

Hitler's American Model

The United States and the Making of Nazi Race Law

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# Introduction

This jurisprudence would suit us perfectly, with a single exception. Over there they have in mind, practically speaking, only coloreds and half-coloreds, which includes mestizos and mulattoes; but the Jews, who are also of interest to us, are not reckoned among the coloreds.

—Roland Freisler, June 5, 1934

On June 5, 1934, about a year and a half after Adolf Hitler became Chancellor of the Reich, the leading lawyers of Nazi Germany gathered at a meeting to plan what would become the Nuremberg Laws, the notorious anti-Jewish legislation of the Nazi race regime. The meeting was chaired by Franz Gürtner, the Reich Minister of Justice, and attended by officials who in the coming years would play central roles in the persecution of Germany's Jews. Among those present was Bernhard Lösener, one of the principal draftsmen of the Nuremberg Laws; and the terrifying Roland Freisler, later President of the Nazi People's Court and a man whose name has endured as a byword for twentieth-century judicial savagery.

The meeting was an important one, and a stenographer was present to record a verbatim transcript, to be preserved by the ever-diligent Nazi bureaucracy as a record of a crucial moment in the creation of the new race regime. That transcript reveals the startling fact that is my point of departure in this study: the meeting involved detailed and lengthy discussions of the law of the United States. In the opening minutes, Justice Minister Gürtner presented a memo on American race law, which had been carefully prepared by the officials of the ministry for purposes of the gathering; and the participants returned repeatedly to the American models of racist legislation in the course of their discussions. It is particularly startling to discover that the most radical Nazis present were the most ardent champions of the lessons that American approaches held for Germany. Nor, as we shall see, is this transcript the only record of Nazi engagement with

American race law. In the late 1920s and early 1930s many Nazis, including not least Hitler himself, took a serious interest in the racist legislation of the United States. Indeed in *Mein Kampf* Hitler praised America as nothing less than “the one state” that had made progress toward the creation of a healthy racist order of the kind the Nuremberg Laws were intended to establish.

My purpose is to chronicle this neglected history of Nazi efforts to mine American race law for inspiration during the making of the Nuremberg Laws, and to ask what it tells us about Nazi Germany, about the modern history of racism, and especially about America.

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The Nazi persecution of the Jews and others, culminating in the Holocaust, counts for all of us as the supremely horrible crime of the twentieth century, and the notion that Nazi policy makers might have been in some way inspired by American models may seem a bit too awful to contemplate. It may also seem implausible: we all think of America, whatever its undeniable faults, as the home of liberty and democracy—as a country that put all of its might into the battle against fascism and Nazism that was finally won in 1945. Of course we also all know that America was home to its own racism in the era of the Nazi ascent to power, particularly in the Jim Crow South. In the 1930s Nazi Germany and the American South had the look, in the words of two southern historians, of a “mirror image”:<sup>1</sup> these were two unapologetically racist regimes, unmatched in their pitilessness. In the early 1930s the Jews of Germany were hounded, beaten, and sometimes murdered, by mobs and by the state alike. In the same years the blacks of the American South were hounded, beaten, and sometimes murdered as well.<sup>2</sup>

Nevertheless the idea that American law might have exerted any sort of direct influence on the Nazi program of racial persecution and oppression is hard to digest. Whatever similarities there may have been among the racist regimes of the 1930s, however foul the history of

American racism may be, we are accustomed to thinking of Nazism as an ultimately unparalleled horror. The crimes of the Nazis are the *nefandum*, the unspeakable descent into what we often call “radical evil.” No one wants to imagine that America provided any measure of inspiration for Hitler. In any case, it may seem inherently improbable that Nazis would have felt the need to look to any other country for lessons in racism—perhaps least of all to the United States, which is, after all, whatever its failings, the home of a great constitutional tradition founded in liberty.

And virtually no one has suggested otherwise, with the notable exception of a shrewd paragraph in Mark Mazower’s 2008 book *Hitler’s Empire*.<sup>3</sup> Other scholars have insisted on what most of us must think of as the obvious truth: There was of course no direct American influence on Nazi race law, or at least no meaningful influence. Whatever similarities there may have been, the Nazis were the authors of their own monstrous work; certainly America had nothing to teach Hitler. The person who has given the question the most sustained attention is a German lawyer named Andreas Rethmeier, who wrote a 1995 dissertation on the Nuremberg Laws that included an examination of some of the many Nazi references to American law.<sup>4</sup> After reviewing his data Rethmeier arrived at a disconcerting verdict: America was, for the Nazis, the “classic example” of a country with racist legislation.<sup>5</sup> Nevertheless, he insisted forcefully that the idea of American influence on the Nuremberg Laws was “not just off-base, but plain wrong.” After all, he argued, the Americans classified Jews as “Caucasian,” a gross error from the Nazi point of view.<sup>6</sup>

Others have come to similar conclusions. “[T]he few and fleeting references by Nazi polemicists and ‘jurists’ to Jim Crow laws,” writes the American legal historian Richard Bernstein, for example, “were, as far as I can tell, simply attempts to cite vaguely relevant precedents for home-grown statutes and policies to deflect criticism, not actual sources of

intellectual influence.”<sup>7</sup> “[T]he segregation law of the states,” declares similarly Marcus Hanke of the University of Salzburg, “has not been of any important influence.”<sup>8</sup> Most recently, Jens-Uwe Guettel has written, in a 2012 book, of what he calls the “astonishing insignificance of American segregation laws” for Nazi policies. The Nazis, Guettel insists, regarded America as hopelessly mired in an outdated liberal outlook.<sup>9</sup> There was nothing that deserves the name of influence. All of these scholars are perfectly aware that the Nazis had things to say about American law. But their reassuring consensus is that the Nazis said them merely in order to claim a specious parallel to their racist programs in the face of international condemnation.<sup>10</sup> The Nazis were interested in taunting America, not learning from it.

The sources, read soberly, paint a different picture. Awful it may be to contemplate, but the reality is that the Nazis took a sustained, significant, and sometimes even eager interest in the American example in race law. They most certainly *were* interested in learning from America. In fact, as we shall see, it was the most radical Nazis who pushed most energetically for the exploitation of American models. Nazi references to American law were neither few nor fleeting, and Nazi discussions took place in policy-making contexts that had nothing to do with producing international propaganda on behalf of the regime. Nor, importantly, was it only, or even primarily, the Jim Crow South that attracted Nazi lawyers. In the early 1930s the Nazis drew on a range of American examples, both federal and state. Their America was not just the South; it was a racist America writ much larger. Moreover, the ironic truth is that when Nazis rejected the American example, it was sometimes because they thought that American practices were overly harsh: for Nazis of the early 1930s, even radical ones, American race law sometimes looked *too* racist.

Be it emphasized immediately that there was certainly never anything remotely like

unmixed admiration for America among the Nazis, who aggressively rejected the liberal and democratic commitments of American government. The Nazis were never interested in simply replicating the United States in Central Europe. Nevertheless Nazi lawyers regarded America, not without reason, as the innovative world leader in the creation of racist law; and while they saw much to deplore, they also saw much to emulate. It is even possible, indeed likely, that the Nuremberg Laws themselves reflect direct American influence.

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The proposition that the Nazis drew inspiration from American race law in creating their own program of racist persecution is sure to seem distressing; no one wants the taint of an association with the crimes of Nazism. But in the end it should really come as no great surprise to attentive readers of Nazi history. In recent years historians have published considerable evidence of Nazi interest in, and even admiration for, a range of American practices, programs, and achievements. Especially in the early years of the regime, the Nazis did not by any means regard the United States as a clear ideological enemy.

In part, the Nazis looked to America for the same more or less innocent reasons others did all around the globe. The United States is powerful, wealthy, and creative, and even its most visceral enemies have found things to admire about it. During the century or so since 1918 the glamour of America has proven particularly hard to resist. As interwar German racists observed, the United States had emerged after World War I as “the premier power in the world”;<sup>11</sup> it is hardly a surprise that the Nazis, like others, looked for what lessons the global powerhouse might have to teach, even as they also derided the liberal and democratic commitments of American society. Like others, the Nazis were impressed by the vigor of American industrial innovativeness and the vibrancy of Hollywood culture (though their taste for American culture

was heavily qualified by their disgust for the “Negro music” of Jazz).<sup>12</sup> Hitler in particular voiced his admiration, in *Mein Kampf*, for the “wealth of inventions” generated by the United States.<sup>13</sup> None of this was peculiar to Nazi Germany.<sup>14</sup>

But historians have shown that there were also things about America that appealed to more distinctively Nazi views and goals. Some of this involved the American politics of the early 1930s. We have long known the strange fact that the Nazis frequently praised Franklin Roosevelt and New Deal government in the early 1930s. FDR received distinctly favorable treatment in the Nazi press until at least 1936 or 1937, lauded as a man who had seized “dictatorial powers” and embarked upon “bold experiments” in the spirit of the Führer.<sup>15</sup> Similar things were said more broadly about what was sometimes labeled in the 1930s “the fascist New Deal.”<sup>16</sup> The glossy *Berlin Illustrated Magazine*, seized from its Jewish publisher and converted into a kind of Nazi *Life* magazine, ran heroic photo spreads on Roosevelt;<sup>17</sup> while Nazi rags like *Will and Power*, the newsletter of the Hitler Youth, described him as a “revolutionary” who might fail only because he lacked “a disciplined Party army like our Führer.”<sup>18</sup> -Meanwhile Roosevelt, for his part, though he was certainly troubled by the persecution of the German Jews and had harsh words for “dictators,” cautiously refrained from singling out Hitler until 1937 or even 1939.<sup>19</sup> There were certainly not deep ties of friendship between the two governments in the early 1930s, but the pall of unconditional hostility had not yet clearly fallen over US/German relations either. In this connection it is worth emphasizing, as the political scientist Ira Katznelson has recently done, that the New Deal depended heavily on the political support of the segregationist South.<sup>20</sup> The relationship between the northern and southern Democrats was particularly cozy during the early 1930s, a period when, as we shall see, Nazi observers were particularly hopeful that they could “reach out the hand of friendship” to the United States on the basis of a shared commitment to

white supremacy.<sup>21</sup>

To be sure, there are ways of minimizing the significance of the favorable press given to New Deal America in Nazi Germany. Nobody would suggest that Hitler was inspired by the example of FDR to become a dictator; and in any case the reality is that the American president was a committed democrat, who preserved American constitutional government at a time when it was under ominous stress.<sup>22</sup> If the United States and Germany, both confronting the immense challenges of the Great Depression, found themselves resorting to similar “bold experiments,” that does not make them intimate bedfellows.<sup>23</sup> And whatever the Nazis may have thought about southern racism, southern whites themselves did not generally become supporters of Hitler.<sup>24</sup> If the Nazis regarded New Deal America as a potential comrade in arms, that does not necessarily tell us much about what kind of a country America really was.

But—and here recent scholarship on German-American relations becomes more troubling—historians have also tracked down American influence on some of the most unambiguously criminal Nazi programs—in particular on Nazi eugenics and the murderous Nazi conquests in Eastern Europe.

Begin with eugenics. A ruthless program of eugenics, designed to build a “healthy” society, free of hereditary defects, was central to Nazi ambitions in the 1930s. Soon after taking power, the regime passed a Law to Prevent the Birth of the Offspring with Hereditary Defects, and by the end of the decade a program of systematic euthanasia that prefigured the Holocaust, including the use of gassing, was under way.<sup>25</sup> We now know that in the background of this horror lay a sustained engagement with America’s eugenics movement. In his 1994 book *The Nazi Connection: Eugenics, American Racism, and German National Socialism*, historian Stefan Kühl created a sensation by demonstrating that there was an active back-and-forth traffic



between American and Nazi eugenicists until the late 1930s, indeed that Nazis even looked to the United States as a “model.”<sup>26</sup> During the interwar period the United States was not just a global leader in assembly-line manufacturing and Hollywood popular culture. It was also a global leader in “scientific” eugenics, led by figures like the historian Lothrop Stoddard and the lawyer Madison Grant, author of the 1916 racist best-seller *The Passing of the Great Race; or, The Racial Basis of European History*. These were men who promoted the sterilization of the mentally defective and the exclusion of immigrants who were supposedly genetically inferior. Their teachings filtered into immigration law not only in the United States but also in other Anglophone countries: Britain, Australia, Canada, and New Zealand all began to screen immigrants for their hereditary fitness.<sup>27</sup> Kühl demonstrated that the impact of American eugenics was also strongly felt in Nazi Germany, where the works of Grant, Stoddard, and other American eugenicists were standard citations.

To be sure, there are, here again, ways we may try to minimize the significance of the eugenics story. American eugenicists, repellant though they were, did not advocate mass euthanasia, and the period when the Nazis moved in their most radically murderous direction, at the very end of the 1930s, was also the period when their direct links with American eugenics frayed. In any case, eugenics, which was widely regarded as quite respectable at the time, was an international movement, whose reach extended beyond the borders of both the United States and Nazi Germany. The global history of eugenics cannot be told as an exclusively German/American tale. But the story of Nazi interest in the American example does not end with the eugenics of the early 1930s; historians have carried it into the nightmare years of the Holocaust in the early 1940s as well.

It is here that some of the most unsettling evidence has been assembled, as historians

have shown that Nazi expansion eastward was accompanied by invocations of the American conquest of the West, with its accompanying wars on native Americans. This tale, by contrast with the tale of eugenics, is a much more exclusively German/American one. The Nazis were consumed by the felt imperative to acquire *Lebensraum*, “living space,” for an expanding Germany that would engulf the territories to its east, and “[f]or generations of German imperialists, and for Hitler himself, the exemplary land empire was the United States of America.”<sup>28</sup> In Nazi eyes, the United States ranked alongside the British, “to be respected as racial kindred and builders of a great empire”:<sup>29</sup> both were “Nordic” polities that had undertaken epic programs of conquest.

Indeed as early as 1928, Hitler was speechifying admiringly about the way Americans had “gunned down the millions of Redskins to a few hundred thousand, and now keep the modest remnant under observation in a cage”;<sup>30</sup> and during the years of genocide in the early 1940s Nazi leaders made repeated reference to the American conquest of the West when speaking of their own murderous conquests to their east.<sup>31</sup> Historians have compiled many quotes, from Hitler and others, comparing Germany’s conquests, and its program of extermination, with America’s winning of the West. They are quotes that make for chilling reading, and there are historians who try to deny their significance.<sup>32</sup> But the majority of scholars find the evidence too weighty to reject: “The United States policy of westward expansion,” as Norman Rich forcefully concludes, for example, “in the course of which the white men ruthlessly thrust aside the ‘inferior’ indigenous populations, served as the model for Hitler’s entire conception of *Lebensraum*.”<sup>33</sup>

All of this adds up to a tale of considerable Nazi interest in what the example of the United States had to offer. It is a tale that has to be told cautiously. It is surely too much to call

the United States “the” model for Nazi Germany without careful qualification; Nazi attitudes toward America were too ambivalent, and Nazi programs had too many indigenous sources. America, for its part, as we shall see, embodied too much of what the Nazis hated most, at least in its better moments. If the Nazis found precedents and parallels and inspirations in America, they nevertheless struck out on their own path. Still, what all this research unmistakably reveals is that the Nazis *did* find precedents and parallels and inspirations in the United States.

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It is against that background that I ask the reader to ponder the evidence that this book has to present. In the early 1930s, as the Nazis were crafting the program of racial persecution enshrined in the Nuremberg Laws, they took a great interest not only in the way Henry Ford built cars for the masses, not only in the way Hollywood built its own mass market, not only in FDR’s style of government, not only in American eugenics, and not only in American westward expansion, but also in the lessons to be garnered from the techniques of American racist legislation and jurisprudence.

Scholars have failed to write this history for two reasons: they have been looking in the wrong place and have been employing the wrong interpretive tools. First and foremost, they have been looking in the wrong place. Scholars like Guettel and Hanke have addressed their question in unmistakably American terms. What Americans ask is whether “Jim Crow” had any influence on the Nazis; and by “Jim Crow” they mean segregation as it was practiced in the American South and fought over in the American civil rights era from the early 1950s into the mid-1960s—segregation in education, public transportation, housing, and the like. Looking for an influence of American segregation law on the Nazis, Guettel and Hanke conclude that there was little or none. Now, as we shall see, that conclusion is too hasty. The Nazis *did* know, and did care, about

American segregation; and it is clear that some of them *were* intrigued by the possibility of bringing Jim Crow to Germany. As we shall see, important programmatic Nazi texts made a point of invoking the example of Jim Crow segregation, and there were leading Nazi lawyers who made serious proposals that something similar ought to be introduced into Germany.<sup>34</sup> But the principal difficulty with the conclusions of Guettel and Hanke is that they are answering the wrong question. Segregation is not what counts most.

Yes it is true that segregation in the style of the American South did not matter all that much to the Nazi regime—but that is for the simple reason that segregation was not all that central to the Nazi program. The Nuremberg Laws said nothing about segregation. Their concern, and the overwhelming concern of the Nazi regime of the early 1930s, lay in two other domains: first, citizenship, and second, sex and reproduction. The Nazis were committed to the proposition that “every State has the right to maintain its population pure and unmixed,”<sup>35</sup> safe from racial pollution. To that end they were determined to establish a citizenship regime that would be firmly founded on racial categories. They were further determined to prevent mixed marriages between Jews and “Aryans,” and to criminalize extramarital sex between members of the two communities.<sup>36</sup>

In both respects they found, and welcomed, precedent and authority in American law, and by no means just in the law of the South. In the 1930s the United States, as the Nazis frequently noted, stood at the forefront of race-based lawmaking. American immigration and naturalization law, in the shape of a series of laws culminating in the Immigration Act of 1924, conditioned entry into the United States on race-based tables of “national origins.” It was America’s race-based immigration law that Hitler praised in *Mein Kampf*, in a passage that has been oddly neglected by American legal scholars; and leading Nazi legal thinkers did the same after him,

repeatedly and volubly. The United States also stood at the forefront in the creation of forms of de jure and de facto second-class citizenship for blacks, Filipinos, Chinese, and others; this too was of great interest to the Nazis, engaged as they were in creating their own forms of second-class citizenship for Germany's Jews. As for race mixing between the sexes, the United States stood at the forefront there as well. America was a beacon of anti-miscegenation law, with thirty different state regimes—many of them outside the South, and all of them (as we shall see) carefully studied, catalogued, and debated by Nazi lawyers. There were no other models for miscegenation legislation that the Nazis could find in the world, a fact that Justice Minister Gürtner highlighted at the June 5, 1934, meeting with which I began. When it came to immigration, second-class citizenship, and miscegenation, America was indeed “the classic example” of a country with highly developed, and harsh, race law in the early 1930s, and Nazi lawyers made repeated reference to American models and precedents in the drafting process that led up to the Nuremberg Laws and continued in their subsequent interpretation and application. The tale is by no means one of “astonishing insignificance.”

The scholars who dismiss the possibility of American influence on Nazi lawmaking have also used the wrong interpretive tools in making their case. Our literature has taken a crass interpretive tack: it has assumed that we can speak of “influence” only where we find direct and unmodified, even verbatim, imitation. That is the assumption behind Rethmeier's confident assertion that American race law could not have influenced the Nazis, since American law did not specifically target Jews. We find the same assumption in Hanke: Nazi law was simply different, Hanke declares, because the German laws of the early 1930s were “but one step on the stair to the gas chambers.”<sup>37</sup> Unlike American segregation laws, which simply applied the principle of “separate but equal,” German laws were part of a program of extermination. Now

part of the problem with this argument, which Hanke is by no means alone in offering,<sup>38</sup> is that its historical premise is false: It is simply not the case that the drafters of the Nuremberg laws were already aiming at the annihilation of the Jews in 1935. The concern of early Nazi policy was to drive the Jewish population into exile, or at the very least to marginalize it within the borders of the Reich, and there were serious conflicts among Nazi policy makers about how to achieve even that goal.

But in any case, it is a major interpretive fallacy on the part of all these scholars to suppose that we cannot speak of “influence” unless Nazi laws were perfectly congruent with American ones. As we shall see, Nazi lawyers had no difficulty exploiting American law on race, even if it had nothing to say about Jews as such. In any case, influence in comparative law is rarely just about literal imitation. Influence is a complex business of translation, creative adaptation, selective borrowing, and invocation of authority. All borrowers engage in tinkering and retrofitting; that is as true of the Nazis as it is of any other regime. All borrowers start from foreign models and then reshape them to meet their own circumstances; that is true of vicious racist borrowers just as it is true of everyone else.

Influence does not come just through verbatim borrowing. It comes through inspiration and example, and the United States had much inspiration and example to offer Nazi lawyers in the early 1930s, the era of the making of the Nuremberg Laws.

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None of this is entirely easy to talk about. There is more than one reason why it is hard to look coolly on the question of whether the racist program of the Nazis was influenced by, or even paralleled by, what went on in other Western regimes—just as it is hard to admit the continuities between Nazism and the postwar European orders that replaced it. No one wants to be perceived

as relativizing Nazi crimes. Germans in particular are generally understandably reluctant to engage in discussions that might smack of apologetics. Contemporary Germany rests on the moral foundation not only of the repudiation of Nazism, but also of the refusal to deny German responsibility for what happened under Hitler. Alluding to foreign influences remains largely out of bounds in Germany for that reason. Conversely no non-Germans want their country to be accused of any part in the genesis of Nazism. It is hard to overcome our sense that if we influenced Nazism we have polluted ourselves in ways that can never be cleansed. On the deepest level it is perhaps the case that we feel, throughout the Western world, a need to identify a true *nefandum*, an abyss of unexampled modern horror against which we can define ourselves, a wholly sui generis “radical evil”—a sort of dark star to steer by lest we lose our moral bearings.

But of course history does not make it that easy. Nazism was not simply a nightmarish parenthesis in history that bore no relationship to what came before and after; nor was it a completely unexampled racist horror. The Nazis were not simply demons who erupted out of some dark underworld to shatter what was good and just within the Western tradition, until they were put down by force of arms and the authentic humane and progressive values of Europe were restored. There were traditions of Western government within which they worked. There *were* continuities between Nazism and what came before and after. There *were* examples and inspirations on which the Nazis drew, and American race law was prominent among them.

None of this is to suggest that America was a Nazi country in the 1930s. Of course it was not, appalling as the law of the early and mid-twentieth century sometimes was. Of course the racist strains in American law coexisted and competed with some glorious humane and egalitarian strains. Of course thoughtful Americans reviled Nazism—though there were certainly

some who fell for Hitler. The most famous of the lawyers among them was none other than Roscoe Pound, dean of the Harvard Law School, icon of advanced American legal thought, and a man who made little secret of his liking for Hitler in the 1930s.<sup>39</sup> Nazi lawyers for their part saw plenty of things to despise about America.

The point is not that the American and Nazi race regimes were the same, but that the Nazis found examples and precedents in the American legal race order that they valued highly, while simultaneously deploring, and puzzling over, the strength of the liberal countercurrent in a country with so much openly and unapologetically sanctioned racism. We can, and should, reject the sort of simple-minded anti-Americanism that blames the United States for all the evils of the world, or reduces America to nothing but its history of racism.<sup>40</sup> But there is no excuse for refusing to confront hard questions about our history, and about the history of American influence abroad. The American impact on the rest of the world is not limited to what makes Americans proudest about their country. It has also included aspects of the American past that we might prefer to forget.

We will not understand the history of National Socialist Germany, and more importantly the place of America in the larger history of world racism, unless we reckon with these facts. In the early 1930s, Nazi lawyers were engaged in creating a race law founded on anti-miscegenation law and race-based immigration, naturalization, and second-class citizenship law. They went looking for foreign models, and found them—in the United States of America.

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## Chapter 2

# Protecting Nazi Blood and Nazi Honor

Dr. Möbius: I am reminded of something an American said to us recently. He explained, “We do the same thing you are doing. But why do you have to say it so explicitly in your laws?”

State Secretary Freisler: But the Americans put it in their own laws even more explicitly!

—June 5, 1934

When we turn to the Blood Law, we enter a world of what refugees from Nazi Germany decried as *Rassenwahn*, “race madness”<sup>41</sup>—of Nazi ravings about the Jewish menace, and fanatical Nazi obsessions with the state enforcement of racial and sexual purity and the criminalization and expulsion of those who endangered it. The Blood Law, with its ban on race mixing in sex and marriage, would be condemned by postwar European lawyers as the epitome of the violation of natural rights;<sup>42</sup> but in the Nazi period the Supreme Court of the Reich declared it to be nothing less than a “fundamental constitutional law of the national socialist state.”<sup>43</sup> Nazi lawyers presented it to the public as an essential measure for maintaining a German race that was “pure and unmixed”;<sup>44</sup> as the basic commentary on the Nuremberg Laws proclaimed, the Blood Law, like the Citizenship Law, was imperatively necessary in order to prevent “any further penetration of Jewish blood into the body of the German *Volk*”;<sup>45</sup> and the rhetoric surrounding it was shrill with warnings about the dangers of sexual contact with Jews.

“Mixing” was the term that Nazi writers constantly used to describe the menace of such “penetration of Jewish blood into the body of German *Volk*,” evoked by a variety of words based on the German root *-misch*, “mix.” Sick societies were societies that had

witnessed the “mixing” (*Vermischung*) of *Völker*; what such mixing yielded, the Nazi literature often said, was a degenerate racial *Mischmasch*, a “mishmash.” The aim of the Nuremberg Laws was to safeguard Germany from such degeneration, making it “forever impossible for Jewdom to mix itself [*Vermischung*] with the German *Volk*”; and the key legal terminology was based on the same root: What the Blood Law aimed to prohibit was a *Mischehe* or *Mischheirat*, “mixed marriage.” What sexual mixing threatened to spawn, not least, was a degenerate *Mischling* child—a “mixed one,” a “mongrel.”

In the effort to capture the obsessive anti-mixing sensibility that lay behind the Blood Law, it is useful to draw on the pronouncements of two especially intriguing Nazi figures: Helmut Nicolai, who made himself “the leading Party legal philosopher” in the early 1930s;<sup>46</sup> and Achim Gercke, a specialist on “racial prophylaxis” who served in the Ministry of the Interior and was responsible for an early draft of the statute and much later policy making.<sup>47</sup> Both men were prominent in the early years of Nazi rule; both would be purged in 1935 on the same charge: homosexuality.<sup>48</sup> We cannot know whether the charge was true—whether these Nazi fanatics of sexual purity were indeed homosexual men many of whose neighbors would have viewed them with sexual disgust. In any case, the two were at the forefront in the early 1930s, and their speeches and writings illustrate the mentality of the Nazi fanaticism about the dangers of sexual mixing that informed the crafting of the Blood Law.

Nicolai and Gercke preached fervently against what Nazis called the crime of *Rassenschande*, “race scandalization”—sexual unions between Germans (especially German women) and racial inferiors (especially Jewish men.)<sup>49</sup> The general populace, Nazi leaders fretted, simply did not grasp the monstrosity of sexual congress between

Germans and Jews, which endangered the entire race; Germans had to be “educated and enlightened”;<sup>50</sup> they had to be, as it were, converted. To that end Gercke, for example, gave a radio lecture in the summer of 1933 with the memorable title “Learning to Think Like a Racist.” He patiently explained to his listeners, still in need of Nazi indoctrination, that marriage with a Jew was simply “sick.”<sup>51</sup> Nicolai for his part, in a pamphlet published in 1932, the frightening year before Hitler’s installation as Chancellor, was at pains to explain to voters that Jews were vectors of mongrelization: Indeed they were not, properly speaking, members of a “pure” race at all: they were all *Mischlinge*, all mongrels, the products of thousands of years of heedless interbreeding.<sup>52</sup>

Nicolai’s 1932 warnings about the dangers posed by Jewish mongrels rested on the standard wild-eyed Nazi view of history, much repeated in the literature of the time. Human history was a millennia-long chronicle of race decay—of superior races that had degenerated, and eventually been completely submerged, as a result of race mixing. With “Nordic” Germany at risk, it was urgent that there be new marriage legislation. Race mixing through indiscriminate marriage was akin to race mixing through indiscriminate immigration; and the Jews were agents of pollution in both respects:

Today the different *Völker* are essentially kept separate by international borders. The fact that so far no stronger mixing [*Vermischung*] of all *Völker* has taken place than what has occurred, that therefore the *Völker* are racially distinguished from each at all, has to do strictly with the sedentariness of the *Völker*. That sedentariness does not exist with the Jews. It is true that they maintain their own *völkisch* unity through the strictest possible closure of the community, supported by the Jewish religion. Nevertheless they have always been nomads, and they are still nomads today. It corresponds to their sensibility and their sense of justice that state borders should be allowed to vanish and that all the ties that unite a *völkisch* community should be loosened, that the various *Völker* should mix with each other promiscuously and create a single unified humanity.<sup>53</sup>

Jews were “foreign bodies” who violated both international and sexual boundaries; they opened the door to the worst of possible futures, the emergence of “a single unified

humanity.” “Our *Volk* is in danger!,” as another Nazi legal text cried in 1934, repeating the standard slogan.<sup>54</sup>

One might wish that all this Nazi raving were remote from anything to be found in the United States. But in fact, as this chapter shows, it is with the Blood Law that we discover the most provocative evidence of direct Nazi engagement with American legal models, and the most unsettling signs of direct influence. American law was expressly invoked in the key radical Nazi document establishing the initial framework for the Blood Law, the so-called *Preußische Denkschrift*, the Prussian Memorandum, circulated by Nazi radicals in 1933. In the subsequent debates—in particular in an important June 1934 planning meeting preserved in a lengthy stenographic transcript—American models were regularly discussed. In particular, American models were championed by the most radical Nazi faction, the fiercest advocates of a stringent ban on sexual mixing. Finally the Blood Law itself that emerged at Nuremberg bore the marks, as I shall argue, of American influence.

The story of American influence that this chapter has to tell is certainly depressing. But it may come, once again, as no great surprise to readers knowledgeable about early twentieth-century American race history. It is a familiar fact that much of America was infected with the same race madness: as the Nazi literature noted, there were plenty of Americans who simply “knew” that black men regularly raped white women.<sup>55</sup> American courts, as German authors were aware, were capable of delivering matter-of-fact holdings such as “the mixing of the two races would create a mongrel population and a degraded civilization”;<sup>56</sup> the American Supreme Court entertained briefs from southern states whose arguments were indistinguishable from those of the Nazis;<sup>57</sup>

and southern racists like Senator Theodore Bilbo, staunch supporter of the New Deal in the early 1930s, could tell tales of the decay of races through mixing every bit as wild-eyed as Helmut Nicolai's: "Pleading against 'mongrelization' in the anti-lynching debate of 1938, a process he claimed had destroyed white civilization over much of the globe, Bilbo took a page from Hitler's *Mein Kampf* to assert that merely 'one drop of Negro blood placed in the veins of the purest Caucasian destroys the inventive genius of his mind and palsies his creative faculty.'"<sup>58</sup> (In fact, Bilbo was going further than the Nazis were willing to go: as we shall see, the Nazis firmly rejected the one-drop rule as too extreme.)

Nevertheless, if America too was infected with race madness, what made the United States influential on the Blood Law was not its race madness, but the distinctive legal techniques that Americans had developed to combat the menace of race mixing. Here once again, America was the global leader.

First and foremost, the United States offered *the* model of anti-miscegenation legislation. The notion that marriage between "superior" and "inferior" races should be avoided was widespread in the world in the age of early twentieth-century eugenics.<sup>59</sup> Nevertheless actual legislative bans were a rarity; certainly the Nazis had a hard time uncovering non-American examples. As Reich Minister of Justice Gürtner declared at the June 1934 planning meeting that will occupy much of this chapter, it was "naturally very attractive to look around in the world to see how this problem has been attacked by other *Völker*"; and the United States provided the only model that the Justice Ministry found to investigate.<sup>60</sup> The same was true of the published Nazi literature, which identified many instances of customary or socially enforced prohibitions, but no statutes outside the

United States.<sup>61</sup>

It is especially significant that the United States offered examples of an otherwise unparalleled legislative practice: not only did thirty American states declare racially mixed marriages civilly invalid, many of them also threatened those who entered into such marriages with criminal punishment. This was highly unusual. Criminalization of marriage is rare in legal history. Many species of marriage have been deemed invalid over the centuries; but the only form regularly criminalized and prosecuted in the modern Western world has been bigamy.<sup>62</sup> Even a thoroughly race-obsessed country like Australia in the era of the “White Australia” policy did not go so far as to criminalize marital race mixing. A principal Australian law of 1910, for example, simply decreed that “[n]o marriage of a female aboriginal with any person other than an aboriginal shall be celebrated without the permission, in writing, of a Protector authorized by the Minister to grant permission in such cases.”<sup>63</sup> The statute did threaten those who presided over such marriages with a fine; but it did not suggest that the parties themselves would be punished.<sup>64</sup> The contrast with the anti-miscegenation statute of an American state like Maryland was stark. The Maryland statute was far more detailed in its discussion of who counted as a member of which race, and harsh indeed in its threats:

All marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race or between a negro and a member of the Malay race, or between a person of negro descent, to the third generation, inclusive, and a member of the Malay race, or between a person of negro descent, to the third generation, inclusive, and a member of the Malay race or between a negro and a member of the Malay race, or between a person of negro descent, to the third generation, inclusive, and a member of the Malay race, are forever prohibited, and shall be void; *and any person violating the provisions of this Section shall be deemed guilty of an infamous crime, and be punished by imprisonment in the penitentiary for not less than eighteen months nor more than ten years.*<sup>65</sup>

Draconian penalization of this kind represented a sort of law that only the United States

had to offer. The only other even partially comparable example that the Nazis could uncover in the early 1930s was found in South Africa, which penalized interracial adultery—but not interracial marriage.<sup>66</sup> As we shall see, the notion that racial miscegenation could be punished criminally was deeply appealing to Nazis like Nicolai, Gercke, and the radical Nazi lawyers who drafted the Prussian Memorandum of 1933; it is in the criminalization of racially mixed marriage that we see the strongest signs of direct American influence on the Nuremberg laws.

American anti-miscegenation law had something else to offer as well: law on how to classify “mongrels”—what I will call “mongrelization law.” The Nazi faced far-reaching problems in the treatment of the mongrels of Germany as they set out to combat race mixing. A majority of German Jews were incontestably Jews. But the German Jewry had a substantial history of intermarriage, and there was also a heavy proportion of mixed-descent persons whose status was uncertain. By the official Nazi reckoning in 1935 there were 550,000 full and three-quarter Jews, 200,000 half Jews, and 100,000 quarter Jews in Germany.<sup>67</sup> How much Jewish blood was enough to indelibly taint a child of part “Aryan” descent? Which mongrelized German nationals would fall under the axe of the new Nazi laws? Here again, as German authors observed, the United States had basic lessons to teach: because it had a long history of sexual relations between masters and slaves, it was a country, as Eduard Meyer reported in 1920, that was groaning under the weight of “an enormous mass of mongrels,”<sup>68</sup> and it had consequently developed a large body of law on mongrelization, defining who did and did not belong to which race. Unlike American immigration and citizenship law, moreover, this law was “open”: it made no secret of its racist aims, and employed no devious pathways or subterfuges.

American mongrelization law represented, once again, the only body of foreign jurisprudence offering an extensive corpus of doctrine that Nazi policy makers found to investigate and exploit, and exploit it they did. But here we arrive at the most uncomfortable irony in this history: when it came to the law of mongrelization the Nazis were not ready to import American law wholesale. This is not, however, because they found American law too enlightened or egalitarian. The painful paradox, as we shall see, is that Nazi lawyers, even radical ones, found American law on mongrelization too harsh to be embraced by the Third Reich. From the Nazi point of view this was a domain in which American race law simply went too far for Germany to follow. Nevertheless, we shall also see that Nazi lawyers put real effort into studying the law of the American states, in the search for what wisdom they had to provide.

## Toward the Blood Law: Battles in the Streets and the Ministries

Before turning to the details of what Nazi policy makers made of American miscegenation and mongrelization law, it is important once again to provide some historical context. Nazi investigation of American anti-miscegenation legislation took place against the background of several conflicts that developed in the months after Hitler took power in early 1933. First, there was political conflict between street radicals, who wanted to carry the Nazi program forward through spontaneous pogrom-like violence, and party officials who wanted to keep control of the “National Revolution” in the hands of the state. Second, there was ongoing bureaucratic conflict between two groups: on the one hand Nazi radicals, who pushed for the harshest conceivable measures, and on the other hand lawyers of a more traditional bent, who tried to hew to older juristic



conventions to the extent possible, and to bring some moderation to the Nazi ordinances and enactments. Finally, there was conflict over foreign relations. Radical Nazi plans to pass legislation disfavoring “colored” races met with angry protests from many parts of the world, including Japan, India, and South America.<sup>69</sup> Faced with the threat of boycotts, Nazi policy makers felt pressure to tone their racist legislative program down. All of these conflicts colored the history of the Nazi use of American law on marriage and sexual mixing.

## Battles in the Streets: The Call for “Unambiguous Laws”

Political conflict in the streets lay in the immediate background of the Nuremberg Laws. As historians have shown, the Nuremberg Laws were promulgated in response to radical street violence. In 1933 and again in 1935, during the chaotic early years of the “National Revolution,” there was widespread violence “from below”—what the Nazis called “individual actions” against Jews, many but not all fatal, that had not been sanctioned or directed by the authorities in Berlin.<sup>70</sup> These were incidents, inevitably, that sometimes particularly targeted cases of *Rassenschande*, “race-scandalizing” instances in which Jews were accused of engaging in sexual “mixing” with Germans.<sup>71</sup> Heinrich Krieger, the leading Nazi student of American race law, regarded these “individual actions” on the street as the German parallels to American lynch justice: just as inhabitants of the American South, motivated by their “race consciousness,” acted outside legal channels to engage in deplorably wild and unregulated violence against black “race scandalizers,” so too were Germans engaging in wild and unregulated violence against Jews<sup>72</sup> — “rising up,” in the words of the Party Office on Race Policy, against “an alien race that [was]

attempting to gain the upper hand.”

The central Nazi leadership too viewed these “individual actions” as deplorable, for two reasons. First, they made for bad foreign press. Finance Minister Hjalmar Schacht was particularly concerned that street violence was damaging Germany’s international image, and therefore impeding economic recovery, and he pushed hard for a crackdown.<sup>73</sup> Second, the “individual actions” reflected a breakdown in the central party control of affairs that was always integral to the Nazi ambitions. The Nazis favored official, orderly, and properly supervised state-sponsored persecution, not street-level lynchings or “actions” incited by low-level party members. As Gunnar Myrdal remarked in 1944, Nazi racists, unlike the racists in the American South, understood persecution to be the task for “the centralized organization of a fascist state”;<sup>74</sup> and popular lynch justice did not fit in.

It was such concerns about the dangers of German street violence that led to the promulgation of the Citizenship Law and Blood Law at Nuremberg. Concerned that the “National Revolution” might slip out of control, the party set out to calm matters by creating “unambiguous laws” that would put the business of persecution securely in the hands of the state.<sup>75</sup> Over the months leading up to the “Party Rally of Freedom” in September 1935, Interior Minister Frick and others regularly declared that both citizenship and sex legislation was in preparation, precisely in the effort to bring order to the streets.<sup>76</sup>

## Battles in the Ministries: The Prussian Memorandum and the American Example

The preparation of the necessary “unambiguous laws” was however shadowed by

bureaucratic conflict between Nazi radicals and more traditionally minded lawyers. Nazi Party radicals demanded far-reaching criminalization of sexual mixing. As early as 1930 Nazi deputies in the Reichstag had put forward a proposal to criminalize racially mixed marriage,<sup>77</sup> and after the party took power in 1933 radicals continued to press the same demand for the prevention of “any further penetration of Jewish blood into the body of the German *Volk*.” Conventional lawyers however mounted considerable, and for a while successful, resistance. This conflict between Nazi radicals and conventional lawyers makes for a remarkable story, and it deserves some close attention. It is a major episode in modern legal history—a test case for how legal traditions could operate to impose limits during the descent into Nazism. And from the beginning, it was a conflict turned in part on the usefulness of the American model.

The radical program for the Nazification of German criminal law was laid out in the key text known as the Prussian Memorandum, first circulated in September 1933, at a moment when a wave of summer street violence had died down.<sup>78</sup> This hardline text, which established the basic terms for what would become the Blood Law two years later,<sup>79</sup> was composed by a team assembled by Hans Kerrl, a Nazi radical who served as Prussian Minister of Justice. Kerrl’s team was headed by Roland Freisler, a man who will loom large in this chapter. Freisler was an infamous Nazi lawyer, who would later serve as the presiding judge of the bloody Nazi People’s Court—a “murderer in the service of Hitler,” as one biographer calls him<sup>80</sup>—and attend the Wannsee Conference that decided on the extermination of the Jews.<sup>81</sup>

The main aim of the Prussian Memorandum on which Freisler and other radicals collaborated was to do away with the “liberal” criminal law of the Weimar Republic in

favor of the harsh new approach typical of Nazi politics. To that end it detailed a list of demands for toughening criminal law that met with considerable critique from conventionally trained lawyers.<sup>82</sup> And among those demands was a passage that laid out the program that would be incorporated in the Blood Law two years later. That passage pointed to two examples for the new Nazi order to follow: medieval expulsions of the Jews in Europe--and modern-day American Jim Crow.

In this passage, which would be hotly debated both domestically and internationally, the authors of the Prussian Memorandum called for the creation of the three new race crimes of “Race Treason,” “Causing Harm to the Honor of the Race,” and “Race Endangerment.” The authors began with a prologue invoking the Nazi view of history:

History teaches that racial disintegration [*Rassenzersetzung*] leads to the decline and fall of *Völker*. By contrast *Völker* that have rid themselves of racially foreign segments of the *Volk*, in particular of Jews, have blossomed (e.g., France after the expulsion of the Jews in the year 1394, England after their expulsion in the year 1291). ... The fundamental principle of the egoistic age of the past, that everyone who bears a human countenance is equal, destroys the race and therewith the life force of the *Volk*. It is therefore the task of the National Socialist state to check the race-mixing that has been underway in Germany over the course of the centuries, and strive toward the goal of guaranteeing that Nordic blood, which is still determinative in the German people, should put its distinctive stamp on Germany.

In order to achieve these goals, the criminalization of racially mixed marriage was a burning necessity. Nevertheless the Memorandum held that existing mixed marriages were not to be disturbed:

The first necessary condition for this so-called “Nordic-i-fication” [*Aufnordung*] is that henceforth no Jews, Negroes, or other coloreds, be absorbed into German blood. *The criminal prohibition of mixing* is to be so framed, that mixing between members of foreign blood communities or races, whose strict separation from German blood is to be determined by law, will be forbidden. It follows that the proscription will have no application to currently existing mixed marriages. *The future formation of mixed marriages shall be prevented by a law of the Reich.* ...

Leaving existing interracial marriages intact would indeed remain Nazi policy—though the party worked hard to encourage “Aryan” spouses to divorce their partners.<sup>83</sup> The Memorandum then proposed the creation of a new crime of “race treason”:

#### *Race Treason*

Every form of sexual mixing between a German and a member of a foreign race is to be punished as *race treason*, and indeed both parties are to be subject to punishment. ... Particularly deserving of punishment is the case in which sexual intercourse or marriage is induced through malicious deception. ... As a matter of civil law, it must be declared that the fact that a marriage is mixed is grounds for its dissolution. ...

The Memorandum next turned to “Causing Harm to the Honor of the Race.” This was the proposal, soon so controversial, that targeted “colored” races, thereby giving diplomatic offense to East Asians, South Asians, and South Americans. It was also the proposal that included the first of the many invocations of the United States that we shall examine in this chapter:

#### *Causing Harm to the Honor of the Race*

Causing harm to the honor of the race must also be made criminally punishable. It scandalously flouts the sentiments of the *Volk* when, for example, German women shamelessly consort with Negroes. That said, the provision is to be limited to cases in which the association takes place in public and occurs in a shameless manner and gives gross offense to the sentiments of the *Volk* (for example indecent dancing in a pub with a Negro). The provision is also to be limited to coloreds. Protection of racial honor of this kind is already practiced by other *Völker*. It is well-known, for example, that the southern states of North America maintain the most stringent separation between the white population and coloreds in both public and personal interactions.<sup>84</sup>

There are few documents that show more provocatively how mistaken it is to imagine that American segregation law was of no interest to the Nazis. The Prussian Memorandum was the principal early statement of the radical program that eventuated in the Nuremberg Laws; there is no ignoring the fact that it made a point of citing the example of Jim Crow. Moreover, it is a striking fact that it treated Jim Crow as *more* radical than what the Nazis themselves envisaged: The Nazi program was to be carefully

restricted to instances in which Germans and “coloreds” consorted in public; as one radical Nazi on the drafting team declared, the proposal in the Memorandum was in that sense “very limited”;<sup>85</sup> by contrast, as the Memorandum made a point of noting, Jim Crow targeted “both public *and personal* interactions.” This is the first of several instances in which, as we shall see, the Nazis treated American race law as too harsh to be borrowed wholesale by Nazi Germany. (Nor was this the last mention of American law in the Memorandum; it went on to invoke both American and Australian immigration law in its discussion of the proposed crime of “race endangerment.”)<sup>86</sup>

## Conservative Juristic Resistance: Gürtner and Lösener

The Nazi legal radicalism embodied in the Prussian Memorandum would eventually triumph at Nuremberg;<sup>87</sup> but at first it faced substantial, and for a time successful, resistance from traditionally minded lawyers. Indeed, juristic traditionalists managed to hold the radicals at bay for some months. It may seem puzzling that any measure of successful resistance could ever have been mounted--had not Germany become a Nazi dictatorship?--but it is essential to bear in mind the larger political context in the Germany of the early 1930s. During the first months of Hitler’s rule the Reich still flew its two flags, the swastika of Nazism and the plain black, white, and red banner symbolizing the nationalist conservatism that was common within the powerful bureaucracy, staffed heavily by trained lawyers. Eventually one event would make the unshackled radicalism of the regime inescapably clear: the Night of the Long Knives, the Nazi orgy of murders that began on June 30, 1934. After the Night of the Long Knives it was impossible to pretend that Germany had not cut all ties with traditional conceptions

of even a minimal rule of law.<sup>88</sup> But before then, at least until the early summer of 1934, comparatively moderate lawyers were in a position to hold something of a line; and the record of conflict over the Prussian Memorandum shows that they did so.

In the history of lawyerly rearguard actions against Nazi radicalism, two fascinating and ambiguous figures played especially important roles: Franz Gürtner and Bernhard Lösener. These were men who made well-documented efforts to counter two critical aspects of the radical program: the criminalization of racially mixed marriages, and the extensive definition of who would count as a “Jew.” Neither was a heroic figure by any means. Both were men of the far right, who collaborated with Hitler, and who were quite prepared to work toward the creation of a system of persecution of some kind. What made them relative moderates was not some commitment to liberal political values, or at least not some openly expressed commitment.<sup>89</sup> What the sources show instead is that they defended the traditional doctrines of the law, insisting that the Nazi program of persecution conform to the logic and strictures of the highly developed “legal science” for which Germany was famous. These were not soapbox political dissidents, but bureaucratic officeholders who displayed the instinctive conservatism of trained jurists, and who succeeded for a while in defending some of the traditional standards of German lawfulness.

To begin with Gürtner, the Minister of Justice: He was one of the nationalist conservatives who had collaborated with the Nazis and taken up posts in Nazi government. A leading member of the German National People’s Party, Gürtner had been Justice Minister of Bavaria, home state of the Nazis, in the 1920s, where he had shown sympathy with Hitler, and perhaps aided him, while never joining the Nazi Party.<sup>90</sup> He

was appointed Reich Minister of Justice by nationalist conservative Franz von Papen in the summer of 1932, and was subsequently retained first by Schleicher, and then by Hitler. He would be kept in his office until his death in 1941, joining the party only in 1937, a late representative of Nazi collaboration with nationalist conservatives. Scholars portray him as a man who remained in office out of a sincere, if hopeless, desire to obstruct the worst evils of Nazism to the extent possible.<sup>91</sup>

Of course it *was* hopeless; in the end Gürtner did stay in office under Hitler, and he can hardly be called a hero. Nevertheless we know that he made efforts to check Nazi radicalism in the early 1930s,<sup>92</sup> and in particular that he played a major role, alongside other lawyers, in raising doubts about the demand of the Prussian Memorandum that racially mixed marriages be criminalized.

It is important to describe those doubts carefully. From the point of view of conventionally trained German jurists, even ones who were perfectly willing to accept the authority of the new regime, there were far-reaching questions about whether the measures called for by the Prussian Memorandum were workable within the established norms of German law. A large part of the difficulty had to do with the sweeping magnitude of its proposals. The Prussian Memorandum demanded, in a few fiery paragraphs, that racially mixed marriages be criminalized. But how was such a criminalization possible unless racially mixed marriages were also declared civilly invalid? How could one part of the law criminalize an institution that another part treated as lawful? Rewriting the Criminal Code would entail rewriting the Civil Code as well--a daunting proposition for the conventional German jurists.<sup>93</sup> Moreover declaring mixed marriages civilly invalid was no simple matter. Even the Prussian Memorandum did not



suggest that the state should dissolve existing interracial marriages. Putting its proposals into effect thus meant creating a peculiar state of affairs in which some interracial marriages would remain perfectly legal while others were subject to harsh criminal punishment. That could only be made to work by means of some complex and contentious juristic gyrations.<sup>94</sup>

Nor did the difficulties end there. It was standard legal doctrine in Germany, as in all parts of the Western world outside the United States, that marriage was in any case not a matter for criminal law. Only bigamy had historically been prosecuted as a crime, but bigamy did not offer a model easily applicable to racially mixed marriage.<sup>95</sup> Indeed, for conventional lawyers like Gürtner, the contrast between bigamy and ordinary miscegenation was sharp. The crime of bigamy was close in spirit to fraud: a bigamy prosecution commonly deemed one party an innocent victim.<sup>96</sup> Bigamies generally took place when one spouse lied to the other about his or her marital status. There was certainly some room to generalize from the example of bigamy in the making of new Nazi law: the Prussian Memorandum suggested that the law on “race treason” should take a particular harsh line on “malicious deception,” cases in which one spouse deceived the other about his or her race. A person who lied about his or her race was akin to a person who lied about his or her marital status. (It was also possible to cite the precedent of a 1927 law, which imposed criminal penalties on those who married without disclosing that they had a venereal disease; not revealing that you were a Jew, radical Nazis suggested, was like not revealing that you had a sexually transmitted disease.)<sup>97</sup> But in ordinary cases of miscegenation both parties would go into the union with open eyes, with neither having lied. How could that be criminalized? All that Minister Gürtner was

willing to endorse was the criminalization of “malicious deception”—though even there conventional jurists saw serious logical difficulties.<sup>98</sup>

As for Bernhard Lösener: He played his part primarily with regard to the problem of defining “Jews.” When it came to the classification of “mongrels,” party radicals inevitably favored the most expansive definition possible; and in the July 1933 Law on the Revocation of Naturalization and the Withdrawal of German Citizenship they succeeded in declaring any person with one Jewish grandparent a “Jew.”<sup>99</sup> This was, by the standards of Nazi policy, a far-reaching definition—though to be sure nowhere near as far-reaching as the “one-drop” rule and other racial definitions that prevailed in the American states.<sup>100</sup> Certainly it was too radical for moderate lawyers in the regime, who wished to take a more sparing and merciful attitude, and who pushed for less aggressive definitions over the following two years.

{~?~IM: HERE INSERT FIGURE 7 [Whitman\_HAModel\_03\_Losener\_ch 2\_PHOTO.jpg]: Bernhard Lösener. }

Lösener was first among them. Lösener was a centrally important actor in the making of the Nuremberg Laws. He served as **Judenreferent**, “reporter on the Jews” for the Ministry of the Interior, and was one of the chief draftsmen of the Laws, and the author of an important account of the drafting process. He has been the target of considerable, and withering, criticism, since it is clear that his account of events was self-serving. Nevertheless even Lösener’s harshest critics call him, jarring though the phrase may sound, an authentically “moderate” Nazi anti-Semite:<sup>101</sup> he would eventually resign from the office of Jewish affairs in the 1940s, be arrested in 1944 after sheltering some of the plotters against Hitler, and be expelled from the Nazi Party in 1945.<sup>102</sup>

This was another striking figure: the draftsman of the Nuremberg Laws who was eventually arrested and expelled from the party. Like others among his colleagues, the Lösener of the 1930s displayed conservative lawyerly instincts. Nazi though he was—and let it be emphasized that he was a reprehensible anti-Semite, an early member of the party who later tried to whitewash his record—Lösener was also a cautious and methodical jurist; and his role in the drafting process too shows how juristic conservatism could work as a brake on Nazi radicalism. During the early 1930s Lösener and other jurists fought to limit the definition of “Jew,” shielding where possible persons of only half Jewish descent.<sup>103</sup> Those efforts, which historians have traced in engrossing detail in the archives, were only partly successful: the ultimate implementation ordinance of the Reich Citizenship Law did include some, but not all, half Jews within the disfavored status. That ordinance, completed in November 1935, distinguished between two classes: those who “were” Jews, having at least three Jewish grandparents, and those who “counted” as Jews, having two Jewish grandparents while also practicing the Jewish religion, or having chosen to marry a Jewish spouse.<sup>104</sup> The great bureaucratic battle over the “mongrels” thus ended in a tense compromise—but one in which even as late as November 1935 the weight of juristic opinion represented by figures like Lösener could still make itself felt.

\* \* \*

Such was the context of the making of the Nuremberg Laws: With mob violence periodically erupting in the streets, Nazi legal officials were under pressure to draft “unambiguous” laws banning mixed marriages and sexual liaisons. Nazi leaders with an eye on foreign relations were hesitant to see the passage of provocative race legislation. Party radicals wished to criminalize all sexual mixing; moderate jurists were full of

doubts. The radicals wanted an expansive definition of “Jews”; moderates resisted. In the ensuing debates, Germans went looking for foreign models, and they found the anti-miscegenation laws of the American states.

## The Meeting of June 5, 1934

Like American immigration and citizenship law, American anti-miscegenation law was very old, dating back to a pioneering Virginia statute of 1691.<sup>105</sup> The American tradition of banning race miscegenation, like American immigration and second-citizenship law, was attracting European attention well before the Nazis came on the scene.<sup>106</sup> This was another area in which America was a recognized global leader, with prohibitions both old and new. Indeed, American states continued to introduce anti-miscegenation statutes in the early twentieth century; this was an active area of American racist lawmaking.<sup>107</sup>

And as with immigration and citizenship law, German lawyers and policy makers had a history of great interest in American anti-miscegenation law that long predated the Nazi period. The first flurry of German studies of the American approach dated to the era of pre–World War I German imperialism. Beginning in 1905, German colonial administrators in South-West Africa and elsewhere instituted anti-miscegenation measures, intended to safeguard the “purity” of the German settler population against mixing with the natives. These racist measures were unparalleled among other European colonial powers, but they had a model in America, and German colonial administrators investigated that model eagerly, as Guettel has shown in important work. Their efforts included voyages through the southern states, commissioned reports from diplomats, consultation with the Harvard racist Archibald Cary Coolidge, and more; and the colonial archives include detailed reports on US law.<sup>108</sup> Here once again, late nineteenth- and

early twentieth-century America struck Germans as a country at the forefront of the creation of “a conscious unity of the white race.”<sup>109</sup>

German interest in American anti-miscegenation law did not fade in the 1930s. The anti-miscegenation measures that prewar colonial administrators produced may or may not have directly influenced the Nuremberg Laws; historians disagree.<sup>110</sup> But there can be no doubt that the drafters of the Nuremberg Laws studied American law just as eagerly as their colonial predecessors did. America was the great model in 1905, and it remained the great model three decades later.

It is now time to turn to the details of the stenographic report of the June 5, 1934, meeting of the Commission on Criminal Law Reform.<sup>111</sup> This report, preserved in the archives in two separate versions, was first published in 1989.<sup>112</sup> The meeting it transcribed brought together seventeen lawyers and officials under the chairmanship of Justice Minister Gürtner. The attendees included Lösener, the “reporter on the Jews,” Freisler, the future President of the Nazi People’s Court, at the time a State Secretary attached to the Ministry of Justice, along with other lawyers and medical doctors from the Nazi ministries, including three radicals who had participated with Freisler in the drafting of the Prussian Memorandum.<sup>113</sup> The meeting was called to respond to the demands that the Memorandum had made; and the principal legal questions on the table were whether mixed marriages should be criminalized, what form any such criminalization should take, and how to manage the challenging business of defining “Jews” and other members of disfavored races, along with a few other matters that I will leave to the side.

The transcript is a record of clashes—though generally studiously polite ones—between the radicals who had worked on the Memorandum, and juristic moderates led by

Justice Minister Gürtner. At the time that the meeting occurred, the Night of the Long Knives had not yet taken place. The meeting thus dates to the last weeks before the mask had fully fallen from the face of radicalism in Nazi Germany; and the transcript records a last moment of moderate success.<sup>114</sup> Gürtner and the other moderate lawyers present did not quarrel with the goal of institutionalizing anti-Jewish policies; these were, to say it once again, no heroes of resistance to Hitler; but they did work to fend off extremes of criminalization. Some of them suggested that perhaps education and a campaign of public "education and enlightenment" might gradually succeed in ending the evil of mixed marriages without formal criminalization. If there was to be criminalization at all, Gürtner insisted, it must be done on the basis of the only traditional juristic model, the criminalization of bigamy:<sup>115</sup> that meant that there were only to be prosecutions in cases where a Jew had engaged in "malicious deception" of an "Aryan" marriage partner.<sup>116</sup> Other lawyers present pushed an even milder line: Eduard Kohlrausch, a prominent professor of criminal law, argued that criminalization of any kind would be actively counterproductive.<sup>117</sup> Lösener maintained, in line with traditional juristic teachings, that the very concept of a "Jew" was so elusive that criminalization was impracticable.<sup>118</sup>

For their part, the radicals present argued, occasionally in browbeating tones, that the Criminal Code must be revised to reflect the "fundamental principle of National Socialism," that was the harsh legal enforcement of racism;<sup>119</sup> but at the end of the day they were forced to give up on the full-scale implementation of the Prussian Memorandum. Some of them admitted that diplomatic pressures made it impossible, for the moment, to carry out the measures that they deemed necessary; the objections of so many countries to targeting "colored Races" were too grave.<sup>120</sup> Freisler, while insisting

ferently on the need to remain faithful to the mission of national socialism and defending the use of the term “colored,” yielded to the technical objections of the conventional jurists: for the moment there could only be the creation of the offense of “malicious deception.”<sup>121</sup> At the same time that the radicals were making these concessions, though, they were also making unmistakably threatening noises. There were menacing references to the political agitation taking place outside the meeting.<sup>122</sup> Freisler observed, courteously but ominously, that the ultimate judgment would have to be made, not by the professional jurists present, but by the “political decision” of the Nazi leadership.<sup>123</sup> If the moderate lawyers were able to hold the line at this meeting, it is clear enough in retrospect that the political forces were arrayed against them.

And what about the place of American law, already cited by the Prussian Memorandum? The dismaying answer is that this pivotal meeting on the road to the Nuremberg Laws involved repeated and detailed discussion of the American example, from its very opening moments; and that American law was championed principally by the radicals.

After a brief opening statement by Gürtner, the meeting heard from two Justice Ministry officials charged with preparing reports for the commission. The first was Fritz Grau, a party member, later to rise to high rank in the SS.<sup>124</sup> Grau, one of the men who had participated in the drafting of the Prussian Memorandum, took a hardline view of the need for criminalization. But, like other hardliners present, he conceded that it was not yet possible to implement the program of the Prussian Memorandum. “Painful” though it was for him to say so, he declared, for the moment foreign relations made it necessary to hold off on including “race protection” explicitly in the Criminal Code.<sup>125</sup>

But that did not mean that Grau was ready to abandon the field to the forces of moderation; he was still determined to lay out the unsparing Nazi case against the Jewish menace. Grau acknowledged there were some lawyers and officials who believed that a program of “education and enlightenment” would suffice as an alternative to criminalization. “Education and enlightenment” was, however, he said, an unacceptable approach. Like other Nazis, Grau linked the question of sexual mixing to the question of citizenship, just as the two would be linked at Nuremberg. Here is the record of his words:

The Party Program [of 1920] determines that citizens may only be persons of German descent, and that foreign races should be subject to a guest right. The Program thus intends that the new German state should be built on a racial foundation. In order to achieve this goal, a great deal has taken place over the last years. An effort has been made to root out the racially foreign elements from the body of the *Volk*, on the one hand by striving to deprive them of any influence, to drive them out of the leadership of the state as well as out of other influential positions and professions. ...

All these measures have undoubtedly brought us a step forward; but they have not achieved and could not achieve an effective quarantine separating the racially foreign elements in Germany from the people of German descent. For foreign policy reasons the necessary law could not be instituted—a law that would prevent all sexual mixing between Germans and the foreign races.

Now one could perhaps say—and here I come to the second question posed by Mr. Minister of Justice—that this goal could be achieved gradually through education and enlightenment without any express law.<sup>126</sup>

It was at this point that Grau turned to America, the homeland of race-based law. He noted that Jim Crow segregation, already put on the table by the Prussian Memorandum, might seem to offer a possible model for an approach founded on “education and enlightenment.” However, it was his view that segregation was not suitable to German circumstances:

Other *Völker* too, one might say, had achieved such a goal [i.e., of the elimination of race mixing through education and enlightenment] through social segregation. That statement



is however only correct with certain provisos. Among these other *Völker*—I am thinking chiefly of North America, which even has statutes along these lines—the problem is a different one, namely the problem of keeping members of colored races at bay, a problem that plays as good as no role for us in Germany. For us the problem is sharply directed against the Jews, who must be kept enduringly apart, since there is no doubt that they represent a foreign body in the *Volk*. It is my conviction that just taking the path of social segregation and separation will never achieve the goal, as long as the Jews in Germany represent a thoroughly extraordinary economic power. As long as they have a voice in economic affairs in our German Fatherland, as they do now, as long as they have the most beautiful automobiles, the most beautiful motorboats, as long as they play a prominent role in all pleasure spots and resorts, and everywhere that costs money, as long as all this is true I do not believe that they can really be segregated from the body of the German *Volk* in the absence of statutory law. This can only be achieved through positive statutory measures that forbid absolutely all sexual mixing of a Jew with a German, and impose severe criminal punishment.<sup>127</sup>

Thus, riveting to read, a hardline Nazi view on Jim Crow segregation: Segregation would simply never succeed in Germany. German Jews, unlike American blacks, were too wealthy and arrogant; the only hope was that they be put down by “severe criminal punishment.” Jim Crow segregation—such was this striking Nazi judgment—was a strategy that could work only against a minority population that was already oppressed and impoverished.

It deserves emphasis that Grau went out of his way to dismiss the option of Jim Crow segregation: The fact that he felt obliged to do so suggests clearly enough that there had been debates about American law behind the scenes before this meeting took place. Somebody had been making the case for a German Jim Crow as the foundation of comparatively mild approach aiming at “education and enlightenment” of the population. Indeed we shall see momentarily that Grau was not the only participant at the meeting to address the possible attractions of Jim Crow.<sup>128</sup> When Grau had finished his report, Kohlrausch then followed with his own distinctly more moderate one, which pled the case against criminalization.<sup>129</sup>

Minister of Justice Gürtner then took the floor to open the general discussion. His

intervention revealed that the ministry had been working hard to collect information on the very American example that Grau had brought up:

I am very grateful to the two gentlemen for their reports. ... If I were to express a few thoughts myself, they would be these.

When it comes to race legislation it was naturally very attractive to look around in the world to see how this problem has been attacked by other *Völker*.

I possess here a thoroughly comprehensible synoptic presentation of North American race legislation, and I can tell you right away that the material was rather difficult to find. If any of you gentlemen takes a personal interest, I am ready to make this document available to you.<sup>130</sup>

Apparently Gürtner displayed a Justice Ministry memo surveying the law of the American states. Then as now, collecting information on all of the states was “rather difficult.” Nevertheless the ministry had been able to extract what German lawyers always seek, a “Grundgedanke,” a “fundamental idea”:

The material gives an answer to the question of what form race legislation in the American states takes. The picture is as variegated as the American map. Almost all American states have race legislation. The races that must be defended against are characterized in different ways. Nevertheless a fundamental idea can be very easily extracted. The laws list Negroes or mulattos or Chinese or Mongols in motley variation. They often speak of persons of African descent, thus addressing the issue historically, by which they mean Negroes, and there are a few sections which make positive reference to the Caucasian race. That is not uninteresting; since I believe there is a jurisprudence on the question of whether Jews belong to the Caucasian race.<sup>131</sup>

At that point, Gürtner apparently turned to his deputy Hans von Dohnanyi, perhaps the most fascinating, and certainly the most heroic, of the moderates present. Dohnanyi, the son of the Hungarian composer Ernő Dohnanyi and brother-in-law of the dissident theologian Dietrich Bonhoeffer, joined the Nazi Justice Ministry in June 1933. But only a few weeks after the June 5, 1934, meeting, he became a clandestine opponent of the regime, embarking on the dangerous project of collecting and indexing documents that he hoped would someday be used for a prosecution of the Nazi leadership.<sup>132</sup> Eventually he

would be executed for participation in the resistance against Hitler.<sup>133</sup>

In early June 1934, however, Dohnanyi was still a government legal official at work on the creation of anti-Jewish legislation. Evidently he had had some of the responsibility for the ministry's research, for he supplied an account of American race jurisprudence as to Jews:

State Attorney Dr. von Dohnanyi: Yes, the jurisprudence speaks of the Caucasian race simply in opposition to all colored races, that is to say it speaks of the white race, and since Jews belong to the white race they are reckoned among the Caucasians.

Reich Minister of Justice Gürtner: That is the jurisprudence of the highest courts?

State Attorney Dr. Dohnanyi: Yes.

[Gürtner]: One can see from that, and from the map, how correct the observation of Mr. Vice President Dr. Grau was, that this legislation is not directed against Jews, but protects the Jews. That gives us nothing to work with; the aim [of an American-style approach] would be the contrary [of our own].<sup>134</sup>

If that were all that the participants had had to say about American law, we would have to conclude that the American model, carefully researched by the Justice Ministry, had proven of no value to the Nazi regime. But Gürtner did not stop with the observation that American legislation was not directed against the Jews; and he would not be the last to raise the subject. He continued with his presentation of the ministry memo, turning to what was "interesting" about American law. The ministry's research had turned up many facts about American anti-miscegenation statutes: "Then it is interesting," Gürtner reported, "to see what legal consequences are attached to sexual union. That too is variable. All sorts of expressions appear: 'illegal' and 'void,' 'absolutely void,' 'utterly null and void.' 'Prohibited' also sometimes appears. From these shifting and not very sharply juristically defined words it can be seen that civil law consequences attach in all cases, and criminal consequences in a great number of cases."<sup>135</sup> This was the critical point: In America there were "criminal consequences." The American example spoke

directly to the great question that divided the lawyers present at the meeting. It showed that the criminalization of racially mixed marriages, even outside the case of bigamy, was not unprecedented. That fact cannot have been welcome to Gürtner, who opposed such far-reaching criminalization; and he quickly made an effort to neutralize the American example. Whatever American statutes might say, Gürtner rushed to argue, it could not really be the case that Americans routinely imposed such “criminal consequences” in practice: “A question that cannot be answered on the basis of our research is how criminal law race protections are applied in practice. It seems to me that what is portrayed here does not in practice always correspond to the reality.”<sup>136</sup> Gürtner simply refused to concede that the Americans actually went so far as to prosecute miscegenists. He had no evidence for that assertion;<sup>137</sup> but we should understand that he was doing his best to grasp at some argument that would deflect the impact of the American precedent.

Gürtner then returned to the question of anti-Jewish legislation. The United States, he reported, was not alone in refusing to engage in formal legal persecution of Jews: “We have not been able to find race legislation aimed at combatting the Jews in any currently existing foreign law, among the states which were the object of our research. I believe that in order to find such legislation, we would have to go back to the law of the medieval German cities.”<sup>138</sup> It was true enough that there was no anti-Jewish legislation in the United States; but then, there was no anti-Jewish legislation in any contemporary system. What was nevertheless “interesting,” much though Gürtner wished to minimize it, was that America had produced the very sort of law that Nazi lawyers had gathered at the meeting to debate: it had taken the step of criminalizing race mixing “in a great number of cases.”

After Gürtner's presentation of the ministry's memo, the participants moved on to a variety of technical questions in the drafting of criminal measures; it is certainly not the case that America was the sole subject of discussion, even if it was the first. Nevertheless, it was not forgotten. References to American law continued to pepper the meeting.<sup>139</sup> Most especially, the transcript reveals that as the morning wore on, the American example was highlighted by two of the more aggressively racist Nazis at the meeting, Freisler and Karl Klee, Presiding Criminal Court Judge and Professor of Criminal Law at the University of Berlin, and another of the radicals who had worked on the Prussian Memorandum.<sup>140</sup> It seems that the United States had particular attractions for the more uncompromising racists present.

Thus about two-thirds of the way through the meeting Klee turned once again to Jim Crow segregation and its value for Germany. The question that concerned Klee was whether the new Nazi criminal law regime should be race-*based*, simply declaring the separation of the races, or *racist*, declaring the superiority of some races and the inferiority of others. Some Nazis had suggested that the new law should be purely race-based: avoiding any claim that Jews were inferior, they argued, would improve Germany's international public relations.<sup>141</sup> Klee rejected that approach. The plain truth, he insisted, was that the German people were convinced that the Jews were an inferior race, and German law should say so openly. Here, Klee believed that America offered a valuable model. American race law, he argued, was unquestionably founded on a belief in racial inferiority: like the Supreme Court in *Brown v. Board of Education*, Klee had no doubt that Jim Crow was designed to dramatize the inferiority of the black population.<sup>142</sup> Klee viewed segregation as a form of Nazi-style "race protection," intended to alert the

white population to the menace posed by blacks. Jim Crow, he argued, was the American equivalent of one of the principal “race protection” strategies Nazis were using on the German streets in 1933–34, the boycott. Nazi storm troopers aimed to “educate and enlighten” the populace by staging intimidating boycotts in front of Jewish shops.<sup>143</sup>

Under Jim Crow, Klee argued, Americans were doing the same thing, but on a grander social scale: “American race legislation too [just like German popular attitudes] certainly does not base itself on the idea of [mere] racial difference, but, to the extent this legislation is aimed against Negroes and others, absolutely certainly on the idea of the inferiority of the other race, in the face of which the purity of the American race must be protected. This is also expressed in the social boycott that is mounted on all sides in America against the Negroes.”<sup>144</sup> Here was another striking Nazi interpretation:

Segregation was the American version of the Nazi boycott. American racists employed Jim Crow law “on all sides” in order to raise American consciousness, just as Nazi thugs stood outside Jewish shops brandishing placards reading “Germans! Defend yourselves! Don’t buy from Jews!” It was yet another case of Americans “defending” themselves against “an alien race that [was] attempting to gain the upper hand” and threatening to exert “influence.” And what the American example showed was that the true race-based criminal law ought to be unapologetically racist criminal law.

But by far the most dramatic exploitation of the American example came a few minutes later, from Freisler, the judicial “murderer in the service of Hitler.” His intervention suggested that he too, like Gürtner, had come to the meeting prepared to debate America, and with detailed knowledge of the American case in hand.

Freisler used the American example to mount a Nazi response to the objections of

traditionally minded jurists like Lösener. It was a fundamental principle of traditional German law that criminal law required clear and unambiguous concepts: if judges were permitted to convict on the basis of vague concepts, the core requirements of the rule of law would not be met.<sup>145</sup> Yet—so Lösener argued at the meeting—Nazi policy makers had failed to find a clear and unambiguous concept of a “Jew.” There was simply no accepted scientific means of determining who was “Jewish”: “An effective means of determining whether a given human being has an element of Jewishness on the basis of his behavior or outward appearance [Habitus] or blood or the like does not exist, or at least at present has not yet been found.”<sup>146</sup> That failure constituted a bar against criminalization: it was intolerable, Lösener declared, to allow every individual judge to make decisions on the basis of mere *Gefühlsantisemitismus*, of vague sentiments of Jew hatred.<sup>147</sup> The indispensable prerequisite for criminalization was a clearly delineated and scientifically acceptable definition of who counted as a racial Jew.<sup>148</sup> Moreover judges, Lösener further added, must work within the limits of the presumption of innocence.<sup>149</sup> These were basic requirements of legality, and they stood in the way of implementing the radical Nazi program.

It was here that Freisler, showing typically bluff radical Nazi contempt for technical doctrinal concerns, countered by citing the United States. The problem, Freisler maintained, along with another radical companion, was not a “scientific” or “theoretical” matter at all. It was a problem that called for a purely “practical” and “political” response<sup>150</sup>—and American law was Freisler’s model of the “practical” and “political.” American law, he said, demonstrated that it was perfectly possible to have racist legislation even if it was technically infeasible to come up with a scientifically

satisfactory definition of race. Freisler went into intimate detail about the laws of the American states, and the nature of American jurisprudence, to make his point:

Now as far as the delineation of the race concept goes, it is interesting to take a look at the list of the American states. Thirty of the states of the Union have race legislation, which, it seems clear to me, is crafted from the point of view of race protection. [“And political!” shouted another radical who had worked on the Prussian Memorandum.]<sup>151</sup> This is perhaps [particularly] with regard to the Japanese, but in other respects [too] from the racial point of view. Proof: North Carolina has also forbidden marriages between Indians and Negroes; that has after all certainly been done from the point of view of race protection. ... I believe that apart from the desire to exclude if possible a foreign political influence that is becoming too powerful, which I can imagine is the case with regard to the Japanese, this is all from the point of view of race protection.<sup>152</sup>

This American form of “race protection,” Freisler continued, did not trouble itself about the correct scientific conceptualization of race:

Moreover it is not the case that all states that have to reckon with the possibility of Japanese immigration have spoken of the Japanese, but some have spoken of Mongols, even though it is without a doubt the case that Japanese and Chinese are not to be assigned to the Mongols, but to an entirely different *Volk* blood group. Why have these states done this? I cannot believe that they have done it in order to delineate a concept. Rather I believe that they have done it, because they were targeting a kind of race image [*Rassebild*], and have only erroneously lumped the Japanese in with the Mongols. The same thing is shown by the way they list them [i.e. the various races] all together. A state speaks of Mongols, Negroes or mulattoes. That clearly shows that the racial point of view has been placed in the foreground. ... The bottom line is that the Americans in reality have first and foremost desired to have race legislation, even if today they would perhaps like to pretend it is not so.<sup>153</sup>

At any rate, he explained, the beauty of the American example was that it demonstrated, as American law so often does, that it was possible to manage a functioning legal system without the sorts of clear concepts German lawyers cherished:

How have they gone about doing this? They have used different means. Several states have simply employed geographical concepts. One state speaks of African descent, another of persons from Africa, Korea or Malaysia. Still others have conflated matters, combining geographical origin with their conception of a particular circle of blood relatedness. For example in the example I have just given there is subsequently added: or of mongolian race. Another state mentions both alongside each other: Nevada speaks of Ethiopians or of the black race, Malaysians or of the brown race, Mongols or of the yellow race. That signifies a remarkable mixing of the system of geographical origins with conceptualization on the basis of blood relatedness.<sup>154</sup>



Yet all this conceptual messiness did not prevent America from having a racist order. American legislation, Freisler argued, managed perfectly well with what might be called the “political construction of race”:<sup>155</sup> it displayed an ideological determination to build a racist order even in the face of the absence of any meaningful scientific conception of race; and in that regard Freisler believed that Germany had something to learn from American legislative techniques.

Nor was it just American legislation that had lessons to offer. Freisler further argued that there was something to learn from the techniques of American judging. American judges had no trouble applying racist law despite its fuzzy concepts. Indeed, if it were not for the lack of American attention to the Jewish problem, the American style of jurisprudence, Freisler declared in a resonant sentence, would “suit us perfectly”:

These states obviously all have an absolutely unambiguous jurisprudence, and this jurisprudence would suit us perfectly [*würde für uns vollkommen passen*], with a single exception. Over there they have in mind, practically speaking, only coloreds and half-coloreds, which includes mestizos and mulattoes; but the Jews, who are also of interest to us, are not reckoned among the coloreds. I have not seen that any state speaks of foreign races [as standard Nazi language would dictate] but instead they name the races in some more primitive way. ...<sup>156</sup>

The absence of an anti-Jewish jurisprudence did not mean, however, that American jurisprudence had nothing to teach Germany. What the American example showed was that German judges could persecute Jews even without legislation founded in clear and scientifically satisfactory definitions. “Primitive” concept formation would suffice. In fact, Freisler maintained, it would be perfectly workable if German race legislation too, following the American lead, simply specified “coloreds”:

It seems to me doubtful that there would be any need to expressly mention the Jews alongside the coloreds. I believe that every judge would reckon the Jews among the coloreds, even though they look outwardly white, just as they do the Tatars, who are not yellow. Therefore I am of the opinion that we can proceed with the same primitivity

[*Primitivität*] that is used by these American states. A state even simply says: “colored people.” Such a procedure would be crude [*roh*], but it would suffice.<sup>157</sup>

Such was the attractiveness of the American common-law model for this baleful figure, the avatar of the modern judicial butcher, a man guilty of “a perversion of the forms of justice that was extreme even by the standards of the Third Reich”:<sup>158</sup> American courts did not allow themselves to be hobbled by some pedantic insistence on clear and juristically or scientifically defensible concepts of race. They just went to work. Even though America did not target the Jews, this American common-law style of legal racism, with its easygoing, open-ended, know-it-when-I-see-it way with the law, had a “primitivity” that would “suit” Nazi judges “perfectly.”

This was too much for Gürtner, who responded to Freisler by trying once again to dismiss the usefulness of American “models”: “Well, the idea that we could get anything useful from these American models cannot be exploited in practice, since, as Herr State Secretary Dr. Freisler has already said, American law concerns itself with variants, with different nuances, of the concept ‘coloreds,’ used now in this way, now in that, perhaps most clearly in the case of Virginia, which speaks of ‘coloured persons,’ including mulattoes, mestizos etc.”<sup>159</sup> Such vague reference to “coloreds” was useless to Germany, Gürtner insisted; and it was useless because there should be no general criminalization of racially mixed marriages. The only possible aim of the new legislation would be to criminalize malicious racial deception in marriage; and it was in the nature of things that “coloured persons” were in no position to deceive others about their race: “If our aim in the criminal law of race protection is to punish malicious deception, then the question of coloreds falls *ipso facto* by the wayside, since malicious deception on the part of coloreds does not seem to me very probable.”<sup>160</sup> The American question was thus sharply framed

as part of the conflict between hardliner and moderate. Freisler, the champion of merciless criminalization and “political” rather than juristic decision making, declared that the American approach would “suit us perfectly”; Gürtner, the lawyer-moderate, still in the saddle in early June 1934, but destined to lose in the political battles of the coming year, insisted that there was no place for “American models” in the more modest and juristically conventional approach he advocated.

{~?~IM: HERE INSERT FIGURE 8 [Whitman\_HAModel\_04\_Meeting CCL\_ch 2\_PHOTO.jpg]: A meeting of the Commission on Criminal Law Reform, 1936.}

The meeting included further references to American law that I will not discuss in full here. Among them, though, there is one exchange, toward the end of the day, that stands out. Erich Möbius, a Nazi doctor attached to the Interior Ministry,<sup>161</sup> raised once again, sorrowfully, the difficulties caused by foreign objections to the criminalization of consorting with “colored races”—and reported, memorably, on a conversation with an American, to which Freisler gave his own memorable response. Möbius’s American acquaintance had observed that the Nazis’ diplomatic troubles were caused by the explicit racism of the Nazi program, and asked whether it was necessary to be quite so open:

Dr. Möbius: I am reminded of something an American said to us recently. He explained, “We do the same thing you are doing. But why do you have to say it so explicitly in your laws?”

State Secretary Freisler: But the Americans put it in their own laws even more explicitly!<sup>162</sup>

Indeed.

\* \* \*

Thus a stenographic transcript of a critical meeting planning what would become the

Nuremberg Laws. The transcript is quite a striking datum in comparative law: it is rare indeed that we possess such an ingenuous and detailed record of how the process of influence transpires.

And needless to say what the June 5 transcript records is not evidence of the “astonishing insignificance” of American law. American law was the first topic of discussion at the meeting, and it was mooted in notably well-informed detail by the participants, including numerous verbatim quotes from anti-miscegenation statutes from all over the United States. Moreover the American example, already highlighted by the Prussian Memorandum in September 1933, had clearly been a subject of discussion and debate before the meeting took place, so much so that the Justice Ministry had gone out of its way to prepare a detailed memo on the subject. In particular it is clear that there had been debates over whether the importation of Jim Crow measures might not serve to “educate and enlighten” the German populace. Some moderates had advocated Jim Crow “enlightenment” as an alternative to criminalization; while a hardline figure like Klee thought of Jim Crow as a more broad-gauged version of the menacing Nazi boycott. Justice Minister Gürtner was manifestly uncomfortable with “American models”; but he cited them nevertheless, sometimes in significant detail, just as Freisler did.<sup>163</sup> Moreover Gürtner felt constrained to open the general discussion at the meeting by presenting the ministry’s memo. In particular he felt constrained to note that the American states engaged in the otherwise unparalleled practice of the criminalization of racially mixed marriages. The meeting was certainly not by any means devoted exclusively to America; but the participants clearly took a serious interest in what they could learn from the laws of the American states, and discussed them repeatedly; and it is unmistakably the case

that the American example was pushed hardest by the radical faction, which lost out for the moment, but which would ultimately triumph at Nuremberg fifteen months later.

The transcript, be it said, does not record an effort at generating international propaganda by citing the American example. The participants unquestionably were worried about “foreign policy” considerations; but they were a drafting commission for criminal law, and the purpose of their closed-door meeting, and in particular of their effort to undertake the “rather difficult” business of collecting American law, was to find “material” for the making of their own Nazi legislation.

All this certainly does not mean that the Blood Law was mechanically copied from the law of some American state; but it can hardly be written off. What it suggests, clearly enough, is that for radical Nazi lawyers in the summer of 1934, as for Hitler in the 1920s, America was the obvious preeminent example of a “race state,” even if it was one whose lessons were not unproblematically applicable to Germany. The bottom line is this: when the leading Nazi jurists assembled in early June 1934 to debate how to institutionalize racism in the new Third Reich, they began by asking how the Americans did it.

## The Sources of Nazi Knowledge of American Law

A tantalizing question about the meeting remains. Where did the participants get their information? What has become of the “thoroughly comprehensible synoptic presentation of American race legislation” that Gürtner presented at the meeting? What was the source of the “list” of the laws of the thirty states that Freisler mentioned? The originals of the document or documents in question have doubtless perished, but they can be

reconstructed with fair confidence, and they tell us some interesting things about the diffusion of American racist ideas in the mid-twentieth century.

It seems likely that Gürtner and Freisler were relying in part on a table listing the law of the American states that was published a few months later in the *National Socialist Handbook on Law and Legislation*, to which I will return shortly.<sup>164</sup> As for the ministry's memo: it is clear that it drew on the research of a man I have already mentioned several times, Heinrich Krieger, to whom a reference was later added in a redacted version of the stenographic transcript;<sup>165</sup> and it is important to turn for a moment to Krieger's biography, for knowing Nazi engagement with American law in the early 1930s means knowing Heinrich Krieger.

Krieger was a young Nazi lawyer who had just returned to Germany from Arkansas, where he spent two semesters as an exchange student at the University of Arkansas Law School in 1933–34.<sup>166</sup> He was deeply immersed in American law, so much so that in 1935 he published a well-wrought English-language article in the *George Washington Law Review* titled "Principles of the Indian Law."<sup>167</sup> When he returned home to the Germany in the throes of the "National Revolution," he benefited from the sponsorship of Otto Koellreutter, among others, and became a fellow at an academic institute in Düsseldorf under the control of Frick's Ministry of the Interior.<sup>168</sup> It was during his time in Düsseldorf that Krieger's work came to the attention of Gürtner's Ministry of Justice. He published his magnum opus on American law, *Race Law in the United States*, in 1936, and then left Germany once again to continue his research on foreign race regimes. Joining the National Socialist Office of Race Policy, he traveled to South-West Africa, where German

colonial administrators had first investigated the American race law model thirty years earlier.<sup>169</sup> Krieger spent two productive years in Africa, publishing studies on local race law and the treatment of indigenous legal traditions, while collecting research for an extensive monograph on South Africa, a "Nordic" state, as he wrote, that was on the road to becoming a great power.<sup>170</sup> He returned to Germany in 1939, just in time for the outbreak of hostilities, and served with the forces of his country in a war that he described as perhaps "the most important turning point in the entire evolution" of the race question.<sup>171</sup> After the war was lost, Krieger's life took a new direction. In the 1950s we discover him as a prominent schoolteacher, with a changed profile: he has become a vocal proponent of international understanding and peace, advocating for European unification, while organizing student exchanges and aid for developing countries in Africa and Asia.<sup>172</sup> What the internationalist Krieger of the 1950s had to say about his younger Nazi self we do not know.

The writings of his youth showed a deep allegiance to Nazi values. They also showed Krieger's command of the finest techniques of advanced German scholarship. Nazi law was marked by a strong commitment to what Americans call "Legal Realism," the style of legal scholarship that also dominated in New Deal America. (I will return to the comparison between these two legal realisms in the conclusion.) Legal Realism in the 1930s was an approach that looked beyond the black letter of the law in the effort to grapple with larger social and cultural forces. The young Krieger was a prime representative of the Nazi strain of realism. Indeed his interpretation of America is one of the more impressive examples of Nazi writing in the realist vein.

Krieger's work interpreting American law begins with his *George Washington*

*Law Review* article on Indian law. This was a legal realist study whose aim was to identify the underlying social values that could explain what otherwise would seem incoherent black letter doctrine. The young Nazi lawyer, profiting from his year of research in the law library at the University of Arkansas in Fayetteville, presented a careful and learned review of the history of American Indian law, whose point was to expose the ultimate incoherence of the formal law. There was only one way to make sense of the jarring contradictions in American Indian law, Krieger argued: it simply had to be understood as a species of race law, founded in the unacknowledged conviction that Indians were racially different and therefore necessarily subject to a distinct legal regime.<sup>173</sup> The article makes for sinister reading, in light of Nazi history: setting up a distinct legal/racial regime for the Jews was of course the core idea of the Nuremberg laws; and the American treatment of the Indians was later to be invoked as a precedent for German conquests in the East. What horror we all ought to feel when we learn that Hans Frank referred to the Jews of Ukraine as “Indians” in 1942.<sup>174</sup> But while Krieger’s interpretation may have been sinister, it was not stupid: there is nothing foolish about detecting racism at work in American Indian law.

His *Race Law in the United States* was another work that cannot be called stupid. That book, filled though it was with ugly Nazi judgments, was a work of real learning and numerous insights. Heinrich Krieger was, as it were, the Nazi Gunnar Myrdal; and his book would deserve at least a partial translation today. In it, he provided an account of American legal history, presented against a richly described socioeconomic background. The book makes for startling reading today—startling, if for no other reason, because Krieger's heroes were Thomas Jefferson and Abraham Lincoln. *Race Law in the United*



*States* was the legal companion to the Nazi world histories that credited the Founding with the creation of “the strongest prop for the Aryan struggle for world domination”; it was a heroic interpretation of American history as a long, though deeply troubled, struggle against race mixing, led by America's greatest presidents.

Jefferson was already featuring in Krieger’s work in 1934, which highlighted Jefferson’s 1821 declaration of the impossibility of racial coexistence: “[i]t is certain that the two races, equally free, cannot live in the same government.”<sup>175</sup> *Race Law in the United States* added an account of the Civil War era that included an exact and lengthy documentation of Lincoln’s many pre-1864 declarations to the effect that the only real hope for America was the resettlement of the black population elsewhere.<sup>176</sup> This was telling material in the Germany of the Nuremberg Laws: the Nazi policy with regard to the German Jews was precisely that they must be driven out of the Reich. Lincoln was Krieger’s exemplary statesman, to whom he referred frequently: he maintained that America would have become the first truly healthy race-based order if only Lincoln, wise in the knowledge that the races could not inhabit the same country, had not been assassinated.<sup>177</sup> Krieger’s villains were the Radical Republicans, and his ultimate diagnosis of America in the 1930s was another piece of Nazi legal realism. The Radical Republicans had saddled America with the highly formalistic jurisprudence of the Fourteenth Amendment, founded on an abstract concept of equality foreign to human experience, and certainly foreign to the basic racist worldview of the American populace. The result was that American law was torn between two “shaping forces”: formalistic liberal egalitarianism and realistic racism.<sup>178</sup> It was to be hoped that realistic racism would ultimately win out.

This was certainly a deeply distasteful reading of American legal history; but there were plenty of Americans who believed something like it at the time, both in the North and in the South.<sup>179</sup> Krieger's book was moreover buttressed by three hundred fifty pages of detailed study of American statutory and decisional law, accompanied by statistical and qualitative studies in American society; and it was rich in theoretical sophistication and acute observations about workings of American legal racism. It may sound grating to speak of "first-rate Nazi scholarship," but that is what Heinrich Krieger's *Race Law in the United States* represented. Krieger was only one of many fine legal scholars whose gifts did not immunize them to the draw of Nazism.

The transcript of the June 1934 planning meeting shows the stamp of young Krieger's influence. The "material" that Gürtner quoted most likely came from research included in another Krieger Article, also titled "Race Law in the United States," published in mid-1934 in a technical journal of administrative law, the *Verwaltungsarchiv*, and thereafter regularly cited by Nazi policy makers.<sup>180</sup> That article is a compendium of what was known in Germany in the summer of 1934. Krieger reviewed for his readers the harsh tenor of American anti-miscegenation law in the early 1930s:

The attempt to enter into an unlawful mixed marriage has the almost universal legal consequence of both invalidity and exposure to criminal punishment. With regard to the first of these consequences the statutes use the following terms, either individually or in combination: void, unlawful, null, illegal, absolutely void. The reach of the civil invalidity is not defined in a uniform way, but illegitimacy and incapacity to inherit of the offspring are the regular results.

Violations of these marriage prohibitions are threatened with both fines and imprisonment. Statutes that provide for both forms of punishment sometimes permit both to be imposed, sometimes threaten them in the alternative. There is a corresponding variation in the grading of the offense, for example misdemeanor in Nevada, felony in Tennessee, felony (infamous crime) in Maryland, and in the measure of punishment. In several states imprisonment of up to ten years may be imposed, in others six months is

the highest possible sentence. In a few states (Missouri, Indiana) the law expressly uses the concept of knowing violation of the law, a provision that rests on the recognition that there is widespread knowledge of the descent of individuals.<sup>181</sup>

It was presumably this passage, or some version of it, that Gürtner had before him at the June 5 meeting.

Krieger's article also made a point of emphasizing the open-ended and "not very sharply juristically defined" approach of American law, dwelling on the fact that American law was content to divide the population into two fundamentally arbitrary categories, "white" and "colored." Like Freisler, Krieger emphasized that there was nothing scientific about these concepts: the two categories were the product of "ideological influences," not race reality. Nevertheless American law was able to manage as it wrestled with the same critical "problem" as Germany: how to treat "mongrels": "The problem of the legal treatment of *mongrels* has received a simple solution, at least from the point of view of American statutory law: A fundamental distinction is made between only *two* population groups: *whites* and *coloreds*. All of the concepts used in the regulations accordingly involve artificial line-drawing, partly driven by ideological influences." Implicit in this was the point made by Dohnanyi at the June 5 meeting: the fact that there were only two categories meant that American law lumped Jews in under the heading "Caucasian." As Krieger would explain in *Race Law in the United States*, this was because the United States had "so far" not gotten around to the Jew problem.<sup>182</sup> In his 1934 article, however, Krieger did not pause over the question of the Jews. Like Gürtner and Freisler he simply moved on to what was "interesting" in the many techniques that the American states used for addressing the definitional challenges posed by their "enormous mass of mongrels." For the most part, Krieger reported, the states

looked to descent, defined by fractions of blood, but they sometimes took other tacks as well:

States that draw racial distinctions determine membership in the colored group either according to degrees of descent from a colored ascendant or according to the percentage of colored blood. In line with this the laws of four states define coloreds as “persons who descend from a negro for up to three generations, even though one ancestor in each generation is white.” Five states make a simpler determination: “Coloreds are persons who have 1/8 or more negro blood.” In two states we find the proportion to be 1/4. Occasionally the smallest admixture of “African blood” suffices to give rise to the legal classification as colored. Other states permit outward characteristics to be decisive in determining membership in this or that population group, e.g., former slave status (North Carolina), the fact of regular social association with one or another group (ditto) or, in the case of a second marriage, the racial identity of the first marital partner (Texas).

Again like Freisler, Krieger emphasized the open-endedness of American case law:

The conceptualization of race in the *courts* is even more variable. A rare example of an extreme case of a judicial definition is a decision from Ohio which declares white persons to include those of more than half white descent.<sup>183</sup> There is a growing tendency in judicial practice to assign a person to the group of coloreds whenever there is even a trace of visible Negro physical features, and beyond that to do so when the Negro descent of the individual is common knowledge, without regard to how far the degree of descent reaches back.<sup>184</sup>

Here again the memo that Gürtner brought to the June 5 meeting presumably included this passage or something like it.

It is true enough that Krieger’s 1934 account was not about Jews as such; indeed it did not even mention them. But you would have to be willfully obtuse to deny that it was meant to inform Nazi policy discussions. It is particularly noteworthy that Krieger’s article provided meat for the discussion of the “variable” “conceptualization of race” in American law of the kind that Freisler praised. In this regard his article was typical: as we shall see in a moment, there were plenty of Nazi observers who thought there was something to learn from the American approach to “mongrels,” even if the Americans had “so far” not understood the imperative of putting down their Jews.

Nazi engagement with the American model continued over the subsequent months leading up to the formal proclamation of the Nuremberg Laws in September 1935.

Almost as striking as the discussion of American law by the Commission on Criminal Reform in the summer of 1934 is Herbert Kier's Article on "*Volk*, Race and State," in the *National Socialist Handbook for Law and Legislation*, whose treatment of American immigration law was already quoted in Chapter 1. More quotes are in order here. Kier began by alluding to the foreign incomprehension of Nazi goals:

The national socialist ideology presented here, and the conclusions that must be drawn from it, have been widely met with complete misunderstanding, and National Socialism and the German *Volk* have been the targets of serious attacks. This is all the more incomprehensible since the United States of North America in particular has introduced statutory regulation in many areas that grow out of the racial point of view. In this regard it is worth observing that the dominant political ideology in the USA must be characterized as entirely liberal and democratic. With an ideology of that kind, which starts from the fundamental proposition of the equality of all persons who bear a human countenance, it is all the more astonishing how extensive race legislation is in the USA. Let me provide a few examples. The laws of the following American states forbid mixed marriages between white and colored Races.<sup>185</sup>

Kier then printed a two-page alphabetical table with exact description and citation of the anti-miscegenation legislation of all thirty American states.<sup>186</sup> That table corresponds to the description of American law given by Gürtner and Freisler the previous June, and it seems a fair guess that it was one of the sources of their detailed information on American law, very likely the "list" to which Freisler referred at the June 5 meeting. The same table would continue to circulate in later years, reappearing in a standard 1937 commentary on the Blood Law.<sup>187</sup> After printing it, Kier continued,

Thus the 30 states listed here all have prohibitions on miscegenation, which with a single exception all pursue the aim of safeguarding the American population of European origin against race-mixing with non-European races. Only in North Carolina is there in addition a prohibition on miscegenation between Indians and Negroes. Extramarital sex between members of different races is also forbidden in several states, or even subjected to criminal punishment, for example in Alabama and Arkansas.<sup>188</sup>

Here we have it again: detailed Nazi engagement with the specifics of American law.

Kier's next topic was segregation. He expressed some astonishment at the lengths to which American segregation was sometimes taken:

In most of the Southern states of the Union white children and colored children are sent to different schools following statutory regulations. Most American states further demand that race be given in birth certificates, marriage licenses, and death certificates. Many American states even go so far as to require by statute segregated facilities for coloreds and whites in waiting rooms, train cars, sleeping cars, street cars, busses, steamboats, and even in prisons and jails. In several states, as in Florida, only whites can be members of militia, in yet others, as in Arkansas, voter lists are separated by race and in the same state whites and coloreds are separated on the tax rolls.<sup>189</sup>

Kier clearly found all of this strange and a shade excessive; we shall see in a moment more examples of Nazi authors who thought American law went overboard. At any rate, what American law demonstrated, Kier wrote, was how natural and inevitable racist legislation was:

This variegated abundance of statutory racial regulation in the States of the Union demonstrates that the elemental force of the necessity of segregating humans according to their racial descent makes itself felt even where a political ideology stands in the way—a political ideology that denies that human beings have different worth depending on their descent. A very brief overview of American race law is given by H. Krieger in the *Verwaltungsarchiv*.<sup>190</sup>

It was from there that Kier moved to his peroration, identifying America as Nazi Germany's forerunner despite its "liberal and democratic" ideology—as the country that had arrived at the "fundamental recognition" of the evils of race mixing, now to be carried to its logical fulfillment in the Third Reich

Once again it is important to reject the idea that all this was somehow meant as mere propaganda, directed at foreign readers. Kier certainly did refer to international "misunderstanding" of the regime. But his chapter cannot have been meant for a foreign audience. This was another dense text in *Fraktur*, probably with limited foreign

circulation,<sup>191</sup> intended to guide and inspire domestic Nazi deliberations. We should hear, in Kier's reference to the outside world, not an exercise in propaganda, but a kind of honest bewilderment about foreign "misunderstandings" of a scheme that was very close indeed to what was found in the United States. And we must remember that the Nazi regime, at the time, was not preaching extermination. What it was preaching arguably *did* represent a logical extension of much of American race law, much though we may want to pretend otherwise.

## Evaluating American Influence

Like American immigration and citizenship law, American miscegenation law was thus a regular point of reference during the years when the Nuremberg Laws emerged. The question remains whether we can say that the Nazis were in some meaningful way directly "influenced" by American miscegenation practice. The answer to that question is an (inevitably controversial) yes.

First of all it is essential to reject once and for all the proposition that American law could not have been of interest to the Nazis because it did not expressly target Jews. The absence of Jews from American prohibitions did not deter Nazi jurists from investigating American law in the least. Yes, it is true that American anti-miscegenation law primarily spoke of "Negroes" and "Mongols." But that hardly meant that American law had nothing to offer. Helmut Nicolai, the Nazi race fanatic with whom this chapter began, declared, in a major 1933 speech, that "Negroes" and "Mongols" represented a threat to racial purity just as Jews did,<sup>192</sup> and the Prussian Memorandum spoke, in the same vein, not just of Jews, but of "Jews, *Negroes or other coloreds*."<sup>193</sup> Radical Nazis throughout the early years of the 1930s were well aware that there was an American

model to exploit, and they were quite willing to draw on American law in planning their “fundamental constitutional law of the national socialist state” on interbreeding and sex. It is simply nonsense to claim that Nazi lawyers could not have made use of American precedents because of the absence of formal measures against American Jews. These were able lawyers, who were quite capable of extracting legal techniques from statutes with goals somewhat different from their own.

Once we dispose of that dubious claim, we can indeed, and really must, speak frankly of something that can only reasonably be called “influence,” as objectionable as that term is sure to seem. First and foremost, we can detect something that it is entirely right to deem “influence” in the criminalization of racially mixed marriages. The Blood Law decreed both the civil invalidity and the criminality of mixed marriages:

## Law on the Protection of German Blood and German Honor

### § 1

(1) Marriages between Jews and nationals of German blood or racially related blood are forbidden. If such marriages are nevertheless entered into they are null and void, even if they are concluded abroad in order to evade this law.

\* \* \*

### § 5

(1) Any person who violates the prohibition of § 1 shall be punished by imprisonment at hard labor.

The language of this law was certainly not directly copied from some American statute; but that is not the point. Legal influence on jurists as sophisticated as the Germans of the mid-twentieth century does not involve literal copying. Lawyers make use of larger



conceptual frameworks while drafting language that suits their particular circumstances; and in this case the leading German lawyers of the early Nazi period framed their conceptual question as the question of whether marriage could ever be the subject of criminal law, outside the cases of bigamy and “malicious deception.” American law offered the sole example of a Western system that criminalized mixed marriages. German jurists had known that since the early twentieth century, they still knew it in the early 1930s, and they discussed the American sources in detail, both in print and in the critical closed-door meeting for which we possess a transcript. In particular, the radical Nazi Freisler, who pushed for broad criminalization from the Prussian Memorandum on, appears in that transcript as a vocal champion of American legislation and jurisprudence.

Skeptics may retort that Nazi radicals would have succeeded in criminalizing racially mixed marriages even if they had not had an American example to cite. That is perfectly possible; we will never know. Nevertheless there can be no justification for ignoring the evidence of Nazi engagement with American models that litters the sources. Even if the radicals were destined to win, that does not mean that having an American model meant nothing in the political battles of the early 1930s; nor that the radicals who cited American law over and over again were not in some significant way inspired by what they found. Only a naive and pedestrian understanding of law—only a dogged refusal to face facts—would dismiss the American example as insignificant in this setting. If we had evidence of this kind for any less freighted case in comparative law, we would not hesitate for a moment to speak of “influence.” Konrad Zweigert and Hein Kötz, the preeminent postwar German specialists on comparative law, give a standard account of how foreign law affects legislative innovation:

Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specially prepared on the topic in question.

Ever since the second half of the nineteenth century legislation in Germany has been preceded by extensive comparative legal research.<sup>194</sup>

Like other postwar German scholars, Zweigert and Kötz pass over the Nazi period in silence; but their description of how laws are made is equally applicable to Germany in the period 1933 to 1935; it is just as pertinent to the making of bad laws as it is to the making of good ones; and the “extensive comparative research” conducted by the Nazi lawyers of the early 1930s inescapably links America to the making of the Nuremberg Laws.

## Defining “Mongrels”: The One-Drop Rule and the Limits of American Influence

America’s role is clearest in the case of the criminalization of racially mixed marriages; but the American example also mattered for Nazi discussions of the classification of racially inferior “mongrels.” American law was concerned with defining “Negroes” just as German law was concerned with defining “Jews,” and Nazi observers were well aware that the United States offered a possible model. Lawyers were by no means the only Germans intrigued by American racial classification schemes. For example, there was this passage in a 1934 book that was published as a guide for teachers on how to present Nazi race policies to their pupils. The author observed that Americans took the need for racial purity so seriously that they were prepared to take what even Nazis regarded as exceedingly harsh classificatory measures: “Sharp social race separation of whites and blacks has shown itself to be necessary in the United States of America, even if it leads in

certain cases to human hardness, as when a mongrel of predominantly white appearance is nevertheless reckoned among the niggers.”<sup>195</sup> This was the world of the American one-drop rule, disturbing even to Nazi commentators, who shuddered at the “human hardness” it entailed. Another Nazi author, this time in an article written for English teachers in 1936, had similar words. He praised the American commitment to legislating racial purity, but he too blanched at “the unforgiving hardness of the social usage according to which an American man or woman who has even a drop of negro blood in their veins,” counted as blacks.<sup>196</sup>

The one-drop rule was too harsh for the Nazis (or at least for most of them—the fanatical Achim Gercke was in favor of something like it),<sup>197</sup> and for that reason alone the influence of American classification schemes was inevitably limited. The scholars who see parallels between American and Nazi racial classification schemes are to that extent wrong—but only because they understate the relative severity of American law.<sup>198</sup> The Nazi literature saw other obstacles as well. German Jews were simply not American blacks. American blacks, as one anonymous author explained in 1935, were generally physically recognizable as such, and that meant that America could rely on “mostly clear color lines.”<sup>199</sup> Identifying Jews was far tougher. Unlike blacks, Jews maintained their communal identity by their culture, not their color. American blacks by contrast had lost all of their distinctive culture after centuries of oppression: “The Negroes [having lost their cultural traditions] are now held together only negatively, by their identifying physical features. ... What the Jews and the Negroes of the USA have in common, however, is the will to become outwardly assimilated. In this regard the prospects of the Jews are seemingly better, since the bodily differences do not stand out visibly as

strongly, and accordingly can be hidden more successfully.”<sup>200</sup> Germany’s “Jewish problem” was far more insidious than America’s “Negro problem”: The German Jews, this author worried, would find it all too easy to infiltrate themselves into the community by pretending to embrace the German characteristics of “diligence, love of orderliness, and thrift.”<sup>201</sup>

America was different: there were limits to the possible extent of American influence on Nazi racial classifications, and Nazi authors were quite conscious of them. Nevertheless American racial classifications were of inevitable legal interest; that was a large part of the appeal in American miscegenation law. We see that in Justice Minister Gürtner’s report on how American law defined the races. We see it in the *Handbook* article on “*Volk*, Race and State,” carefully listing for its Nazi readership which American states defined blacks as those with which fraction of black blood. We see it in Johann von Leers’s 1936 review of the laws of the American states.<sup>202</sup> We see it in Krieger’s 1934 article, and later in his 1936 book.

And at least one aspect of American law may have carried some weight in the German debates: American states did not define “mongrels” strictly on the basis of descent. As Krieger explained, race classifications in the United States might also turn on other factors: The courts of some American states, in particular North Carolina and Texas, also looked to other “outward characteristics.” Texas in particular considered marital history: “[O]utward characteristics [may] be decisive in determining membership in this or that population group, e.g., former slave status (North Carolina), the fact of regular social association with one or another group (ditto) or, in the case of a second marriage, the racial identity of the first marital partner (Texas).”<sup>203</sup>

The idea that race classifications might turn on something other than descent, and in particular on marital history, deserves to be flagged: that idea was of critical importance in the ultimate Nazi definition of “Jews.” As we have seen, radicals wished to define Jews as those with only a single Jewish grandparent—the equivalent of what American states would call “1/4” colored. As early as April 1933, however, there was a counterproposal on the table. This alternative classification scheme proposed to spare half Jews—unless those half Jews either practiced the Jewish religion or entered into a marriage with a Jew.<sup>204</sup> It was that counterproposal that ultimately made its way into the crucial implementation ordinance of the Nuremberg Laws:<sup>205</sup>

### First Regulation Issued Pursuant to the Reich Citizenship Law, November 14, 1935

§ 5 (1): A person *is* a Jew, if he descends from at least three grandparents who are racially full Jews.

(2) A person *counts* as a Jew, if he is a mongrel descended from two fully Jewish grandparents,

(a) who at the time of the promulgation of this law belongs to the Jewish religious community or is subsequently accepted into it, [or]

(b) who at the time of the promulgation of this law was married to a Jew or subsequently married a Jew.

[minor other provisions follow]<sup>206</sup>

Thus the moderates managed to shield some, but only some, half Jews. Lösener justified this compromise by holding that life choices were relevant because they revealed the “inclinations” of the “mongrel” in question. The half Jews who “counted” as “Jews” were the ones who were not submitting to German cultural values: “Also reckoned among the

Jews are certain *groups of half Jews* (persons with two full Jewish and two non-Jewish or not full Jewish grandparents), who on account of certain circumstances must be regarded as more strongly inclined toward Jewdom.”<sup>207</sup> Did the American example count for something here? Krieger’s article was not the only possible source for the notion that a juristic solution to the problem of classifying Jews might turn in part on marital history. As we have seen, the Nazi literature on American immigration law praised the American Cable Act rule denaturalizing women who stooped to marry Asian men.<sup>208</sup> It may have mattered, in the charged debates of the weeks after the promulgation of the Nuremberg Laws, that America, the model of a country with anti-miscegenation law, offered some support for the notion that marital history should play a role in assigning persons to one racial category rather than another.

In the end though we do not know. We cannot say what part if any this aspect of the American model played in German thinking. The bottom line is that the Nazis regarded American classification schemes as too harsh, and the American race problem as too different, for any unmodified borrowing to have taken place. But what ultimately matters is that they knew that there *was* an American example, and indeed the example that they turned to first, and over and over again.

\* \* \*

[FROM CONCLUSION]:

# Nazism and American Legal Culture

The questions that must be addressed are not just about American and anglophone white supremacy. There are also questions about the pragmatic American style of common-law jurisprudence that Freisler touted to his Nazi colleagues as one that “would suit us perfectly.” The allure of American race law was not just the allure of a “Nordic” continental empire dedicated to white supremacy. It was also the allure of an open-ended, flexible, American common-law approach to the law. It was the allure of American “realism,” an approach to the law that was prevalent among leading Nazi lawyers just as it was among leading lawyers of the New Deal. Not least it was the allure of the kind of American willingness to innovate that continues to make us global leaders in many areas of the law today, just as it made us the leaders in eugenics and race legislation a century ago. What attracted Nazi lawyers was not just American racism but American legal culture, and that means that we must face some uncomfortable questions about the value of the American way of doing things.

Some of the most striking, and inescapable, questions have to do with the common-law tradition. What Freisler admired about American law is manifestly the same thing that we often celebrate in the common-law tradition today: the common law’s flexibility and open-endedness, and the adaptability to “changing societal requirements” that its judge-centered, precedent-based approach is often said to permit.<sup>209</sup> Other Nazis too had admiring things to say about American judge-made common law, which, they declared, had facilitated the creation of a healthy law that “emerged out of the *Volk*” rather than being the product of barren legal formalism.<sup>210</sup> What should we think about this?

The question is especially pressing because it has become so commonplace in America these days to celebrate the common law as superior—and superior precisely because it is thought to embody what Friedrich Hayek, the great Austrian champion of free markets, and a man shut out from his home country by Nazism, called “the constitution of liberty.” American authors today frequently contrast the liberty-oriented virtues of the common law with the defects of the code-based civil-law tradition of continental Europe, which they view as overly rigid—a system in which the law is reduced to the comparatively inflexible commands of a powerful state. Here is how a leading American law professor explains why, of the two, the common law is today so widely regarded as embodying superior values:

Hayek provides the most prominent discussion ... of differences between legal families. He argues vigorously that the English legal tradition (the common law) is superior to the French (the civil law), not because of substantive differences in legal rules, but because of differing assumptions about the roles of the individual and the state. In general, Hayek believed that the common law was associated with fewer government restrictions on economic and other liberties. ... These views are correct as a matter of legal history. ...<sup>211</sup>

The comparative freedom of the common-law judge, on this account, is the institutional expression of a grander culture of common-law liberty, to be contrasted with the comparative subjection of the citizens of continental Europe and the comparative unfreedom of the civil-law jurist, bound to follow the positive commands of the state embodied in the code.<sup>212</sup> Common-law judicial authority is a bulwark against excessive state power. This conception of the common law is not always articulated with perfect clarity, but it seems fair to say that it is broadly, if vaguely, embraced in America today. Indeed it occupies a place somewhere in the core of our understanding of the nature of American liberty. It certainly leaves one wondering why any Nazis would ever have had anything good to say about the American common law.



At the same time there is a widespread belief that Nazism was facilitated by precisely the sort of state-heavy positivism that Hayek feared and denounced. To be a Nazi, it is assumed, was to submit unconditionally to the will of the Führer, surrendering all powers of independent judgment; it was to have a law without liberty. The Nazi philosophy of law, on this view, was a crass version of what philosophers call “legal positivism”: it was a philosophy that reduced law to the bare command of the sovereign/dictator; it was a philosophy of “subservience”<sup>213</sup> and obedience,<sup>214</sup> and the lesson of the crimes of Nazism is a lesson about the dangers of state-heavy positivistic approaches, which threaten, at the limit, to reduce all of society to serfdom.

Yet the history that I have recounted in this book suggests clearly enough that something more complicated was going on; and so it was. In fact careful students of Nazism have demonstrated that the legal philosophy that prevailed under Hitler was not a philosophy of crass legal positivism at all.<sup>215</sup> What the Nazis espoused was something much closer to what Freisler espoused: it was something close to common-law pragmatism, and if there are jurisprudential lessons to be learned from the crimes of Nazism they are not lessons in any simple way about the dangers of crass legal positivism or of civil-law attitudes.

For the striking truth is that Nazi jurists were opposed to any theory of the law that reduced it to mere obedience. Yes it is the case that Germany was to be ruled by the *Führerprinzip*, the doctrine of obedience to the leader. But while it is true that ordinary citizens were to be blindly obedient, Nazi officials were expected to take a different attitude. Nazi teachings on this score can be found, for example, in an early version of the Oath to Adolf Hitler from 1934, produced by his right-hand man Rudolf Hess: According

to the oath, while ordinary Germans were to swear to obey the commands of the Führer unconditionally, “political leaders” were enjoined “to be loyal to the spirit of Hitler. Whatever you do, always ask: How would the *Führer* act, in accordance with the image you have of him.”<sup>216</sup> This was a formula for a real discretion in pursuing Nazi goals. As Ian Kershaw puts it, officials were to “work towards the Führer.”<sup>217</sup> Yes it is the case that the Nazis vested limitless power in the “centralized organization of a fascist state.” But they rejected the idea that the officials who wielded that authority should be mere foot soldiers, deprived of individual initiative. If they denied the liberty of the ordinary German citizen, they frequently insisted on a kind of liberty for the individual Nazi official to act independently “in the spirit of Hitler.” That is indeed a part of what made Nazism so terrifying.

And yes it is the case that Nazism emerged in a continental Europe with a code-based civil-law tradition. But it would be utterly mistaken to imagine that the Nazis embraced or embodied that civil-law tradition. On the contrary, the critical truth of legal history is that the Nazis set out to smash the traditional juristic attitudes of the civil-law jurist. Far from representing the traditions of the legalistic state, the Nazis belonged to a culture of contempt for the ways continental lawyers had been trained to work. Nazi radicals understood themselves to be, in the words of Hans Frank’s “greeting” to the forty-five lawyers who gathered on the SS *Europa* in September 1935, a movement that opposed the “outdated type of jurist, always inclined to ignore the realities of life,” and that meant that they were steadfastly opposed to the traditions of the civil law as they had existed in Germany before the Nazi takeover of the German state.

We see the resulting conflict playing itself out in the June 5, 1934, meeting. Franz

Gürtner, Bernhard Lösener, Hans von Dohnanyi, and the other advocates of relative moderation in the persecution of the Jews represented precisely the “outdated type of jurist” that radicals like Freisler were determined to shoulder aside, and if we are to understand the jurisprudential drama of the clash at the meeting, and the appeal of the American common-law approach for a man like Freisler, it is imperative that we describe their attitudes with more care and sympathy than a Friedrich Hayek could muster. As we have seen, these civil-law jurists were men who thought of the law as a science. That science had established a body of basic rules that set real limits on what jurists, or for that matter legislators, could do; legislators could no more ignore the logical dictates of legal science than they could repeal the laws of gravity or mathematics. The radical Nazi program of the Prussian Memorandum in particular could not be coherently incorporated into the edifice of criminal law, and for that reason it had to be rejected, or at the very least drastically modified.

This avowedly “scientific” attitude is the true mark of the well-trained jurist in the civil-law tradition. It is certainly different from the attitude of the common-law judge, but it is not an attitude of meek submissiveness to the state. On the contrary, we can think of this juristic commitment to the “science” of the law as imposing quasi-constitutional limits on any radical legislative program. The traditions of legal science constituted, as it were, the code in which legislation had to be written. The consequence, even as late as the early summer of 1934, was that the “scientifically” informed legal profession was in a position to ride herd on the demands of Nazi radicals, much though those radicals might push for “political” or “practical” rather than “scientific” decisions. Yes, the state in the civil-law world was in principle comparatively powerful; but the traditions of legal

science operated to keep it in check.

A man like Freisler was drawn to American jurisprudence precisely because it was not hobbled by this sort of “outdated” respect for legal science and juristic tradition; and that ought to be enough to raise doubts in our minds about whether common-law liberty offers the best defense against tyranny of the Nazi kind. Common-law America attracted Roland Freisler because, in his Nazi eyes, ours was a country that enjoyed the blessings of liberty from the straitjacket of formalistic legal science; and by German standards he was right: America was, and is, a country where belief that there are “scientific” principles of the law that impose limits on what politics can do has always been comparatively weak. Trained “legal scientists” have never wielded the kind of power in America that Gürtner and Lösener were still able to wield in early June 1934.

To be sure, Americans have certainly sometimes cultivated something that they have called “legal science,”<sup>218</sup> and the American version of legal science has certainly sometimes imposed limits on the legislative process. In the late nineteenth and early twentieth centuries in particular, self-described American “legal scientists” dominated institutions like the Harvard Law School. During the same period the Supreme Court developed its own “legal science,” founded in the Due Process Clause of the Fourteenth Amendment, which it used to strike down progressive economic legislation, most famously in the 1905 case *Lochner v. New York*.<sup>219</sup> To some extent American lawyers of what is commonly called the “Lochner era” aspired to claim the same authority that German “legal scientists” like Gürtner and Lösener aspired to claim.

But if Americans sometimes liked to speak of their “legal science,” the reality is that American legal science was always a far weaker force than German legal science.

The doctrinal “legal science” of American law schools was never a match for the subtlety and systematic depth of its German counterpart. As for the *Lochner* era courts, while they sometimes struck down economic legislation, they also left much progressive legislative untouched. More importantly they left racist legislation almost entirely untouched as well. When it came to race, American “legal science” generally yielded unceremoniously to American politics.<sup>220</sup> As for American common-law judges, unlike German “legal scientists” such as Lösenner they showed no sign of concern about the conceptual incoherence of their racist decisions. Where Lösenner insisted that criminalization was barred in the absence of a scientifically defensible definition of a “Jew,” American common-law judges, as Freisler approvingly noted, simply improvised their conceptions of “coloreds” as they went along.

*That* was the racist America that commanded the respect of radical Nazi lawyers: it was an America where politics was comparatively unencumbered by law. The great jurisprudential conflict at work in Nazi Germany was not the conflict between common-law liberty and civil-law state power. The great conflict was between lawfulness, as founded in a civil-law idea of legal science, and lawlessness, in favor of which a man like Freisler could invoke the American common law.<sup>221</sup> Nazi law, as a man like Freisler imagined it, was not a crass form of legal positivism, reducing the law to a duty of obedience to the command of the superiors. Nazi law was law that was liberated from the juristic past—it was law that would free the judges, legislators, and party bosses of Nazi Germany from the shackles of inherited conceptions of justice, allowing them to “work toward” the realization of the racist goals of the regime, with a sense of their duty to use their discretion in the spirit of Adolf Hitler.<sup>222</sup> Judges in particular were to enjoy

meaningful independence to be exercised in line with the goals of the Führer.<sup>223</sup> By this means, the law would institutionalize and perpetuate a savage form of national revolution, by giving discretion to the savage instincts of innumerable Hitlers in innumerable state offices. It would create a Nazi hydra. That is precisely how Freisler conducted himself in office as President of the People’s Court. And that was why the jurisprudence of the common law, with its “pragmatism,” its “immediacy,” its surrender of lawmaking authority to the judges, attracted him so much.

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It is in light of the same issues, finally, that we should think about the nature of 1930s “realism.”

It is a large part of the story that throughout the 1930s leading lawyers in both Nazi Germany and New Deal America were self-proclaimed “realists”—equally committed in both countries to combating the “outdated type of jurist, always inclined to ignore the realities of life.” On the American side, this was the high age of the movement called American Legal Realism, which has long been described as one of the great products of an American pragmatic style, ready to tackle social problems in a can-do spirit and displaying a healthy resistance to dogmatism. Such realism, for its American supporters, was sharply opposed to “formalism,” a style that produced a rigid kind of pseudo-scientific law unable to adapt to the modern social needs.<sup>224</sup> The association between this American Legal Realism and the New Deal is close indeed;<sup>225</sup> and American lawyers often express considerable pride in their realist tradition, “the most important indigenous jurisprudential movement in the United States,” as Brian Leiter writes, “during the twentieth century.”<sup>226</sup>

Meanwhile the economic programs of the early New Deal were undertaken in a closely related pragmatic spirit. As Franklin Roosevelt described the American mood in a famous 1932 speech, “the country demands bold, persistent experimentation.”<sup>227</sup> The epic legal drama of the early 1930s, retold in every history of the New Deal, was the drama of the conflict between the bold experimenters of the administration and a hostile Supreme Court. Jack Balkin describes how the lawyers of the 1930s viewed this struggle. On one side there was a conservative Supreme Court with its history of striking down at least some progressive economic legislation on “formalistic” grounds. On the other side was New Deal “pragmatism,” oriented toward “social realities”: “[D]uring the ‘Lochner Era’ courts employed a rigid formalism that neglected social realities, while the New Deal engaged in a vigorous pragmatism that was keenly attuned to social and economic change. The Lochner Era Court imposed laissez-faire conservative values through its interpretations of national power and the Due Process Clause, while the New Deal brought flexible and pragmatic notions of national power that were necessary to protect the public interest.”<sup>228</sup> The conservative Supreme Court famously continued to block the key reforms of the New Deal until the momentous “switch in time” of 1937, which at last put the Court behind the administration’s program. This epic struggle between executive and judiciary, like other aspects of the New Deal, was followed in the Nazi literature, and Nazi authors saw it in the same terms that American realists did: the battle was precisely a test of whether the “bold experiments” of New Deal politics could overcome “outdated” legalistic conceptions of the dictates of the Constitution in favor of the necessary “realistic” action in the face of economic crisis. As one Nazi commentator put it, the Supreme Court’s decisions striking down the programs of the early New Deal were

“incomprehensibly formalistic and alien to life.”<sup>229</sup>

Meanwhile, on the German side, anti-formalistic approaches dominated in Nazi writings during the same years as well, though Nazis did not use the term “realism” as frequently or consistently as Americans did. The Nazi jurists who participated would be among the most influential in Germany throughout the twentieth century—though after the war all of them made determined efforts to suppress the record of their Nazi activities; today there is little national German pride in that country’s 1930s Nazi Realism.<sup>230</sup> Nevertheless there was indeed something it is reasonable to call 1930s Nazi Realism, and it was a vigorous movement. And it is a striking fact that when scholars set out to describe the jurisprudence of both the United States and Nazi Germany, they arrive at formulas that are almost identical. The American legal realists, we read, were driven by “the perception that law and life were out of sync”,<sup>231</sup> in just the same way, we read that for the Nazis the great aim was “to overcome the alienation between life and law.”<sup>232</sup> “Life-law before formal-law is the fundamental drive of national socialist legal life,” as one Nazi put it.<sup>233</sup> Bringing law back in line with “life” and “social realities” was the watchword on both sides of the Atlantic in these troubled years.

So what precisely was the connection between the two “realisms,” Nazi and New Deal? Certainly in the 1930s there were plenty of observers who thought the affinities were close. As G. Edward White has written, throughout the decade the American Legal Realists had to struggle with the “perceived relationship between their moral relativism and the rise of amoral totalitarian governments.”<sup>234</sup> In April 1934, for example, Karl Llewellyn, the leading voice of American Legal Realism, was told that “you have been accepted as a true Nazi, fit to be amalgamated in the lifeblood of the new Reich.”



Llewellyn, who was an energetically committed liberal, responded with real anger;<sup>235</sup> but he was not the only figure who had to navigate the ugly associations of “realism” in the 1930s. Another noteworthy example is Hans Morgenthau, the pioneer of “realism” in international relations. Morgenthau had begun his career as a young lawyer in Germany, where he had imbibed the most advanced German legal thought of the Weimar Republic. With the coming of Hitler in the 1930s, though, he fled abroad; and as a freshly arrived exile in America, he decided he had to avoid the term “realism,” as his biographer writes, “because he worried that it might encourage American readers to place him in the camp of American Legal Realism, or even worse, to infer an association with Nazi ideologues who were also advocating a ‘realistic’ view of the law.”<sup>236</sup> It was not until after World War II that Morgenthau was willing to advocate “realism” again.

An odor of Nazism was clinging to our “most important indigenous jurisprudential movement” in the early 1930s. That certainly does not mean that the American Legal Realists were Nazi sympathizers. Most of them unquestionably were not. The Realists were not in reality fascists, any more than FDR was in reality a dictator.<sup>237</sup> The fact that there was a Nazi variant of Realism certainly does not imply that we must recoil in horror from everything in our own tradition. The American Legal Realist movement yielded some superb insights, from which there is still much to learn, in my view.<sup>238</sup> Moreover there is a case to be made that it was the American Legal Realism of the New Deal era that eventually set the stage for *Brown v. Board of Education* in the 1950s.<sup>239</sup> In any case, whatever resemblances there may have been, the fact remains that the Nazi courts descended into appalling depths of lawlessness. Even at their worst, American courts were better.<sup>240</sup> Nevertheless, for all that, there *were* unmistakable

resemblances between New Deal Realism and Nazi Realism; and we cannot properly assess Nazi interest in American race law, and the Nazi sense of kinship with the United States in the early years of the Hitler regime, unless we make some effort to grapple with them.

There was more to “Realism” in New Deal America and Nazi Germany than I can explore here; the topic requires a book of its own. Here I would like to emphasize only the obvious point: The “realists” of both countries shared the same eagerness to smash the obstacles that “formalistic” legal science put in the way of “life” and politics—and “life” in both New Deal America and Nazi Germany did not include only economic programs designed to lift the two countries out of the Depression. “Life” also involved racism.

It is here that the affinities between the realisms of Nazi Germany and New Deal America should really begin to make us shift uneasily in our seats. American Legal Realism was not just the possession of liberals like Karl Llewellyn; there were also many prominent American racists of the 1930s who embraced it.<sup>241</sup> The “realistic” attitude in American law did not just involve yielding to political decision makers when it came to economic legislation; it was also involved yielding to political decision makers when it came to racist legislation. And while some prominent realists spoke out against American racism, during the 1930s, most passed over the race question in silence.<sup>242</sup> In that sense the American Legal Realism of the early 1930s was entirely at home in the early New Deal, founded as it was on the Mephistophelean bargain between economic reformers and southern racists. The same “realistic” legal philosophy that could be invoked to defend the “bold [economic] experiments” of FDR could also be invoked to defend the

racism of the Southern Democratic Party.

Such was the American scene in the early years of Hitler's regime, as it presented itself to the eyes of German lawyers. America was a country that united economic reform, in the face of the Great Depression, with racism. The racist side of it was perceptively described by Heinrich Krieger, the former exchange student at the University of Arkansas Law School whose work made its way into the hands of the Ministry of Justice officials planning the Blood Law, the German lawyer whose research did the most to shape Nazi understandings of America. Krieger saw that the deep tension in American race law was no different from the deep tension in American economic law: as he put it, the United States was a country torn between the two "shaping forces" of formalism and realism. When it came to race in particular, there was on the one hand the formalistic jurisprudence of the Fourteenth Amendment, with its commitment, so "alien to life," to the equality of all human beings; and on the other hand the "realistic" racism of a law that was rooted in the "legal intuitions of the American *Volk*," and that had produced the ingenious "devious pathways" of second-class citizenship law alongside the frank racism of anti-miscegenation statutes.<sup>243</sup> Krieger did not think that this American state of affairs was healthy. He believed that America was struggling to be open about its legal racism, as it ought to be, but that it had not yet managed to do so. Nevertheless he remained hopeful that the United States might achieve full health once it finally abandoned its formalism in favor of its realism. One southern racist published a 1938 review of Krieger's book that communicated his hopes for America perfectly. *Race Law in the United States*, wrote the reviewer, was a "scholarly and valuable study," informed by Krieger's "realism." The Nazi Krieger was a "frank" man, "fac[ing] the problem

squarely,” and he made a powerful case for reviving the racial exclusionism of his heroes Jefferson and Lincoln: “Krieger is convinced by his studies—and he will convince any sincere reader as well—that our race problems can be solved only after we have found our way back to the point of view held by our greatest statesmen. That was a realistic point of view, and it alone can lead to a healthy and fair solution for all races concerned.”<sup>244</sup> Such was the “realistic point of view” that Heinrich Krieger carried home from Fayetteville to Nazi Germany.

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Perhaps it goes without saying that all this should give us a bit of pause when it comes to American legal culture, with its pragmatic traditions and the vaunted openness and adaptability of its common law. Sometimes the American common law may indeed produce superior results, with its comparatively underdeveloped attachment to “legal science,” its experimental quality, and its liberal grant of authority to judges. American contract law, for example, is, in my view, exemplary in its innovativeness. Sometimes the American democratic political process produces admirable legislation. But to have a common-law system like that of America is to have a system in which the traditions of the law do indeed have little power to ride herd on the demands of the politicians; and when the politics is bad, the law can be very bad indeed.

The resulting dangers have not vanished, and it would be wrong to close this book without pointing to at least one contemporary realm of American law in which they are still making themselves felt. That realm is American criminal justice. American criminal justice is spectacularly, and frighteningly, harsh by international standards. It includes practices that are sometimes uncomfortably reminiscent of those introduced by the

Nazis—for example "three-strikes-and-you're-out" laws, a form of habitual offender sentencing. The Nazis too promoted habitual offender sentencing.<sup>245</sup> What makes contemporary America so exceptionally harsh? The answer, in part, is that contemporary American criminal law is unique, in the advanced economic world, in the extent to which it is shaped by the political process, whether through tough-on-crime legislation, or through the election of judges and prosecutors, a practice unheard of in the rest of the world.<sup>246</sup> Conversely, American “legal science” has proven uniquely incapable of staving off the dangers of the politicization of criminal law over the past generation. American jurists do not have the influence to put the brakes on the projects of politicians who make their careers on tough-on-crime platforms; post-Nazi continental Europe, where the traditions of legal science have reasserted themselves powerfully, is different in this regard. In continental Europe today the legal profession generally manages to keep a steady hand on the criminal justice system.<sup>247</sup> Not so in the United States: what Roland Freisler saw, and admired, in American race law eighty years ago is still with us in the politics of American criminal justice—as is, not least, the American race problem that looms so large in it. The story in this book, in that sense, is not done yet.

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“There is currently *one* state,” wrote Adolf Hitler, “that has made at least the weak beginnings of a better order.” When one thinks of race law, said Nazi lawyer and later SS-Obersturmbannführer Fritz Grau, one thinks of “North America.” “It is attractive to seek foreign models,” declared Reich Minister of Justice Franz Gürtner; and like others before them, it was American models that the lawyers of the ministry found. To be sure, America had failed to target the Jews “so far,” as Heinrich Krieger acknowledged; but

apart from that “exception,” declared Roland Freisler, hanging judge of the National Socialist People’s Court, America had things to teach Germany: The United States had produced an admirably uninhibited racist jurisprudence, a jurisprudence that did not trouble itself about juristic niceties and that would therefore “suit us perfectly.” In the eyes of these Nazis, the United States was indeed the “classic example.” It was the country that produced the really “interesting” innovations, the natural first place to turn for anybody in the business of planning a “race state.” That is why the *National Socialist Handbook of Law and Legislation* could close its chapter on how to build a race state by describing America as the country that had achieved the “fundamental recognition” of the truths of racism, and taken the first necessary steps, now to be carried to fulfillment by Nazi Germany.

Yes, of course it is also true that the United States was, and remains, the pioneer of many magnificent legal institutions. Of course there were also many aspects of the liberal democratic tradition in America that the Nazis found contemptible. Of course America proved a generous place of refuge for at least some of the victims of Nazism. Nevertheless when it came to race law, numerous Nazi lawyers regarded America as the prime exemplar; and, much though we may wish to deny it, it was not outlandish for them to think of their program of the early 1930s as a more thoroughgoing and rigorous realization of American approaches toward blacks, Asians, native Americans, Filipinos, Puerto Ricans, and others—even if the regime had shifted its sights to a new target in the form of the Jews, even if it would later take the racist exercise of modern state power in an unimaginably horrifying new direction.

This too has to be a part of our national narrative.

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- 1 Johnpeter Horst Grill and Robert L. Jenkins, “The Nazis and the American South in the 1930s: A Mirror Image?,” *Journal of Southern History* 58, no. 4 (November 1992): 667–94.
  - 2 For discussion of the parallels, see George Fredrickson, *Racism: A Short History* (Princeton: Princeton University Press, 2002), 2, 129; Judy Scales-Trent, “Racial Purity Laws in the United States and Nazi Germany: The Targeting Process,” *Human Rights Quarterly* 23 (2001): 259–307.
  - 3 Mark Mazower, *Hitler’s Empire: How the Nazis Ruled Europe* (New York: Penguin, 2008), 584, discussed more fully in Chapter 1. See also the clever speculations of a student paper published in 2002: Bill Ezzell, “Laws of Racial Identification and Racial Purity in Nazi Germany and the United States: Did Jim Crow Write the Laws That Spawned the Holocaust?,” *Southern University Law Review* 30 (2002–3): 1–13.
  - 4 Andreas Rethmeier, “*Nürnberger Rassegesetze*” und *Entrechtung der Juden im Zivilrecht* (New York: Lang, 1995), 138–39.
  - 5 *Ibid.*, 139.
  - 6 *Ibid.*
  - 7 H. Richard Bernstein, “Jim Crow and Nuremberg Laws,” *H-Judaica*, March 31, 1999, [http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Judaic&month=9903&week=e&msg=BHhgu7G7S8og2GgfCEpHNg&user=&pw=.](http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Judaic&month=9903&week=e&msg=BHhgu7G7S8og2GgfCEpHNg&user=&pw=)
  - 8 *H-Judaica*, March 31, 1999, [http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Judaic&month=9903&week=e&msg=BHhgu7G7S8og2GgfCEpHNg&user=&pw=.](http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Judaic&month=9903&week=e&msg=BHhgu7G7S8og2GgfCEpHNg&user=&pw=)
  - 9 Jens-Uwe Guettel, *German Expansionism, Imperial Liberalism, and the United States, 1776–1945* (Cambridge: Cambridge University Press, 2012), 204–6.
  - 10 Rethmeier, “*Nürnberger Rassegesetze*”, 140. For a similar assessment, with interesting additional material on Nazi references to the United States, see Michael Mayer, *Staaten als Täter. Ministerialbürokratie und "Judenpolitik" in NS-Deutschland und Vichy Frankreich. Ein Vergleich* (Munich: Oldenbourg, 2010), 101.
  - 11 Karl Felix Wolff, *Rassenlehre. Neue Gedanken zur Anthropologie, Politik, Wirtschaft, Volkspflege und Ethik* (Leipzig: Kapitzsch, 1927), 171, and 173 for the widespread currency of this view in Europe. Wolff, it should be said, nevertheless believed that race mixing doomed America to decline. For the place of America in European perceptions of the international scene, see generally Adam Tooze, *The Deluge: The Great War, America and the Remaking of the Global Order, 1916-1931* (New York: Penguin, 2014).
  - 12 E.g., Wahrhold Drascher, *Die Vorherrschaft der Weissen Rasse* (Stuttgart: Deutsche Verlags-Anstalt, 1936), 340; and the treatment in Michael Kater, *Different Drummers: Jazz in the Culture of Nazi Germany* (Oxford: Oxford University Press, 1992), 29–56. For German interest in American Fordism and industrial society, see Mary Nolan, *Visions of Modernity: American Business and the Modernization of Germany* (New York: Oxford University Press, 1994); Volker Berghahn, *Industriegesellschaft und Kulturtransfer: Die deutsch-amerikanischen Beziehungen im 20. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 2010), e.g., 28–29.
  - 13 Hitler, *Mein Kampf*, 143–44 ed. (Munich: Eher, 1935), 479 (= Hitler, *Mein Kampf. Eine kritische Edition*, ed. Christian Hartmann, Thomas Vordermayer, Othmar Plöckinger, and Roman Töppel [Munich: Institut für Zeitgeschichte, 2016], 2:1093–

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- 95).
- 14 See Victoria de Grazia, *Irresistible Empire: America's Advance through Twentieth-Century Europe* (Cambridge, MA: Harvard University Press, 2005); Egbert Klautke, *Unbegrenzte Möglichkeiten. "Amerikanisierung" in Deutschland und Frankreich (1900–1933)* (Wiesbaden: Steiner, 2003).
  - 15 These quotes are from the Nazi Party newspaper *Völkischer Beobachter*, reproduced in Hans-Jürgen Schröder, *Deutschland und die Vereinigten Staaten 1933–1939; Wirtschaft und Politik in der Entwicklung des deutschamerikanischen Gegensatzes* (Wiesbaden: Steiner, 1970), 93, and generally 93–119. Detlef Junker sees the turning point as coming with the Quarantine Speech in October 1937. Junker, "Hitler's Perception of Franklin D. Roosevelt and the United States of America," in *FDR and His Contemporaries: Foreign Perceptions of an American President*, ed. Cornelius A. van Minnen and John F. Sears (New York: St. Martin's, 1992), 143–56, 150–51. See also Klaus P. Fischer, *Hitler and America* (Philadelphia: University of Pennsylvania Press, 2011), 65–69. For further discussion, see below, Chapter 1, text at note 28.
  - 16 Schröder, *Deutschland und die Vereinigten Staaten*, 93–119; and for "the fascist New Deal," James Q. Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code," *Yale Law Journal* 97 (1987): 156–75, 170. European progressives too were interested in the New Deal, of course: see Daniel Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998), 410–11.
  - 17 Detlef Junker, "The Continuity of Ambivalence," in *Transatlantic Images and Perceptions: Germany and America since 1776*, ed. David E. Barclay and Elisabeth Glaser-Schmidt (New York: Cambridge University Press, 1997), 246.
  - 18 Wulf Siewert, "Amerika am Wendepunkt," *Wille und Macht*, April 15, 1935, 22.
  - 19 While Junker points to the Quarantine Speech of 1937, Detlef Junker, "Hitler's Perception of Franklin D. Roosevelt and the United States of America," in *FDR and His Contemporaries: Foreign Perceptions of an American President*, ed. Cornelius A. van Minnen and John F. Sears (New York: St. Martin's, 1992), 143–56, 150–51, Steven Casey, *Cautious Crusade: Franklin D. Roosevelt, American Public Opinion, and the War against Nazi Germany* (New York: Oxford University Press, 2001), 40, documents the reluctance of FDR to name Hitler until 1939. See also *ibid.*, 9. Philipp Gassert by contrast points, somewhat tentatively, to the State of the Union speech in January 1936. Gassert, "'Without Concessions to Marxist or Communist Thought': Fordism in Germany, 1923–1939," in Barclay and Glaser-Schmidt, *Transatlantic Images and Perceptions*, 238.
  - 20 Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright, 2013).
  - 21 For a call for friendship on the basis of shared racism, see Waldemar Hartmann, "Deutschland und die USA. Wege zu gegenseitigem Verstehen," *Nationalsozialistische Monatshefte* 4 (November 1933): 493–94.
  - 22 Katznelson, *Fear Itself*, 126–27. It is also important to observe that adulation of the American president could be found elsewhere in Europe as well. See David Ellwood, *The Shock of America: Europe and the Challenge of the Century* (New York: Oxford,



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- 2012), 186-193.
- 23 For studies on the resemblances and influences, see John Garraty, “The New Deal, National Socialism, and the Great Depression,” *American Historical Review* 78 (1973): 907–44; Wolfgang Schivelbusch, *Three New Deals: Reflections on Roosevelt’s America, Mussolini’s Italy, and Hitler’s Germany, 1933–1939*, trans. Jefferson Chase (New York: Metropolitan, 2006); and for Italy, see James Q. Whitman, “Of Corporatism, Fascism and the First New Deal,” *American Journal of Comparative Law* 39 (1991): 747–78.
- 24 Grill and Jenkins, “Nazis and the American South.”
- 25 For this program, conducted under the cover of war, and its background in German legal thought, see Christian Merkel, “*Tod den Idioten*”—*Eugenik und Euthanasie in juristischer Rezeption vom Kaiserreich zur Hitlerzeit* (Berlin: Logos, 2006), 20–21 and passim.
- 26 Stefan Kühl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (New York: Oxford University Press, 1994), 37 and passim.
- 27 E.g., Randall Hansen and Desmond King, “Eugenic Ideas, Political Interest and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.,” *World Politics* 53, no. 2 (2001): 237–63; Véronique Mottier, “Eugenics and the State: Policy-Making in Comparative Perspective,” in *Oxford Handbook of the History of Eugenics*, ed. Alison Bashford and Philippa Levine (New York: Oxford University Press, 2010), 135.
- 28 Timothy Snyder, *Black Earth: The Holocaust as History and Warning* (New York: Tim Duggan Books, 2015), 12.
- 29 Ibid.
- 30 Quoted partially and discussed in Ian Kershaw, *Fateful Choices: Ten Decisions That Changed the World* (New York: Penguin, 2007), 386–87; cf. Carroll P. Kakel, *The American West and the Nazi East: A Comparative and Interpretive Perspective* (New York: Palgrave Macmillan, 2011), 1. I have added a fuller and slightly altered translation of the passage quoted by Kershaw, from Adolf Hitler, *Reden, Schriften, Anordnungen* (1928; repr., Munich: Saur, 1994), 3:1, p. 161.
- 31 For a survey of the literature, see Kakel, *American West and the Nazi East*, 1–2. See also David Blackbourn, “The Conquest of Nature and the Mystique of the Eastern Frontier in Germany,” in *Germans, Poland, and Colonial Expansion in the East*, ed. Robert Nelson (New York: Palgrave Macmillan, 2009), 152–53; Alan Steinweis, “Eastern Europe and the Notion of the ‘Frontier’ in Germany to 1945,” *Yearbook of European Studies* 13 (1999): 56–70; Philipp Gassert, *Amerika im Dritten Reich: Ideologie, Propaganda und Volksmeinung, 1933–1945* (Stuttgart: Steiner, 1997), 95–97.
- 32 Guettel, *German Expansionism*, 193–95 and 209–11, makes unpersuasive efforts to dismiss this literature, essentially by denying the force of examples, no matter how many are given.
- 33 Norman Rich, “Hitler’s Foreign Policy,” in *The Origins of the Second World War Reconsidered: The A.J.P. Taylor Debate after Twenty-Five Years*, ed. Gordon Martel (Boston: Allen & Unwin, 1986), 136.
- 34 See Chapter 2 for the *Preußische Denkschrift* of 1933 and other texts and discussions.

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- 35 Gustav Klemens Schmelzeisen, *Das Recht im Nationalsozialistischen Weltbild. Grundzüge des deutschen Rechts*, 3rd ed. (Leipzig: Kohlhammer, 1936), 84.
- 36 See Chapter 2.
- 37 <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Judaic&month=9903&week=e&msg=BHhgu7G7S8og2GgfCEpHNg&user=&pw=>
- 38 See, e.g., the remarks of David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997), 100.
- 39 On Pound, see Stephen H. Norwood, *The Third Reich in the Ivory Tower* (New York: Oxford University Press, 2009), 56–57; and on American Nazism more broadly, see Sander A. Diamond, *The Nazi Movement in the United States, 1924–1941* (Ithaca, NY: Cornell University Press, 1974).
- 40 Veering in that direction: Hermann Ploppa, *Hitlers Amerikanische Lehrer: Die Eliten der USA als Geburtshelfer der Nazi-Bewegung* (Sterup: Liepsen, 2008).
- 41 E.g., Claus Eichen, *Rassenwahn. Briefe über die Rassenfrage* (Paris: Éditions du Carrefour, 1936).
- 42 Gerhard Werle, *Justiz-Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich* (Berlin: De Gruyter, 1989), 179.
- 43 Entscheidungen des Reichsgerichts in Strafsachen 72, 91, 96 (Decision of 23.2.1938): “eines der Grundgesetze des nationalsozialistischen Staates”; also in *Deutsche Justiz* 100 (1938): 422–24.
- 44 Gustav Klemens Schmelzeisen, *Das Recht im Nationalsozialistischen Weltbild. Grundzüge des deutschen Rechts*, 3rd ed. (Leipzig: Kohlhammer, 1936), 84.
- 45 Wilhelm Stuckart and Hans Globke, *Kommentare zur deutschen Rassengesetzgebung* (Berlin: Beck, 1936), 1:15.
- 46 Matthias Schmoeckel, “Helmut Nicolai,” in *Neue Deutsche Nationalbiographie* 19 (Berlin: Duncker & Humblot, 1999):205; see also Klaus Marxen, *Der Kampf gegen das liberal Strafrecht. Eine Studie zum Antiliberalismus in der Strafrechtswissenschaft der zwanziger und dreißiger Jahre* (Berlin: Duncker & Humblot, 1975), 90–91.
- 47 For the work of Gercke, see Cornelia Essner, *Die "Nürnberger Gesetze" oder die Verwaltung des Rassewahns, 1933–1945* (Paderborn: Schöningh, 2003), 76–82; Alexandra Przyrembel, “*Rassenschande*”. *Reinheitsmythos und Vernichtungslegitimation im Nationalsozialismus* (Göttingen: Vandenhoeck & Ruprecht, 2003), 103 and 103n112.
- 48 See Bernd-Ulrich Hergemöller, *Mann für Mann. Biographisches Lexikon zur Geschichte von Freundschaft und Mann-Männlicher Sexualität im Deutschen Sprachraum* (Hamburg: Männerschwarmskript, 1998), 275, 536–37; and for Nicolai’s arrest in the Black Forest, confession, and subsequent marriage, see Martyn Housden, *Helmut Nicolai and Nazi Ideology* (Houndmills: Macmillan, 1992), 111.
- 49 Przyrembel, “*Rassenschande*”; Cornelia Essner, “Die Alchemie des Rassenbegriffs,” *Jahrbuch des Zentrums für Antisemitismusforschung* 4 (1995): 201–25.
- 50 For “education and enlightenment” as goals of Nazi policy, see below text at notes 74 and 85. chapter.
- 51 Przyrembel, “*Rassenschande*,” 104.

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- 52 Helmut Nicolai, *Die Rassengesetzliche Rechtslehre. Grundzüge einer nationalsozialistischen Rechtsphilosophie* (Munich: Eher, 1932), 27.
- 53 *Ibid.*, 45–46. For Alfred Rosenberg’s 1930 linking of the two questions of citizenship and miscegenation, see Essner, *Nürnberger Gesetze*, 56; and for Hitler, *ibid.*, 58.
- 54 Arno Arlt, “Die Ehehindernisse des BGB in ihrer geschichtlichen Entwicklung und im Hinblick auf künftige Gestaltung” (diss., Jena, 1935) (submitted December 15, 1934), 87.
- 55 Heinrich Krieger, *Das Rassenrecht in den Vereinigten Staaten* (Berlin: Junker & Dünhaupt, 1936), 311: “die von Negern oft verübte Notzucht an weißen Frauen.” American courts in the South could still endorse the same view two decades later. See *McQuirter v. State*, 36 Ala. App. 707, 63 So. 3d 388 (1953).
- 56 *Pace & Cox v. State*, 69 Alabama Rep. 231, 232 (1882), translated, quoted, and discussed in Detlef Sahn, *Die Vereinigten Staaten von Amerika und das Problem der nationalen Einheit* (Berlin: Buchholz & Weisswange, 1936), 68.
- 57 Cited and discussed in David Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011), 80–81.
- 58 Bilbo quoted and discussed in Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright, 2013), 86.
- 59 E.g., Philippa Levine, “Anthropology, Colonialism and Eugenics,” in *Oxford Handbook of the History of Eugenics*, ed. Alison Bashford and Philippa Levine (New York: Oxford University Press, 2010), 52–54.
- 60 Transcript of Meeting of Strafrechtskommission, June 5, 1934, in Jürgen Regge and Werner Schubert, eds., *Quellen zur Reform des Straf- und Strafprozeßrechts* (Berlin: De Gruyter, 1989), 2:2, pt. 2:277.
- 61 Richard Espenschied, *Rassenhygienische Eheverbote und Ehebeschränkungen aus allen Völkern und Zeiten* (Stuttgart: Olnhausen & Warth, 1937), 52–54, surveying the law in the United States; and 57 noting that prohibitions are elsewhere left to the church.
- 62 For the prohibition on bigamy in German criminal law under the Reichsstrafgesetzbuch of 1871, see Reichsstrafgesetzbuch § 171. There were certainly earlier precedents for criminalization of forms of marriage other than bigamy, but the Nazis did not to my knowledge make use of them. The Theodosian Code included a criminalization of religiously mixed marriage targeting Jews. See Amnon Linder, *The Jews in Roman Imperial Legislation* (Detroit: Wayne State University Press, 1987), 178–82, for texts and commentary; and medieval examples are traced, e.g., for Iberia by David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (Princeton: Princeton University Press, 1996), 129–38. Other forms of plural marriage were of course also in principle subject to prosecution in Western Europe, but were too rare to figure prominently in the discussions leading up to the Nuremberg Laws.
- 63 The Northern Territory Aboriginal Act 1910 (SA) (Austl.), s. 22.
- 64 For the broader legislative landscape and context, and the conclusion that Australian legislation looked “mild by comparison” to American, see Katherine Ellinghaus, *Taking Assimilation to Heart: Marriages of White Women and Indigenous Men in the*

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- United States and Australia, 1887–1937* (Lincoln: University of Nebraska Press, 2006), 202–3; and for the limited consequences of agitation in New Zealand, see Angela Wanhalla, *Matters of the Heart: A History of Interracial Marriage in New Zealand* (Auckland: Auckland University Press, 2013), 134–38. For the observation that South Africa in particular lacked anti-miscegenation legislation, see Johann von Leers, *Blut und Rasse in der Gesetzgebung. Ein Gang durch die Völkergeschichte* (Munich: Lehmann, 1936), 113.
- 65 Md. Code Ann., Crimes and Punishments, art. 27, §§ 393, 398 (1957).
- 66 E.g., Espenschied, *Rassenhygienische Eheverbote*, 61, noting earlier civil invalidity in some cases; Leers, *Blut und Rasse*, 115. For the scattered foreign examples of marriage invalidity that the Nazis were able to find, see Andreas Rethmeier, “*Nürnberger Rassegesetze*” und *Entrechtung der Juden im Zivilrecht* (New York: Lang, 1995), 140–41n.171.
- 67 See Essner, *Nürnberger Gesetze*, 136.
- 68 Eduard Meyer, *Die vereinigten Staaten von Amerika. Geschichte, Kultur, Verfassung und Politik* (Frankfurt: Keller, 1920), 93–94: “Unmasse.”
- 69 Lothar Gruchmann, *Justiz im Dritten Reich, 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, 3rd ed. (Munich: Oldenbourg, 2001), 865; cf. Gürtner in Regge and Schubert, *Quellen*, 303 (East Asia); Lösener in *ibid.*, 306 (South America and East Asia); Gürtner in *ibid.*, 308 (South Asia).
- 70 Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* (Oxford: Oxford University Press, 2010), 36, 54–57, and the more circumstantial account in Longerich, *Politik der Vernichtung. Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung* (Munich: Piper, 1998), 65–115.
- 71 Otto Dov Kulka, “Die Nürnberger Rassengesetze und die deutsche Bevölkerung im Lichte geheimer NS-Lage- und Stimmungsberichte,” *Vierteljahrshefte für Zeitgeschichte* 32 (1984): 608; Gruchmann’s account in accessible article form in “{~?~thinspace} ‘Blutschutzgesetz’ und Justiz,” *Vierteljahrshefte für Zeitgeschichte* 31, no. 3 (1983): 418–42, 426; Essner, *Nürnberger Gesetze*, 110.
- 72 Krieger, *Rassenrecht*, 311 (“Lynchjustiz ... auch bei uns in ihren typischen Einzelheiten bekannt geworden ist”). While Krieger does not specifically mention pogrom violence against Jews, the phrase “auch bei uns ... bekannt geworden” could hardly refer to anything else.
- 73 E.g., Longerich, *Politik der Vernichtung*, 97–98; Gruchmann, “{~?~thinspace} ‘Blutschutzgesetz’ und Justiz,” 428–30.
- 74 Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper, 1944), 1:458.
- 75 Longerich, *Holocaust*, 58–59; Essner, *Nürnberger Gesetze*, 109–12; Uwe Dietrich Adam, *Judenpolitik im Dritten Reich* (Düsseldorf: Droste, 1972), 115, 120–24.
- 76 Adam, *Judenpolitik*, 115, 120–24.
- 77 Gruchmann, *Justiz im Dritten Reich*, 864.
- 78 Essner, *Nürnberger Gesetze*, 96; and for the political context, see Longerich, *Politik der Vernichtung*, 84–95.
- 79 For its importance and radical character, see Gruchmann, *Justiz im Dritten Reich*, 764–71. It was to be sure not an official Party document, but the work of radicals



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- pushing a program that was not at first realized. See Marxen, *Der Kampf gegen das liberal Strafrecht*, 120.
- 80 Helmut Ortner, *Der Hinrichter: Roland Freisler, Mörder im Dienste Hitlers* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1993).
- 81 See Gruchmann, *Justiz im Dritten Reich*, 760.
- 82 *Ibid.*, 764–65.
- 83 Abundant details on the relevant legal debates are given in Rethmeier, “*Nürnberger Rassegesetze*”, 55–69. Dissolving existing marriages was difficult, since no obvious legal grounds existed. Nazi theorists tried to deal with this difficulty by holding that the passage of Nazi legislation had made the importance of race membership clear, so that Aryan spouses could contest their marriages on the grounds that they had been mistaken as to the nature of the union. See *ibid.*, 56–57.
- 84 Hans Kerrl, ed., *Nationalsozialistisches Strafrecht. Denkschrift des Preußischen Justizministers* (Berlin: Decker, 1933), 47–49 (hereinafter *Preußische Denkschrift*).
- 85 Grau, in Regge and Schubert, *Quellen*, 279: “sehr eingeschränkt.”
- 86 *Preußische Denkschrift*, 49. I have reproduced the full text of this section of the *Preußische Denkschrift* in <http://press.princeton.edu/titles/xxxxx.html>
- 87 See Gruchmann, *Justiz im Dritten Reich*, 770–71, on Freisler’s gratification at seeing the program of the *Denkschrift* triumph.
- 88 E.g., Karl Dietrich Bracher, *The German Dictatorship: The Origins, Structure, and Effects of National Socialism*, trans. Jean Steinberg (New York: Praeger, 1970), 238–40; Norbert Frei, *National Socialist Rule in Germany: The Führer State, 1933–1945*, trans. Simon B. Steyne (Oxford: Blackwell, 1993), 23–27; Ian Kershaw, *Hitler, 1889–1936: Hubris* (New York: Norton, 1999), 470–71. Of course it is the case that some Germans regarded the Night of the Long Knives as a triumph for order. See, e.g., *ibid.*, 517. Nevertheless there was no mistaking its significance for the collapse of traditional ideas of legality.
- 89 Gruchmann, *Justiz im Dritten Reich*, 868, repeating his judgment in his earlier article, observes that Gürtner’s objections were based on “Überlegungen rechtlicher und—wie bei Männern wir Gürtner angenommen werden kann—ethischer Art.”
- 90 On a careful assessment of the evidence, Gruchmann concludes that Gürtner probably did not act improperly to favor Hitler in the Beer Hall Putsch proceedings. See Gruchmann, *Justiz im Dritten Reich*, 34–48.
- 91 *Ibid.*, 79. For Gürtner’s enduring commitment, if conditional, to the Rechtsstaat, see *ibid.*, 68–78; and for his non-anti-Semitism, see *ibid.*, 71. For the assessment of Gürtner as a “genuine conservative” working “to retain the last vestiges of a legal order,” see Elisabeth Sifton and Fritz Stern, *No Ordinary Men: Dietrich Bonhoeffer and Hans von Dohnanyi, Resisters against Hitler in Church and State* (New York: NYRB Books, 2013), 45.
- 92 Claudia Koonz, *The Nazi Conscience* (Cambridge, MA: Harvard University Press, 2003), 171–77.
- 93 Cf. Freisler’s concessions in Regge and Schubert, *Quellen*, 285, 286; and e.g. Arlt, “Ehehindernisse des BGB.”
- <sup>94</sup> See Rethmeier, “*Nürnberger Rassegesetze*”, 54–69.
- 95 For the general background, see Rethmeier, “*Nürnberger Gesetze*”, 70–82.
- 96 Cf. Lawrence Friedman, “Crimes of Mobility,” *Stanford Law Review* 43 (1991): 637–

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- 58, 638: “The bigamist and the swindler both committed what might be called crimes of identity. Their crimes turned on false pretenses, on disguised personality, on lies about one’s past.” It is important to observe that earlier forms of bigamy involved more collusion between the two parties. See Sara A. McDougall, *Bigamy and Christian Identity in Late Medieval Champagne* (Philadelphia: University of Pennsylvania Press, 2012).
- 97 Gesetz zur Bekämpfung der Geschlechtskrankheiten, February 18, 1927, Reichsgesetzblatt (1927), 1:61, § 6; cf. Klee in Regge and Schubert, *Quellen*, 290; Freisler in Regge and Schubert, *Quellen*, 338; *Preußische Denkschrift*, 50.
- 98 This was Dohnanyi, in Regge and Schubert, *Quellen*, 325–27, making the striking argument that criminalizing only “malicious deception” was conceptually incoherent, since the interest such a criminalization protected was that of the individual, and not, as the *Denkschrift* demanded, of the race.
- 99 Essner, *Nürnberger Gesetze*, 83.
- 100 See below [SECTION HEADING OF THIS CHAPTER: " Defining “Mongrels”: The One-Drop Rule and the Limits of American Influence." ]
- 101 This is the ultimate judgment of Essner, despite her hostility toward Lösener. Essner, *Nürnberger Gesetze*, 173.
- 102 For a brief recent biography, see Hans Christian Jasch, *Staatssekretär Wilhelm Stuckart und die Judenpolitik* (Munich: Oldenbourg, 2012), 481, and further details of Lösener’s doings in the immediate aftermath of the war in *ibid.*, 396–97. Lösener’s biography is subjected to an important skeptical treatment in Essner, *Nürnberger Gesetze*, 113–34. An English translation of some of the relevant material is in Karl Scheunes, ed., *Legislating the Holocaust: The Bernhard Lösener Memoirs and Supporting Documents*, trans. Carol Scherer (Boulder, CO: Westview, 2001).
- 103 Adam, *Judenpolitik*, 135-37; Essner, *Nürnberger Gesetze*, 160-161.
- 104 See below, text at endnote 161.
- 105 The distinctive feature of the 1691 Virginia statute, unlike its 1664 Maryland predecessor, was that it barred relations with non-Whites “bond or free,” no longer limiting itself to master-slave relations. See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford: Oxford University Press, 2009), 19–20. Lying in the background here is an issue of considerable importance that I cannot discuss in this book: the shift from a social-status-based conception of hierarchy to a race-based conception. See Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1991), 149–50. The contrast between the Virginia statute and contemporary French law is particularly striking. The relevant provision of the 1685 Code Noir, Art. 9, far from banning miscegenation, was designed to encourage marriage “dans les formes observées par l’Église.” Robert Chesnais, ed., *Le Code Noir* (Paris: L’Esprit Frappeur, 1998), 21. Only the 1724 version introduced, in Art. 6, a ban. *Ibid.*, 43–44. For the shift from the 1685 to the 1724 code, see Peter Sahlins, *Unnaturally French: Foreign Citizens in the Old Regime and After* (Ithaca, NY: Cornell University Press, 2004), 182–83. For reference to some French legislation and decisions, and the observation that miscegenation rules were not in fact applied in practice, see Louis Charles Antoine Allemand, *Traité du Mariage et de ses Effets*

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- (Paris: Durand, 1853), 1:129–30. Early anti-miscegenation legislation in the West focused on religiously mixed marriages, not racially mixed ones. See note 22 and, e.g., Dagmar Freist, “Between Conscience and Coercion: Mixed Marriages, Church, Secular Authority, and Family,” in *Mixed Matches: Transgressive Unions in Germany from the Reformation to the Enlightenment*, ed. David M. Luebke and Mary Lindemann (New York: Berghahn, 2014), 104–9.
- 106 Interest in American miscegenation legislation included the influential Geza von Hoffman’s *Rassenhygiene in den Vereinigten Staaten* of 1913. See Stefan Kühl, *The Nazi connection: Eugenics, American Racism, and German National Socialism* (New York: Oxford University Press, 1994), 16.
- 107 Mont. Code Ann., ch. 49 §§ 1–4 (1909); S.D. Civil Code, ch. 196 § 1 (1909); N.D. Cent. Code., ch. 164, § 1 (1909); Wyo. Stat. Ann., ch. 57, § 1 (1913).
- 108 Jens-Uwe Guettel, *German Expansionism, Imperial Liberalism, and the United States, 1776–1945* (Cambridge: Cambridge University Press, 2012), 127–60. The enthusiasm for America led Germans into error at least once. Franz-Josef Schulte-Althoff, “Rassenmischung im kolonialien System. Zur deutschen Rassenpolitik im letzten Jahrzehnt vor dem Ersten Weltkrieg,” *Historisches Jahrbuch* 105 (1985): 64, describes German admiration for the anti-miscegenationist views of the “American” Bishop Montgomery. Montgomery was, however, British. The remarks that enthused Germans can be found in *The Pan-Anglican Congress, 1908: Special Report of Proceedings &c., Reprinted from The Times* (London: Wright, 1908), 122. For the larger political setting and history, see Dieter Gosewinkel, *Einbürgern und Ausschließen. Die Nationalisierung der Staatsangehörigkeit vom Deutschen Bund bis zur Bundesrepublik Deutschland* (Göttingen: Vandenhoeck & Ruprecht, 2001), 303–9.
- 109 Wahrhold Drascher, *Die Vorherrschaft der Weissen Rasse* (Stuttgart: Deutsche Verlags-Anstalt, 1936), 217.
- 110 See Birthe Kundrus, “Von Windhoek nach Nürnberg? Koloniale ‘Mischehenverbote’ und die nationalsozialistische Rassengesetzgebung,” in *Phantasiereiche. Zur Kulturgeschichte des deutschen Kolonialismus*, ed. Birthe Kundrus (Frankfurt: Campus, 2003), 110–31.
- 111 For central importance of this meeting and a careful account of the debates, see Gruchmann, *Justiz im Dritten Reich*, 864–68; Przyrembel, “*Rassenschande*,” 137–43; and Essner’s account, focusing particularly on problems in the definition of race, in Essner, *Nürnberger Gesetze*, 99–106. See also Koonz, *Nazi Conscience*, 171–77.
- 112 There is a full version of the transcript, and an abbreviated version edited down in consultation with the participants. Regge and Schubert, *Quellen*, 223n1. In this book I quote from the longer version.
- 113 These were Grau, Klee, and Schäfer. See *Preußische Denkschrift*, 10–11.
- 114 See especially the careful account of Gruchmann, *Justiz im Dritten Reich*, 865–68.
- 115 Regge and Schubert, *Quellen*, 278.
- 116 See the assessment of Przyrembel, “*Rassenschande*,” 138; and the review of the debates over how far an approach based on “arglistige Täuschung” could extend in Essner, *Nürnberger Gesetze*, 103–4; alongside *ibid.*, 151–52, for the subsequent regulatory drafting process.
- 117 Regge and Schubert, *Quellen*, 281–83. For Kohlrausch as a defender of the rule of

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- law cf. Eberhardt Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, 3rd ed. (Göttingen: Vandenhoeck & Ruprecht, 1965), 450–51.
- 118 See below, text at endnote 105.
- 119 Dahm in Regge and Schubert, *Quellen*, 293; Freisler in Regge and Schubert, *Quellen*, 288; Klee in Regge and Schubert, *Quellen*, 290–91.
- 120 See the quotations from Grau below text at endnotes 83-86.
- 121 Regge and Schubert, *Quellen*, 288, 300.
- 122 Cf. Dahm on the “aktivistischen, führenden Kreisen der Studentenschaft.” In Regge and Schubert, *Quellen*, 292. Gürtner carefully made an effort to concede the truth of these student demands. *Ibid.*, 295–96.
- 123 E.g., Regge and Schubert, *Quellen*, 283–88, here 286. Freisler was acknowledging that there must be a preliminary decision to render mixed marriages invalid—a “politische Entscheidung ... daß dieser Grundsatz des Nationalsozialismus durchgeführt werden soll.”
- 124 On Grau, see Ernst Klee, *Das Personenlexikon zum Dritten Reich. Wer War Was vor und nach 1945?* (Frankfurt: Fischer, 2003), 197. The text quoted is included among leading documents in the Nazi persecution of the Jews in Götz Aly, *Die Verfolgung und Ermordung der europäischen Juden durch das Nationalsozialistische Deutschland* (Munich: Oldenbourg, 2008), 1:346–49.
- 125 Regge and Schubert, *Quellen*, 280. Freisler held that the proposed criminalization of “Verletzung der Rassenehre” could be salvaged by dropping the express reference to “colored races.” *Ibid.*, 287, 308. Elsewhere he defended the term “colored.” See below, text at endnote 116.
- 126 Regge and Schubert, *Quellen*, 278–79.
- 127 *Ibid.*, 279.
- 128 Klee, below, text at endnote 103.
- 129 Regge and Schubert, *Quellen*, 280–81.
- 130 *Ibid.*, 281.
- 131 *Ibid.*, 281–82.
- 132 Sifton and Stern, *No Ordinary Men*, 46–47.
- 133 *Ibid.*, 126.
- 134 Regge and Schubert, *Quellen*, 282.
- 135 *Ibid.*, 282.
- 136 *Ibid.*, 282.
- 137 Though perhaps he was not too far off: criminal prosecution was “sporadic.” See Pascoe, *What Comes Naturally*, 135–36.
- 138 Regge and Schubert, *Quellen*, 282.
- 139 E.g., Gürtner in Regge and Schubert, *Quellen*, 307, discussing the Montana statute in detail.
- 140 On Klee, see Christian Kasseckert, *Straftheorie im dritten Reich* (Berlin: Logos, 2009), 179.
- 141 Regge and Schubert, *Quellen*, 315.
- 142 See *Brown v. Board of Education*, 347 US 483, 494 (1954).
- 143 See Avraham Barkai, *Vom Boykott zur “Entjudung.” Der wirtschaftliche Existenzkampf der Juden im Dritten Reich* (Frankfurt: Fischer, 1987), 26–28.



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- 144 Regge and Schubert, *Quellen*, 315.
- 145 For the importance of this principle in German law, and its violation by the Nazis, see Hans-Ludwig Schreiber, *Gesetz und Richter. Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena sine lege* (Frankfurt: Metzner, 1976).
- 146 Regge and Schubert, *Quellen*, 283.
- 147 *Ibid.*, 306.
- 148 *Ibid.*, 307.
- 149 *Ibid.*, 318, defending the principle of *in dubio pro reo*, which for ease of American understanding I render as “the presumption of innocence.”
- 150 See Ernst Schäfer in Regge and Schubert, *Quellen*, 314 and 319; Freisler in Regge and Schubert, *Quellen*, 320.
- 151 This was Schäfer.
- 152 Regge and Schubert, *Quellen*, 319. Freisler declared that he had not faced this difficulty before the meeting. *Ibid.*, 313.
- 153 *Ibid.*, 319–20.
- 154 *Ibid.*, 320.
- 155 I offer this phrase, of course, as an echo of our contemporary phrase “the social construction of race.” See, e.g., Ian F. Haney López, “The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice,” *Harvard Civil Rights–Civil Liberties Law Review* 29 (1994): 1–62.
- 156 Regge and Schubert, *Quellen*, 320. For “foreign races,” see the quote from Grau, above.
- 157 *Ibid.* Freisler had in mind the workings of the courts under the Erbhofgesetz. Regge and Schubert, *Quellen*, 309, 317, and esp. 320. Grau too looked to the Erbhofgesetz; *ibid.*, 278. Meanwhile Schäfer defended “primitive” approaches over “scientific” ones; *ibid.*, 314.
- 158 Robert Rachlin, “Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror,” in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, ed. Alan E. Steinweis and Robert D. Rachlin (New York: Berghahn, 2013), 63. Cf., e.g., Uwe Wesel, “Drei Todesurteile pro Tag,” *Die Zeit*, February 3, 2005, available at <http://www.zeit.de/2005/06/A-Freisler>.
- 159 Regge and Schubert, *Quellen*, 320.
- 160 *Ibid.*, 321.
- 161 See Essner, *Nürnberger Gesetze*, 102, calling him (I believe incorrectly) “Kurt.”
- <sup>162</sup> Regge and Schubert, *Quellen*, 334
- 163 E.g., Gürtner in Regge and Schubert, *Quellen*, 316, with detailed discussion of the Montana statute.
- 164 See below, text at endnote 143.
- 165 Regge and Schubert, *Quellen*, 227n3.
- 166 Heinrich Krieger, “Principles of the Indian Law and the Act of June 18, 1934,” *George Washington Law Review* 3 (1935): 279–308, 279.
- 167 *Ibid.*
- 168 For his thanks to Otto Koellreutter and others, see Krieger, *Rassenrecht*, 11; and for his fellowship in the Notgemeinschaft der deutschen Wissenschaft in Düsseldorf, see Krieger, “Principles of the Indian Law,” 279.
- 169 See Heinrich Krieger, “{~?~thinspace} ‘Eingeborenenrecht?’ Teleologische

- Begriffsbildung als Ausgangspunkt für die Kritik bisherigen und den Aufbau zukünftigen Rechts,” *Rasse und Recht* 2 (1938): 116–30, dated at Windhoek and identifying Krieger as “Mitarbeiter des Rassenpolitischen Amtes der NSDAP.”
- 170 Heinrich Krieger, *Das Rassenrecht in Südafrika* (Berlin: Junker & Dünhaupt, 1944), 12. For his early African writings, see Krieger, “{~?~thinspace} ‘Eingeborenenrecht?’ {~?~thinspace}”; Heinrich Krieger, *Das Rassenrecht in Südwestafrika* (Berlin: Junker & Dünhaupt, 1940); and for the commission from the Rassenpolitisches Amt to study South Africa, his “Vorwort” to Krieger, *Rassenrecht in Südafrika*, 11.
- <sup>171</sup> Ibid., dated ‘Im Felde’.
- <sup>172</sup> Assuming that I have identified him correctly, Krieger became Studienrat and then Oberstudienrat at the Gymnasium Philippinum zu Weilburg. He is identifiable not only because of his continuing international outlook, but also because he continued to write in a social scientific vein about the same British world he had written about in earlier years. See Heinrich Krieger, “Fakten und Erkenntnisse aus der englischen Volkszählung,” *Die Neueren Sprachen* (neue Folge) 1 (1952): 87-91. For his work as an advocate of reconciliation with France and European unification: “Europa-Union Oberlahn feiert 60-jähriges Jubiläum,” available at <http://www.oberlahn.de/29-Nachrichten/nId,178202,Vonder-Gr%C3%BCndung-1954-1955-bis-2014.html>; as a promoter of aid and student exchange in Africa and Asia: “Rund um den Pakistanberg. Völkerfreundschaft an der Lahn,” *Die Zeit*, September 4, 1964. Available at <http://www.zeit.de/1964/36/rund-um-den-pakistanberg>; Wolfgang Henss, “Entwicklungshilfe aus Pakistan. Volksverständigung. Vor 50 Jahren veränderten asiatische Studenten Kubach,” *Weilburger Tagesblatt*, August 8, 2014, available at [http://www.mittelhessen.de/lokales/region-limburg-weilburg\\_artikel,-Entwicklungshilfe-aus-Pakistan-\\_arid,326225.html](http://www.mittelhessen.de/lokales/region-limburg-weilburg_artikel,-Entwicklungshilfe-aus-Pakistan-_arid,326225.html); for his supervision of post-war exchange programs with France and England, Heinrich Krieger, “Grundsätzliche Erfahrungen aus einem internationalen Schüleraustausch,” *Neuphilologische Zeitschrift* 3 (1951): 354-60; for his activity as co-founder of the Europäischer Erzieherbund: Wolfgang Mickel, *Europa durch Europas Schulen. 40 Jahre EBB/AEDE* (n.p.: Frankfurt, 1999), 2.
- 173 Krieger, “Principles of the Indian Law,” 304, 308.
- 174 Quoted in Guettel, *German Expansionism*, 209—though Guettel is quite prepared to minimize the horror.
- 175 Heinrich Krieger, “Das Rassenrecht in den Vereinigten Staaten,” *Verwaltungsarchiv* 39 (1934): 316. The original quotation appears in Thomas Jefferson, *Works*, ed. Paul Leicester Ford (New York: Putnam, 1904), 1:77.
- 176 Krieger, *Rassenrecht*, 49–53.
- 177 Ibid., 55–61.
- 178 Ibid., 327–49; and 57 on the “lebensfremder Positivismus” of the ideology of equality. Krieger’s argument deserves a lengthier account than I can give it here. See, for example, his effort in *Rassenrecht*, 337–39, to account for the social foundations of the ideology of equality in the labor markets, and to describe the countertendency of racist sentiment to “break through.”
- 179 For the teachings of Burgess, Dunning, and their followers, see Hugh Tulloch, *The Debate on the American Civil War Era* (Manchester: Manchester University Press, 1999), 212–20, and for the continuing grip of the Dunning school into the 1920s and early 1930s, Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1989), xx–xxi.
- 180 E.g. especially, among others cited in this book, Roland Freisler, “Schutz von Rasse und Erbgut im werdenden deutschen Strafrecht,” *Zeitschrift der Akademie für*

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- deutsches Recht* 3 (1936): 142-46, 146, giving a list of American states with anti-miscegenation legislation, along with a description of Jim Crow segregation.
- 181 Krieger, "Rassenrecht", 320.
- 182 Krieger, *Rassenrecht*, 16.
- 183 The reference is to *Monroe v. Collins*, 17 Ohio St. 665 (1867).
- 184 Krieger, "Rassenrecht," 319–20.
- 185 Herbert Kier, "Volk, Rasse und Staat," in *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, 1st ed, ed. Hans Frank (Munich: Zentralverlag der NSDAP, 1935).
- 186 *Ibid.*, 26–27.
- <sup>187</sup> Arthur Gütt, Herbert Linden and Franz Maßfeller, *Blutschutz- und Ehegesundheitsgesetz* (Munich: Lehmann, 1937), 17-19.
- 188 *Ibid.*, 27–28. Also reproduced without attribution in Gütt et al., *Blutschutz- und Ehegesundheitsgesetz*, 19.
- 189 *Ibid.*, 28.
- 190 *Ibid.*, 28.
- 191 I can find few references in the non-German literature. Of the copies held in America that I have inspected, those at both Princeton and Columbia were acquired after the war, when the holdings of Nazi libraries must have been distributed to American universities. The Yale copy, by contrast, was acquired in 1935.
- 192 Helmut Nicolai, "Rasse und Recht," in *Deutscher Juristentag* (Berlin: Deutscher Rechts-Verlag, 1933), 1:176.
- <sup>193</sup> *Preußische Denkschrift*, 47. Italics mine.
- 194 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd ed., trans. Tony Weir (New York: Oxford University Press, 1998), 16.
- 195 Philipp Depdolla, *Erblehre, Rasse, Bevölkerungspolitik; vornehmlich für den Unterricht in höheren Schulen bestimmt* (Berlin: Metzner, 1934), 90.
- 196 Otto Harlander, "Französisch und Englisch im Dienste der rassenpolitischen Erziehung," *Die Neueren Sprachen* 44 (1936): 62.
- 197 Essner, *Nürnberger Gesetze*, 77–78, 81.
- 198 Bill Ezzell, "Laws of Racial Identification and Racial Purity in Nazi Germany and the United States: Did Jim Crow Write the Laws That Spawned the Holocaust?," *Southern University Law Review* 30 (2002–3): 1–13; Judy Scales-Trent, "Racial Purity Laws in the United States and Nazi Germany: The Targeting Process," *Human Rights Quarterly* 23 (2001): 259–307.
- 199 [Anon.], "Volkstümer und Sprachwechsel," *Nation und Staat: Deutsche Zeitschrift für das europäische Minoritätenproblem* 9 (1935): 348. This journal was published in Vienna, but the article in question was reprinted without citation from some other, presumably German, source.
- 200 *Ibid.*
- 201 *Ibid.*
- 202 Leers, *Blut und Rasse*, 89–90.
- 203 The reference is to *Bell v. State*, 33 Tex. Cr. R. 163 (1894). Krieger's source here was presumably Gilbert Thomas Stephenson, *Race Distinctions in American Law* (New York: Appleton, 1910), 17: "Some states have allowed facts other than physical characteristics to be presumptive of race. Thus, it has been held in North Carolina that

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if one was a slave in 1865, it is to be presumed that he was a Negro. The fact that one usually associates with Negroes has been held in the same State proper evidence to go the jury tending to show that he is a Negro. If a woman's first husband was a white man, that fact, in Texas, is admissible evidence tending to show that she is a white woman."

- 204 *Entwurf zu einem Gesetz zur Regelung der Stellung der Juden*, in Otto Dov Kulka, ed., *Deutsches Judentum unter dem Nationalsozialismus* (Tübingen: Mohr, 1997), 1:38; also in Aly, *Verfolgung und Ermordung der europäischen Juden*, 1:123–24. For the association of this proposal with the moderate camp, see Essner, *Nürnberger Gesetze*, 84.
- 205 For the drafting history of these regulations, see Essner, *Nürnberger Gesetze*, 155–73; and the earlier account of Jeremy Noakes, "{~?~thinspace}' Wohin gehören die "Judenmischlinge"?" Die Entstehung der ersten Durchführungsverordnung zu den Nürnberger Gesetzen," in *Das Unrechtsregime. Internationale Forschung über den Nationalsozialismus*, ed. Ursula Büttner (Hamburg: Christians, 1986), 2:69–89.
- 206 Text available at <http://www.verfassungen.de/de/de33-45/reichsbuerger35-v1.htm>.
- 207 Bernhard Lösener, "Staatsangehörigkeit und Reichsbürgerrecht," in *Grundlagen, Aufbau und Wirtschaftsordnung des Nationalsozialistischen Staates*, ed. H.-H. Lammers et al. (Berlin: Spaeth & Linde, 1936), 13:32. The harder-line view of Stuckart and Globke held that it was a matter of blood, not inclination: "Durch seine *Verheiratung mit einem Juden* beweist ein Mischling ersten Grades, daß sein jüdischer Blutanteil stärker als sein deutscher Blutanteil wirkt." Stuckart and Globke, *Kommentare*, 76.
- 208 See Chapter 1. It is certainly the case that a woman's loss of nationality through marriage was a familiar and much-discussed possibility, which clearly influenced some Nazi thinking. See Adalbert Karl Steichele, *Das deutsche Staatsangehörigkeitsrecht auf Grund der Verordnung über die deutsche Staatsangehörigkeit vom 5. Februar 1934* (Munich: Schweitzer, 1934), 69. What was distinctive about the Cable Act rule was however its specifically race-based character.
- 209 Ralf Michaels, "Comparative Law by the Numbers," *American Journal of Comparative Law* 57 (2009): 765–95, 769.
- 210 Hermann Mangoldt, review of Karl Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika*, *Archiv für Rechts- und Sozialphilosophie* 27 (1933): 304. It is worth observing that Mangoldt, later to become a leading commentator on postwar German constitutional law, was another figure who began his career, when a Nazi, as a student of American law. See his *Rechtsaatsgedanke und Regierungsform in den Vereinigten Staaten von Amerika* (n.p. [Essen]: Essener Verlagsanstalt, 1938).
- 211 Paul Mahoney, "The Common Law and Economic Growth: Hayek Might Be Right," *Journal of Legal Studies* 30 (2001): 504–5. In response to a comment from an anonymous reader, I should emphasize that I do not mean to imply that professional legal historians or legal philosophers concern themselves with the views of Hayek. My aim is to capture a more general attitude toward the common law.
- 212 See esp. the seminal account in Edward Glaeser and Andrei Shleifer, "Legal Origins," *Quarterly Journal of Economics* 107 (2002): 1193–1229.
- 213 H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law*

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- Review* 71 (1958): 617.
- 214 Lon Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” *Harvard Law Review* 71 (1958): 633. The Hart/Fuller debate {Au: “debate” here?} {YES. ADD 'debate'.} has done much to distort Anglo-American understanding.
- 215 See especially the fundamental work of Bernd Rüthers, *Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, 7th ed. (Tübingen: Mohr, 2012).
- 216 “Der Eid auf Adolf Hitler,” in Rudolf Hess, *Reden* (Munich: Zentralverlag der NSDAP, 1938), 12.
- 217 Ian Kershaw, “Working towards the Führer,” *Contemporary European History* 2 (1993): 103–18, 116–17. This book is not the place to enter into the larger debate about functionalism versus intentionalism on the road to the Holocaust, nor about the precise nature of Hitler’s role, since I do not make any effort to assess relevant evidence. I cite the material in the text purely for its importance in judging the legal historical questions that the book raises.
- 218 See classically C. C. Langdell, “Harvard Celebration Speeches,” *Law Quarterly Review* 3 (1887): 124.
- 219 Laurence Tribe, *American Constitutional Law* (New York: Foundation, 2000), 1:14.
- 220 Cf. Stefan Kühl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (New York: Oxford University Press, 1994), 15: “European eugenicists admired the success of their American counterparts in influencing eugenics legislation.”
- 221 The centrality of the Nazi commitment to lawlessness is now emphasized in Anselm Döring-Manteuffel, “Gesetzesbruch als Prinzip. Entwicklungslinien des Weltanschaulichen Radikalismus in der Führerdiktatur,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung)* 132 (2015): 420–40.
- 222 See the discussion of Freisler’s views in Cornelius Broichmann, *Der außerordentliche Einspruch im Dritten Reich* (Berlin: Erich Schmidt Verlag, 2014), 163; and the sensitive assessment of Ralph Angermund, “Die geprellten ‘Richterkönige’. Zum Niedergang der Justiz im NS-Staat,” in *Herrschaftsalltag im Dritten Reich*, ed. Hans Mommsen and Susanne Willems (Düsseldorf: Schwann, 1988), 304–73, 320–21.
- 223 Broichmann, *Der außerordentliche Einspruch*, 168–71; cf. *Preußische Denkschrift*, 115–16.
- 224 For a discussion placing the law of the era in its larger intellectual context, see the classic discussion of Holmes in Morton White, *Social Thought in America: The Revolt against Formalism* (New York: Viking, 1949), 59–75.
- 225 See Marcus Curtis, “Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence,” *Yale Journal of Law and Humanities* 27 (2015): 157–200.
- 226 Brian Leiter, “American Legal Realism,” in *Guide to the Philosophy of Law and Legal Theory*, ed. Martin Golding and William Edmundson (Oxford: Blackwell, 2005), 50.
- 227 Address at Oglethorpe University, May 22, 1932, available at <http://newdeal.feri.org/speeches/1932d.htm>.
- 228 Jack M. Balkin, “Wrong the Day It Was Decided,” *Boston University Law Review* 85



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- (2005): 677–725, 686.
- 229 Friedrich Luckwaldt, *Das Verfassungsleben in den Vereinigten Staaten von Amerika* (Berlin: Stilke, 1936), 51.
- 230 This is not the place to discuss these figures; but Americans should know about the most striking example, Theodor Maunz, who became the leading commentator on German constitutional law after World War II. After his death it was revealed that throughout his career, Maunz had contributed anonymous articles to a far-right-wing newspaper. See <http://www.zeit.de/1994/07/maunz-raus>. It seems that this man, the embodiment of the liberal constitutionalism of the Federal Republic, never abandoned his Nazi sympathies.
- 231 Morton Horowitz, *The Transformation of American Law, 1879–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 188.
- 232 Joachim Rückert, “Der Rechtsbegriff der deutschen Rechtsgeschichte in der NS-Zeit: der Sieg des ‘Lebens’ und des konkreten Ordnungsdenkens, seine Vorgeschichte und seine Nachwirkungen,” in *Die deutsche Rechtsgeschichte in der NS-Zeit*, ed. Rückert (Tübingen: Mohr, 1995), 177; cf., e.g., Gerhard Werle, *Justiz-Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich* (Berlin: De Gruyter, 1989), 144–45. For a statement from a leading German legal thinker, emphasizing both the continuities with Weimar jurisprudence and the importance of according authority to judges, see Philipp Heck, *Rechtserneuerung und juristische Methodenlehre* (Tübingen: Mohr, 1936), 5–6.
- 233 Wolfgang Greeske, *Der Gedanke der Verfassung in der neueren Staatslehre*, (Saalfeld: Günther, n.d.), 109. For the earlier history of this theme, see now Katharina Schmidt, “Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to ‘Life,’ 1903–1933,” *German Studies Review* 39, no. 1 (2016): 121–40.
- 234 G. Edward White, “From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America,” in *Patterns of American Legal Thought* (Indianapolis: Bobbs-Merrill, 1978), 140.
- 235 I quoted and discussed this letter in James Q. Whitman, “Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code,” *Yale Law Journal* 97 (1987): 156–75, 170; and it was also quoted and discussed in N.E.H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997), 237. The University of Chicago informs me that it is no longer to be found among Llewellyn’s papers. I issue here a plea to any scholar who may have inadvertently removed it to return it. My own notes have long since vanished, so that I cannot be certain which Nazi comment on Llewellyn was meant, but I assume that it was Mangoldt’s review, cited in Note 40. **{Au: please confirm Note 40 is correct here.} {CONFIRMED!}**
- 236 William Scheuerman, *Morgenthau* (Cambridge: Polity, 2009), 25.
- 237 Nor of course does it mean that the New Deal held interest only for fascists. There were plenty of European progressives who saw things to admire in it. See Daniel Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998), 410–11 and generally 409–84 for the transatlantic connections.

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- 238 See James Q. Whitman, “The Case for Penal Modernism,” *Critical Analysis of Law* 1 (2014): 143–98.
- 239 See, e.g., Kevin McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2004), 12 and passim.
- 240 I cite only the appalling Blutschutzgesetz decision, Entscheidungen des Reichsgerichts in Strafsachen 72, 91, 96 (Decision of February 23, 1938). The spirit of gleeful lawlessness in such decisions is unmatched in the United States, I think. Others may differ.
- 241 See Jamal Greene, “The Anticanon,” *Harvard Law Review* 125 (2011): 438–39.
- 242 See the controversial claims of David Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011), 73–89; cf. Note, “Legal Realism and the Race Question: Some Realism about Realism on Race Relations,” *Harvard Law Review* 108 (1995): 1607. The bulk of this Note traces the undoubted opposition to racist law of some leading realists, including Llewellyn, Hale, and Felix Cohen, but the author is also obliged to note that “the majority of canonical Realists avoided the race question.” *Ibid.*, 1619. For the larger intellectual context, see Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics and American Economics in the Progressive Era* (Princeton: Princeton University Press, 2016), 109–28.
- 243 Heinrich Krieger, *Das Rassenrecht in den Vereinigten Staaten* (Berlin: Junker & Dünhaupt, 1936), 327–49; and 57 on the “lebensfremder Positivismus” of the ideology of equality. Guettel, *German Expansionism*, 200–201, misreads Krieger’s book on this score, interpreting him as far more of a critic of the United States than is the case, and than he was understood to be in Nazi Germany. See e.g. Schmidt-Klevenow, review of Krieger, *Das Rassenrecht in den vereinigten Staaten*, *Juristische Wochenschrift* 111 (1936): 2524, praising Krieger's account of an “uns deutschen innerlich nahestehenden Landes.”
- 244 Karl J. Arndt, review of Krieger, *Das Rassenrecht in den Vereinigten Staaten*, *Books Abroad* 12 (1938): 337–38.
- 245 For parallels between Nazi criminal justice and criminal justice in contemporary America, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York: Oxford University Press, 2003), 202–3. Long-term confinement for habitual offenders was one of the anti-liberal measures demanded by the Prussian Memorandum, *Preußische Denkschrift*, 138—though also calling for systematic treatment for alcoholics, the mentally ill, and others. This book is not the place to discuss the complexities of Nazi punishment practices.
- 246 See esp. William J. Stuntz, “The Pathological Politics of Criminal Law,” *Michigan Law Review* 100 (2001–2): 505–600.
- 247 I have made this argument more fully in Whitman, *Harsh Justice*, 199–203.