

A RESPONSE TO “LEGAL PUNISHMENT AS CIVIL RITUAL”

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SpearIt has done an excellent job exploring the relationship between religion and punishment in the United States. Beyond this, his article helps us to get a much better understanding of the relationship between punishment and race in United States history, as well as the ritual and religious nature of our criminal punishment practices. In this short essay, I will respond to the most important aspects of SpearIt’s observations.

My response is organized into three distinct parts and focuses upon the three areas at the core of SpearIt’s article: Criminal Justice and Christianity, the Gospel of America and Civil Religion, and Civil Rights Turned Wrong. SpearIt’s discussion of criminal justice and Christianity provides a compelling account of the relationship between the American jury system and the biblical discussions of the divine judgment of sin. Likewise, the article includes a cogent discussion and explanation of the creation of the American jury system, as well as the use of penitentiaries as the preferred method of criminal punishment. The extensive correlations that the article demonstrates between the American system and the numerous discussions of judgment and sin in the biblical text are quite impressive. Although this was not the central purpose of the article, the skillful treatment relating American history and legal tradition to biblical passages warrants a more extensive examination that includes a more extensive consideration of the rationale and perspective of lawyers and jurists involved in the system’s implementation.

Moreover, the article spotlights the need for more critical scholarship that analyzes the adequacy of the judge and jury system and the ways that it may perpetuate racial injustices in contemporary society. If, as the article shows, the system that we have today is a reflection of our religious norms at the time of the country’s establishment, and particularly at the adoption of our judge and jury system, to what degree does that system reify

injustices common at that time. At the time the system was created, African Americans/Africans were specifically excluded from participating as lawyers, judges, or jurors. Moreover, African Americans/Africans were excluded from testifying as witnesses in cases against whites, as their testimony was deemed unreliable and without credibility. This exclusion is perhaps a reflection of certain religious norms and ideals and may also have some religious basis or significance. As fanciful as it may seem, this would not necessarily be inconsistent with prevailing religious views of early Americans with regard to the religious state of African Americans/Africans. A popular belief among some in the colonial period was that Africans lacked souls and the capacity to receive religious instruction.¹ In light of these early beliefs, it is curious that blacks were also readily excluded from participating on juries and whether this might have had some religious origins. Beyond the fact that many blacks who were enslaved were limited in their ability to participate in the judge and jury system, it is clear that the colonies, and, later, the states also routinely excluded free blacks from participating in the jury system until the passage of the Fourteenth Amendment. Even then, many jurisdictions attempted to continue those exclusions until they were prohibited by the Supreme Court.

SpearIt's discussion of civil religion provides a thoughtful reflection on commonly unexamined practices and the religious nature and history behind them. As the article points out, most of those practices have an unrecognized religious component or dimension. Most of us engage in those practices without much thought, in the same way that those who are adherent to a religious faith may engage in religious rituals and practices without knowledge of their original form, meaning, or origin, and the way those practices came to become inculcated in the life of their religious community. The examination of civil religion also accentuates something that the article does not explore: the dominance of Christianity in American society and its acceptance as a matter of religious neutrality. Stated more clearly,

¹ WINTHROP JORDAN, *THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* 90-91 (1974). *See also* A. LEON HIGGINBOTHAM JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 9-10 (1978).

Christianity's dominance in American society provides it a prominence that is viewed not as a religious expression, but as an expression of cultural and historical practice. The recent controversy regarding the construction of a Muslim mosque and community center within a few miles of the Ground Zero Memorial in New York City provides an excellent example. The controversy suggested that opponents should use the law to prevent construction, not because the members of the mosque or the community center had any relationship to the 9/11 tragedy, but rather because they merely happened to share the same religious identity, as Muslims, with the persons who orchestrated the 9/11 terrorist plot. This reasoning would be completely nonsensical if applied in the context of Christianity. The idea that somehow a Christian church attempting to construct a worship facility should in any way be limited in its exercise of its property rights because some other group or individual who identified themselves as Christians had committed some tragedy or atrocity would be preposterous.

This is a reflection of both the unrecognized dominance of Christianity in America and American civil religion, which grew out of Christian norms and beliefs. Consider the use of the term "god", which is the common term used in American Christianity and by the larger society at public events, activities, and practices. This term fits with a Christian and Jewish belief system, however, it is less consistent with Islam and with polytheistic belief systems or belief systems that are religious yet have no notion of god. In that way, the civil religion reflects a historical narrative regarding the creation of our nation and the religious identity of the early founders. This leads me further to wonder how these unrecognized and acknowledged notions and beliefs further impact practices with regard to punishment described otherwise in the article.

In the discussion of Civil Rights turned wrong, the article makes very helpful and perceptive observations regarding the contemporary developments of harsh punishment in the wake of the successes of the civil rights movement. In this section, the article helps to make the connection between the focus on crime and punishment in the 1960s and the removal of race based legal restraints on African Americans and other racial groups. SpearIt provides a compelling argument about the bipartisan decision to

increase the number of crimes as well as the penalty for crimes in this period. Further, the article makes clear how persons who attempted to retain the restraints of Jim Crow laws led the movement to create harsher penalties, to remove discretion from judges, and to set what penalties would follow a conviction. Today, it is difficult to conceptualize how America came to have such large percentages of African-American and Latino men and women in prison without the narrative that the article provides. SpearIt has skillfully connected the proliferation of prisons and the use of harsh punishment following the civil rights movement, up to the 1990s and through to the present, with the same practices of punishment and ritual seen in the post-reconstruction era through lynching.

In fact, the article renders clarity to the current identity of the Republican Party, which was largely re-created during the period as a party focused on religious values and law and order. SpearIt, though not explicitly, has identified a critical relationship within the Republican Party that connects its base of Christian adherents with the belief in punishment, law and order, criminalization, and race. Using the backlash and frontlash theories, the migration of large numbers of white Southern Democrats to the Republican Party under President Ronald Reagan logically follows. In that time, the Republican Party emerged from the moral majority, harsh drug criminalization laws, and a heavy use of civil religion by then President Reagan. The article renders intelligible the shift of the American South to a Republican dominated region from one that was firmly and strongly held by Democrats in earlier times. The South's strong and dominant religious adherence to Christianity and Christian worship, through church attendance, also correlates with the enhanced use of civil religion by President Reagan and other Republican leaders as well as the focus on punishment and harsh punishment practices in response to the fear associated with large numbers of African-American and Latino citizens free from the social restraints of racial discrimination in education, housing, public accommodations, and employment.

The article genuinely shines in the way the conclusion pools together each of the preceding areas to allow for a cogent statement about contemporary society. Drawing on

understandings of ritual practice, civil religion, the nature of punishment, religious norms, American history, and racial politics, the article makes a significant and cogent statement about contemporary practices of punishment that dominate American society today. Moreover, it should cause us to question the legitimacy and justification for mass incarcerations and harsh punishments currently in place and to wonder why the nation draws less on understandings of penology, human psychology, neuroscience, and social science to set policy than on tradition, fear, and political rhetoric.

