and redundancy* (the same activities are performed repeatedly), *a restricted range of themes* (danger/protect, purity/impurity). *See* Pascal Boyer & Pierre Liénard, *Why Ritualized Behavior? Precaution Systems and Action Parsing in Developmental Pathological and Cultural Rituals*, 29 BEHAV. & BRAIN SCI. 1, 4 (2006). Evolutionary psychologists explain ritual from the perspective of evolution and natural

engaged in a common venture that can be called "ritual studies."[19] This section attempts to lay out some of the common characteristics as distilled from the myth-ritual school, phenomenological, and psychoanalytic approaches.[20] Of the various accounts, the functionalist model, as advanced by Durkheim and later progeny, is the most relevant to this Article.[21] This approach stresses the practicality of ritual activity as opposed to the mystical or emotive aspects, and is more concerned with the "social" work of ritual performance, including enhancing group solidarity, defusing social contradictions,[22] channeling and resolving social conflict,[23] and, as Michel Foucault has argued, exercising power.[24]

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selection. *See generally* Steven Pinker, *The Evolutionary Psychology of Religion*, *in* 1 WHERE GOD AND SCIENCE MEET: EVOLUTION, GENES, AND THE RELIGIOUS BRAIN 1 (Patrick McNamara ed., 2006) (questioning whether humans have a "God gene" or "module" that makes sense of the universal phenomenon of religion); BERNARD SPILKA ET AL., THE PSYCHOLOGY OF RELIGION: AN EMPIRICAL APPROACH 63 (3d ed. 2003) (defining ritual as having roots that "lie deep in the genetic prehistory and neurophysiology of our species. . . . It can, depending on the situation be called 'social,' 'political,' 'spiritual,' 'religious,' or whatever adjective is elicited by immediate circumstances.").

[18] In religious ritual studies, Mircea Eliade interpreted ritual through personal experience and asserted an archaic structure for ritual that is more than mere memorial of a previous sacred event, but rather, one which allowed practitioners to participate in the sacred event itself. *See* MIRCEA ELIADE, THE MYTH OF THE ETERNAL RETURN: COSMOS AND HISTORY (Willard R. Trask trans. Princeton University Press, 1971); MIRCEA ELIADE, THE SACRED AND THE PROFANE: THE NATURE OF RELIGION (Willard R. Trask trans., Harcourt, Brace & World, Inc. 1959) (1957). Other scholars have developed ritual theory, paying close attention to ritual's connection to space and location. *See* JONATHAN Z. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN (1982); JONATHAN Z. SMITH, TO TAKE PLACE: TOWARD THEORY IN RITUAL (University Of Chicago Press 1992) (1987); DAVID CARRASCO, RELIGIONS OF MESOAMERICA: COSMOVISION AND CEREMONIAL CENTERS (1990). Recent revisions to the notion of ritual show that not all ritual is a practiced and controlled constant. *See* RONALD L. GRIMES, RITE OUT OF PLACE: RITUAL, MEDIA, AND THE ARTS (2006).

[19] RONALD L. GRIMES, RESEARCH IN RITUAL STUDIES: A PROGRAMMATIC ESSAY AND BIBLIOGRAPHY 35 (1985) (offering one of the early bibliographies for this field of study); *see also* THE MYTH AND RITUAL THEORY: AN ANTHOLOGY (Rober A. Segal ed., 1998); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1993) (discussing the role of ritual in the operation of criminal sanctions).

[20] BELL, *supra* note 6, at 5-12.

[21] *See* DURKHEIM, *supra* note 4.

[22] Winn, *supra* note 9, at 555.

[23] BELL, *supra* note 6, at 59.

[24] MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 30 (Alan Sheridan trans., 1977) (correlating the various rituals of penal discipline with

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.[25] 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."[26] 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;[27] "the need to construct a safe and ordered environment;"[28] and the "potency of disorder."[29] As a psychological mechanism, ritual activity is "geared to the detection of and reaction to particular *potential* threats to fitness."[30] The cleansing function of ritual activity is of critical importance in this respect

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economies of power to show how imprisonment represents a "technology of power over the body").

[25] CAROLINE HUMPHEY & JAMES LAIDLAW, THE ARCHETYPAL ACTIONS OF RITUAL: A THEORY OF RITUAL ILLUSTRATED BY THE JAIN RITE OF WORSHIP 3 (1994).

[26] RONALD L. GRIMES, RITUAL CRITICISM: CASE STUDIES ON ITS PRACTICE, ESSAYS ON ITS THEORY 13 (1990).

[27] BARBARA A. HUDSON, UNDERSTANDING JUSTICE: AN INTRODUCTION TO IDEAS, PERSPECTIVES, AND CONTROVERSIES IN MODERN PENAL THEORY 169 (2003).

[28] Pascal Boyer, *Religion: Bound to Believe?*, 455 NATURE 1038 (2008).

[29] DOUGLAS, *supra* note 2, at 94.

[30] Boyer & Liénard, *supra* note 17, at 1.

since "fitness" is often threatened by pollution.[31] 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.[32] 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."[33] The violence of lynching often corresponded to rumors of such rape, which rendered the punishment a ritualistic means of patrolling sexual borders.[34] In later times, the threats of miscegenation reappeared in the civil rights struggles in the 1950s and 1960s, with *Brown v. Board of Education*[35] ending school segregation and *Loving v. Virginia*[36], 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."[37] Equally ancient are associations between dirt and crime, and in

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[31] *See* DOUGLAS, *supra* note 2, at 35 ("Dirt is the by-product of a systematic ordering and classification of matter . . . [D]irt takes us straight into the field of symbolism and promises a link-up with more obviously symbolic systems of purity.").

[32] *See* SpearIt, *Enslaved by Words: Legalities & Limitations of "Post-racial" Language*, 2011 MICH. ST. L. REV. 705, 717 (2011) (discussing fears of black sexuality, the contamination of white purity, and anti-miscegenation laws).

[33] David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 821 (2005).

[34] Of course this era in lynching played out against a volatile social backdrop where clashes between whites and the ex-slave populations left thousands of ex-slaves dead, so lynchings undoubtedly did more than patrol sexual borders. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 101-05 (2011).

[35] 347 U.S. 483 (1954).

[36] 388 U.S. 1 (1967).

[37] WILLIAM QUINBY DE FUNIAK, 2 HANDBOOK OF MODERN EQUITY 39 (1956) ("Pursuant to the equitable maxim that 'He who comes into equity must come with clean hands' . . . . the complainant seeking equitable relief must not himself have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on.").

early modern times, cleanliness was an intended goal of legal punishment.[38] 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.[39]

Accordingly, for the crime to be adequately punished, it was necessary for wrongdoers to be cleansed of their iniquities before reentering society,[40] and sometimes, there was a cleansing of the location where the crime was committed.[41]

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 José, 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."[42] 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 Article 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[43]—law and order, to be more precise.

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[38] JOHN BRIGGS ET AL., CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY 84 (1996).

[39] WHITMAN, *supra* note 8, at 21.

[40] BRIGGS, *supra* note 38.

[41] EDWARD MUIR, RITUAL IN EARLY MODERN EUROPE 117 (2005).

[42] *See generally* Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39 (2003).

[43] *See* DOUGLAS, *supra* note 2, at 40; Winn, *supra* note 9, at 553 ("The power of ritual in general depends on its ability to create, order and structure human social institutions.").

I. CRIMINAL JUSTICE & CHRISTIANITY

> We are a religious people whose institutions presuppose a Supreme Being.[44]

With a ritual studies framework in place, this section excavates what has been designated as a "primal connection between religion and criminal justice."[45] It supports this Article'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.[46] However, some argue that *all* the major justifications for punishment can be found in older models of Protestant ecclesiastical law.[47] In America, Christians continued the tradition by passing legislation against behavior offensive to Christian sensibilities[48] and establishing criminal law based on the Bible,[49] as well as instituting penitentiary houses across the country.

A. 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.[50] 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

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[44] Zorach v. Clauson, 343 U.S. 306, 313 (1952); THEODORE M. VIAL, LITURGY WARS: RITUAL THEORY AND PROTESTANT REFORM IN NINETEENTH-CENTURY ZURICH (2004) (examining the links between language and ritual).

[45] ANDREW SCOTNICKI, CRIMINAL JUSTICE AND THE CATHOLIC CHURCH 2 (2008).

[46] *See generally* George L. Haskins, *Ecclesiastical Antecedents of Criminal Punishment in Early Massachusetts*, 72 PROC. MASS. HIST. SOC'Y 21 (1957-60).

[47] *See, e.g.*, John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433 (1993-94).

[48] SCOTT A. MERRIMAN, RELIGION AND THE LAW IN AMERICA: AN ENCYCLOPEDIA OF PERSONAL BELIEF AND PUBLIC POLICY 407 (2007).

[49] Stearns, *supra* note 1, at 225.

[50] MARY E. MILLS, IMAGES OF GOD IN THE OLD TESTAMENT 11 (1998).

punishing those who transgress it; the legislative, executive, and judicial functions all rolled into one.[51] When scripture speaks of God-as-judge, the metaphor corresponds to all three functions.[52] Thus, God as the author of the Ten Commandments is inextricably tied to the judgment of humanity and the discharge of punishment.[53]

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,"[54] and as one who "shall judge the world in righteousness, and shall judge the people with equity."[55] The heavens trumpet his fairness, for "he will judge the world with righteousness, and the people in his truth."[56] God's verdicts never stray from justice because "[r]ighteous art thou, O Lord . . . . Thou hast commanded justice by thy testimonies and truth especially."[57]

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,"[58] God punishes this couple for disobeying his orders not to eat from the forbidden Tree of Knowledge.[59] For leading Adam astray with the apple, Eve and all women are forced to bear the pains of childbirth and subjugation by their husbands.[60] 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

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[51] *Id.* at 11-12.

[52] *Id.* at 12.

[53] *Id.* at 13.

[54] *Psalms* 7:11 (Geneva Bible).

[55] *Id.* at 9:8.

[56] *Id.* at 96:13.

[57] *Id.* at 119:137-38.

[58] *See* William Renwick Riddell, *The First Reported Criminal Trial*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 8 (1916).

[59] *Genesis* 3:6.

[60] *Id.* at 3:16.

couple's offspring did not fare better, with their son Cain slaying his brother Abel.[61] 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,[62] with the king serving as God's human extension. This ideal is portrayed biblically through King Solomon, the ideal judge and monarch.[63] More practically, there were local judiciaries consisting of village elders,[64] magistrates, and officers.[65] Priests also played a role as judges, and they are described as functioning alongside other royal appointees or the king himself.[66] A monarch's power to punish derived from the theological concept of "covenant," a sacred agreement between God and his people.[67] 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.[68] Accordingly, it has been argued that the practice of conducting trials passed from God to humans as reflected in biblical narrative.[69]

Having inherited this portrait in Hebrew scripture, the Christian Bible paints a powerful image of God as Judge.[70] 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

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[61] *Id.* at 4:8.

[62] *See, e.g.*, 2 *Samuel* 15:2-6.

[63] 1 *Kings* 3:9-12.

[64] *Deuteronomy* 21:2-3; 1 *Kings* 21:8-11; *Ruth* 4:2, 9-11.

[65] *Deuteronomy* 16:18-20.

[66] 2 *Chronicles* 19:8-11.

[67] *See Exodus* 21-23.

[68] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 184 (1983).

[69] Daniel Friedman, *From the Trial of Adam and Eve to the Judgments of Solomon and Daniel*, 5 RUTGERS J.L. & RELIGION (2002).

[70] *See generally* ALLAN COPPEDGE, PORTRAITS OF GOD: A BIBLICAL THEOLOGY OF HOLINESS (2001).

humanity played a critical role in the development of the legal values of the Eastern as well as the Western Church.[71] For the Gospel writers, Jesus's entire life and ministry are the embodiment of divine justice.[72] 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.[73] 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?"[74] Similarly, it is God who judges the "secrets of men,"[75] 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."[76]

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.[77] The second coming is known by a host of names including the the "Last Day,"[78] and "Day of the Lord."[79] On this day, Christ returns as the judge of the world: "See, I am coming soon; my reward is with me,

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[71] BERMAN, *supra* note 68, at 166-67.

[72] CHRISTOPHER D. MARSHALL, BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT 69 (2001).

[73] *Id.* at 70.

[74] *Romans* 2:2-3 (Geneva Bible).

[75] *Id.* at 2:16, 3:6; 1 *Corinthians* 5:13 (Geneva Bible).

[76] *Hebrews* 10:30 (Geneva Bible).

[77] The belief in last judgment has prevailed at all times in the Church. It is contained as an article of faith in ancient cannons and creeds. *See* PETER KING, THE HISTORY OF THE APOSTLES CREED: WITH CRITICAL OBSERVATIONS ON ITS SEVERAL ARTICLES 27 (2d ed. 1703) ("[H]e ascended into heaven . . . from thence shall he come to judge the Quick and the Dead."); A.E. BURN, THE NICENE CREED 3 (1909) ("And is coming again with glory to judge the quick and the dead."); J.N.D. KELLY, THE ATHANASIAN CREED 20 (1964) ("[W]hence he will come to judge living and dead: at whose coming all men will rise again with their bodies, and will render an account of their deeds.").

[78] *John* 6:39 (Geneva Bible).

[79] 1 *Thessalonians* 5:2; *see also Joel* 2:31; *Ezekiel* 13:5; *Isaiah* 2:12 (New International Version) ("The Lord Almighty has a day in store.").

to repay according to everyone's work."[80] 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.[81] At the Final Judgment, the close of history, all people, alive and dead, will appear before the judgment seat of God,[82] and they shall receive their payment for their works in the body, whether good or evil.[83] There will be a separation in which the righteous will depart into eternal life[84] and the wicked will go away into eternal punishment.[85] For those excluded from salvation, Jesus repeatedly invokes a place of unquenchable fire where there will be "weeping and gnashing of teeth."[86]

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."[87] Within Catholic Church history, this doctrine is found "all times and in all places."[88] 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."[89] 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."[90] This linguist

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[80] *Revelations* 11:18; 18:21; 22:12 (New Revised Standard Version).

[81] MARSHALL, *supra* note 72, at 176.

[82] *Romans* 14:10; 2 *Corinthians* 5:10.

[83] *Romans* 2:6-11; 2 *Corinthians* 5:10; *Matthew* 25:31-46; *Revelations* 20:11, 21:5-8.

[84] *Matthew* 7:14, 19:29, 24:46; *Luke* 10:25; *John* 3:15-16, 5:28; *Acts* 11:18, 13:46-47; *Romans* 2:7; 1 *Corinthians* 5:4-5; 1 *Peter* 3:7; *Hebrews* 5:9, 9:12.

[85] *See, e.g.*, *Matthew* 25:46; *Mark* 3:28-29.

[86] *Mark* 9:42-48; *Matthew* 5:22, 8:11-12, 10:28, 13:41,42,50, 18:8-9, 22:13, 23:15,33, 24:51, 25:29-30; *Luke* 12:4-5, 13:28; *James* 3:6.

[87] *General Judgment*, NEW ADVENT CATHOLIC ENCYCLOPEDIA, http://www.newadvent.org/cathen/08552a.htm (last visited Dec. 12, 2012).

[88] *Id.*

[89] *Matthew* 19:28 (Geneva Bible).

[90] RENE GIRARD, THE SCAPEGOAT 28 (1989).

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.[91] While history shows that different numbers have been used at different times,[92] 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.[93] 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.[94] 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."[95] 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.[96] The king called his brainchild "Apostolic Law": "'[f]or,' quoth our regal and pious

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[91] Robert H. Miller, *Six of One is not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries* 146 U. PA. L. REV. 620, 634-36 (1998).

[92] JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 85 (1898).

[93] TEXAS BAR ASSOCIATION, PROCEEDINGS OF THE . . . ANNUAL SESSION OF THE TEXAS BAR ASSOCIATION 28 (1905); *see also* FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS: VOLUME 4 (1961); WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 3-4 (1875); THORL. GUDM. REPP., A HISTORICAL TREATISE ON TRIAL BY JURY, WAGER OF LAW, AND OTHER CO-ORDINATE FORENSIC INSTITUTIONS 41-42 (1832).

[94] LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 5-6 (1999).

[95] *Id.* at 39.

[96] FORSYTH, *supra* note 93, at 46.

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!"[97] In 1164, the *Constitutions of Clarendon* prescribed twelve sworn men to judge disputes between lay and clergy,[98] which has been described as the gradual introduction of the trial jury.[99] 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."[100] 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 herselfe in the number of 12, for there must not onely 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.[101]

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.[102]

The custom of trial by jury was a central element of the American colonists' vision for its legal systems, which highlighted

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[97] *Id.*

[98] *Medieval Sourcebook: Constitutions of Clarendon, 1164*, http://www.fordham.edu/halsall/source/cclarendon.asp (last visited Dec. 12, 2012).

[99] LEVY, *supra* note 94, at 13.

[100] A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE 325 (John Simpson trans., 1913).

[101] 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND, 155.a (Small 1853).

[102] GILES DUNCOMB, TRIALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS, ETC. 92-93 (8th ed. 1766).

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."[103] For trial by jury, that "most transcendent privilege," he required a jury of twelve.[104]

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.'"[105] 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."[106] Rather than indicate the true significance, the Court discounted religious interpretation as "superstitious."[107]

B. From Sinner to Criminal

This section shows how the modern system of American criminal law builds on religious thought and practice. Broadly speaking, it traces political changes that led to the rise of the modern nation-state and legal punishment.[108] Although most American law is rooted in the British common law system, in medieval Europe there was no such thing as criminal justice, nor a distinct law governing particular punishments for particular acts, as Western legality would not obtain structure until the eleventh and twelfth centuries.[109] This period of legal systematization followed the reform led by Pope Gregory, which, according to Professor Harold Berman, "gave birth to the modern Western state," whose first example was, paradoxically enough, "the church itself."[110] The church, as a centralized sovereign with independent

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[103] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 350 (William Carey Jones ed., 1916).

[104] *Id.* at 379.

[105] *Williams v. Florida*, 399 U.S. 78, 102 (1970).

[106] *Id.* at 89-90.

[107] *Id.* at 88.

[108] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 29 (2001).

[109] BERMAN, *supra* note 68, at 33.

[110] *Id.* at 113.

lawmaking power, had the right to legislate.[111] Led by the pope and a judicial hierarchy, it "exercised the legislative, administrative, and judicial powers of a modern state."[112] In another sense, the papal revolution laid the foundation of the modern state by withdrawing from monarchs "the spiritual competence which they previously exercised."[113]

The birth of the modern state took place during the rise of church canon law.[114] 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."[115] 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.[116]

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.[117] The "state" stood as something distinct from the "government," as an "abstract" being that "can be neither seen, nor heard."[118] 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

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[111] *Id.*
[112] *Id.*
[113] *Id.* at 115.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 171.
[117] MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE 1 (1999).
[118] *Id.*

nineteenth centuries, the policing, prosecution, and punishment of criminals came under increasing monopolization by the state.[119]

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.[120] Hence, despite the fact that secular humanist Sigmund Freud believed the human race would eventually outgrow the need for this "childhood neurosis,"[121] and that by the 1880s, Friedrich Nietzsche's work had announced the death of God,[122] 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.[123] 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."[124] 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."[125] Hence, rather than dead, God is very much alive and present, and, most notably, in the punishment of criminals.

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

This section examines religion's ideological connection to slavery and how slavery relates practically to criminal procedure. The Thirteenth Amendment to the United States Constitution begins with the statement: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United

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[119] BERMAN, *supra* note 68, at 171.

[120] GUENTER LEWY, WHY AMERICA NEEDS RELIGION: SECULAR MODERNITY AND ITS DISCONTENTS 23 (1996).

[121] SIGMUND FREUD, THE FUTURE OF AN ILLUSION 50 (CreateSpace 2009) (1927).

[122] FRIEDRICH NIETZSCHE, THE GAY SCIENCE 90 (Mass Market Paperback 1974) (1882).

[123] *See generally* PAUL ALTHAUS & ROBERT C. SCHULTZ, THE ETHICS OF MARTIN LUTHER (2007).

[124] Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion*, 27 MISS. C. L. REV. 159, 172 (2007).

[125] *Id.*

States, or any place subject to their jurisdiction."[126] This amendment was not an outright ban on slavery since it legalized the imposition of slavery for one duly convicted for "crime." Instead of wiping out the institution, the Thirteenth Amendment wed criminal justice and slavery by carving out an exception for criminals by reclassifying who could be enslaved—it was a shift from color to crime, which, over time, would prove to be largely one and the same.[127]

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."[128]

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,[129] and other various means of exploiting prison labor.[130] 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.[131]

Two hundred fifty years of slavery made Americans proficient in the tactics of bondage and punishment, and "[t]he old slave

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[126] U.S. CONST. amend. XIII, § 1.

[127] *See* Vijay Prashad, *From Plantation to Penal Slavery*, 30 ECON. & POL. WKLY. 2237, 2237 (1995).

[128] Brooks Berndt, *Ritual and Racism: A Social-Historical Analysis of the Crack Sentencing Guidelines*, 39 CRIME, L. & SOC. CHANGE 175, 177 (2003).

[129] *See generally* MARK COLVIN, PENITENTIARIES, REMORMATORIS, AND CHAIN GANG: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN NINETEENTH-CENTURY AMERICA (2000) (discussing the financial implications of chain gangs and convict leasing).

[130] DARIO MELOSSI & MASSIMO PAVARINI, THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM 130-142 (Glynis Cousin trans., 1981); for an early account *see* Blake McKelvey, *Penal Slavery and Southern Reconstruction*, 20 J. NEGRO HIST. 153 (1935).

[131] MELOSSI & PAVARINI, *supra* note 130.

system provided many traditions and customs for southern penology."[132] 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.[133] 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.[134] 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"[135] and the tags as "an embryonic form of the modern [identification]."[136] 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.[137] 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.[138] Slaves were among the very first people circumcised under God's covenant with Abraham,[139] were expected to live in fear of their master,[140] and were classified as valuable property like cattle, gold, and silver.[141]

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[132] McKelvey, *supra* note 130, at 171.

[133] CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR 32 (2003).

[134] *Id.* at 15.

[135] *Id.* at 17.

[136] *Id.* at 18.

[137] *Id.* at 36.

[138] *See, e.g.*, *Exodus* 22:2-3; *Deuteronomy* 21:10-11.

[139] *Genesis* 17:27.

[140] *Malachi* 1:6.

[141] *See, e.g.*, *Genesis* 12:16, 20:14, 24:35, 30:43, 32:5; *Exodus* 20:17.

Later in colonial America, Christian slave owners would point to other biblical passages to justify the enslavement of Africans.[142] 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.[143] 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]."[144] 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,[145] 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.[146]

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.[147] 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.

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[142] *See* STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (2002).

[143] *Genesis* 9:22-24. This rationale may have also contributed to Israel's conquest and enslavement of the Canaanites, who were believed to be descendants from Canaan. *See generally* DONALD E. GOWAN, FROM EDEN TO BABEL: A COMMENTARY ON THE BOOK OF GENESIS 1-11, 110-11 (1988).

[144] *Genesis* 9:25.

[145] When and how this gained widespread acceptance is questionable, but anti-slavery religious and political leaders have refuted such interpretations for more than a century. Contemporary biblical scholars note that the ancient Hebrew word "ham" does not have to be translated as "burnt" or "black," but there is little consensus on how the name and passage should be interpreted. Further complicating matters is the position of some "Afrocentrists" that Ham, although not actually cursed, was indeed black, as was Noah. *See* HAYNES, *supra* note 142, at 196.

[146] *Deuteronomy* 20:10-16 (proscribing the enslavement of Israelite prisoners of war).

[147] WHITMAN, *supra* note 8, at 173.

D. 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.[148] 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,[149] 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."[150] Hence, these advocates saw in punishment more than a reaction to crime, but a ritual that could reclaim the souls of their captives.

The very first "[p]enitentiary [h]ouse" appeared in 1790 within the Walnut Street Jail in Philadelphia,[151] as a measure to alleviate overcrowding at Philadelphia's Old Stone Jail.[152] Ideologically, the solitary confinement was viewed as offering criminals the opportunity to sit and reflect on their wrongs and hopefully to accept responsibility through repentance.[153]

In the years that followed, the Philadelphia Society for Alleviating the Miseries of Public Prisons headed a lobby aimed at the Pennsylvania legislature to approve funding to build the first supermax prison of its day, Eastern State Penitentiary.[154] The state legislature responded by enacting the following:

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[148] *See generally* Michael Ignatieff, *State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment*, 3 CRIME & JUST. 153 (1981).

[149] *Id.* at 156.

[150] Muriel Schmid, *"The Eye of God": Religious Beliefs and Punishment in Early Nineteenth-Century Prison Reform*, 59 THEOLOGY TODAY 547 (2003).

[151] EASTERN STATE PENITENTIARY, http://www.easternstate.org/learn/timeline (last visited Dec. 12, 2012).

[152] *Id.*

[153] W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK 1796-1878, 8 (2009).

[154] EASTERN STATE PENITENTIARY, http://www.easternstate.org/learn/timeline (last visited Dec. 12, 2012).

> Be it enacted [by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same], That a State penitentiary capable of holding two hundred and fifty prisoners, on the principle of solitary confinement of the convicts.[155]

The model of solitary confinement at Eastern State Penitentiary was the creation of reformers who were well-informed about European prison reform.[156] Yet, rather than follow the prevailing liberal philosophies of Europe, the American reformers took a different path and allowed Christian beliefs to inform their whole conception of the penitentiary.[157]

Although their use was infrequent until the Roman Catholic Inquisition in the thirteenth century,[158] penitentiaries derive from Catholic practices, which go back to the fourth century.[159] 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.[160]

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.[161] The Hospice cell design was associated with monastic enclosure and each "inmate[] had a view of the altar" centerpiece from the cell.[162] 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.[163]

Although Eastern State penitentiary traces to Catholic models, there were differences in the Quaker concept. For

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155 OFFICE OF THE AUDITOR GENERAL, STATE PRISONS, HOSPITALS, SOLDIERS' HOMES AND ORPHAN SCHOOLS CONTROLLED BY THE COMMONWEALTH OF PENNSYLVANIA 369 (1897).

156 Schmid, *supra* note 150, at 546.

157 *Id.*

158 David Shichor, The Meaning and Nature of Punishment 82 (2006).

159 SKOTNICKI, *supra* note 45, at 83.

160 WHITMAN, *supra* note 8, at 105

161 *Id.*

162 NORMAN JOHNSTON, FORMS OF CONSTRAINT: A HISTORY OF PRISON ARCHITECTURE 36 (2000).

163 *Id.*

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.[164] 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."[165]

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.[166]

This part of the Article 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.[167]

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[164] *See* Schmid, *supra* note 150.

[165] WHITMAN, *supra* note 8, at 105.

[166] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (Harvey C. Mansfield & Delba Wintrhop trans., The University of Chicago Press 2000) (1835/1840).

[167] The term "civil religion" comes originally from Jean-Jacques Rousseau's final words in the *Social Contract*. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND THE DISCOURSES (David Campbell Publishers Ltd. 1992) (1762). Although Rousseau's

Although the concept of civil religion is not without its detractors,[168] including those who deem it "idolatry,"[169] presently, there is "consensus among social scientists that there is a component of Americanism . . . . [that] may be termed *civil religion*."[170] 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."[171]

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.[172] This self-understanding set a foundation for notions like "Manifest Destiny" and "Providentialism," which provided a theological basis to justify the

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contract theory is disputed, the notion of civil religion has been revived in scholarship. Among those who have developed this idea is Robert Bellah. Robert N. Bellah, *Civil Religion in America,* 96 J. AM. ACAD. ARTS & SCI. 1-21 (1967). Prior to Bellah's work, other scholars had articulated ideas that resembled the concept. *See, e.g.*, WILL HERBERG, PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (Anchor Books 1960) (1955) ("American way of life"); THOMAS LUCKMANN, THE INVISIBLE RELIGION: THE PROBLEM OF RELIGION IN MODERN SOCIETY (1967).

[168] *See, e.g.*, GEORGE ARMSTRONG KELLY, POLITICS AND RELIGIOUS CONSCIOUSNESS IN AMERICA 223 (1932); Charles M. Sherover, *Rousseau's Civil Religion*, 8 INTERPRETATION 114 (1980); Martin E. Marty, *Two Kinds of Civil Religion, in* AMERICAN CIVIL RELIGION (Russel E. Richey & Donald G. Jones eds. 1974).

[169] KELLY, *supra* note 168, at 242.

[170] WILLIAM H. SWATOS JR & PETER KIVISTO, ENCYCLOPEDIA OF RELIGION & SOCIETY 96 (1998); *see also* 2 ENCYCLOPEDIA OF RELIGION IN AMERICAN POLITICS 53 (Jeffrey D. Schultz, John G. West Jr. & Iain Maclean eds., 1999); Similar concepts have developed along the civil ritual premise. *See, e.g.*, CHRISTOPHER F. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION (1986); MARTIN MARTY, THE PUBLIC CHURCH (1981); SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA (1963); MARTIN MARTY, RELIGION AND THE REPUBLIC: THE AMERICAN CIRCUMSTANCE (1987).

[171] Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1249 (1986).

[172] ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 2 (1975).

expansion of colonial settlements and played a significant role in the development of colonial economics and cultural identity.[173]

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.[174] 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."[175] 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.[176]

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.[177] Yet the American understanding of truth was long ago affirmed by Jesus in the Gospel of *John* that "the truth will [set] you free."[178] "Not

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[173] *See generally* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1930); DAVID HACKETT FISHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989).

[174] BELLAH, *supra* note 172, at 139.

[175] TRAVERS, *supra* note 14, at 6.

[176] Letter from John Adams to Abigail Adams (July 3, 1776), MASS. HIST. SOC'Y, *available at* http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=L17760703jasecond.

[177] BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS 39 (2007).

[178] *John* 8:32.

only [was] . . . . Truth [axiomatically] grounded in religion, but its self-evident quality [was] as well."[179] 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,'"[180] which echoes Jeremiah's prophecy that the new covenant will be "writ[ten] up[on] their hearts."[181] Thus, self-evident truth may have been a part of American politics from the beginning.[182]

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,[183] 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."[184] 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,'

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[179] LEDEWITZ, *supra* note 177, at 39.

[180] *Id.*

[181] *Jeremiah* 31:33.

[182] LEDEWITZ, *supra* note 177, at 39.

[183] For example, slave owners and others would deny this claim, as in the case of Senator Calhoun, who stated on the floor of Congress in 1848 that there was "not a word of truth" in this claim. HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF CIVIL WAR 407 (2000).

[184] *Genesis* 1:27.

> And the star-spangled banner in triumph shall wave
> O'er the land of the free and the home of the brave[185]

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![186]

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."[187] 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.[188] The addition was a symbolic effort to "distinguish America from its atheistic Cold War rival."[189]

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[185] FRANCIS SCOTT KEY, *The Star Spangled Banner, available at* http://amhistory.si.edu/starspangledbanner/pdf/ssb_lyrics.pdf (last visited Dec. 18, 2012) ("Showing spelling and punctuation from Francis Scott Key's manuscript in the Maryland Historical Society collection.").

[186] ROBERT JAMES BRANHAM & STEPHEN J. HARTNETT, SWEET FREEDOM'S SONG: "MY COUNTRY 'TIS OF THEE" AND DEMOCRACY IN AMERICA 64 (2002).

[187] NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 151 (2005).

[188] SCOTT A. MERRIMAN, RELIGION AND THE LAW IN AMERICA: AN ENCYCLOPEDIA OF PERSONAL BELIEF AND PUBLIC POLICY 110-12 (2007) (describing how adding "under God" to the Pledge was seen as an important part of the process to counter communism).

[189] Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2119 (1996); *see also* Matthew W. Cloud, *"One Nation, Under God": Tolerable Acknowledgement of Religion or Unconstitutional Cold War Propaganda Cloaked in American Civil Religion?*, 46 J. CHURCH & ST. 311 (2004).

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,[190] whose concept and practice likely traces to religious roots.[191] 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.[192] 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.[193]

Civil religion evinces through other institutional practices, including adopting the phrase "In God we trust" both on currency and as a national motto. This trademark of all time has its roots in the Coinage Act of 1864, a federal law that authorized the printing of this motto on the 1864 two-cent coin.[194] As this phrase became popular, efforts were made to make "In God we trust" the official motto of the United States, which culminated in Congress passing legislation to realize this goal.[195] Prior to this act, there was no such thing as an official motto, which is noted in the committee report on House Joint Resolution 396.[196] Citing the lyrics to the Star-Spangled Banner, the report asserts, "In view of these words in our National Anthem, it is clear that 'In God we trust' has a strong claim as our national motto."[197] Explaining the social good of adopting this phrase in an official capacity, the report continues: "It will be of great spiritual and psychological value to our country to have a clearly designated national motto of

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[190] *See generally* S. BRENT MORRIS, CORNERSTONES OF FREEDOM: A MASONIC TRADITION (1993).

[191] The idea of cornerstone may be traced to *Psalms* 118:22, which is cited to six times in the Christian Bible. *Matthew* 21:42; *Mark* 12:10; *Luke* 20:17; *Acts* 4:11; *Ephesians* 2:20; 1 *Peter* 2:7.

[192] For more on the history of the mail service, see FELDMAN *supra* note 187, at 54.

[193] McGowan v. Maryland, 366 U.S. 420, 433 (1961).

[194] Coinage Act of 1864, ch. 66, 13 Stat. 54.

[195] *Establishment of a National Motto for the United States*, 102 CONG. REC. 13917 (1956).

[196] *Id.*

[197] *Id.*

inspirational quality."[198] The legislation made mandatory that all coins and bills thenceforth be marked with the motto.[199]

Accompanying the motto on currency are graphic images of religious influence. One such image is the "All-Seeing Eye," a symbol common in Christian and Renaissance art.[200] The Eye appears on one side of the "Great Seal of the United States," which is used to authenticate certain government documents, including United States currency. The Bureau of Public Affairs of the United States Department of State describes the side on which the eye appears as the "spiritual side of the seal" that:

> [C]ontains the 13-step pyramid with the year 1776 in Roman numerals on the base. At the summit of the pyramid is the Eye of Providence in a triangle surrounded by a Glory (rays of light) and above it appears the motto *Annuit Coeptis*. Along the lower circumference of the design appear the words *Novus Ordo Seclorum*, heralding the beginning of the new American era in 1776.[201]

In the image, the unfinished pyramid represents the original thirteen states, which anticipates the future growth of the nation and further implies that the Eye—or God—favors American prosperity.[202]

As this part of the Article 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.

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[198] *Id.*

[199] Coinage Act of 1864, ch. 66, 13 Stat. 54.

[200] JEREMY HARWOOD, THE FREEMASONS 59 (2006).

[201] BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, THE GREAT SEAL OF THE UNITED STATES 8 (1996), *available at* http://www.state.gov/documents/organization/135450.pdf.

[202] *Id.* at 58.

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.[203]

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.

A. The Logic of Lynching

The history of lynching is a lesson in harsh punishment.[204] The peak of the practice came after the passage of the Thirteenth Amendment in 1865, which ended private ownership of slaves.[205] 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.[206] As emancipation ruptured a centuries-old social structure, "Southern whites—poor and rich alike—were utterly outraged."[207] The southern response to abolition was to inflict terrorism against ex-slave populations through mob violence and riots, most notably

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[203] THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES 16 (Austin Sarat & Christian Boulanger eds., 2005).

[204] *See* WILLIAM F. PINAR, THE GENDER OF RACIAL POLITICS AND VIOLENCE IN AMERICA: LYNCHING, PRISON RAPE, & THE CRISIS OF MASCULINITY (2001).

[205] *See supra* note 126 and accompanying text.

[206] *Id.* at 50-51.

[207] ALEXANDER, *supra* note 5, at 27.

through the practice of mass killing of ex-slaves.[208] 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.[209]

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.[210]

In this era, the social spectacle of bodies being hanged, genitally mutilated, and burnt alive sent messages of power and recemented social hierarchies.[211] 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.[212]

As Garland notes, the lynchers did not choose just any form of violence, but co-opted the legitimate form of criminal punishment, hanging.[213] As the state's mode of execution, the practice of hanging lent legitimacy to activities that subverted the

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[208] *See* STUNTZ, *supra* note 34, at 105-06.

[209] *See* G.C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY 1865-1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS" 8-9 (1990).

[210] Garland, *supra* note 33, at 799.

[211] For further illustration, see generally PINAR, *supra* note 204.

[212] Garland, *supra* note 33, at 807-08.

[213] *Id.*

law itself, since they were used to carry out unlawful killing against an individual who had not been tried by a court.

As the lynchings may illustrate, ritual acts often overlap with the notion of sacrifice, where violence and killing are part of the ritual script. In this regard, Rene Girard's influential mimetic analysis of ritual violence contributes to Garland's study by suggesting that society needs sacrifice as a means to maintain stability, maintain order, and "keep violence *outside* the [religious] community."[214] From this perspective, the will to violence derives from competition that produces "dissensions, rivalries, jealousies, and quarrels within the community that the sacrifices are designed to suppress. The purpose of the sacrifice is to restore harmony to the community, to reinforce the social fabric."[215] Hence, ritual sacrifice is a way of channeling violence such that the scapegoat is used to avert more ominous forms of violence.

Under this scheme, sacrifice channels the community's tensions and polarizes its aggressive impulses, redirecting them toward victims who may be actual or figurative criminals.[216] In the context of lynching, the immediacy of the act was important, and Garland notes how the lynching's proximity to the alleged crime allowed for a cathartic release of powerful emotions: "[t]he public ritual provided an occasion for acting out communal outrage and an opportunity for injured victims to express their (socially sanctioned) fury. Contemporary newspaper reports emphasized that the people were 'aroused,' 'incensed,' 'impassioned,' 'furious,' 'bent on vengeance.'"[217]

The lynching spectacle produced a cohesive effect and positive psychological impact on the community. Garland observes: "The outrage provoked by the alleged crime made it possible to stage a collective action that surmounted these conflicts and channeled the hostilities that they produced."[218] Here, the concern was not so much with law. The concern was

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[214] RENE GIRARD, VIOLENCE AND THE SACRED 92 (1995); *compare with* BELL, *supra* note 6, at 171 (discussing theorists who helped to create "channeling of conflict theory").

[215] GIRARD, *supra* note 214, at 8.

[216] *Id.* at 18.

[217] Garland, *supra* note 33, at 820.

[218] *Id.* at 823.

with society since the activity helped bind people closer together, which of course was to the exclusion of the victim's community:

> Carrying out the ritual over and over again is what serves to keep the group tied together. Now in the case of punishing criminals, the group that is held together is not the criminal's group. It is the rest of society, the people who punish the criminals. The criminal is neither the beneficiary of the ritual nor a member of the group that enacts the ritual, but only the raw material out of which the ritual is made.[219]

B. 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.[220] 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.[221] As Professor Ian Haney López 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."[222]

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[219] RANDAL COLLINS, SOCIOLOGICAL INSIGHT 110 (1992); *see also* MARTHA J. MCNAMARA, FROM TAVERN TO COURTHOUSE 37 (2004) (describing the variety of ritual functions which "can range from communication and transformation to the creation of a sense of cultural unity and support of social hierarchy").

[220] Ian Haney López, *Freedom, Mass Incarceration, and Racism in the Age of Obama*, 62 ALA. L. REV. 1005, 1013 (2010); JOHN HAGAN, WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 150 (2010) (asserting that conservative politicians fought against civil right victories by framing the changes in terms of threats and tapping into "public fears that the changes in civil rights-related criminal laws were loosening the very controls that preserved citizens' physical safety and that of their families and neighborhoods").

[221] ALEXANDER, *supra* note 5, at 22.

[222] Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1032 (2010).

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.[223] More specifically, the term indicates:

> [T]he process by which formerly defeated groups may become dominant issueentrepreneurs 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.[224]

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."[225] For example, scholars have traced the development of the Federal Sentencing Guidelines in the 1980s to decisions made during the civil rights era.[226] 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.[227]

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

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[223] KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 8 (1997).

[224] Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. IN AM. POL. DEV. 230 (2007).

[225] *Id.* at 236.

[226] *See, e.g.*, Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 480 (2006).

[227] *Id.*

policies against civil rights by creating links between civil rights and crime.[228] Frontlash embodies the turn to "law and order" politics of southern officials in the effort to undermine the civil rights movement.[229] 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."[230] 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.[231] 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."[232]

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.[233] There are other factors as well, including what might collectively be labeled "backlash," some of which was the result of economic factors[234]

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[228] Weaver, *supra* note 224, at 237; *see* ALEXANDER, *supra* note 5, at 54 (describing how the shift to "toughness" toward minorities began in the 1960s "when the gains and goals of the civil rights movement began to require real sacrifices on the part of white Americans").

[229] BECKETT, *supra* note 223, at 28.

[230] ALEXANDER, *supra* note 5, at 40-41.

[231] BECKETT, *supra* note 223, at 30.

[232] Jonathan Simon, Ian Haney López & Mary Louise Frampton, *Introduction, in* AFTER THE WAR ON CRIME 7 (Mary Louise Frampton, Ian Haney Lopez & Jonathan Simon eds., 2008).

[233] GOTTSCHALK, *supra* note 15, at 9; *see generally* James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (arguing that "black attitudes" toward crime and punishment helped propel mass incarceration).

[234] BRUCE WESTERN, PUNISHMENT & INEQUALITY IN AMERICA 4 (2006) (noting how the collapse of the urban labor market "fueled . . . anxieties and resentments of working-class whites. These disaffected whites increasingly turned to the Republican Party through the 1970s and 1980s, drawn by a law and order message that drew veiled connections between civil rights activism and violent crime among blacks in inner cities."); *see also* Malcolm Feeley, *Crime, Social Order and the Rise of Neo-Conservative Politics*, 7 THEORETICAL CRIMINOLOGY 111, 120 (2003) (describing how

and particular interest groups.[235] Although backlash has been described as a "pseudo-theory" for describing anti-racial sentiment and its relation to election outcomes,[236] as well as criticized for its lack of clarity to distinguish concepts,[237] 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.[238] Unlike frontlash activism, which is based on a winner/loser model, backlash is the politically expressed public resentment that spawns from perceived racial advances.[239] 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.[240]

When considered in tandem, these concepts show that crime and punishment in post-civil rights America have more to do with

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President Lyndon Johnson's Law Enforcement Assistance Administration (LEAA) was important because it set the foundation for federal aid to local and state law enforcement, dramatically increasing the financial stakes of crime control).

[235] GOTTSCHALK, *supra* note 15.

[236] Weaver, *supra* note 224, at 237.

[237] *Id.*

[238] BECKETT, *supra* note 223, at 15 (explaining how the setting of public agendas by elites cast doubt on conventional interpretations of crime: "[P]ublic concern[s] are largely unrelated to the reported incidence of crime and drug use but are strongly associated with the extent to which elites highlight these issues in political discourse.").

[239] Weaver, *supra* note 224, at 238.

[240] *Id.*

politics than penology.[241] 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."[242]

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.[243] 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."[244] From this perspective, crime is a symbol that stands for other motivations,[245] of which

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[241] *See* WESTERN, *supra* note 234 (arguing that spikes in incarceration are tied to politics and administrative policies that often are neither responses to crime increases nor instruments to decrease crime).

[242] BECKETT, *supra* note 223, at 14.

[243] Weaver, *supra* note 224, at 237.

[244] *Id.* at 232; *see also* WESTERN, *supra* note 234, at 5 (arguing the "prison boom" occurred as a partial response to upheavals in "American race relations in the 1960s"); BECKETT, *supra* note 223 (arguing that "the creation and construction of the crime issue in the 1950s and 1960s reflect its political utility to conservative opponents of social and racial reform"); Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as 'Law and Order' in Postwar American Politics*, *in* RACE AND AMERICAN POLITICAL DEVELOPMENT 234 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008) (arguing that leaders declared "victory over Jim Crow while simultaneously passing more mandatory minimums, funding more prison construction, and reinstating the death penalty, all with disproportionate impact on black Americans"); MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST AND THE CRISIS OF LIBERALISM IN THE 1960S 22 (2005) ("[F]or conservatives, black crime would become the means by which to mount a flank attack on the civil rights movement when it was too popular to assault directly.").

[245] Weaver, *supra* note 224, at 234.

racial perceptions are paramount.[246] These concepts support post-civil rights crime policy as inseparable from political agendas.[247]

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.[248]

This Article concludes by commenting on its import for scholarship and social justice. At its base, the Article contributes a slice of analysis on the interconnectivity between religion, law, and society. Use of "incense" in the title of this conclusion is a double entendre; it is ambiguous since incense describes both intense feelings of anger, as in the type that leads to harsh punishment, and it may also reference the scented offering made to one's deity. As applied to the United States, both connotations hold true simultaneously: ethnic minorities and other marginalized populations, like the poor, homeless, and the mentally ill, are scapegoats in a great gulag-ish sacrifice to the post-civil rights social order, the incense of incensed Americans.

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

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[246] *Id.* at 232; López, *supra* note 220, at 1017 ("The backlash story introduces an element that is otherwise missing in legal theories of racism: that racism is functional.").

[247] Weaver, *supra* note 224, at 236.

[248] COLIN DAYAN, THE LAW IS A WHITE DOG 40 (2011).

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.[249] 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."[250]

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,"[251] harsh punishment is a way of keeping things the same, keeping some "down by law."

Ritual analysis of punishment also suggests that any theory of criminal justice would be incomplete without treatment of religion. As scholars have lamented, there is a general lack of criminal justice theory as it stands.[252] Systematic study of the ritual and religious elements is no exception, yet basic questions remain unanswered. For example, what sense might be made of the fact that the "palladium of justice," the trial by jury, has all but vanished in American criminal law—displaced by the plea-bargain model—and that for almost all criminal defendants, there is no trial at all? How does this relate to lynching where victims were not seen as worthy of trial? Now that today's ethnic minorities are the dominant groups facing the threat of criminal

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[249] *Proverbs* 13:24.

[250] *Id.* at 23:13-14 (Geneva Bible).

[251] DOUGLAS, *supra* note 2, at 162.

[252] *See* DAVID E. DUFFEE & EDWARD R. MAGUIRE, CRIMINAL JUSTICE THEORY: EXPLAINING THE NATURE AND BEHAVIOR OF CRIMINAL JUSTICE 68 (2007); *see generally* John Hagan, *Why is There So Little Criminal Justice Theory? Neglected Macro- and Micro-Level Links Between Organization and Power*, 26 J. RES. CRIME & DELINQ. 116 (1989).

prosecution, is this perhaps why the jury trial is all but dead? Might the fact that those labeled "African American," on any given day, are much more likely to be jailed or imprisoned have anything to do with religion? Christianity provided American slaveholders, among other justifications, with the Curse of Ham, whose people were punished with slavery. Could today's prisons reflect a modern endorsement of the same story, where one-third of all "black" males are somehow supervised by the criminal justice system? To be sure, "today mass incarceration defines the meaning of blackness in America: black people, especially black men are criminals. That is what it means to be black."[253]

Although many conceive of punishment as merely a corollary of crime, i.e., what happens to convicted offenders, this thesis proposes that more is at stake. This has been the case since early modern Europe, "[w]hen governments . . . replace[d] private vengeance with public [punishment], . . . produc[ing] the most powerful symbols of state authority and quasi-liturgical drama."[254] The state kept peace through the ritual of inflicting harm on its citizens—in awesome ceremonies that "surrounded the killing . . . with an elaborate ritual that justified the execution . . . and produced a spectacular warning about the consequences of crime."[255]

The same process is in place today, without need for religion since, paradoxically, the rhetoric of separation of church and state has obscured how the state is inherently religious.[256] The state's posture is popularly legitimized by the invocation of its "suprapolitical sovereignty"[257] that sanctions punishment and gives reason to believe that punishment practices are rooted in religious ritual. As Girard has indicated:

> The procedures that keep men's violence in bounds have one thing in common; they are no strangers to the ways of violence. There is reason to believe that they are all rooted in religion. As we have seen, the various forms of prevention go hand in hand with religious practices. The curative

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253 ALEXANDER, *supra* note 5, at 192.

254 MUIR, *supra* note 41, at 117.

255 *Id.*

256 Boyer & Liénard, *supra* note 17, at 1620.

257 *Id.*

> procedures are also imbued with religious concepts—both the rudimentary sacrificial rites and the more advanced judicial forms.[258]

In the olden days, the spectacle was Bataille's prison, with its gothic, dungeon-like design that imposed itself on the observer.[259] Today the spectacle is abstracted and takes place in front of a TV screen when yet another dark face is the featured criminal on the news or when shows like *COPS* make ethnic disparities routine, or practically, when vigils are held before executions.[260] These images act as a curative to temper social impulses to vengeance since the focal point of the system shifts away from religion and is translated into judicial retribution.[261] In lessening the tendency of individuals seeking vengeance on their own, the state's criminal justice system itself becomes the incarnation of vengeance. "Even when this theology disappears, as has happened in our culture, the transcendental quality of the system remains intact. Centuries can pass before men realize that there is no real difference between their principle of justice and the concept of revenge."[262] Behind punishment is the desire for revenge on someone: "We call it a wish to see justice done, i.e., to have him 'punished.' But in the last analysis, this turns out to be a thin cloak for vengeful feelings directed against a legitimized object."[263]

Punishment's instrumental use for ulterior motives also presents a critical challenge to the notion that American society is "evolving" in its "standards of decency," a doctrine propounded by the Supreme Court in punishment jurisprudence.[264] Instead, a ritual analysis of punishment proves the crux of punishment jurisprudence to be nothing more than wishful thinking trapped in a Darwinian frame; far from reflecting a permanent increase in

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[258] GIRARD, *supra* note 214, at 22.

[259] DENIS HOLLIER, AGAINST ARCHITECTURE: THE WRITINGS OF GEORGES BATAILLE x (1989).

[260] *See, e.g.*, GREGOR T. GOETHALS, THE TV RITUAL: WORSHIP AT THE VIDEO ALTAR (1981) (describing the different ways watching TV can embody ritual activity).

[261] GIRARD, *supra* note 214, at 22.

[262] *Id.* at 23.

[263] KARL MENNIGER, THE CRIME OF PUNISHMENT 190 (The Viking Press 1977) (1968).

[264] *See generally* JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY (2000).

human decency, as the Court would have it, punishment has come to represent all that is indecent, including the maintenance of a permanent underclass.

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.[265] 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.[266] 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.

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[265] Sanctions against apostasy and blasphemy have their root in the Hebrew Bible. Regarding apostasy, Israel was forbidden to have gods other than Yahweh or to worship their images (*Exodus* 20:2-5); to sacrifice to another god (*Exodus* 22:19) for fear of the death penalty (*Deuteronomy* 17:2-7); an entire city could be implicated, and its inhabitants killed (*Deuteronomy* 13:13-18). Incitement to apostasy was likewise punishable by death (*Id.* at 13:2-12). Regarding blasphemy, cursing of God is prohibited (*Exodus* 22:28), for one who curses God shall bear his punishment—that one who slanders the name is to be stoned (*Leviticus* 24:15-16), which was based on an actual case (*Leviticus* 24:10-14, 23).

[266] GARLAND, *supra* note 108, at 135.