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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).

advocate criminalization reform are too obvious to warrant a serious sociological investigation. After all, they might stress, social movements mobilizing on behalf of women and minorities are naturally drawn to the field of criminalization reform because changes in criminal law are necessary to provide members of these groups with better protection from violence. This response certainly captures the sincere motivations of many activists and policymakers. However, it seems to be premised on popular images of criminal law rather than on empirically grounded evidence of its actual accomplishments. There is ample empirical evidence to support the claim that changes in social policy that act on the structural causes of crime – including poverty, unemployment, social disintegration, and inadequate policing – are more likely to reduce violence and victimization than are changes in criminal law.[20] Moreover, many studies have shown that criminalization reform often serves as a vehicle of symbolic politics, with little effect on regulatory and enforcement outcomes.[21] To examine the gains and costs of the reliance on criminalization reform as a tool for mobilizing progressive social change, we have to overcome the conventional tendency to presuppose that such reform provides the optimal remedy to previous failures to protect minorities from violence. Investment in the mobilization of criminalization reform is a strategically driven course of action, responsive to the opportunities and constraints that political entrepreneurs identify within concrete sociopolitical settings.[22] The decision to focus on criminalization campaigns is premised on particular assumptions regarding the power of criminal law to advance the effective regulation of human conduct and to serve as a vehicle of moral education. Improving our understanding of the social forces that shape these assumptions and of the extent to which they are grounded in historical and empirical evidence is important for developing a fuller understanding of how the reliance on criminalization by progressive social movements both facilitates and constrains the pursuit of egalitarian political change.

[20] Michael Tonry and David P. Farrington, eds., *Building a Safer Society: Strategic Approaches to Crime Prevention, Crime and Justice: A Review of Research,* vol. 19 (Chicago: University of Chicago Press, 1995).

[21] For a classic example, see Edelman's analysis of the functions played by the anti-trust legislation of the late nineteenth century in reaffirming public trust in the capitalist system. Murray Jacob Edelman, *The Symbolic Uses of Politics* (New York: Free Press, 1964).

[22] For a comparative analysis of the significance of the political opportunities structure in enabling and constraining the mobilization of criminalization reform, see Abigail C. Saguy, *What Is Sexual Harassment: From Capitol Hill to the Sorbonne* (Berkeley: University of California Press, 2003).

Although this study focuses on the specific context of the criminalization of racial violence, it discusses sociological questions that are raised in many other contexts of legal mobilization. Hate crime legislation has served over the last decades as a platform for many groups whose experiences of victimization have long been neglected by the criminal justice system (including gays and lesbians, people with disabilities, and religious minorities). Through this legislation they have sought to precipitate more effective regulation and a firmer condemnation of the forms of violence to which they are vulnerable.[23] Feminist activists have effectively mobilized substantial definitional and procedural reforms related to criminalization and sentencing for rape, domestic violence, and other forms of sexual victimization.[24] With the increasing scope and range of political activism and legal reform in this field, new questions are raised for the sociology of criminalization. What are the driving forces that enable the emergence of new criminal laws regarding the victimization of minority groups, especially within political settings fraught with structural impediments to the effective influence of these groups on the design and implementation of public policy? Given that these laws are enforced by institutions whose organizational culture is pervaded by symptoms of class, racial, and gender inequality, how can the introduction of benevolent criminal legislation rectify the institutional problems that obstructed the effective protection of minority groups prior to their enactment? Does creating new criminal offenses that condemn symptoms of racism, sexism, and homophobia serve as a catalyst of progressive change in public attitudes, or does it instead operate to individualize blame and legitimize the status quo?

We can usefully begin to address these questions by considering the conditions that produce new criminal laws to address symptoms of social inequality. Criminalization provides an institutional tool through which societies denounce particular forms of behavior and authorize the State to use coercive measures against individuals who perpetrate these actions.[25] Legal philosophers and lawyers commonly characterize criminalization either as an instrument of reducing the

[23] Ryken Grattet and Valerie Jenness, "Examining the Boundaries of Hate Crime Laws: Disability and the Dilemma of Difference," *Journal of Criminal Law and Criminology* 91 (2001): 653–698.

[24] Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Durham, NC: Duke University Press, 2008).

[25] I use the term *State* as a socio-scientific concept, referring to a set of institutions that possess the authority to enact and enforce laws within a particular jurisdiction. In the United States, this authority is divided among national, state, and local governments. Together, they exercise and symbolize the key functions attributed to the State in modern political thought.

incidence of harmful or offensive conducts (as emphasized by the utilitarian tradition harking back to the work of Becarria, Bentham, and Mill)[26] or as an expressive medium through which a political community denounces forms of behavior that infringe on its core moral values (as classically explained by thinkers such as Durkheim and Stephen).[27] In fact, there is mixed empirical evidence with regard to the actual accomplishments of criminalization in reducing the frequency of harmful and offensive conduct (e.g., by means of general deterrence and incapacitation). Likewise, there are ample reasons to question the accuracy of portraying modern criminal codes, which often include a plethora of regulatory offenses (*mala prohibita* rather than *mala in se*)[28] and are strongly biased toward the preferences of pressure groups and organized interests,[29] as genuine reflections of society's core social values. Nevertheless, although the empirical validity of the conventional images of criminal law is questionable, these images continue to shape public perceptions of the social goods that criminal law is capable of delivering. In turn, these images produce the public demand for the introduction of new criminal laws to address troubling aspects of social life. As Nicola Lacey et al. note, although "empirical evidence suggests that the reductive effect of criminal processes … [is] meagre … it may be that a widespread belief in the instrumental efficacy of and necessity for criminal law is something which typically underpins its existence."[30] Thus, irrespective of their factual validity, conventional images of criminal law provide symbolic capital that political actors have ample incentives to utilize. Among other things, the passage of criminal legislation bestows legitimacy on particular moral claims by presenting them as expressions of society's fundamental values. It also reassures relevant audiences that policymakers are taking robust measures to prevent the future spread of harmful forms of conduct.

[26] Cesare Becarria, *On Crimes and Punishments*, trans. Graeme R. Newman and Pietro Marongiu (5th ed., New Brunswick: Transaction Publishers, 2009) [1764]; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Mineola: Dover Publications, Inc., 2007) [1780]; John Stuart Mill, *On Liberty* (London: Parker, 1859).

[27] Émile Durkheim, *The Division of Labor in Society*, trans. Lewis A. Coser (New York: Free Press, 1997) [1893]; James Fitzjames Stephen, *Liberty, Equality, Fraternity* (New York: Holt & Williams, 1873).

[28] Douglas N. Husak, "Malum Prohibitum and Retributivism," in R. A. Duff and Stuart P. Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005): 65–90.

[29] Barbara A. Stolz, "Roles of Interest Groups in U.S. Criminal Justice Policy Making: Who, When, and How," *Criminal Justice* 2 (2002): 51–69.

[30] Nicola Lacey, Celia Wells, and Oliver Quick, *Reconstructing Criminal Law* (3rd ed., London: Butterworths, 2003): 10.

The following chapters develop a sociological and historical account of the conditions under which new regimes of criminalizing racial violence emerged throughout American history. I argue that the emergence of these regimes was enabled by the materialization of three interlocking sets of underpinnings: (1) structural economic, political, and cultural changes that permitted openings for new forms of political mobilization around the issue of racial violence; (2) the development of effective strategies of political mobilization by collective actors, based on the representation of the failure to protect African Americans as a symbol of a broader political failure to meet basic standards of legitimacy; and (3) the perceived contribution of criminalization reform to advancing dominant political and economic interests, often with the effect of reinforcing key aspects of the existing system of racial stratification. Let us elaborate on each of these three sets of underpinnings.

Campaigns protesting against unjust social conditions do not emerge in a vacuum. They are made possible by political changes that allow social reformers to build new organizational capacities and networks of communication through which they can attract public attention to problems that either are new or were previously neglected. At the same time, these structural conditions inevitably constrain the ways in which social reformers can frame the meaning of the problem they aspire to address and the range of policy solutions that can actually gain political and public support.[31] The following chapters demonstrate how structural economic, political, and cultural shifts that took shape in transitional moments of American history enabled social reformers to place the issue of racial violence at the center of the national political agenda; at the same time, these shifts set ideological and institutional limits on the ways in which these reformers could represent the nature of the problem and its appropriate solutions. Another question that is illuminated by studying the underlying structural conditions of pro-black criminalization campaigns is why reform sentiments did not gain ground in other periods during which racial violence was rife. This question is particularly intriguing with regard to the post-Reconstruction period, a time when the ritual of public lynching across the South did not generate significant

[31] The impact of structural forces on the emergence, development, and outcomes of political protest and reform initiatives is a major theme in social movement theory. Major discussions of the literature include David S. Meyer and Debra C. Minkoff, "Conceptualizing Political Opportunity," *Social Forces* 82 (2004): 1457–1492; Sidney Tarrow, "States and Opportunities: The Political Structuring of Social Movements," in Doug McAdam, John D. McCarthy, and Mayer N. Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures and Cultural Framing* (New York: Cambridge University Press, 1996): 41–61.