

Spring 2017

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Recommended Citation

Charlton C. Copeland, *Criminalization as Governance in the American Racial State*, 52 *Tulsa L. Rev.* 643 (2017).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/27>

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CRIMINALIZATION AS GOVERNANCE IN THE AMERICAN RACIAL STATE

Charlton C. Copeland*

ELY AARONSON, *FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY* (CAMBRIDGE UNIVERSITY PRESS 2014). Pp. 205. HARDCOVER \$93.00.

NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (OXFORD UNIVERSITY PRESS 2014). Pp. 260. HARDCOVER \$105.00. PAPERBACK \$26.95.

RENEE C. ROMANO, *RACIAL RECKONING: PROSECUTING AMERICA'S CIVIL RIGHTS MURDERS* (HARVARD UNIVERSITY PRESS 2014). Pp. 268. HARDCOVER \$35.00. PAPERBACK \$19.95.

Over the last few years, American race relations have been inflamed by the violence against black bodies. From the death of Michael Brown, and the deaths of Eric Garner, Sandra Bland, Walter Scott, Tamir Rice, and Freddie Gray, the conflict between the police and activists against police violence have called for greater legal accountability. Such accountability is framed as criminal accountability, which has often been unattainable because of a failure to pursue criminal prosecutions, or a failure to attain criminal convictions where prosecutions have been sought.¹ Calls of increased criminal prosecutions for what are deemed to be racially motivated shootings are both understandable and remarkable. While calling for increased accountability through crime for police shootings, activists reject the punitive turn that American law enforcement policies took in the last quarter of the twentieth century, leading to an explosion of the prison population and an increase in the disparity between whites and blacks in the prison population. One might reasonably scoff at my attempt to connect these two responses as anything but evidence that blacks bear the burden of unequal policing on two fronts, rather than as evidence of black policy incoherence

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1. The most recent failures to secure criminal conviction of police officers in the shooting deaths of Freddie Gray in Baltimore, Maryland and Walter Scott in Charleston, South Carolina demonstrate the difficulty of the path of criminal liability. *See, e.g.,* Rich Schapiro, *Civil Rights Group Slams Very White Jury in Walter Scott Cop Case*, N.Y. DAILY NEWS, Nov. 3, 2016, <http://www.nydailynews.com/news/national/s-didn-bother-cpr-walter-scott-prosecutor-article-1.2856473>. However, some have commented on what they see as silence after the trial against Walter Scott's shooter ended in a mistrial. Issac Bailey, *Where is Anger Over Mistrial for Cop Who Shot Walter Scott?*, CNN, Dec. 14, 2016, <http://www.cnn.com/2016/12/14/opinions/slager-mistrial-bailey>.

or inconsistency. However, calls for criminal accountability exhibit some measure of faith in the capacity of law and legal process to respond in acceptable ways to injustice. Faith, even if oft disappointed, rests in the capacity of criminalization of police misconduct to offer a remedy against racially-motivated abuses of authority.

What accounts for this faith? What accounts for continued efforts to remedy police misconduct through criminalization? Some might suggest that such faith is part of a larger faith in courts that rests in the perceived role of courts in the advancement of black civil rights during the heyday of the Civil Rights Movement.² Some might suggest that the confidence in criminalization is consistent with the “weak” nature of the American state, where courts have seemingly always had an outsized role as compared to other western democracies.³ Each of these explanations is likely right. However, the first explanation likely comes rather late in the historical narrative regarding the turn to criminalization as a governing mechanism in American racial policy. The second explanation likely fails to take race sufficiently seriously in explaining the weakness of the American state in the first instance and is likely to underestimate its ongoing role in the changing reception of American political institutions.⁴ The three books under review offer a different explanation of the turn to criminalization than either of the above. Theirs offers us an opportunity to see the “long” turn toward criminalization as a governance tool in American race relations.⁵ In uncovering this longer history, these projects offer analytical perspectives on the role of law, politics, and institutions in the transformation of American racial regimes that offers an additional perspective on black faith in criminalization as a remedy for racial violence. However, they also offer us three trenchant perspectives on the limits and costs of this deployment.

These three books—Ely Aaronson’s *From Slave Abuse to Hate Crime: The Criminalization of Racial Violence in American History*; Naomi Murakawa’s *The First Civil Right: How Liberals Built Prison America*; and Roberta Romano’s *Racial Reckoning: Prosecuting America’s Civil Rights Murders*—each takes the reader back in time to examine three distinct, but related, dimensions of a single phenomenon: the impact of the turn to criminalization as a governance strategy in American racial politics.⁶ They each address the politics and consequences of the turn to criminalization as a response to racial violence—particularly anti-black violence—in American life. Collectively, these

2. For a discussion of the basis of faith in courts to advance black interests, see PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 70-97 (2008).

3. STEPHEN SKOWRONEK, *BUILDING THE NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, 3-35, 37-46 (1982) (describing the American state as one of courts and parties).

4. For a critique of the failure of American politics to take race seriously in the study of American political development, see JOSEPH LOWNDES, JULIE NOVKOV & DORIAN WARREN, *RACE AND AMERICAN POLITICAL DEVELOPMENT* (2008).

5. My use of the term “race relations” in the broad sense is conscious of the fact that racial violence has played such a crucial role in the history of both the maintenance and transformation of the American racial regime. See, e.g., JOEL WILLIAMSON, *A RAGE FOR ORDER: BLACK-/WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 117-51 (1986).

6. See, e.g., JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2009).

books span the antebellum period through the recent past. In their focus on the institutional, ideological, and political residue left by past policy choices, these three books connect at the methodological level, as each bears the influence of developmental literatures in political science and sociology.⁷ Also, connecting these projects it seems is the nagging question of whether the “liberal”⁸ comfort with criminalization as a policy stance is connected to the turn toward increased criminalization and penalization in contemporary American politics and policy represented by the massive expansion of the carceral state and the phenomenon of mass incarceration.⁹

Addressing the residue of the turn toward criminalization, these projects draw our attention to the ways that law and legal institutions are both impacted by and impact the project of racial governance across American history. In distinct, but related ways, each book identifies the criminalization of racial violence as enhancing the capacities of legal institutions in the structure of the governance of American racial policy.¹⁰ Endowing legal institutions with capacity over race relations through the criminal law impacted the judiciary as an institution in the political landscape, and it also impacted the shape of the future trajectory of the development of the racial state by becoming an important component of America’s institutional infrastructure vis à vis the racial state.¹¹

Each of these projects calls our attention to the long history of the politics of criminalization, which means it is a policy choice that is neither inevitable nor natural.¹² Rather, it is the result of the contestation of power and interests. These three books call us to confront the fact that criminalization of racial violence is not simply

7. This is especially true of Ely Aronson and Naomi Murakawa, which is more heavily influenced by these social science methodologies than is Roberta Romano. That said, Romano, who is a trained historian, is clearly at home in this terrain, as her projects gestures toward a recognition of the extent to which political decisions create paths down which future decisions are affected. For a useful guide to this literature, see KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

8. My use of the term “liberal” is clearly not altogether warranted, but it captures something about the *relatively* racially progressive policy that a turn toward criminalization represents, even in an account where blacks simultaneously are held in chattel slavery.

9. This question is admittedly less explicit in Aronson and Romano, than in Murakawa, for whom it serves as the central question of her project. Scholars have offered explanations for the growth of the carceral state in the last quarter of the 20th century, attributing the phenomenon to various causes, including white backlash, black complicity, and the institutional growth of the state carceral capacity of earlier eras. See, e.g., MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006).

10. To be sure there are other incidents of the enhancement of the capacity of legal institutions in the governance of American racial policy, particularly congressional empowerment of the judiciary in legislation enacted pursuant to the Fourteenth Amendment, and the empowerment of the judiciary by the political branches to address American racial policy for their own interests. See, e.g., MEGAN MING FRANCIS, *CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE* (2014); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN* (2004).

11. The role of judicial institutions in the demise of Reconstruction is incomplete without an understanding of the judiciary’s place in a larger political/constitutional order. For an example of this interpretation of the judicial role in killing reconstruction, see PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2014).

12. For a broader history of the ways that criminalization served the interests of racial, ethnic, and gender boundary maintenance, see JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 257-344 (2003).

the triumph of the “weak” over the “strong” but the convergence of interests that seek to maximize their advantages through criminalization as governance mechanism. This convergence of interests that are opposed to racial violence often impose constraints on the ability to confront a racially hierarchical social and political structure.

These books make a significant contribution to the “racial orders” literature in law and social science.¹³ The racial orders thesis asserts that the racism in American history is neither aberrational nor uncontested. Race is simultaneously a constituent element in the structure and organization of the American state building project and resisted throughout American history. The success of the maintenance of a particular racial order—whether it is a “white supremacist” order or an “egalitarian” order—is dependent upon its capacity to make alliances with political, social, and other institutions. The demise of a racial order does not signal that the order does not leave residual institutions and ideologies that are capable of being repurposed in another, even more progressive or regressive, order. The examination of the turn toward criminalization in ways that might be understood as pro-black—i.e., egalitarian—provide an important case study for the interrogation of the racial orders thesis in American political and legal development. Through their examinations we are able to see the ways that so-called transformative policies accommodate residue of past (even regressive) orders and institutions in ways that have important consequences for the capacity to move further along a transformative racial path.

Related to the above discussion of the complicated nature of the transformation of racial orders, but deserving of separate emphasis is a theme that is on display in varying degrees in each of these projects—the conceptualization of racism in the transforming racial order. Despite the fact that the racial orders thesis asserts that racism is not a deviant quality in American political development, the ideological commitment to its aberrational quality is important. Each of the authors demonstrates that the turn to criminalization against racial violence hinges upon accepting the capacity of racial violence to be identified and apprehended through criminal process. This commitment rests on the characterization of racism as separable from the political and social order. Indeed, to the extent that criminalization grants to the state a monopoly power over the articulation of the opposition to anti-black violence, the state is incapable of being inherently racist. The state stands over and against the racist acts of those identified as criminals. The logic calling for the state to criminally prosecute police officers is premised upon the conception that they are “rogue,” and abused otherwise legitimate authority. As such, the turn to criminalization may blunt the capacity to hold the state accountable for its complicity in racial violence, specifically, and racial injustice more broadly.

Ely Aaronson examines the long history of what he calls “pro-black criminalization” against what he asserts is the amnesia surrounding the extent to which law was mobilized in the service of protecting the safety of slaves in antebellum America

13. See Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75, (2005). See also Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J. OF L. 95 (2011); JULIE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954* (2008).

against certain forms of bodily cruelty.¹⁴ Aaronson informs us that the late 18th century ushered in the conception of “slave victimization” that would shape the formal response of southern legal institutions to violence against slaves.¹⁵ The period saw the first state-based laws aimed at protecting slaves from violence at the hands of others.¹⁶ Aaronson canvasses the legal reports of antebellum state courts, finding evidence of the constitutional and jurisprudential expansion of the state’s protection of slaves.¹⁷ One of the earliest cases on which Aaronson reports is that of *State v. Will*, in which a North Carolina court tried a slave (Will) for the killing of his overseer, who had tried to shoot him in the back for allegedly taking a hoe without permission.¹⁸ Aaronson describes this as early evidence of the law’s recognition of the slave’s right to protection based on the court’s acceptance of a slave’s right to defend himself against a master who transgressed the limits of this authority.¹⁹ Aaronson argues that this is one of the earliest examples of the law’s recognition of some limitation of a slaveholder’s authority over the body of the slave.²⁰

In addition to the rights of the slave to defend against a master’s unconstrained authority, Aaronson points to legislation that barred “cruel and inhuman treatment of slaves,” including the imposition of limits on the number of hours that a slave could work and prohibitions on the withholding of food and appropriate clothing.²¹ Though Aaronson acknowledges the disparity in the conviction rate in criminal prosecutions of slave killings (32% versus an overall conviction rate of nearly 47%), he rightly asserts that the discrepancy is likely better than one might have thought, without knowing very much more.²²

Though Aaronson clearly sees these as relative advancements in the treatment of slaves, he is clear that the turn to criminalization of violence against slaves did not bear the marks of egalitarian commitments.²³ In fact, advancements in the protection of slaves from physical violence were based on the desire to protect the slaves as financial investments, whose value significantly increased in the early 19th century.²⁴ Aaronson explains the turn to criminalization to guard against anti-slave violence was heavily influenced by the transformation in the political economy of slavery in 19th century America.²⁵ As others have pointed out, the prohibitions on the importation of slaves likely had a significant effect on the value of slaves.²⁶ This combined with the invention of the cotton gin and its effects on the southern slave economy, which

14. ELY AARONSON, FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY 5 (2014).

15. *Id.* at 26, 30.

16. *Id.* at 26-27.

17. *See id.* at 33-49.

18. *Id.* at 36-37; *see State v. Will*, 18 N.C. 121 (1834).

19. AARONSON, *supra* note 14, at 37.

20. *Id.* at 36.

21. *Id.* at 38.

22. *Id.* at 38-39.

23. *Id.* at 48.

24. AARONSON, *supra* note 14, at 40-49.

25. *Id.*

26. *Id.* at 44.

Aaronson reports created a “highly stratified class structure *within white society*,”²⁷ increased inequality among whites in the antebellum South, marked by a declining number of whites who owned slaves, and resulted in disproportionate political power in the hands of slaveholding elites.²⁸ Aaronson argues that the stratified political economy incentivized the development of a collective white identity that transcended class disparities while undergirding slavery’s structure.²⁹ White supremacy, Aaronson argued, played this role well and allowed poor whites a measure of identity security over blacks in their midst, while it masqueraded the unequal benefits of the racial hierarchy.³⁰ Indeed, poor whites were enlisted in maintaining the racial order, and given license over black bodies. However, these same whites had to be restrained in their ability to undermine elite white investment in black bodies, which were ultimately the property of the white elite. Aaronson declares, “[O]wners were well aware of the problems inherent in the routine involvement of poor whites in enforcing racial codes. Excessive violence on slaves by white strangers impinged on the economic investment of individual slave holders.”³¹ Criminalization of violence against slaves is a response to the white supremacist structure that was demanded in order to hold the system of slavery together in the south given its unequal distribution of material benefits. Criminalization was a tool by which elite slaveholding investments in black bodies was protected as property rather than as personhood worthy of the state’s concern. Aaronson asserts, the class dimension of the criminalization of slave violence is evidenced by the distinction between the state’s response to violence against slaves that took place on plantations, which went largely unpunished, and violence outside of plantations, which constituted a disproportionate share of the prosecutions.³² Aaronson argues that these distinctions were possible because of the broad discretionary powers of the investigatory institutions of the state, and the elite bias in institutions, like the jury, which were made up of property-owning white men.³³

Criminal prosecutions also reinforced the conception of the individualized nature of racist violence. Criminal law does not admit a conception of a societal implication, thereby “privatizing” the violence committed because they are the acts of individuals or collections of individuals. The turn to criminal law does not admit of a broader assessment of the risks under which black life is lived due to societal conditions and state and communal policy choices. Slavery as an institution, no more for *de facto* segregation at a later period, could not be tried at the criminal bar; only the acts of individuals who had acted outside of the boundaries of societal norms could

27. *Id.* at 40.

28. *Id.* at 41. See ROBERT W. FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974) (discussing the lucrative nature of slaveholding).

29. AARONSON, *supra* note 14, at 43.

30. *Id.* at 42-43.

31. *Id.* at 43.

32. *Id.* at 46. Aaronson rightly notes that laws to protect marginalized groups are often implemented against other marginalized groups, rather than against elite members of society. For a discussion of this in the context of early anti-wife abuse laws, and their disproportionate deployment against black men, see REVA B. SIEGEL, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117 (1996).

33. AARONSON, *supra* note 14, at 45-46.

be called to answer in such a process.³⁴

Beyond protecting the financial interests of slaveholder's investments, protecting slaves from private violence served the interests of defending slavery's integrity, which was increasingly under assault in 19th century America. Aaronson argues that the turn toward criminalization of violence against slaves was also a response to the argument that slavery's inherent brutality undermined its legitimacy.³⁵ Criminalization of violence against slaves was used to "represent incidents of racial brutality as rare deviations from prevailing norms of paternalism and honor."³⁶ The imposition of constraints on slave masters served as a way to legitimize the institution of slavery against the harsh criticisms of the arbitrary nature of slavery's violence. Reforming this perceived demerit in the slave system demonstrated that the system could not only be made more legitimate, but also more conformable to basic conceptions of law and decency, withstanding attacks by former slaves, and other abolitionists.³⁷

Aaronson's description of the role that criminalization plays in American racial governance in the Reconstruction period and beyond is a story that is reminiscent of other narratives of the Long Civil Rights Movement. Specifically, the advances and retreats of pro-black criminalization are impacted by the needs of political parties and partisan alliances. Here, the most important of those are the Republican Party's retreat from its commitment to a criminalization policy that appears costly to its national ambitions, and the impact of the Great Migration of blacks from the South to the North, which began the reintegration of blacks into national party politics through the Democratic Party.

What Aaronson emphasizes a bit less is the extent to which the turn to criminalization empowered judicial institutions to protect against anti-black violence. In the Reconstruction Era, federal judicial institutions were endowed with responsibilities to protect blacks from violence. Yet, judicial institutions would deliver the death knell to Reconstruction Era statutes and authority, essentially divesting the federal government of any authority over the continued protection of blacks in the former Confederacy. As Aaronson states, but does not explore in much detail, commitments to a limited national government and a robust federalism underwrote the judiciaries retreat from the promise of Reconstruction. The commitment to limited government continues to linger as residue, impacting the ways in which the assertion of national authority is exercised.

The reemergence of a national commitment to the protection of the rights of blacks in the Civil Rights Era was understood as a response to the South's intransigence in the face of violence against blacks. Aaronson declares that the South was depicted as the paradigmatic site of racial violence, obscuring "the ways [that] . . . the

34. *Id.* at 57.

35. *Id.*

36. *Id.* at 49.

37. On the role that reform plays in the maintenance of white supremacist orders, see KIMBERLEY S. JOHNSON, REFORMING JIM CROW: SOUTHERN POLITICS AND STATE IN THE AGE BEFORE BROWN (2010).

Northern system of racial stratification” disproportionately exposed blacks to vulnerability to violence.³⁸ Here, the South’s depiction as an exceptional site of generates a “Northern revulsion against Jim Crow” thereby legitimating the federal government’s assertion of what continue to be thought of as extraordinary powers to transform southern society. Here, Aaronson notes that the racist culprit is the *de jure*, not *de facto*, segregation.³⁹ He argues that the closer southern society came to Northern society, the greater the support for deregulating race relations in a host of areas.⁴⁰

Naomi Murakawa’s *The First Civil Right* is an incredibly ambitious examination of the liberal contribution to the turn toward criminalization in the twentieth century.⁴¹ Murakawa’s project is, to be frank, less tidy than either Aaronson’s or Romano’s, which makes a straightforward narrative engagement with the text less compelling than in either of the other books. But what Murakawa’s account lacks in a certain historical tidiness, it makes up for in analytical rigor. This is not to suggest that Murakawa is not attentive to the unfolding of politics in history, but rather that she is juggling a few balls simultaneously, and this reviewer finds it a bit more profitable to spend time on the highlighting the Murakawa’s assertions and their implications for the larger narrative.

Murakawa’s treatment of the turn to criminalization is distinct from both Aaronson and Romano’s in that it focuses on those whom we rightly understand as the racial liberals within American race policy of the post-World War II era.⁴² While it is clear that racial liberals might have supported the criminalization policies studied by both Aaronson and Romano, Murakawa credits an ascending anti-racist order with the production of what she calls “liberal law and order.” Unlike the liberals in Aaronson’s account of the Reconstruction, who are under attack from almost the very first, the coalition that Murakawa describes is assuming power of post-World War II America armed with the dominance over retrograde concepts of race as near certainties.⁴³ Perhaps because of this dominance, Murakawa is comfortable placing them in the crosshairs of her examination of the role that liberal commitments to criminalization continue to play in racial governance.

Murakawa argues that efforts to explain the puzzle of mass incarceration in an era of declining crime rates, fixated on racial conservatives, as the stokers and manufacturers of white fear and anxiety about black advancement in a post-Civil Rights

38. AARONSON, *supra* note 14, at 149.

39. *Id.* at 150.

40. *Id.* at 150-51.

41. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

42. It might strike some as a controversial statement that the Democratic Party of Harry Truman is seen as the embodiment of racial liberalism, but recent studies have demonstrated that the transformation in the Democratic Party’s coalition in the North had, by the Truman Administration, made the Democratic Party, at least in the North, the liberal party on the question of race and civil rights. See ANTHONY CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972* (2009); ERIC SCHICKLER, *Racial Realignment: The Transformation of American Liberalism*, 79 J. OF POLITICS 1932-1965 (2016).

43. For one of the best accounts of this rise and dominance, see MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2015).

world.⁴⁴ Murakawa asserts that the near-unanimity of attention to conservatives obscures the role that liberals played in building the ideological and institutional infrastructure of the carceral state's expansion. More profoundly, Murakawa contends that the liberal obsession with procedure as the remedy for racism furthered the conceptualization of racism as an aberrant quality in American institutional and political life, and deprived racial justice discourses of a vocabulary with which to confront the carceral state's expansion and racially disparate consequences.

One of the first questions that one might reasonably ask is why focus on the role that so-called racial liberals played in the infrastructure of the carceral state? Murakawa suggests that paying attention to the dominance of liberal law and order allows us to see the ways in which its dominance was the product of politics, and more particularly racial politics. Here, Murakawa, to a greater extent than either Aaronson or Romano, sits at the moment of a significant ideational transformation as it regards race and racial ideas—that is the actual demise of a biological conception of race in favor of a socially constructed conception of race. Murakawa suggests that the rise of liberal racialism was preceded by—and in competition with—a conception of racial disadvantage as structural. Murakawa identifies calls by black civil rights activists for federal protection against anti-black violence as encompassing a structural critique of the disparate vulnerability to violence that permeated black life in the Jim Crow era.⁴⁵ This was distinct from the liberal conception of crime as individualized, and committed by “lawless whites and ‘lazy’ blacks.”⁴⁶ For those who adhered to what Murakawa calls “structural law and order” activists, “violence was neither individualized nor was a byproduct; it was the strong arm of white supremacy that permeated the state itself.”⁴⁷ Though it is not altogether clear in Murakawa's account, the supplanting of a structural law and order denies blacks access to a capacious conception of equality in favor of a narrower one. Murakawa's description raises the question of the political dynamics that allow white's conceptions of quality, no matter how narrow, to crowd out more radical conception of an egalitarian commitments. In this regard, the racial liberalism that underwrites the dominant liberalism of the post-War era is not the construction of a multi-racial coalition of political equals, but rather the deal that whites have been willing to strike with blacks, who are made offers that cannot be refused. In this account American racial politics is less about the construction of a moral vocabulary across racial difference, but rather—as was depicted in Aaronson's account in antebellum laws to protect slaves—an intra-racial negotiation among whites themselves with blacks as beneficiaries.

Blacks as beneficiaries of the goodwill of whites in Murakawa's framework is further evidenced by what she calls the deployment of pity (as against conservative contempt) for black victims of racial violence. Murakawa asserts that the trope of

44. Murakawa is not alone in turning her attention from conservatives to liberals in offering an explanation of the rise of mass incarceration, see ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE RISE OF MASS INCARCERATION (2016); and MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015).

45. MURAKAWA, *supra* note 41.

46. *Id.* at 54.

47. *Id.*

Bigger Thomas as the embodiment of black seething frustration that will, at some point, threaten white society, rests on dangerous repackaging of the trope of black criminality, but also furthers the association of black civil rights advancement with crime. To the extent that liberals paint crime as even the reasonable response to racial inequality, Murakawa suggests that black political action is truncated, always returning to a site of violence. Further, she argues that centering the figure of a volcanic Bigger Thomas as the barometer of black consciousness results in centering attention on white safety rather than on black disadvantage.⁴⁸ Bigger is understood to be a threat because of the pervasiveness of racial inequity, but he is understood to be a threat to white safety. For Murakawa, liberal law and order allows this slippage, which creates white victims and black threats. As stated above with respect to the racial orders thesis, perceptions about the relationship between blackness and criminality, which underwrote an earlier era's retreat from a commitment to black social and political equality (Aaronson's story), infected liberal law and order rhetoric in ways that would be useful for those who sought to attribute advancement in racial equality to black criminality. One of the most significant contributions that liberal law and order makes for Murakawa is the maintenance of the conceptual connection between blacks and criminality for repurposing and deployment.

Perhaps most importantly, Murakawa argues that liberal law and order's commitment to rationality and neutrality resulted in a faith in procedural fairness that would constrain the ways in which racial violence could be remedied. Liberal law and order identified the flourishing of racist treatment against blacks as a problem of procedural deficiencies, which could be remedied through procedural reforms. Understanding racial disparity and injustice in such limited terms also constrained the things that could be understood as the product of racist decision-making. Commitment to a procedural framework as an effective mechanism by which to govern racial politics impacts the nature of what is seen as racial politics. Murakawa argues that liberal law and order understood police officers who were inadequately trained in appropriate procedures as the basis of racial disparities, which could be eradicated where training in appropriate procedural methods could be disseminated. While it is not clear whether these commitments were causal factors in a turn to criminalization during the Civil Rights Movement, a commitment to such frames, when combined with commitments to criminal process as a governance tool, would result in feedback effects that would strengthen the resilience of the institutional forms, relationships and practices that developed.

The consequence of such a constrained conception of racism and appropriate remedies, Murakawa argues, left progressives without the tools to critique the massive expansions in black incarceration and in the attendant racial disparities in incarceration rates. She asserts that where procedural practices were understood to be fair, other decisions that placed blacks at disproportionate risk of encounters with law enforcement or risk of violence could not be seen as part of the landscape of American racial politics worthy of governance by a state concerned with equality.⁴⁹

48. *Id.* at 51-53.

49. *Id.* at 23-24.

Roberta Romano's *Racial Reckoning* travels the shortest chronological distance of the three books, but explores many of the same themes as the others. In some ways, Romano's project is the most successful because she is not engaged in an inter-temporal analysis in which she must demonstrate the lasting impact of institutions and ideologies of other eras. Romano calls our attention to the period of the 1950's and 1960's, during which whites deployed racial violence to maintain the Southern racial order in the wake of the modern Civil Rights Movement. *Racial Reckoning* focuses on the return to criminalization that took place toward the end of the twentieth century, which led to reopening of criminal investigations and trials or retrials of those accused of some of the most iconic acts of violence during the Civil Rights Movement – the bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama; the murder of James Chaney, Goodman and Schwerner; and the murder of Medgar Evers to name a few. Romano asks what made policy activists and governing institutions return to criminalization in an effort to confront the legacy of violence against civil rights activists at the end of the 20th century. Here, she suggests that their criminalization was not the only possibility, particularly in the post-Apartheid and post-Communist world, in which truth commissions and reparations regimes were deployed as a mechanism for reconciling past injustices so that communities could move forward.⁵⁰

Clearly one of the explanations of the turn to criminalization is likely the resistance to truth commissions as an institutional form as against the familiarity with the mechanisms of trials and the ideological commitment to criminal law as the instantiation of societal norms and codes. Romano argues that “trials offer a powerful arena for performing and communicating societal values.”⁵¹ She calls our attention to the unique role that law and legal institutions played in making the deployment of criminal prosecutions possible, and the impact that the theater of law plays in the public understanding and reception of the criminal prosecutions.⁵² Trials are conducted according to a “predetermined set of rules” and, while there is clearly drama in the trial, Romano is no doubt correct to emphasize the extent to which the outcome does not vary much, particularly at the criminal level.⁵³

Romano begins with a discussion of the historical contexts that gave rise to the Civil Rights-era murders and the interest in revisiting the murders in the last quarter of the twentieth century.⁵⁴ The failure of state governments to successfully prosecute many of those who had committed the heinous violence against black and white civil rights activists imposed a burden on the reputation of the individual states, and the South as a region. The reputational stain is all the more meaningful because of the involvement of state actors and institutions in the failure to successfully prosecute

50. For a discussion of the role that truth commissions played in transitions to democratic government, see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 19 BERKLEY INT'L L.J. 428 (2001).

51. RENEE C. ROMANO, *RACIAL RECKONING: PROSECUTING AMERICA'S CIVIL RIGHTS MURDERS* 106 (2014).

52. *Id.* at 106-07.

53. *Id.* at 106.

54. *Id.* at 42-43.

many of the unsolved Civil Rights-era murders. Romano highlights the extent to which state actors, and the broader white community, were complicit in both the maintenance of violence against blacks in protection of the Jim Crow racial order, and the futility of that era's attempts to bring the perpetrators of violence to justice, when charges were actually brought.⁵⁵ Moreover, those convicted of racial violence often spent very little time in state custody; of the eleven white men convicted of racial violence during the Civil Rights era, only four ended up serving more than one-year in jail.

Despite the reputational stain borne by the South as a result of the violence committed against Civil Rights activists, southern states did not initiate reopening the murders of that era. A confluence of actors and interests were involved in moving Southern governments and the national government toward action. Romano reports that in the late 1980's, interest began to grow that would result in increased momentum for revisiting the racial violence of the Civil Rights era.⁵⁶ Journalists played a significant role in generating interest in, and pressure for, reopening investigations. Romano also credits increased black political power in the post-Civil Rights era, which gave blacks increased influence in the Democratic Party, and also, increased the number of black elected officials.⁵⁷ From an ideological perspective, Romano reports that reopening the crimes of the Civil Rights era was believed to be consistent with the increasingly dominant colorblind ethos, which was able to frame the treatment of black victims as paradigmatic cases of unequal treatment under the law.⁵⁸ Conservatives, likewise, could see the benefits of bringing individual criminal perpetrators to justice for their violent deeds, which would simultaneously provide closure for the South with respect to its "troublesome past."⁵⁹

In addition to the political and ideological factors that made revisiting the Civil Rights era cases easier, cultural factors drew attention to the period in ways that forced the South to respond to this buried narrative. For example, in 1988 *Mississippi Burning* debuted at theaters across the United States. The feature film depicted the FBI investigation of the murder of three young civil rights workers in 1964 in Philadelphia, Mississippi. The film garnered seven Academy Award nominations, including best picture, which only gave more widespread attention to the South's history than had been engaged in recent memory. Further, network television shows demonstrated the interest in the so-called cold cases, including cold cases of the Civil Rights era.

Revisiting the Civil Rights era violence was made easier because of the rise of the victims' rights movement of the 1980's. Although the movement is associated

55. Romano points to the fact that the prosecutorial failures rested not simply with white jurors who refused to convict white perpetrators of racial violence, but extended to police officers' refusal to adequately investigate cases, prosecutors' "lackluster performance" in trying such cases, and collusion between state agencies and defense counsel for those accused of racial violence. *Id.* at 51-52.

56. ROMANO, *supra* note 51, at 67.

57. *Id.* at 68.

58. *Id.*

59. *Id.* at 90.

with a conservative, tough-on-crime posture, Romano reports that the focus on “the pain of the grieving relatives of victims” allowed the public to identify with cases for which it might have been difficult to generate sympathy.⁶⁰ The generation of sympathy for the victims’ families allowed popular and journalistic explorations of the Civil Rights era murders to generate analogous sympathy through their concentration on the survivors of the victims of Civil Rights era violence.

Entrepreneurial southern prosecutors played important, early roles in advancing the revisiting of Civil Rights-era murders. Moved by what they identified as the failure of the state, and the failure of law enforcement officials who had sworn to uphold the law, Romano relays the role played by state prosecutors, who endeavored to complete what they saw as unfinished work.⁶¹ While Romano rightly asserts that their efforts were motivated by their belief that the South’s reputation would continue to be sullied by the stain of these unsolved murders, it is also likely that professional ideals and institutional interests also motivated prosecutors to shore of the legitimacy of their institutions and their relationships with constituencies by evidencing the pursuit of justice in an evenhanded fashion.⁶² Indeed, Romano suggests as much when she contends that the FBI moved forward with reopening investigations into the bombing of the Sixteenth Street Baptist Church only after it had been involved in a public corruption investigation and conviction of Birmingham’s first black mayor, Richard Arrington.⁶³

Institutions developed by professional journalists and academics also increased momentum and capacity for revisiting Civil Rights-era murders. Romano reports how institutionalization by non-state actors helped to shape the movement.⁶⁴ In 2008, journalists organized to establish the Civil Rights Cold Case Project.⁶⁵ This followed the 2007 creation of the Cold Case Justice Initiative at Syracuse University Law School, under the leadership of Professors Janice McDonald and Paula Johnson, and the Civil Rights and Restorative Justice Project at Northeastern University Law School.⁶⁶ These projects brought together journalists, academics, lawyers, and victims’ families to share information and other resources.

These efforts culminated in efforts to enact legislation at the national level that would provide resources for re-opening cold cases from the Civil Rights era.⁶⁷ The Unsolved Civil Rights Crime Act was introduced in Congress in 2005, and enacted as the Emmett Till Unsolved Civil Rights Crime Act in 2008, with nearly unanimous support.⁶⁸ The law authorized \$10 million per year for ten years for a cold case unit in the Department of Justice, and the cold case unit was responsible for investigating

60. *Id.* at 90.

61. ROMANO, *supra* note 51, at 133.

62. *Id.*

63. *Id.* at 74-76.

64. *Id.* at 98.

65. *Id.*

66. ROMANO, *supra* note 51, at 99.

67. *Id.* at 100.

68. *Id.* at 101.

and prosecuting pre-1970's racial violence cases.⁶⁹

Romano identifies the tensions that were present in the reopening of Civil Rights era murders from the very beginning. For the families of victims, like Myrlie Evers-Williams and other activists, the reopening of the cold Civil Rights murders was seen as a way of forcing a confrontation with a society and governmental institutions that they saw as complicit in the murders, and the continued flouting of the law by their killers.⁷⁰ For others who signed on to reopening investigations and prosecutions, trials of the murderers were seen as providing expungement of a blot on the state's reputation, rather than as a way of sullyng the state, or as a vehicle through which present day inequality might be connected to past inequities.⁷¹ As has been stated above, criminalization's focus on the deeds of individuals does not present itself as the most appropriate vehicle by which society could be held responsible for the creation of the environment in which racial violence flourished. As such, the very conception of injustice is delimited by the choice of venue and remedial mechanism.

One of the most interesting dimensions of Romano's discussion is her analysis of the way that the criminalization and its attendant institutionalization in the criminal trial transforms the state into the heroic actor, and silences the voices of those who might seek to try the state in addition to the officially accused.⁷² As a trial, the state is the prosecutor, not the victim or the victim's family. The state stands as the vindicator of the state's moral code, rather than merely the rights and interests of the victims' family. For Romano, the murder trial is an individualized site that "focus[es] on proving the culpability of an individual actor for a specific crime," rather than a larger societal or institutional apparatus.⁷³ In the criminal trial, the successful prosecution of the accused depends on what Romano calls the legitimacy of the state and state institutions.⁷⁴ Here, the state stands against the accused, which suggests that the accused stands alone, outside of the boundaries of society in a way that sanitizes the state from complicity with the deeds of the accused. The turn to criminalization allows the state to monopolize the role of the protector of societal norms, and demands distance between the state and the accused. This tension is exemplified in Romano's discussion of the trial of the murders of Schwerner, Goodman, and Chaney.⁷⁵ Chaney's brother complained that the only person indicted for his brother's murder was a more marginalized Edgar Ray Killen, while others he believed to be involved avoided being charged, largely because of their wealth and status.⁷⁶

Even as the state stands beyond reproach in the criminal prosecution of decades-old Civil Rights murders, the state stands ready to receive the benefits of the cleansing that such trials provide. Despite what Romano identifies as the criminal

69. *Id.*

70. *Id.* at 103.

71. ROMANO, *supra* note 51, at 102-03.

72. *Id.* at 105-07.

73. *Id.* at 105.

74. *Id.* at 106.

75. *Id.* at 124-32, 171-72.

76. ROMANO, *supra* note 51, at 132.

trial's depiction of racism as an "individual attitude," the trial simultaneously served as the mechanism by which the state could relieve itself of the burden of its past.

Romano's description of the trials raises the issue of the way in which racism is depicted in ways that suggest its exceptionality. Romano reports that at the criminal trials, prosecutors made great moment of the fact that the accused were members of the Ku Klux Klan, or that they were virulent racists of biological sort, who could be painted as irrational and out of step with the post-Civil Rights South.⁷⁷ This depiction, Romano argues, had the effect of narrowing the conception of racism to a small class of old, recalcitrant (largely) men, who simply failed to realize that society did not share their irrational prejudices.⁷⁸ Like Murakawa's account, criminalization and the-atics of the criminal trial underwrite the individualization of racism, and its siting in the irrational prejudices of "crazy," old men, who embody the most virulent forms of racial prejudice.⁷⁹ Nowhere is this embodied more clearly than in Romano's depiction of then-Governor Haley Barbour of Mississippi, who is described as having participated in commemorations of the deaths of Civil Rights activists *and* sporting a Confederate flag lapel pin, simultaneously.⁸⁰ Romano, like Aaronson and Murakawa, contends that the narrowed conception of racism underwritten by the turn to criminalization increases the burden to articulate the continued black disadvantage as implicating societal commitments to racial equality.⁸¹

I began this essay with a recounting of the deadly confrontations that black men, women, and children have had with police officers over the last few years. The fact that my attention, and ours, is drawn to these instances of the deaths of unarmed persons, is evidence of the ways in which a turn toward criminalization, and its attendant commitment to process, frame what we understand as the appropriate subjects of critique. What we are bothered by is the killing of unarmed men by the police, or the killing of men who are fleeing the police, and are clearly of no reasonable risk to their safety. We have only begun to appreciate the ways that the state's turn to criminalization—in the form of the use of the carceral state to enforce child support payments and other civil violations—increases the opportunities for rationalizing the racially motivated policing of poor, black communities in particular. These books offer a way of understanding how the complicated investments made by many constituencies, over long periods of time, have contributed to the legitimacy of the criminal turn, and weakened both the perceptual and rhetorical capacities to confront it. To the extent that they offer us a way of seeing and articulating differently, they will make valuable contributions to the project of democratic governance that exceeds their real contributions to substantive areas of scholarly inquiry, and methodological advancement.

77. *Id.* at 126.

78. *Id.*

79. *Id.*

80. *Id.* at 97.

81. ROMANO, *supra* note 51, at 184-85.