From Slave Abuse to Hate Crime

The Criminalization of Racial Violence in American History

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From Slave Abuse to Hate Crime

This book explores the complex ways in which political debates and legal reforms regarding the criminalization of racial violence have shaped the development of American racial history. Spanning previous campaigns for criminalizing slave abuse, lynching, and Ku Klux Klan violence and contemporary debates about the legal response to hate crimes, this book reveals both continuity and change in terms of the political forces underpinning the enactment of new laws regarding racial violence in different periods and of the social and institutional problems that hinder the effective enforcement of these laws. A thought-provoking analysis of how criminal law reflects and constructs social norms, the book offers a new historical and theoretical perspective for analyzing the limits of current attempts to use criminal legislation as a weapon against racism.

Ely Aaronson is an assistant professor of law at the University of Haifa, Israel.

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For Karin, Daniel, and Yahli

The headlong stream is termed violent
But the river bed hemming it in is
Termed violent by no one

Bertolt Brecht, *On Violence*

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Contents

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Toward a Historical and Sociological Analysis of the Criminalization of Racial Violence

The agencies built by society for preventing deviance are often so poorly equipped for the task that we might ask why this is regarded as their "real" function in the first place.

Kai T. Erikson, *Wayward Puritans*[1]

Introduction

In the face of the many significant indicators of progress in American race relations over the last decades, it is easy to overstate the extent to which current race policies signal a complete discontinuity with the past. This temptation, noticeable in recent talk about the coming of a post-racial society, tends to obfuscate the complex ways in which traces of the past continue to be present in the contemporary landscapes of American race relations. Over the last decades, in light of the growing influence of theoretical approaches that examine the formation and implementation of public policy across broad swaths of time,[2] social scientists and historians have shed important light on how the legal rules, institutional arrangements, and social conditions that were created at various points in the past continue to have an effect on current efforts to bring about social and political change.[3] In various contexts

[1] Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (New York: John Wiley, 1966): 283–284.

[2] See, e.g., Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004); Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ: Princeton University Press, 2004); Rogers M. Smith, "Historical Institutionalism and the Study of Law," in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Galdeira, eds., *The Oxford Handbook of Law and Politics* (New York: Oxford University Press, 2008): 46–59.

[3] Karl Marx was one of the first to theorize the complex relations between the past and the present in the construction of political action. "Men make history," he famously wrote, "but they do not make it ... under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living." Karl Marx, *The 18th Brumaire of Louis Bonaparte* (Rockville: Wildside Press, 2008): 15.

of African American studies, scholars have demonstrated how the institutional and ideological patterns that crystallized during slavery, under Jim Crow laws and during the early formation of black ghettos in the North, have continued to influence the forms, functions, and outcomes of race policies in later periods.[4] This literature underscores the deep truth in William Faulkner's observation that "the past is never dead; it's not even past."[5] It also presents us with the challenge of utilizing the lessons of the past to gain a better understanding of the possibilities, limits, and risks of current strategies of using legal reform to address social inequality.

By and large, the current scholarship on hate crime laws has not challenged the conventional view that the emergence of this new legal framework in the 1980s represents a novel approach with respect to the use of criminal law as a weapon against racism. The major sociohistorical studies in this field have argued that the underpinnings of hate crime laws are rooted in relatively recent trends such as the rise of identity politics[6] and the triumph of new social movements.[7] This book takes a different perspective. It argues that although post-1970s political developments were doubtlessly influential in shaping the content of hate crime laws (leading to the focus on penalty enhancements as the putative remedy to the problem of racially motivated violence), the use of distinct criminal offenses to address the racially motivated victimization of African Americans is far from being a novel innovation. The recent proliferation of hate crime laws represents both continuities and discontinuities with earlier moments in which new criminalization regimes were introduced with the promise of ameliorating the plight of black victims. The major aim of this book

[4] See, e.g., Robert C. Lieberman, "Legacies of Slavery? Race and Historical Causation in American Political Development," in Joseph Lowndes, Julie Novkov and Dorian T. Warren, eds., *Race and American Political Development* (New York: Routledge, 2008): 206–233; Douglas Massey and Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993); Daryl Michael Scott, *Contempt and Pity: Social Policy and the Image of the Damaged Black Psych, 1880–1996* (Chapel Hill: University of North Carolina Press, 1997); Angela Behrens, Christopher Uggen, and Jeff Manza, "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850–2002," *American Journal of Sociology* 109 (2003): 559–605.

[5] William Faulkner, *Requiem for a Nun* (New York: Random House, 1951): 92.

[6] James J. Jacobs and Kimberley Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York: Oxford University Press, 1998).

[7] Valerie Jenness and Kendal Broad, *Hate Crimes: New Social Movements and the Politics of Violence* (New York: Aldine de Gruyter, 1997); Valerie Jenness and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (New York: Sage, 2004); Terry Maroney, "The Struggle against Hate Crime: Movement at a Crossroad," *New York University Law Review* 73 (1998): 564–620.

is to recover this history, and explore the lessons that it provides with regard to the social and political consequences of the criminalization of racial violence.

Interestingly, the idea of creating distinct criminal offenses to protect black victims first emerged in the slave states of the South. In the late eighteenth century, legislatures and courts in the South began enacting new laws that prohibited cruelty to slaves. As the nineteenth century progressed, these laws came to cover more aspects of plantation life. For example, a statute passed in Georgia in 1817 provided that "any owner of a slave or slaves, who shall cruelly treat such slave ... by withholding proper food and nourishment, by requiring greater labor from such slave or slaves than he or she or they may be able to perform [or] by not affording proper clothing, whereby the health of such slave or slaves may be injured and impaired ... shall be sentenced to pay a fine or be imprisoned."[8] In the wake of the Civil War, as terror from the Ku Klux Klan began to thrive in many Southern locales, Congress enacted a series of statutes that authorized the federal government to prosecute racially motivated interferences with the citizenship rights of African Americans.[9] During the early 1870s, thousands of Klansmen were indicted in federal courts under the Enforcement Acts.[10] The first four decades of the twentieth century saw several anti-lynching bills win considerable support in Congress, though their passage was eventually obstructed by Southern political elites.[11] As part of the landmark civil rights legislation of 1964–1968, new federal offenses were introduced to enforce the rights of African Americans to engage in a range of "federally protected activities," including voting, serving on juries, and using facilities of interstate commerce.[12]

Placing the recent spread of hate crime legislation within this broader historical context, this study aims to address two interpretive tasks that have not been systematically examined by the current

[8] Penal Code (passed December 20, 1817), S. 237, in Oliver H. Prince, ed., *A Digest of the Laws of the State of Georgia* (Milledgeville, GA: Grantland and Orme, 1822): 376.

[9] Act to Enforce the Rights of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, 16 *Statutes at Large, 41st Congress* (Second Session), 140 (May 31, 1870).

[10] Everette Swinney, "Enforcing the Fifteenth Amendment, 1870–1877," *Journal of Southern History* 28 (1962): 202–218, 218. On the enforcement of the Enforcement Act see Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871–1872* (Athens: University of Georgia Press, 1996); Kermit L. Hall, "Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872," *Emory Law Journal* 33 (1984): 921–953.

[11] George C. Rable, "The South and the Politics of Anti-lynching Legislation, 1920–1940," *Journal of Southern History* 51 (1985): 204–220.

[12] Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73 (1968), § 245.

literature. First, it aspires to illuminate the ways in which the institutional arrangements and social conditions that took shape in earlier periods of American racial history continue to have an impact on forms of racial victimization and practices of criminalization in the present. For example, constitutional doctrines that originated in the Reconstruction era and refused to interpret the Equal Protection Clause as authorizing federal regulation of discriminatory acts by private individuals impeded the development of effective regimes of criminalizing racial violence throughout most of the twentieth century.[13] The formation of the urban black ghetto in the first decades of the twentieth century created residential and occupational structures that continue to cultivate interracial conflicts in poor urban neighborhoods today.[14] Tracing the ways in which earlier race policies set specific trajectories for the formulation and implementation of criminal laws regarding racial violence in later periods is vital for understanding why criminalization reform often fails to bring about significant reductions in the incidence of victimization.

Second, by placing the recent spread of hate crime laws alongside earlier regimes of criminalizing racial violence, it is possible to identify similarities and differences in the regulatory and symbolic functions that these regimes performed in distinct eras of American racial history. For example, although the specific political goals that impelled elites and lawmakers to enact new legislation regarding racial violence were shaped by the distinct historical circumstances of each period, the intended contribution of criminalization reform to legitimizing central aspects of the existing system of racial stratification served as a powerful driving force in each case. Similarities can also be found with regard to the double-edged effects that each of these criminalization reforms engendered. While these reforms confirmed the entitlement of African Americans to equal protection, they also framed the meaning of this entitlement in a way that failed to address most of the social harms built into the existing system of racial stratification. Repeatedly, the criminalization of particular forms of racial violence served to legitimize the nonregulation of

[13] These doctrines include *Slaughter-House Cases*, 83 U.S. 36 (1872); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883). For discussion of their long-lasting impact, see William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Harvard University Press, 2011): 117–122.

[14] Massey and Danton, *American Apartheid*; Stephen G. Meyer, *As Long as They Don't Move Next Door: Segregation and Racial Conflict in American Neighborhoods* (Lanham, MD: Rowman and Littlefield, 1999); Jeannine Bell, "Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation," *Ohio State Journal of Criminal Law* 5 (2007): 47–77.

various forms of racially skewed social harm at the same time that it symbolized public condemnation of forms of violence that were previously ignored by public opinion.

The concept of *criminalization*, as used throughout this book, refers to the range of practices through which societies define and identify the forms of conduct that may be liable to penal sanctions.[15] In common law systems, legislatures and judges possess the authority to define the categories of conduct forbidden by criminal law. However, other institutional and social agents also participate in the diverse interpretive practices that construct the legal meaning of statutory offense definitions. These include not only governmental organs such as prosecutors and police officers but also lay citizens who serve on juries or decide whether to report experiences of victimization to the police. In addition, the decisions made by legislatures and judges in defining crimes are responsive to changes in social practices and sensibilities. These changes are often stimulated by strategic practices of legal mobilization taken by social movements and by the media.[16] Thus, a sociological study of the underpinnings and consequences of changes in the criminalization of racial violence must consider a wide range of social actors and practices and explain how their actions are shaped by (and in turn affect) the institutional, political, and social settings in which they are placed.

To name the legal reforms that created distinct criminal offenses penalizing the racially motivated victimization of African Americans, I use the concept of *pro-black criminalization reform*. This concept refers to the stated aims of these reforms, namely, providing blacks with improved protection from violence and expressing the community's disapproval of such violence. These aims are recognizable in the statements made by the legislators and judges that constructed these offenses and by the social movements that campaigned for their enactment. It is important to clarify that the use of this concept does not intend to defend the arguments made by advocates of this legislation. Instead, this concept identifies a particular aspect of these reforms, namely, the way in which they are represented by their supporters, and provides a tool for analyzing the social and political functions that these representations perform.

[15] This concept of criminalization draws on the work of Nicola Lacey. See, e.g., Nicola Lacey, "Contingency and Criminalisation," in Ian Loveland, ed., *Frontiers of Criminality* (London: Sweet and Maxwell): 5–34; Nicola Lacey, "Historicising Criminalisation: Conceptual and Empirical Issues," *Modern Law Review* 72 (2009): 36–60.

[16] Valerie Jenness, "Explaining Criminalization: From Demography and Status Politics to Globalization and Modernization," *Annual Review of Sociology* 30 (2004): 147–171, 155–156.

The Underpinnings of Pro-Black Criminalization Reform: A Sociological Perspective

The complex relationship between legal reform and social change has long been a central object of theoretical and empirical investigation. The vast literature on this topic has greatly contributed to our understanding of the possibilities, limitations, unintended consequences, and boomerang effects that result from the deployment of legal tactics to challenge social injustice and inequality. Reinforcing an American creed that dates back to Tocqueville's writings about the unique centrality of courts in American political culture,[17] scholars of legal mobilization have directed most of their attention to studying how activists use litigation tactics to initiate social change.[18] In comparison with the voluminous literature on litigation-centered legal mobilization, little systematic effort has been given to theorizing how processes of criminal legislation provide tools through which movements contest the legitimacy of society's power structures.[19]

For some readers, the peripheral place of criminalization studies within the canon of legal mobilization scholarship might be taken as an indication that the motivations that impel social movements to

[17] Alexis De Tocqueville, *Democracy in America:* Vol. I, trans. Henry Reeve and Francis Bowen (New York: Vintage, 1945): 290.

[18] Canonical examples of this vast literature include Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed American Prisons* (New York: Cambridge University Press, 2000); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2012); Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics* (New York: Cambridge University Press, 2009); Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999). Two seminal studies that look at the interactions between public interest litigation and grassroots mobilization are Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011).

[19] Notable exceptions include Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006): Chapters 5–7; Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflicts," *Melbourne Journal of International Law* 9 (2008): 78–124; Jenness and Broad, *Hate Crimes*; Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

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