COMMENTS ON SPEARIT, "LEGAL PUNISHMENT AS CIVIL RITUAL: MAKING CULTURAL SENSE OF HARSH PUNISHMENT"

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INTRODUCTION

Legal scholarship, like other fields of study, is created by networks of scholars who regularly read, criticize, and build on one another's work, attend conferences and workshops in order to converse with one another, and thus develop a common view of what questions are interesting and what methods are appropriate for addressing them. The virtue of such scholarly networks is the promise of expertise through "crowdsourcing." The associated vice is the danger that each network will become a "silo," a closed community that has little or no contact with other communities with similar problems but different methods and personnel. When intellectual silos develop, opportunities for creativity and innovation are lost.

SpearIt's Article, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*,[1] aims to cut holes through several silo walls and succeeds. SpearIt's argument engages with a number of scholarly communities and invites them into conversation. One of these conversations centers on punishment theory. Dominated by scholars with training in moral philosophy, the literature on theories of punishment often assumes—with the exception of various "expressive" theories of punishment—that criminal punishment is a rational enterprise—or, at least, should be analyzed as if it were. To the extent that punishment theorists engage with the meaning of punishment, as opposed to its moral

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[1] SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1 (2013).

legitimacy, they ordinarily do so through sociology or history, and SpearIt's article duly calls upon both. But, SpearIt also invites us to look at religious studies, a field that normally crosses law only in connection with the First Amendment religion clauses or the jurisprudence of natural law. SpearIt challenges us to notice the religious bases of many of our legal traditions and to take them seriously when thinking about the function of law generally and criminal law in particular.

Another silo wall through which SpearIt punches is the literature of law and culture. This small but dynamic literature approaches criminal justice through the lens of popular culture.[2] These scholars recognize that criminal justice is an important site for meaning-making in American culture. Television, films, mystery novels, and true-crime stories feed a steady dose of crime and punishment to Americans, and the demand seems inexhaustible. Like the law and popular culture scholars, SpearIt recognizes the significance of criminal punishment as a language used by many different audiences, not just state actors; and like them, he sees the functions of this language extending beyond moral justification. But his reference to punishment as a "civil ritual" also does something different. The analysis of punishment as ritual focuses more tightly on the meaning of actual practices of punishment, rather than popular representations of punishment. In addition, SpearIt is interested in meaning-making among actors within the system.

Perhaps most significantly, SpearIt breaches the wall between the literature of law and culture—or law and the humanities—and the literature of race theory. It is probably not controversial to say that race, like criminal justice, is an important site for meaning-making in American culture—that indeed race and criminal justice are closely intertwined and have been so for many generations. Yet in legal scholarship there is a curious balkanization. Law-and-culture and law-and-humanities scholars do not often write about race; meanwhile, race scholars typically do not draw on cultural analysis beyond the world of pop

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[2] *See, e.g.*, RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000).

culture.[3] SpearIt writes about race, but from the perspective of anthropology and religion, rather than pop culture, with fascinating results. More work at the junction of cultural anthropology, race, and law would be welcome, as would an end to the separate spheres of law and culture and critical race theory.

I do, however, have some questions inspired by SpearIt's Article about how the study of "civil ritual" or religious studies helps us understand criminal punishment. In the remainder of this response, I will explore two sets of questions. First, what does SpearIt mean by "civil ritual?" How do we know when an action becomes a ritual, and what are the consequences when this happens? Assuming that some aspects of criminal punishment have become "ritualized," to what extent are these rituals still Christian today, even if they originated in Christian symbolism and Christian practices? We are a religious nation but also a deeply secularized one, and there is less attention to this struggle in SpearIt's Article than one might expect.

Second, it is not clear to me to what extent SpearIt's thesis—connecting "scapegoat" rituals to what he calls the "harsh punishment" of African-American men—is either convincing or necessary to explain the regime of mass incarceration that has characterized the U.S. criminal justice system since the 1980s. Scholars in race studies, history, sociology, and political science have provided a powerful narrative centering on racial-interest-group politics to explain the skyrocketing proportions of black and brown men in jail, prison, and on probation in recent decades. To buttress this story, social scientists have developed measures of "implicit bias" to establish the claim that African Americans, in particular, are closely associated with crime in the public mind.

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[3] For a similar observation, see Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004) (suggesting that law and society scholars and critical race scholars should be learning more from and talking more to each other). *See also* Gregory Scott Parks, *Toward A Critical Race Realism*, 17 CORNELL J.L. & PUB. POL'Y 683 (2008) (advocating more collaboration between critical race scholars and empirical social scientists).

Of course, this is a generalization and there are exceptions. Imani Perry comes to mind as a scholar who is fully versed both in the law-and-culture, law-and-the-humanities world and in the critical race theory world. *See, e.g.*, IMANI PERRY, MORE BEAUTIFUL AND MORE TERRIBLE: THE EMBRACE AND TRANSCENDENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2011).

The story, quickly becoming conventional, thus has elements drawn both from political science and from cognitive psychology.

This is not a bulletproof story, of course, and there have been important challenges both to its outlines and some of the details provided by various scholars. But, it is not clear to me what SpearIt's scapegoat thesis adds to or subtracts from the story. This brings us back to SpearIt's most ambitious aim. Is the politics of criminal punishment, like punishment itself, all about rational calculation—such as the strategies politicians use to stay in power and the efforts of white "opportunity hoarders" to keep their privileges in place? Or is there something else going on? Are there emotions and images being stirred up in the sight of African Americans being put into the back of police cars that are better described in the language of ritual than strategy and tactic? Does even the language of "implicit bias," with its concession to the irrational, fail to capture all of why we seem so comfortable with the mass incarceration of black and brown people?

I.

Part II of SpearIt's Article tells a series of fascinating stories about the origin of jury trials, the rhetoric of punishment, and even the source of those weird symbols and mottos printed on United States federal reserve notes. SpearIt shows that Christianity is the reason most juries have twelve members. He reminds us that the penitentiary, an American innovation, was possibly developed by, and certainly promoted by, Quakers. He exposes the deep roots of criminal punishment and its justifications in Christian notions of sin and judgment, and the development of the English common law from the discourse and practices of ecclesiastical courts.

Yet I was not fully convinced of the relevance of this rich and interesting material. For me, three questions needed elaboration. First, what does it mean for a practice to be a "ritual," civil or not? Second, does the concept of a "ritual" obfuscate historical change and discontinuity? Third, how do we decide whether a ritual is specifically religious? How, for instance, should we think about the deep tradition of secularization in American society, including the idea of separation between church and state? How much Christianity is really left in our civil religion? Together, these

questions left me wondering whether our contemporary practices of criminal punishment should really be understood as "civil rituals," or something more akin to "dead metaphors"—symbols and practices that are extant but whose original meaning has been lost?

SpearIt addresses the question of what a ritual is at the very beginning of his Article. He notes that many different disciplines use the concept, including a field called "ritual studies," but he settles on a functionalist, Durkheimian account: a ritual is a practice whose primary purpose is to increase social solidarity.[4] SpearIt explains that calling a practice a ritual points to its quality, not its essential nature: any action can be ritualized, but not every action is a ritual.

However, based on this definition it was difficult for me to understand how we can tell whether criminal punishment is a ritual or not. A clue appears when SpearIt notes that "punishment practices can be ritualized to convey deeply symbolic messages."[5] It seems that another essential element of ritual is the presence of symbolism. Sometimes a cigar is just a cigar, but sometimes it is something else. The importance of symbolism points us, moreover, toward more specific signs that an action has become a ritual: repetition; the intention of the parties; the importance of images and language creating associative chains with other practices and other symbols; and the intent to arouse certain moods, such as gratitude or awe.[6]

This made me wonder, to whose behavior should we look to establish whether a practice has become ritualistic? Certainly the actions of the parties who directly perform the ritual seem important, and the things that happen in a courtroom are deeply ritualistic under SpearIt's definition. Judges, jurors, bailiffs, court clerks, lawyers, witnesses, and defendants themselves participate, with various levels of willingness and various levels of experience, in the ritual of criminal punishment, as do corrections officers and

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[4] SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Mass Incarceration*, 82 MISS. L.J.1, 2 (2013).

[5] *Id.*

[6] For a fuller account of ritual and its applicability to law, see Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181 (2005).

inmates.[7] Of course criminal punishment in general is meant to foster social solidarity. And for those who are repeat players in the system, perhaps even the more specific practice of putting another black man into the custody of the state may well have become ritual within SpearIt's definition.

But, later in his argument SpearIt suggests that the criminal punishment of black men is a ritual not only for the people who appear regularly in criminal courtrooms, but for American citizens more generally. This use of the term "ritual" seemed more diffuse to me. For instance, other scholars have criticized the criminal justice system for keeping punishment and prisons out of public view.[8] Is an action still a ritual for the people who only hear about it indirectly? And, from the perspective of the person *not* involved as a trial participant, what exactly is the ritual? "Punishment" seems too broad. Does the ritual lie in seeing another black face in the Yahoo News banner, in the crime section of the newspaper, or in the lead story on the television news? Scholars of "implicit bias" have certainly demonstrated a strong connection between African-American identity and crime that affects a broad range of Americans.[9] But should the harsh punishment of black men be described as a ritual for all Americans? Or is a better way to understand our complicity with the disproportionate burden that African-American men shoulder through the concept of stereotyping and our expectation of a just world? (I will come back to this point later in this Response.)

Another question is, if ritual is the right word, what is the nature of the social solidarity thereby strengthened? SpearIt's answer is implicit: the ritualistic harsh punishment of African-American men strengthens both white solidarity and national

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[7] When I recently served as a prospective juror, for instance, I was struck by what seemed to be the deliberate and very skillful attempt by court officials to instill a sense of awe in the jury pool, including a film with multiple waving flags and montages of diverse faces and the trial judge's repeated reminders that jury trial was at the foundation of American freedoms. Jury service suddenly struck me as an important ritual of national solidarity.

[8] *See* Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 331 (2009) (criticizing prison and jail regulations for being formulated outside of public view and receiving little judicial or scholarly attention).

[9] *See* Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1139 (2012).

solidarity, and perhaps the two are one and the same.[10] I would have liked to have seen more on this point. Here, in addition to Durkheim's notion of solidarity, SpearIt calls on Mary Douglas's famous examination of certain rituals as involving conceptions of purity and danger. As SpearIt indicates, ideas about purity and contamination are woven through discourses of race in American history; the practice of lynching, he notes, was in part a symbolic response to the fear of "miscegenation" and the idea that sexual congress between black men and white women could endanger the "purity" of the white race. Analogizing lynching to present-day harsh punishment, he argues that both are cleansing rituals that rid the American (white) body of contamination.

The audience question is here again: we can clearly identify both the spectators and the killers in a lynching as participants in a ritual because of its bounded quality, but it is not so clear where the boundaries are of the ritual of "harsh punishment" and who, therefore, are the participants. It is also not clear at which level of specificity we should identify the ritual. Is it about cleansing ourselves of "criminals" or of "black men"? It might be objected that today white supremacy and national identity are no longer as mutually entwined as they were in the late nineteenth and early twentieth centuries. It might be objected, as well, that the purification ritual that constitutes criminal punishment is not directed toward reestablishing white supremacy so much as reestablishing the polity as innocent and good citizens, the upright, law-abiding people who stand against the "scum" who commit crime. In favor of this position, we might observe criminal punishment in societies not as divided by race as ours. How do we decide between this nonracial reading of the ritual and SpearIt's racialized reading?[11]

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[10] Another fascinating issue opened up by SpearIt's argument is the extent to which waves of nativist hysteria, most recently against undocumented immigrants, feeds anti-immigrant legal processes, and whether his theory of ritual would apply to this dynamic as well. Anti-terrorism procedures also seem ripe for a ritual analysis. When we take our shoes off at the airport, are we really preventing future acts of terrorism or participating in a ritual that makes us feel secure while not in fact making us any safer?

[11] On this point, for instance, it would have been interesting to read SpearIt's take on the work of Martha Grace Duncan, who has extensively analyzed the language of corruption and filth as used to describe criminals. *See* Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725 (1993);

This brings us to a second question: How, if at all, does the theory of criminal punishment as ritual address historical change? If by "harsh punishment" SpearIt means mass incarceration, that phenomenon only arose in the 1980s, and seems, at least on some accounts, about to reverse itself.[12] If he means what other scholars have described as the "punitive turn" in American punishment, this, too, has had an historical rise, fall, and rise again.[13] Even the disproportionate presence of African Americans in the criminal justice system has not been constant in our history.[14] It would be fascinating to plot these changes in punishment against the history of racial formation in the United States, since on SpearIt's theory they should vary together. This endeavor may have fallen outside the scope of the Article. But the issue does raise the question: Can a theory of punishment as "ritual," which seems inherently static and focused on continuity, adequately account for change? Mass incarceration and lynching, for instance, both disproportionately target African Americans, but there are also substantial differences between them, among them the facts that lynchings were ad hoc and expressly viewed as extra-legal, whereas mass incarceration is relentlessly legal and systematic. Have the rituals changed? Has the nature of white supremacy? Has social solidarity? If so, how do they co-vary?

Punishment, too, has changed over time. Michel Foucault's book *Discipline and Punish*, for example, posits a break between an earlier period in Europe when punishment was devised as spectacle and focused on the mortification of the body, such as sticking the heads of those executed for treason on spikes at London Bridge, and the modern period, when punishment came to focus instead on the soul, and the body was subjected to

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MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT (1996). Duncan develops this rhetorical and conceptual connection at great length, yet seldom mentions race. I wonder how SpearIt would respond to her argument and its implicit assertion that the solidarity established by criminal punishment does not involve racial antagonism.

[12] *See* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011).

[13] *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

[14] *Id.*

surveillance and "discipline" rather than mortification.[15] Within American history, rehabilitation was for a time at the forefront of justifications for punishment, expressed in indeterminate sentencing and the evolution of a juvenile justice system founded by "child savers."[16] SpearIt's account of a static relationship between punishment and vengeance, and his denial that "standards of decency" actually evolve, brushes away these historical changes in the nature of punishment as well as changes in the character and intensity of white supremacy.

Third and finally, SpearIt's fascinating historical excavation of the Christian roots of criminal punishment did not convince me that religious studies can say much about the present-day practices of criminal punishment. There might well be connections that the Article does not explore; for example, the Article made me wonder about the links between Christian faith and a belief in retribution—or rehabilitation, remembering the Quakers—as justifications for criminal punishment. The historical story by itself, however, does not rule out the possibility that the discourses and practices of criminal punishment have taken on a life of their own. Even if they survive as rituals, they may no longer be meaningfully Christian rituals, but rather dead metaphors; no longer reminders of sin and redemption but now signifiers of, for example, national pride. The same may be true of the connections between Christian doctrine and white supremacy. I doubt, for instance, that very many people involved with the American criminal justice system still remember the "curse of Ham" as a justification for the subordination of black people, despite its former popularity.

SpearIt also does not say very much about the secularization of American society, even though this is a central concern of many

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[15] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 1979).

[16] *See generally* Douglas E. Abrams, *Lessons from Juvenile Justice History in the United States*, 4 J. INST. JUST. INT'L STUD. 7 (2004); Cart Rixey, Note, *The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications*, 58 CATH. U. L. REV. 885 (2009); Christian Sullivan, *Juvenile Delinquency in the Twenty-First Century: Is Blended Sentencing the Middle-Road Solution for Violent Kids?*, 21 N. ILL. U. L. REV. 483, 487 (2001) (detailing the history of the juvenile justice system as a means of "saving, rehabilitating and protecting rather than punishing, incarcerating and penalizing our troubled children").

in religious studies, and certainly many scholars who look at the religion clauses. Is there much "religion" left in our civil religion? Certainly fundamentalist Christians do not think so, and have vehemently protested the "wall of separation" approach to the religion clauses. Indeed, it might be said that secularization is as much an American tradition as religiosity. The Founding Fathers were notably more Deist than they were conventionally religious;[17] and the metaphor of a "wall of separation between church and state," as historians note, was first used by Thomas Jefferson.[18] Given the long and contentious battle over the role of religion in public life, it is odd that SpearIt's argument says little about efforts to de-sacralize formerly Christian customs. Indeed, he does not discuss the extent to which the rituals of the state may have emerged, not as successors to church rituals, but as substitutes for them, thus potentially undermining their religious

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[17] George Washington, Benjamin Franklin, John Adams, Thomas Jefferson and James Madison, for instance, were not especially pious, but rather leaned toward Deism. *See* DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 50-51 (2006). *But see* MICHAEL NOVAK, WASHINGTON'S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY (2006) (arguing secular historians have made the "understandable error" of portraying Washington as a deist when he was, in fact, a devout Christian). And some of the important figures in our history, such as Thomas Paine, were not even really Deists, but closer to agnostic rationalists. THOMAS PAINE, THE AGE OF REASON 588 (Citadel Press 2d ed. 2000) (1948) (explaining that he did not concern himself with the immortality of his soul).

[18] Jefferson wrote:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.

Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), The Papers of Thomas Jefferson (Manuscript Division, Library of Congress), Series 1, Box 89, Dec. 2, 1801-Jan. 1, 1802. Also available in Daniel L. Dreisbach, *"Sowing Useful Truths and Principles": The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation,"* 39 J. OF CHURCH & STATE 455, 455 (1997). See Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 627 (1999) ("No word or phrase is associated more closely by Americans with the topic of church-state relations than the 'wall of separation between church and state.'").

roots.[19] It is hard to conclude, as SpearIt does, that punishment is a "purely religious form" given this vexed history. Yet, he assumes that Christian origin establishes Christian meaning, once and for all.

One road not taken that might have strengthened SpearIt's argument on the religious content of American ritual is comparative studies. Looking at the other countries to which we like to compare ourselves, the United States stands out as more religious, even when compared to countries that still have a state-established church, such as England. Using comparative literature might buttress SpearIt's claim that there is still a lot of "religion" in our "civil religion." Otherwise, the reader might well conclude that SpearIt may have shown that there is a lot of ritual in the criminal justice system, but not that this ritual has any necessary connection with Christianity.

II.

The second major issue SpearIt's argument raises is whether his civil ritual thesis provides a convincing explanation for the disproportionate appearance of African Americans in the criminal

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[19] Some of the scholars associated with American Legal Realism made this point back in the 1930s. Max Lerner, for instance, suggested that "the very habits of mind begotten by an authoritarian Bible and a religion of submission to a higher power have been carried over to an authoritarian Constitution and a philosophy of submission to a 'higher law'; and a country like America, in which its early tradition had prohibited a state church, ends by getting a state church after all, although in a secular form." Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294-95 (1937); compare THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) (drawing on anthropology and the study of propaganda to analyze legal institutions and rituals as intertwined with cultural fantasies). Making a similar point, Mateo Taussig-Rubio considers the applicability of ideas of "sacrifice" to warfare and criminal punishment, specifically the death penalty, in the contemporary United States. *See* Matteo Taussig-Rubio, *The Unsacrificeable Subject?*, *in* WHO DESERVES TO DIE? 131 (Austin Sarat & Karl Shoemaker, eds., 2011). Like SpearIt, Taussig-Rubio references the scholarship of Rene Girard on ritual. Taussig-Rubio concludes, however, that contra Girard, the death penalty should not be understood as a "sacrifice" in the conventional religious sense, but as its opposite. *Id.* at 133. The sacrificed subject is a social insider who willingly or unwillingly suffers for the sake of the entire community; the criminal put to death is a social outsider, superfluous to the community. For Taussig-Rubio, "sacrifice, for us, is now typically opposed to law and ritual as a sincere act; it is a giving of the self, not a scapegoating of a substitute." *Id.* Taussig-Rubio concludes that Giorgio Agamben's concept of *homo sacer*, the person who can be killed but not sacrificed, is more important in the context of the death penalty. *Id.*

justice system. Here, the interesting question for me is what his thesis adds to the "backlash/frontlash" explanation that has been developed by a number of scholars.

As SpearIt explains, many scholars attribute the era of mass incarceration to white interest-group politics. The story, in brief, is that the upheavals of the Civil Rights Movement sparked anger and resentment in many white communities, especially in the South, and further kindled white racism against African Americans. This is the "backlash" part of the story. Meanwhile, politicians, especially those associated with the Republican Party, took advantage of this anti-black resentment to promote themselves. Instead of openly supporting white supremacy, which had now been officially repudiated, these politicians took advantage of preexisting stereotypes associating African Americans with crime, and promised "law and order" to their constituents, while covertly appealing to anti-black sentiments. This strategic action on the part of politicians constitutes the "frontlash" part of the story. Mass incarceration, according to this story, had everything to do with race.

SpearIt incorporates this story into his argument, but he makes an unwarranted leap when he concludes, "As these 'lash' theories indicate, attitudes toward punishment transcend the instrumental logic of reducing crime, and are better understood as deeply symbolic."[20] It is true that the backlash/frontlash story supports SpearIt's thesis that punishment is not entirely about reducing crime. But it does not follow that criminal punishment is therefore "symbolic" in the sense of religious or civil ritual. According to the backlash/frontlash account, criminal punishment is all too rational—a strategy adopted to preserve white supremacy. There is no need for "incense," stories of divine judgment, or actions laden with symbolism, other than the crude equation of "crime" with "black people."

So the story of strategic political advantage does not suggest that "ritual" had anything to do with the rise of mass incarceration, unless by "ritual" SpearIt really means the long conceptual association between black people and crime. Implicit

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[20] SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1, 39 (2013).

bias theorists explain this association as cognitive, however, and this association can similarly be traced to non-symbolic roots: not the curse of Ham, but the calculated and all-too-material project of appropriating the bodies of black people for the benefit of those who called themselves whites.

Here, we are back to where we began. What is the value added to an account of black subordination in the criminal justice system of an inquiry into "ritual," religious or not? As I implied at the beginning of this essay, I believe one answer is the acknowledgment of the importance of the nonrational in politics and law. The literature of law-and-culture and law-and-the humanities, recognizes that symbols, images, emotions, and chains of association shape legal practices, perhaps as significantly as does rational calculation. SpearIt opens an important door to this inquiry by asking about the place of ritual in American criminal justice. What remains to be established is what the study of culture and ritual can add to political science and psychology. How do we talk about the nonrational and the nonstrategic?

The popularity of "implicit bias" as a frame for talking about racism is interesting. Anti-discrimination scholars, of course, have seized on this literature not only for its explanatory value, but also because it offers a more palatable way to confront racial injustice than accusations of conscious bias. Having read SpearIt's article, another reason why the implicit bias literature might be appealing occurs to me: its focus on the mechanisms of bias and the project of "de-biasing" keeps our attention on rational things. We need not look at the horror of racism. Part of that horror lies in the senselessness racism unleashes, the animal-like glee experienced by lynch mobs. SpearIt's suggestion that criminal punishment is based in ritual is most transgressive, perhaps, in opening the door of legal scholarship to the irrational and the nonrational. Despite his very tidy, Durkheimian functionalism, SpearIt also points us toward a deeper encounter with what is wild and dangerous in ourselves and in American culture.