

**HITLER'S
AMERICAN
MODEL**

**THE UNITED STATES AND THE
MAKING OF NAZI RACE LAW**

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ideologue Alfred Rosenberg in 1933.³⁴ Or as Hitler himself put it, in a ringing passage, "The racially pure and still unmixed German has risen to become master of the American continent, and he will remain the master, as long as he does not fall victim to racial pollution."³⁵

To be sure, we must keep our composure when we encounter Nazi pronouncements about America like these (and the many more from which I will quote in the following pages). If there was a great deal of praise for American white supremacy in Germany in the early 1930s, it was also commonplace to speculate the United States might well fail to achieve its historic racist mission. Even the Nazis most favorably inclined were unsure that they could count on American friendship in the long term.³⁶ When the *National Socialist Monthly* published a special number on "The U.S.A. and Us" in November 1933, for example, it trumpeted Germany's affinities with the Americans at some points; but at others it voiced uncertainty about the future course of American development, as well as expressing anger at the ugly stories the American press had published.³⁷ If the Nazis often voiced their sense of kinship with the United States, they were nevertheless never quite sure what they were dealing with.

Still, it remains the case that Nazi authors of the period were quite conscious of the racist strain in American law and society, and sometimes loud in their praise; and it was commonplace throughout the era of the making of the Nuremberg Laws to treat the United States not as an inevitable ideological blood enemy, but as a forerunner and even a potential fellow traveler. When Nazi observers looked out on early New Deal America, they saw a country where white supremacy ran deep, at least once the visitor left New York City behind. And while it is hard to know how many "Anglo-Saxon" Americans would have been receptive to Göring's speech in 1935, there were certainly many who did indeed regard people like Brodsky as "uppity Jews."

As for the two new Nazi anti-Jewish measures that we remember today as the Nuremberg Laws, they were crafted in an atmosphere marked by the same tentative and uncertain spirit of kinship with America: hard though it may be for us to accept it today, the Nuremberg Laws were the product of many months of Nazi discussion and debate that included regular, studious, and often admiring engagement with the race law of the United States.

THE SECOND NUREMBERG LAW: MAKING NAZI CITIZENS

The two anti-Jewish measures we call the Nuremberg Laws today, and whose text was read out by Hermann Göring at the Party Rally of Freedom, are so brief that their principal provisions can be quoted in full. As the *New York Times* correctly reported, the first of them, the *Reichsbürgergesetz*, the Reich Citizenship Law, commonly called the Citizenship Law, established a distinction between "citizens of the Reich" (*Reichsbürger*) and mere "nationals" (*Staatsangehörige*). Its aim was to restrict full political rights to members of the German *Volk*, the mystically understood national German race community (adjective form *völkisch*):

Reich Citizenship Law

§ 1

(1) A national [*Staatsangehöriger*] is any person who belongs to the mutual protection association [*Schutzverband*] of the German Reich, and who owes special duties in return.

(2) Nationality [*Staatsangehörigkeit*] is acquired through the provisions of the Law on Membership in the Reich and the State.

§ 2

(1) A Reich citizen is exclusively a national of German blood, or racially related blood, who demonstrates through his conduct that he is willing and suited to faithfully serve the German *Volk* and Reich.

(2) The right of Reich citizenship is acquired through the conferral of the brevet of Reich citizenship.

(3) The Reich citizen is the sole bearer of full political rights, to be exercised according to the measure of the laws.³⁸

The second, the *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*, the Law on the Protection of German Blood and German Honor, commonly called the Blood Law, banned mixed marriages and sexual relations between Jews and Germans, as well as the employment by Jews of German women as household servants. It made two distinct provisions about mixed marriages: first, that they were void as a matter of civil law, and, second, that they constituted a criminal offense. (The Blood Law also included a sarcastic provision permitting Jews to fly their own Jewish flag; when Göring read that provision out at the rally, the assembled Reichstag delegates, it is reported, "roared with laughter.")³⁹ The Blood Law left unresolved the difficult question of who counted as a "Jew."

Law on the Protection of German Blood and German Honor

Deeply moved by the recognition that purity of German blood is the prerequisite for the continued existence of the German *Volk*, and inspired by the unbending will to secure the German nation for all time to come, the Reichstag has unanimously voted the following law, which is hereby promulgated:

§ 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.

(2) Actions to nullify such marriages are brought by the state prosecutor.

§ 2

Extramarital intercourse between Jews and nationals of German blood or racially related blood is forbidden.

§ 3

Jews may not employ female nationals of German blood or racially related blood under the age of 45 years in their household.

§ 4

(1) Jews are forbidden to raise the Reich and National flag, and to display the colors of the Reich.

(2) However they are permitted to display Jewish colors. The exercise of this right stands under the protection of the state.

§ 5

(1) Any person who violates the prohibition of § 1 shall be punished by imprisonment at hard labor.⁴⁰

- (2) Any male person who violates the prohibition of § 2 shall be punished either by ordinary imprisonment or by imprisonment at hard labor.

- (3) Any person who violates the prohibitions of §§ 3 or 4 shall be punished by ordinary imprisonment for up to a year and by a fine, or by either of these penalties.⁴¹

After Göring had finished reading these ugly decrees, reported the *New York Herald Tribune*, a Republican newspaper that was one of the few in America to headline the racism of the Nuremberg Laws, the assembled Reichstag members, "six-hundred odd men, the bulk of them in brown uniforms, leapt to their feet" in a display of enthusiasm.⁴²

The question we must ask is whether the Nazis gleaned any American inspiration in the making of this program of persecution. Here it is essential that we begin by posing the question correctly. We must recognize what the Nuremberg Laws did not say, and conversely what American law of the era did say. The Nuremberg Laws did not aim to set up a system of segregation or apartheid. Their twofold purpose was to create a new Nazi law of citizenship, alongside a new Nazi law of sex and intermarriage, which I will call by the American name "miscegenation." As for America, citizenship and miscegenation were both central to American interwar race law. Segregation was only a part of it.⁴³

The last point deserves some emphasis. When Americans think about their legal history of race today, they can find it hard to shake off the fascination with Jim Crow segregation in the South. In the 1950s *Brown v. Board of Education* became the pivot on which our understanding of modern American race law turned;⁴⁴ and we have commonly framed American race questions around the conflict between *Brown* and *Plessy v. Ferguson* ever since.⁴⁵ In the American

collective memory, race law involves first and foremost separate schools, separate water fountains, seating at the back of the bus, and so on—the practices that triggered the great sit-ins, protests, and violent clashes of the early civil rights era. The identification of race law with segregation has shaped all of the English-language literature on American influence in Germany; that is why, when scholars have wondered whether American race law influenced the Nazis, what they have wondered about is the significance of "American segregation laws."⁴⁶ But there was always much more to American race law than segregation, as Europeans of the interwar period well knew; and we will not understand how Nazi lawyers viewed "Nordic" America unless we bear that fact in mind.

American race law, pre-*Brown*, sprawled over a wide range of technically distinct legal areas, including not only "separate but equal" segregation under the rule of *Plessy*, but also Indian law,⁴⁷ anti-Chinese and -Japanese legislation,⁴⁸ and disabilities in civil procedure and election law.⁴⁹ America was particularly notable for its creation of novel forms of de facto and de jure second-class citizenship for blacks, Native Americans, Filipinos, and Puerto Ricans.⁵⁰ Anti-miscegenation laws on the state level featured especially prominently;⁵¹ they would be eliminated only at the tail end of the civil rights era, with *Loving v. Virginia* in 1967.⁵² So did immigration and naturalization law on the federal level;⁵³ de facto race-based immigration and naturalization practices would survive until the Immigration and Nationality Act of 1965, which came into full effect only in 1968.⁵⁴ Some aspects of this extensive body of American race law were closely linked to eugenics; immigration and anti-miscegenation laws in particular were often described as measures related to the eugenic maintenance of a racially healthy population.⁵⁵ Other aspects, however, like segregation and the creation of forms of second-class citizenship, had nothing to do with eugenics as such. They represented a different mode of exclusion

and persecution, involving legal degradation rather than population engineering.

And in all of these areas the United States stood out for the energy and innovativeness of its law. Early twentieth-century America was the global leader in race law, admired around the world for the vigor of its legislation; in this the Nazis were not alone. As in so many areas, this was one where American creativity shone.

AMERICA: THE GLOBAL LEADER IN RACIST IMMIGRATION LAW

American anti-miscegenation law is a topic for the next chapter. For now, I begin with the American law of immigration, naturalization, and citizenship.

To some extent, what Nazi lawyers found intriguing about America extended back to the same Founding Era that was highlighted by Nazi world historians. America, as Nazi authors knew, had a history of racial exclusionism that dated to the earliest years of the Republic. When the first Congress met, among its many historic enactments was the Naturalization Act of 1790, which opened naturalization to “any alien, being a free white person.”⁵⁶ This was, as a Nazi commentator observed in 1936, an unusual measure for the time: racial restrictions were not unheard of in the eighteenth century, but they were not common.⁵⁷

For the most part, though, the America that appealed to the Nazis (and other European racists as well) was the America of the late nineteenth and early twentieth centuries. As one leading Nazi author summarized American immigration history in 1933, “[u]ntil the 1880s, a liberal freedom-oriented conception led the United States to regard itself as the refuge of all oppressed peoples, and consequently limitations on immigration, to say nothing of bans on immigration, were considered irreconcilable with the ‘free’ Con-

sitution.”⁵⁸ That is not to say that there were no restrictions at all before the 1880s. In the antebellum period a number of states, especially in the Midwest, introduced legislation aiming to prevent free blacks from settling,⁵⁹ while in the 1850s Connecticut and Massachusetts introduced literacy tests in the hope of keeping undesirable Irish immigrants at bay without formally excluding them.⁶⁰ Nevertheless, taken in the large, the United States was a country of open borders during the first two-thirds of the nineteenth century, and of course it was a country that attracted large migrations from Europe.

Beginning in the late 1870s, however, American immigration and naturalization law took a different turn. The shift had to do largely with the appearance of Asian immigrants.⁶¹ Late nineteenth-century American immigration legislation was directed in particular against Asians,⁶² beginning especially with the Chinese exclusion legislation in California in the 1870s,⁶³ and on the national level in 1882.⁶⁴ Would-be Japanese immigrants were targeted as well, in a history of many decades that gave rise to dangerous diplomatic friction between the Japanese Empire and the United States.⁶⁵ But by the end of the century, exclusionist campaigns began slowly to move beyond the perceived problems of Asian immigration to focus on Europe as well. An especially important 1896 bill aimed to restrict immigration through the use of literacy tests.⁶⁶ That legislation was vetoed by President Cleveland,⁶⁷ but it was followed by a series of twentieth-century measures. First came the Asiatic Barred Zone Act of 1917, which (as its name suggests) marked out a vast area of Asia as the home of undesirables, to be barred alongside homosexuals, idiots, anarchists, and more.⁶⁸ That was followed by two major pieces of “national origins” immigration and naturalization law: the Emergency Quota Act of 1921⁶⁹ and the Immigration Act of 1924.⁷⁰ The latter in particular was manifestly “race-based,” favoring “the ‘Nordics’ of northern and western

Europe over the 'undesirable races' of eastern and southern Europe."⁷¹

It is important to note that the United States was not alone in introducing such measures. In particular, as the Nazis were very much aware, America was part of a broader historically British world. British imperialism deposited a network of "free white men's democracies" around the globe, displaying a common commitment to maintaining what Columbia professor J. W. Burgess influentially praised in 1890 as "ethnically homogeneous" states.⁷² These included Canada and New Zealand;⁷³ Australia, home of anti-Chinese agitation linked to similar agitation in California beginning in the late 1840s;⁷⁴ and of course South Africa.⁷⁵ A British demographer described this Anglophone world in 1936 this way: "[T]here are few gaps in the ring fence which has been erected in the last 50 years by the United States and the Dominions in order to exclude non-Europeans."⁷⁶ As we shall see, the Nazis knew this Anglophone pattern well, and looked for their models not only in the United States, but more broadly in the British Dominions.

Nevertheless by the latter part of the nineteenth century, it was the United States that occupied the place at the vanguard, in the eyes of Germans and others as well. From the late nineteenth century onward the United States came to be regarded as "the leader in developing explicitly racist policies of nationality and immigration,"⁷⁷ and American immigration and naturalization practices were attracting plenty of notice in Europe well before the emergence of the Nazi movement.

Some of the attention came from Europeans on the left who deplored the American developments. Hostile commentary was particularly noticeable in the French literature: French observers, with their own republican tradition of "liberty, equality, and fraternity," were often taken aback by the frank racism of American democracy. When the French social thinker André Siegfried published

his study of American society in 1927, for example, he treated immigration policy as fundamental to the workings of a disturbing broader pattern of American racism.⁷⁸ Other French authors saw America similarly.⁷⁹

But there were also foreigners who looked more favorably on the American experiments. American immigration law was influential throughout the Anglophone world,⁸⁰ and it attracted continental Europeans as well.⁸¹ It is particularly important that American immigration law caught the attention of one influential book: the late nineteenth-century *Handbook of the Jewish Question* by Theodor Fritsch. Fritsch was the man responsible for publishing the German editions of both *The Protocols of the Elders of Zion* and the anti-Semitic writings of Henry Ford. This figure, one of the guiding lights of German anti-Semitism, featured the United States in the opening pages of his *Handbook*, which would be reprinted over and over again in the Nazi period. Late nineteenth-century America was a country, wrote Fritsch, that had finally learned the error of its egalitarian ways: "America, soaked in ideas of freedom and equality, has hitherto accorded equal rights to all races. But it finds itself compelled to revise its attitudes and its laws and create restrictions on Negroes and Chinese."⁸² To Fritsch, the history of American immigration law offered a parable on the dangers of ignoring race in favor of a foolish egalitarianism. As we shall see shortly, Hitler and other Nazis would often repeat Fritsch's interpretive line.

AMERICAN SECOND-CLASS CITIZENSHIP

Immigration and naturalization law was only part of what made the United States a late nineteenth-century leader. Alongside it came American citizenship law. Over the same decades of the late nineteenth century, the United States was developing some distinctive

forms of second-class citizenship. Mark Mazower summarizes some of these forms, and speculates that the American law of second-class citizenship would have been of interest to Nazi lawyers as they set out to create their own form of second-class citizenship for Jews at Nuremberg: "Inside the USA (whose racial laws and eugenics movement had earned Hitler's praise in the 1920s) native Americans were viewed up to 1924 as 'nationals' but not citizens—a distinction that late nineteenth-century American commentators acknowledged to be the prerogative of a great colonial power; Puerto Ricans were defined constitutionally much as the Germans later did the Czechs—they were 'foreign to the United States in a domestic sense.'"⁸³ Mazower is right: he is right, as we shall see shortly, that Hitler, following in the footsteps of Theodor Fritsch, admired American race law; and he is right that the treatment of Native Americans and Puerto Ricans, both carefully discussed in the German legal literature,⁸⁴ offered models of second-class citizenship that intrigued Nazi policy makers. But the full story also includes two other especially important populations, Filipinos and especially American blacks.

Especially American blacks. The problem of black citizenship is a very old one in America, with a history too long and complex to be rehearsed here. What matters most for my purposes, and what mattered most to Nazi observers, were the developments in the creation of second-class forms of black citizenship that dated, once again, to the later decades of the nineteenth century. During the antebellum period, blacks were denied citizenship status in one of the most reviled decisions in American constitutional history, *Dred Scott v. Sandford*,⁸⁵ which was instrumental in triggering the Civil War.⁸⁶ After the victory of the North, *Dred Scott* was overturned, as black citizenship status was in principle guaranteed by the Fourteenth and Fifteenth Amendments.⁸⁷ But with the collapse of Reconstruction, blacks, especially but not exclusively southern ones, were deprived of meaningful political rights by a host of late

nineteenth-century legal subterfuges, designed to evade the strictures of the post-Civil War Constitution.

The right to vote in particular was denied to virtually all southern blacks. The techniques involved included, notably, literacy tests, a device that had first been used by Connecticut and Massachusetts in the 1850s as a means of introducing covert racial restrictions in immigration.⁸⁸ Literacy tests were a clever and influential American legal invention, imitated by the Australians in their own racially restrictive immigration legislation of 1901, and recommended by the influential James Bryce for the Anglophone world more broadly.⁸⁹ Alongside literacy tests came "grandfather clauses,"⁹⁰ limiting voting rights to those whose ancestors had voted before emancipation, poll taxes, and more, including the creation of a system of political primaries that guaranteed exclusive rule to the Southern Democratic Party.⁹¹ The Supreme Court did not hesitate to validate such stratagems, despite the guarantees of the Reconstruction Amendments.⁹² The net result was that American blacks, while de jure citizens, were de facto second class.

Here again Europeans, and Germans in particular, took note. In fact, the black second-class citizenship in America was a source of real fascination for leading German intellectuals in the decades before the Nazis' rise to power. Max Weber was one of them. "Within American democracy," wrote Weber in a 1906 newspaper essay, using an excitable exclamation point, equal voting rights were rights for "non-colored! since for Negroes and all racial mongrels [*Mischlinge*] they *de facto* do not exist."⁹³ (Weber believed this was a typical product of the Protestant ethic in America.)⁹⁴ Weber was by no means the only major figure to take an interest in this aspect of American racism. Eduard Meyer, the immensely erudite ancient historian, published a book about America that explained the relevant practices in careful detail: "All means are used to render the Negro's right to vote illusory," he wrote, surveying the wealth

of legal devices invented by Americans.⁹⁵ “The English-speaking Americans,” observed the eminent sociologist Robert Michels, “deny the Negro any form of equal rights”;⁹⁶ he too worked through the legal details. Early twentieth-century German authors regularly observed that the political rights of American blacks were, as standard texts reported, a “dead letter”;⁹⁷ despite the guarantees of the Reconstruction Amendments, those political rights had been “withdrawn”;⁹⁸ without ever saying so openly, the southern states had made black voting rights a nullity.⁹⁹

De facto black disenfranchisement may have been the most striking and noticeable aspect of race-based second-class citizenship law in turn-of-the-century America, but it was not the only one. Also of considerable importance in the making of American second-class citizenship was the now widely forgotten case of the Puerto Ricans and Filipinos. Victory in the Spanish-American War in 1898 brought the United States colonial possessions in Puerto Rico and the Philippines. The consequence was a minor crisis in American constitutional law. America had never sought the sort of overseas imperial power that the European countries had been accumulating, and the Fourteenth Amendment seemed to leave little room for the creation of a class of colonial subjects. When America acquired new territories, the inhabitants were supposed to become citizens. Nevertheless there was widespread sentiment against granting the inhabitants of the new territories full citizenship. The Philippines in particular, which became the site of a nasty American war, was home to a Pacific population that Americans regarded as belonging to an inferior, or at least for the moment hopelessly backward, race. In a series of decisions known as the Insular Cases, the Supreme Court consented to the creation of a *de jure* form of second-class citizenship for the newly conquered populations: the Constitution, held the Court, permitted these colonial subjects to be treated as mere “non-citizen nationals.”¹⁰⁰

The Insular Cases are little remembered by ordinary Americans today, but they were a subject of intense interest at the end of the nineteenth century and beginning of the twentieth, and contemporary legal scholars highlight them as a key development in American race law and the making of an “American Empire.”¹⁰¹ Europeans too paid attention: the struggles of democratic America with the creation of subject status for colonized peoples were a matter of international interest in the age of European imperialism.¹⁰² In particular early twentieth-century Germans, including some very prominent scholars, created a substantial literature on American colonial law in the decades before the Nazis came to power.¹⁰³

Perhaps the most striking of these German students of American second-class citizenship law was Erich Kaufmann, one of the most eminent, and controversial, German Jewish lawyers of the twentieth century. Kaufmann, a brilliant professor of public and international law, was a man who felt the pull of the German far right wing in the 1920s. He associated with proto-fascists in Weimar, and after the Nazis took power he hung on in Nazi Germany until 1938. Surviving the war in hiding, he returned after 1945 to take up a prominent professorship (despite the fact that the American authorities described him as “unsuited for the indoctrination of German youth with the values of democracy”).¹⁰⁴ This figure from the eerie world of the interwar right wing, one of a number of leading Jewish intellectuals whose political sympathies could draw them “precariously close” to the orbit of fascism,¹⁰⁵ made the American colonial experience the subject of his first book in 1908.

Kaufmann’s book described at great and admiring length how America, having been called to the historic task of a “colonial expansion of its possessions and its sovereignty,”¹⁰⁶ had confronted the question of “whether an uncivilized population . . . can be governed according to the norms guaranteed by the Constitution to superior [*hochstehenden*] citizens.”¹⁰⁷ Kaufmann devoted attentive

energy to describing the work of the Supreme Court in the *Insular Cases*, and registered his deep respect for the subtlety of American judges and the “wealth of life and immediacy” to be found in the American common law. The early twentieth century witnessed the rise of a cult of a kind of common-law worship in Germany,¹⁰⁸ and Kaufmann clearly participated in it:

At first glance, the picture that [the *Insular Cases*] offers to us is exceedingly motley, and almost confusing, especially to an eye that is accustomed to German decisional law. As we study it more deeply and reflect on it in an unbiased way, however, we must concede that there is a wealth of life and immediacy in these decisions, a thorough intellectual and juristic examination of the material from the most varied points of view, a penetrating recourse to the ultimate questions, an impartial formulation of the arguments for and against, and a proud appeal to the living legal intuitions of the American people that lie behind them, which reveals the high legal and political talents and the cultivation of the people of the Union.¹⁰⁹

As we shall see, Nazi jurists too would see much to admire in the “life and immediacy” of American common-law racism and the “living legal intuitions” of the American people on which it was founded.

Kaufmann was not the only prominent commentator on the American colonial experience and its legal consequences. Two famous scholars, the German Hugo Münsterberg at Harvard and the Germanophile Ernst Freund at the University of Chicago, published books in German recounting the American adventures in colonial conquest and law.¹¹⁰ Freund in particular explained how the United States had created a new category of “subjects without citizenship rights,”¹¹¹ in so doing, he explained, America had invented a novel form of law closely analogous to early nineteenth-century state statutes barring free blacks and the late nineteenth-century

statutes barring the Chinese. America was pioneering a range of forms of race-based second-class citizenship.¹¹² There was other commentary as well: as a leading German journal reported a couple of years before World War I, in language that anticipated the Nuremberg Laws, Puerto Ricans and Filipinos had been subjected to the status of “*Schutzbürger zweiter Klasse*,” second-class citizens entitled to the protection of the state, but not to full political rights.¹¹³ America, in the eyes of this German literature, was a laboratory for experimentation in diminished citizenship rights.

THE NAZIS PICK UP THE THREAD

Thus the Nazi movement emerged in a Europe familiar with American immigration and second-class citizenship law, and sometimes fascinated by it; and the familiarity and sometime fascination accompanied the early development of Nazism as well, and continued into the years of the making of the Citizenship Law proclaimed at Nuremberg.

In tracking the Nazi strain in the European engagement with American race law, the place to begin is with the movement’s bible, Hitler’s *Mein Kampf*. The second volume of *Mein Kampf*, published in 1927, laid out Hitler’s vision for German renewal. That vision drew broadly on the Nazi Party Program of 1920, five of whose twenty-five points involved citizenship. The 1920 Party Program called for sharp limits on citizenship, which was to be restricted to persons of “German blood,” along with a scheme of disabilities for resident foreigners, who were to be threatened with expulsion:

4. Only a *Volk-comrade* [*Volksgenosse*] can be a citizen [*Staatsbürger*]. Only a person of German blood, without regard to religion, can be a *Volk-comrade*. Accordingly no Jew can be a *Volk-comrade*.

5. Any person who is not a citizen should be able to live in Germany merely as a guest, and must be subject to legislation for foreigners.

6. Only a citizen is permitted the right to decide on the leadership [*Führung*] and laws of the state. Therefore we demand that every public office, regardless of what kind, regardless of whether it is an office of the Reich, of the constituent States of the Reich, or any municipality, be accessible only to citizens....

7. We demand that the state obligate itself to provide the opportunities and wherewithal of life in the first instance strictly for citizens. If it is not possible to provide sustenance for the entire population, then nationals of foreign countries (non-citizens) must be expelled from the Reich.

8. All further immigration of non-Germans is to be prevented. We demand that all non-Germans who have immigrated into Germany since August 2, 1914, be immediately compelled to leave the Reich.¹¹⁴

These demands, which anticipate so much of the far-right agitation that is troubling Europe again today, established the propositions that would be fundamental to Nazi citizenship law as it emerged at Nuremberg in 1935.

In Volume 2 of *Mein Kampf* Hitler built on the 1920 Party Program, developing a more elaborate conception of race-based citizenship. But as he turned to the citizenship problem in 1927, Hitler was able to seize on a source of authority that had not been available in 1920, in the form of the new American immigration statutes of 1921 and 1924. The Nazi leader certainly saw things to

dislike about the United States in this period, hating Woodrow Wilson, the architect of the Peace of Versailles, and detecting the lurking influence of Jews in much of American society.¹¹⁵ But it is a striking fact that praise for American race policies, and envy of American power, predominated in his pronouncements in the late 1920s, particularly when it came to American immigration legislation. Hitler too, like so many Europeans before him, regarded the United States as the obvious "leader in developing explicitly racist policies of nationality and immigration." His treatment of citizenship in *Mein Kampf* began with a characteristically sarcastic account of the state of German law:

Today the right of citizenship is acquired primarily through birth *inside* the borders of the state. Race or membership in the *Volk* play no role whatsoever. A Negro who previously lived in the German protectorates and now resides in Germany can thus beget a "German citizen." By the same token any Jewish child, or Polish child, or African child, or Asian child can become a German citizen without further ado.¹¹⁶

Apart from naturalization through birth there is also the possibility of subsequent naturalization.... Racial considerations play no role in this whatsoever.

The entire process of the acquisition of citizenship is hardly different from joining an automobile club.

After demanding the acquisition of citizenship take a more meaningful and elevated race-based form, Hitler then turned to the only example on the international scene of a praiseworthy order:

There is currently one state in which one can observe at least weak beginnings of a better conception. This is of course not

our exemplary German Republic, but the American Union, in which an effort is being made to consider the dictates of reason to at least some extent. The American Union categorically refuses the immigration of physically unhealthy elements, and simply excludes the immigration of certain races. In these respects America already pays obeisance, at least in tentative first steps, to the characteristic *völkisch* conception of the state.¹¹⁶

American legal scholars have written a great deal about the racism of the 1920s immigration statutes; but they seem not to have taken notice of the startling fact that those statutes were lauded by Hitler himself as the prime, and indeed only, example of *völkisch* citizenship legislation in the 1920s.¹¹⁷

Hitler continued to speak in such terms thereafter, repeating his judgment of American immigration law in 1928: Americans felt the need, he wrote, deploying standard Nazi terminology, to exclude the “foreign body” of “strangers to the blood” of the ruling race; that was the felt need that was expressed in their immigration legislation.¹¹⁸ He made similar declarations in his “Second Book,” the unpublished sequel to *Mein Kampf* that he drafted in 1928.¹¹⁹ The “Second Book” is indeed striking for its depiction of America as a racial model for, and future racial rival of, Europe. Some German racists in the 1920s portrayed the United States as a country gravely endangered by race mixing, all too likely to go into decline unless “the good blood in the Union” could hold off the onslaught of “a chaos of *Völker* made up of Negroes, Jews, southern Europeans, mongrels, yellows, and undefinables from the milk-coffee Lands.”¹²⁰ Not so Hitler. By contrast with these fellow racists, the Hitler of the “Second Book” was notably sanguine about American prospects.¹²¹ Developments in American immigration law, he held, demonstrated that Americans had seen the light:

The capacity of assimilation for the American Union has given out, both with regard to the Chinese as well as with regard to

the Japanese element. People feel this clearly and know it and for that reason they would most prefer to exclude these foreign bodies from immigration. In this way American immigration policies provide confirmation that the previous “melting pot” approach presupposes humans of a certain similar racial basis and immediately fails as soon as fundamentally different types of humans are involved. That the American Union feels itself to be a Nordic-German state and by no means an international *Völker*-porridge is also revealed by the apportionment of immigration quotas among the European *Völker*. Scandinavians, that is to say, Swedes, Norwegians, furthermore Danes, then Englishmen and finally Germans have been accorded the largest contingent. Latins and Slavs receive very little, and the Japanese and Chinese are groups that one would prefer to exclude entirely.¹²²

The happy result of the shift in immigration policies, Hitler concluded, was that America had safeguarded its character as a “Nordic” state; Europe, he warned, could not hope to compete unless it did the same.¹²³ This was the same year in which Hitler was proclaiming his admiration for the American conquest of the West, where the Americans had “gunned down the millions of Redskins to a few hundred thousand”;¹²⁴ this too, he said, offered yet another “Nordic” example that the Europeans would do well to follow. Assessing some of these writings of the 1920s, historian Detlef Junker concludes that for Hitler, America was “the model of a state organized on principles of *Rasse* and *Raum*,” on principles of race and the acquisition of territory for a racially defined *Volk*.¹²⁵ Gassert too holds that Hitler regarded the America of the 1920s, with its unapologetically race-based immigration legislation and its epic “Aryan” colonization of the West, as a “race state” that deserved admiration.¹²⁶

The views of the Führer on the subject of the “race state,” it goes without saying, carried immense weight in Nazi Germany.¹²⁷ Hitler’s discussion of American immigration law in *Mein Kampf* in

particular would be cited whenever Nazi jurists discussed problems of citizenship after the Nazis took the reins in 1933,¹²⁸ and it set the tone that remained dominant in Nazi writings on American law throughout the early thirties.¹²⁹ America was a country that was in some ways weak, and its future as a racist order was perhaps uncertain, but it remained the leading example of a jurisdiction groping its way toward a race law of the kind essential to the creation of a *völkisch* state, most especially through its sage immigration restrictions. As the *National Socialist Monthly* put it in November 1933, echoing *Mein Kampf* and Fritsch's *Handbook of the Jewish Question*, "The United States of the new world have come to understand the monstrous danger of the 'great melting pot of races' over the course of the last decades, and put a check on bastardization through draconian immigration law. . . . To these circles of tribally related Americans we reach out our hand in friendship."¹³⁰ America, as Hitler had written, had taken the tentative first steps; the moment had come for the torch to pass to Nazi Germany, and the hope of a spiritual alliance between Nazi Germany and the white supremacist United States was not to be excluded.

TOWARD THE CITIZENSHIP LAW: NAZI POLITICS IN THE EARLY 1930S

Before turning to the nuts and bolts of Nazi-era investigation of America's immigration and citizenship law, it is important to set the stage by establishing some context about the goals of the Nazi regime after it took power. In particular it is essential to emphasize that extermination of the Jews was not the initial aim of the Nazis. In the early years of the Nazi regime "deportation and annihilation" were as yet "difficult to imagine";¹³¹ the aim that always stood "in the foreground" was to drive Jews to emigrate, whether through violence on the street or through the creation of legal dis-

abilities.¹³² The goals of the early 1930s were nicely formulated by Wilhelm Stuckart, coauthor of the standard commentary on the Nuremberg Laws. Stuckart, later a high SS officer, would be present at the Wannsee Conference that decided on the Final Solution, and was eventually tried as a war criminal.¹³³ But in the early 1930s he spoke not of the "Final Solution" (*Endlösung*), but of the "definitive solution to the Jewish problem" (*endgültige Lösung*):

The two Nuremberg Laws [i.e., the Citizenship Law and the Blood Law] represent the beginning of the definitive solution to the Jewish Problem in Germany. Starting from the recognition that Jewdom involves, not a religious community, but a community of persons related by blood—a community that is worlds apart from the German *Volk*—these laws, and the supplementary ordinances and provisions for their execution, complete the legal separation of Germanism and Jewdom in the most important realms of life. It has been made forever impossible for Jewdom to mix itself [*Vermischung*] with the German *Volk*, or to get mixed up [*Einmischung*] in state policy, economic policy or cultural shaping of Germany. If according to the principles laid down in these Laws the Jews still belong to the mutual protection association of the Reich and remain nationals for the time being, the definitive solution to the Jewish question can nevertheless only consist in the territorial separation of the Jews from the German *Volk*; i.e. the goal of German Jewish policy is the emigration of the Jews out of Germany.¹³⁴

Annihilation came later; in the period of concern for this book, the Nazi policy was coerced emigration.

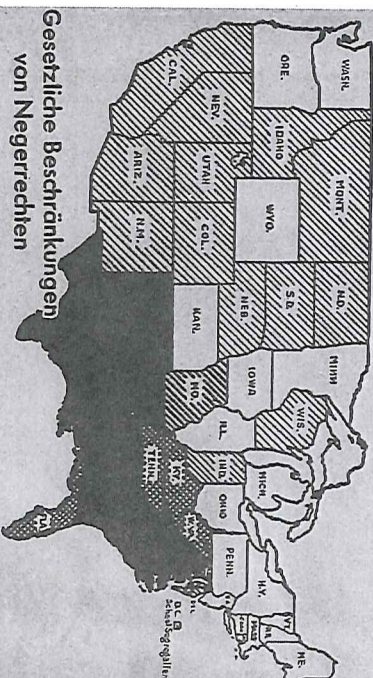
We must bear that fact in mind as we try to understand Nazi citizenship law and its relation to developments in the United States. For a regime whose aim was to drive those of supposedly "foreign

In fact, the topic of black disenfranchisement in the United States seemed of sufficient political interest that it made its way into mass-circulation party publications. For example a cheap party magazine, intended for a broad Nazi readership, the *SA-Führer*, reported on the meaninglessness of black citizenship in the United States.¹⁶² So did a particularly interesting 1936 article, published in *Neues Volk* ("New Volk"), a propaganda newsletter produced by the National Socialist Office on Racial Policy. This striking piece of party race propaganda, which promised to explain "White and Black in America" to the general German population, opened with a handy map of the forty-eight states, showing the precise status of American disenfranchisement and miscegenation law throughout the country under the heading "Statutory Restrictions on Negro Rights." The article then proceeded with a breezy account of black life and history in the United States, accompanied by seven pages of photos. It focused particularly on New York City, New York blacks, it informed its readers, maintained their own culture in Harlem by night, but by day they commuted downtown, to serve as "shoe-shine boys and elevator operators, gleaming like patent leather and with kinky hair like lamb's wool." (Some of the blacks worked as waiters in New York as well, the article reported, but "they are not allowed to speak a word to the white guests, and bring them the menu on a tray, not in their hand.")

Like other Nazi literature, this article, which carried the title “How Race Questions Arise,” warned that the Negro problem represented a grave threat to America. In particular, it noted rising black birth-rates, while its illustrations included reproductions of advertisement for skin-lightening cream and hair-straightening pomade—products that blacks might use to disguise their “gleaming” skin and “lamb’s-wool” hair in order to penetrate white society. Nevertheless, the article emphasized that Americans were taking healthy measures to combat the race danger that they faced, just as Nazis

Wie Kaufenfragen entstehen

Weiß und Schwarz in Amerila



Gesetzliche Beschränkungen von Negerrechten

[illegible][illegible]

Figure 3. "How Race Questions Arise: A Map of the 48 States Showing 'Statutory Restrictions on Negro Rights.'" *Source: Neues Volk. Blätter des Rassenpolitischen Amtes der NSDAP* 4, no. 3 (1936): 9. Courtesy of the University of Michigan Library.



Figure 4. Images from the lives of American Blacks: Clockwise from top: "Shoeshine Boys in America Are Exclusively Negroes;" "The Black World Metropolis: The Neighborhood of Harlem in the Northern New York Is Populated Only by Coloreds;" "Mongrels Too Are Reckoned among the Coloreds." Source: *Neues Volk. Blätter des Rassenpolitischen Amtes der NSDAP* 4, no. 3 (1936): 13. Courtesy of the University of Michigan Library.



Figure 5. Images from the lives of American Blacks. At top: "Young Negro boys in Harlem. The Negroes are multiplying significantly more strongly than the white population of the United States. Their constantly growing numbers are a source of great concern to American statesmen." Source: *Neues Volk. Blätter des Rassenpolitischen Amtes der NSDAP* 4, no. 3 (1936): 14. Courtesy of the University of Michigan Library.



Figure 6. "Mixed marriages between White and Black are forbidden in most states of the Union. The former Negro boxer and world champion Jack Johnson cannot return to America, because he married a white woman in Paris." *Source: Neues Volk. Blätter des Rassenpolitischen Amtes der NSDAP* 4, no. 3 (1936): 15. Courtesy of the University of Michigan Library.

were doing, even if "a certain part" of the American press was hostile to National Socialism: "The United States too [just like Nazi Germany] has racist politics and policies. What is lynch justice, if not the natural resistance of the *Voolk* to an alien race that is attempting to gain the upper hand? Most states of the Union have special laws directed against the Negroes, which limit their voting rights, freedom of movement, and career possibilities. For a while, there was a plan to create a Negro reservation in the Southern states, similar to the Indian reservations."¹⁶³ There is no way of guessing where the authors of the article picked up the odd notion that America had planned a "Negro reservation." South Africa had such reservations, as Leers observed;¹⁶⁴ but the United States did not. In any case, the article shows that in 1936, as the Nuremberg Laws took hold, Nazi Party officials were making an effort to publicize the American method of creating de facto second-class citizenship to average Germans on the street, at a time when Germany too was subjecting its Jews to "racist politics and policy." This was propaganda, but it was propaganda directed at the home population, not at foreign critics.¹⁶⁵

Meanwhile the technical legal literature continued to explicate the law of American second-class citizenship, just as the German literature had done in earlier decades. The United States, a 1933 book reported, had invented for its subject populations a novel, intermediate category between citizenship and statelessness, an unprecedented form of legal "limbo." This novel category covered not only blacks, but also the subject populations of Filipinos and Puerto Ricans.¹⁶⁶ Krieger, in a much-cited 1934 article that (as we shall see) would be influential on the internal deliberations over the drafting of the Blood Law, pointed out that not only Blacks, but also Chinese were deprived of meaningful voting rights in the United States.¹⁶⁷ *Deutsche Justiz*, a leading party organ on legal affairs, highlighted the same fact.¹⁶⁸ ~~The Negroes are not equal~~

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 most *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.¹³

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.¹⁴

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 particu-

lar, 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.¹⁵ 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";¹⁶ the American Supreme Court entertained briefs from southern states whose arguments were indistinguishable from those of the Nazis;¹⁷ 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.'"¹⁸ (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.¹⁹ 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 exploit.²⁰ The same was true of the published Nazi literature, which identified many instances of customary or socially enforced prohibitions, but few statutes outside the United States.²¹

It is especially significant that the United States offered examples of an exceptional 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 punishment, sometimes harsh. 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.²² Even a thoroughly race-obsessed country like Australia in the era of the “White Australia” policy did not follow America’s menacing lead. A principal Australian law of 1910, for example, simply decreed that “[i]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.”²³ The statute did in principle allow for prosecution, but it did not suggest that violators would face severe punishment.²⁴ 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.*²⁵

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 Nazi literature highlighted in the early 1930s was found in South Africa, which penalized extramarital sex between the races, but not marriage.²⁶ 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.²⁷ 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,"²⁸ 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 Nazis 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.²⁹ 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

Judeneigent, "reporter on the Jews" for the Ministry of the Interior, and was one of the chief draftsmen of the Nuremberg Laws, and been the target of considerable, and withering, criticism, since it is clear that his account of events was self-serving. Nevertheless even Lösenner's harshest critics call him, jarring though the phrase may sound, an authentically "moderate" Nazi anti-Semite;⁶¹ 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 1945.⁶²

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 Lösenner 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—Lösenner 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 Lösenner and other jurists fought to limit the definition of "Jew," shielding where possible persons of only half-Jewish descent.⁶³ 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.⁶⁴ 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 Lösenner 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 1691.⁶⁵ 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.⁶⁶ This was another area in which America was a recognized global leader, with prohibitions both old and new. American states continued to introduce anti-miscegenation statutes in the early twentieth century; this was an active area of American racist lawmaking.⁶⁷

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 historian Archibald Cary Coolidge, and more; and the colonial archives include detailed reports on US law.⁶⁸ 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."⁶⁹

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.⁷⁰ 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.⁷¹ This report, preserved in the archives in two separate versions, was first published in 1989.⁷² The meeting it transcribed brought together seventeen lawyers and officials under the chairmanship of Justice Minister Gürtner. The attendees included Lösenner, 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.⁷³ 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.⁷⁴ 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 a campaign of public "education and enlightenment" might gradually succeed in ending the evil of sexual mixing without formal criminalization. If there was to be criminalization at all, Gürtner insisted, it must be done on the basis of the only suitable juristic model, the criminalization of bigamy;⁷⁵ that meant that there were only to be prosecutions in cases where a Jew had engaged in "malicious deception" of an "Aryan" partner.⁷⁶ Other lawyers present pushed an even milder line: Eduard Kohlrusch, a prominent professor of criminal law, argued that criminalization of any kind would be actively counterproductive.⁷⁷ Lösenner maintained, in line with traditional juristic teachings, that the very concept of a "Jew" was so elusive that the radical program was impracticable.⁷⁸

law regime should be race-based, simply declaring the separation of the races, or racism, 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. 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.¹⁰² 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.¹⁰³ 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."¹⁰⁴ 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 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 Gutterer, 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 Lösenet. 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.¹⁰⁵ Yet—so Lösenet 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."¹⁰⁶ That failure constituted an obstacle for criminalization: it was intolerable, Lösenet declared, to allow every individual judge to make decisions on the basis of mere *Gefühlsantisemitismus*, of vague sentiments of Jew hatred.¹⁰⁷ The indispensable prerequisite for proper criminalization was a clearly delineated and scientifically acceptable definition of who counted as a racial Jew.¹⁰⁸ In any case judges, Lösenet added, must work within the limits of the presumption of innocence.¹⁰⁹ 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 "primitive" and "political" response¹¹⁰—and American law was Freisler's model of the "primitive" 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 this 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 politically" added another radical who had worked on the Prussian Memorandum.]¹¹¹ That is perhaps [the case] only with regard to the Japanese, but in other respects 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 foreign political influence that is possibly 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. . . .¹¹²

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 *Volks* blood group. Why have these states done this? I cannot believe that they have done it just 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.¹¹³

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.¹¹⁴

transcript,¹²⁵ 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 1933–34.¹²⁶ 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."¹²⁷ 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.¹²⁸ It was during his time in Düsseldorf that Krieger's work came to the attention of Gürner'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.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³ 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 1942.¹³⁴ 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 his 1821 declaration of the impossibility of racial co-existence: "[i]t is certain that the two races, equally free, cannot live in the same government."¹³⁵ *Race Law in the United States* added an account of the Civil War era that included an exact and lengthy documentation of Lincoln's pre-1863 declarations to the effect that the only real hope for America was the resettlement of the black population elsewhere.¹³⁶ 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 reverently: he maintained that America could have become a 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ 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 Güttner 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.¹⁴⁰ 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 ignorance of the descent of individuals.¹⁴¹

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 "artificial line-drawing," 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 by statute, partly by the courts." 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.¹⁴² 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 *counts* 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.¹⁴³ 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.¹⁴⁴

Here again the memo that Görtner 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 Law 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 everything that bears 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.¹⁴⁵

Kier then printed a two-page alphabetical table with exact description and citation of the anti-miscegenation legislation of all thirty American states.¹⁴⁶ That table corresponds to the description of American law given by Görtner 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 commentary on the Blood Law.¹⁴⁷ 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.¹⁴⁸

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, buses, 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.¹⁴⁹

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 *Vernichtungsarchiv*.¹⁵⁰

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,¹⁵¹ 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.

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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.¹⁵⁴

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.”¹⁵⁵ 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.¹⁵⁶

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),¹⁵⁷ 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.¹⁵⁸ 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."¹⁵⁹ 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."¹⁶⁰ 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."¹⁶¹

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 clas-

sifications 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.¹⁶² 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)."¹⁶³

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.¹⁶⁴ It was that counterproposal that ultimately made its way into the crucial implementation ordinance of the Nuremberg Laws.¹⁶⁵

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spotted in their garment district hotel greeting each other with "Heil Hitler!" and giving the Nazi salute, Jewish fur merchants organized a noisy demonstration against them that lasted a full six hours and required a substantial police presence.⁸

Fischer, the leader of the group, responded to this disturbance with memorable indignation. Jews, huffed Fischer, who was to be hanged for his war crimes in 1947, "were treated in a kindly and dignified fashion" in Nazi Germany:

We came on a study trip to gain first-hand impressions of America, and our first impression is a bad one.... The impression of the City of New York was tremendous, but the other impression was bad. I realize that decent-minded Americans do not approve of this demonstration, and are very friendly and hospitable. What I saw of the demonstration was exclusively Jewish.

Germany treats her guests well, and even Jewish guests are welcome. This Summer there were several international conferences in Germany with Jewish participants, and they were treated in a kindly and dignified fashion.⁹

Once he was done venting his spleen, though, Fischer emphasized that "the impression of New York City itself [is] powerful and overwhelming," and he added an expression of his "especial satisfaction" at the warm reception that the City Bar Association had given him and his fellow Nazis.¹⁰

Sadly it does not seem possible to learn more about how Fischer and his group fared on their study trip (though the curious will find online a film of what is probably Fischer's hanging).¹¹ But as we have seen, we can know a great deal about Nazi interest in American law during their previous "year of work opposing an outdated type of jurist." There was plenty about America that Nazi lawyers of the early 1930s rejected—especially about the liberal America

of Louis Brodsky, the Jewish fur merchants of New York, and those who agreed with them. But there was also plenty that Nazis found to like. Fischer was not the first Nazi lawyer to distinguish between Jews and "decent-minded Americans"; Hitler and Göring had done the same at the Nuremberg Rally eleven days earlier, and Fischer's delegation was not the first Nazi group to study America, nor the first to take away a powerful impression.

From *Mein Kampf* onward, Nazi jurists and policy makers took a sustained interest in American race law. Especially during the early 1930s, the era of the making of the Nuremberg Laws, Nazis engaged in detailed study of American immigration law, American second-class citizenship law, and American anti-miscegenation and mongrelization law. Some of them saw attractions in the system of Jim Crow segregation. In particular, the Prussian Memorandum, the 1933 text that laid out the basic statement of the radical Nazi legal program, specifically invoked Jim Crow—though it proposed a more "limited" version for Nazi Germany. Certain aspects of American race law struck Nazi observers as appealing: in particular, the exceptional American practice of harshly criminalizing interracial marriage lay in the background of the Blood Law. Other aspects, like the one-drop rule, struck them as excessively severe. Some of the more vicious Nazis, notably Roland Freisler, championed the lessons to be learned from American legislation and jurisprudence, while moderates like Justice Minister Görtner worked to downplay the usefulness of American precedents. Nobody argued in favor of a wholesale importation of American practices; everybody was aware that America had liberal traditions that were at war with its racism, but many expressed their approval of what the *National Socialist Handbook of Law and Legislation* called America's "fundamental recognition" of the imperative of creating a legally enforced race order—though Nazi authors always added that the task of building a fully realized race state remained for National Socialist Germany to complete.

What shall we say about all of this?

It is important to begin by underlining what the history in this book does not tell us: It does not explain the genesis of Nazism. No sensible person would conclude that it was American inspiration that led causally to the crimes of the Nazis. It is lunacy to claim, as extremists on both the left and right have been known to do, that the United States is the source of all evil in the world, and it would be lunacy to hold the United States responsible for what happened in Germany and its dominions from 1933 to 1945. Nazism happened for countless reasons, most of them indigenous to Germany; the responsibility for Nazi crimes rests with Germans and their direct collaborators. In the end the United States certainly played its part in the defeat of Hitler, and it has certainly been a force for good in the world often enough.

What the history presented in this book demands that we confront are questions not about the genesis of Nazism, but about the character of America. The Nazis, let us all agree, would have committed monstrous crimes regardless of how intriguing and attractive they found American race law. But how did it come to pass that America produced law that seemed intriguing and attractive to Nazis?

In some ways, that question is not hard to answer. We all know that there was racism in the United States, and that it ran deep. It is not news that America had ugly race law in the early twentieth century. We all already knew that there were parallels between Jim Crow America and Nazi Germany; after all, they are obviously there.¹² We already knew about the Nazi interest in American eugenics. Historians have already documented Nazi admiration for American westward expansion. If the Nazi vogue for Franklin Roosevelt is not well known, it has nevertheless been identified already. If we were not aware of the depth of Nazi interest in American race law during the making of the Nuremberg Laws, we should not be entirely astonished by it. The image of America as seen through

Nazi eyes in the early 1930s is not the image we cherish, but it is hardly unrecognizable.

Nevertheless, seeing America through Nazi eyes does tell us things we did not know, or had not fully reckoned with—things about the nature and dimensions of American racism, and things about the place of America in the larger world history of racism. Not least, seeing America through Nazi eyes tells us some uncomfortable things about the character of American legal culture.

AMERICA'S PLACE IN THE GLOBAL HISTORY OF RACISM

First of all, seeing America through Nazi eyes brings home a truth that wise scholars have recognized, but that our general culture has so far been slow to grasp. The history of American racism is not just a history of the Jim Crow South.¹³ We must overcome the tendency to equate race law in America with the law of segregation; we must look beyond the "mirror images" of Nazi Germany and the southern states. If we think of the history of race in America as the history of *Plessy v. Ferguson* and *Brown v. Board of Education*, of segregation and the heroics of the civil rights movement, we risk blinding ourselves to an immense expanse of what has taken place. European observers of the 1930s all recognized that black-white conflict was only one aspect of the history of American racism.¹⁴ Indeed, Nazis almost never mentioned the American treatment of blacks without also mentioning the American treatment of other groups, in particular Asians and Native Americans: To them what "Nordic" America faced was not just the "Negro problem," but the problems of "Mongols," of Indians, of Filipinos, and of innumerable other non-"Nordic" groups trying to "push their way in."¹⁵ By the same token, America's influential stature in twentieth-century world racism had to do with wider American

campaigns and other American forms of law than just segregation in the South. In particular, it had to do with national and nationwide programs of race-based immigration, race-based second-class citizenship, and race-based anti-miscegenation law. Those were the aspects of American law that appealed most to Nazi Germany, not Jim Crow segregation in the narrow sense.

And as we have seen the appeal of those aspects of American law for the Nazis was strong. That is the unpleasant fact of the matter, and it forces us to confront an unpleasant historical datum about the place of America in the world history of racism: In the early twentieth century the United States was not just a country with racism. It was *the* leading racist jurisdiction—so much so that even Nazi Germany looked to America for inspiration. What David Fitzgerald and David Cook-Martin conclude about immigration—that “[t]he United States was the leader in developing explicitly racist policies of nationality and immigration”¹⁶—is true of the other areas of the law this book has surveyed as well. In the early twentieth century the United States, with its deeply rooted white supremacy and its vibrant and innovative legal culture, was the country at the forefront of the creation of racist law. That is how the Nazis saw matters, and they were not the only ones. The same was true in Brazil,¹⁷ just as it was true in Australia and South Africa,¹⁸ just as it was true of the German colonial administrators who went hunting for a model for the making of anti-miscegenation law.¹⁹ And while the Nazis liked to mention South Africa as a fellow traveler, in practice they found very little South African law to cite in the early 1930s.²⁰ Their overwhelming interest was in the “classic example,” the United States of America.

To be sure, to say that the United States was the leader in racist law-making is not to say that it was the only country that can be accused of racism. It most certainly was not. Europe had its own centuries-old history of persecution, which manifestly prefigured much of

Nazi policy: the Nazis of the early 1930s were not the first Europeans to seek to expel their Jews, as they were well aware.²¹ Moreover there was race law of some kind to be found throughout the world of European colonial and imperial expansion. Iberia and Latin America had a tradition to which some historians trace the roots of modern race law, a tradition as old as the sixteenth century.²² By the end of the nineteenth century there was explicitly race-based exclusionary immigration legislation in Brazil,²³ and a figure like Johann von Leers, Nazi author of *Blood and Race: A Tour through the History of Peoples*, was eager to argue that some measure of racist law could be found throughout the centuries.²⁴

Most especially there was plenty of racism among the other daughter nations of British imperialism. We must pay attention when a leading Nazi jurist like Otto Koellreutter speaks of the “interesting results” to be found in “the United States and the British Dominions.” Passages like that one suggest a haunting question about the Anglo-American, common-law world. The backdrop to Nazism is to be sought partly in British traditions: it is to be sought among the democracies of English-speaking “free white men” not only in America, but also in Australia, in South Africa, and to a lesser extent elsewhere on the British globe. These were all places where yeoman settlers claimed rights of egalitarian self-government at the expense of disfavored, and sometimes warred-upon, minorities,²⁵ and the Nazis looked with interest on all of them.

But within that world America was the leader during the age of the rise of Hitler. That is the truth, and we cannot squirm away from it. It was American immigration, citizenship, and anti-miscegenation law that the Nazis cited over and over again. It was American Jim Crow that was highlighted by the Prussian Memorandum. It was a memorandum on American law that the Justice Ministry prepared for discussion at the planning meeting of June 5, 1934. It was American law to which the radicals at that meeting turned. It was the American

criminalization of racially mixed marriage that was the forerunner of the Blood Law. It was the American conquest of the West that Nazis invoked so often while engaged in the murderous campaigns of the 1940s, just as Hitler was already invoking it in the 1920s.²⁶ Nazism was certainly not a product made in America and imported into Germany, but it remains the case that when the Nazis set out to build a racist order, they turned to America first to see what sort of models they could find.



Of course that sounds extremely strange today, and even perverse. We think of America as the home of liberty and equality, and as a stalwart in the herculean allied anti-Nazi struggles of World War II. More broadly we think of British common-law traditions as a prime historical source of the modern culture of rights, perhaps even as *the* prime historical source. But some of the strangeness dissipates once we understand the claims of Nazism. Nazism too was a movement for equality, if not for liberty: as I have argued elsewhere, the promise of the "National Revolution" of Nazism to the general German population was a promise of leveling up—a promise that all racial Germans as the Nazis defined them would count as high-status members of German society. Society would no longer be divided into noble Germans and commoner Germans, master Germans and servant Germans. Now every German would count as a coequal member of the ruling class by simple virtue of membership in the Master Race.²⁷ The Nazi "National Revolution" was in that sense a thoroughly egalitarian social revolution.

The resemblances to the Anglophone, and especially American, world were much less remote than we would suppose today. American white supremacy too was founded in a "resolute egalitarianism among white men";²⁸ it was a movement that affirmed

the equality of every member of the favored race, while forcefully rejecting the status inequalities of the aristocratic past. Such was the nature of jacksonian democracy in particular. In that sense the connection between American egalitarianism and American racism ran deep. When Hitler praised America in *Mein Kampf* it was partly because he believed that America permitted exactly the sort of leveling he believed Germany needed: America, unlike Europe, was producing a "wealth of inventions" because the Americans, unlike the Europeans, gave "talented people from the lowest social orders" the chance to make something of themselves.²⁹ Hitler too promised to transform German society by bringing "people from the lowest social orders" up in the world. Of course this egalitarian promise could be realized only at the expense of non-"Aryans," but again this was nothing different from what was to be found in vast stretches of the Anglophone world. In this connection it is worth observing that the German words for "master," *Herr*, and "supremacy," *Vorherrschaft* or *Oberherrschaft*, are close cognates: the German "Master Race" is the near linguistic cousin of the English "white supremacy," and German authors of the Nazi period understood it that way.

So the Nazi interest in America in the 1930s is not quite as strange as it seems today. It is also of course essential to bear in mind the geopolitics of the age. The Nazis looked out on a globe that had been largely mastered by English-speaking countries. The British had aimed for world domination long before Hitler did.³⁰ Moreover Anglo-American leaders and intellectuals themselves, most prominent among them Teddy Roosevelt and James Bryce, explained and defended their control of so much of the earth with frankly racist arguments; these were men who believed, in the words of TR, in keeping "the temperate zones of the new and the newest worlds a heritage for the white people."³¹ And among the "Nordic" powers, America was the natural geopolitical model for Nazi Germany, as scholars have

rightly noted. It was the "Anglo-Saxon" United States that had built an imposing continental empire, and that therefore stood out as an expansionist model for the Reich that was determined to conquer to its east. It was the "Anglo-Saxon" United States that had invented an international law doctrine that justified its place as a hegemon in its hemisphere, in the form of the Monroe Doctrine and its more assertive Roosevelt Corollary of 1904.³² To be sure, interwar German racists often speculated that the United States would succumb to race mixing and therefore decline—though Adolf Hitler himself thought differently, at least until the outbreak of World War II.³³ But even if some of them thought America might falter, that was no reason for them to refuse to learn the lessons of American racism. The possibility of American geopolitical decline only brought home the truth that Nazi Germany would have to apply American policies with a rigor that the Americans themselves had failed to sustain.



But for all the attractions of "Nordic" America in Nazi Germany, is it not obvious that there remained significant, and ultimately profound, differences?

Of course there were, as the Nazis themselves emphasized. First and foremost, American race law coexisted with a constitutional tradition that had a strong grip on American legal culture, especially in the form of the Reconstruction Amendments. To be sure, that grip was not strong enough to prevent the United States from pioneering in the creation of racist institutions. American legal history of the decades after 1877 is a largely unrelieved record of shameful evasion of the principle of equality that the Reconstruction Amendments were supposed to enshrine³⁴—the principle, as the Nazis contemptuously put it, "that everyone who bears a human countenance is equal." Nevertheless, the Reconstruction Amend-

ments were there, and American lawyers always had to reckon with them, if only in devising evasions. As Desmond King and Rogers Smith have written, there was always a tension between two racial orders in America, a "white supremacist order" and an "egalitarian transformative order."³⁵ There was certainly nothing comparable in Nazi Germany, and Nazi observers looked on the American constitutional tradition with a mixture of bemusement and disdain.

Nor was it only the constitutional tradition that set America apart from Nazi Germany. There was also, another, arguably even more important, difference as well: Nazi racists made a very different, and far more merciless, use of state power than American racists did. On this subject it is useful to turn to Gunnar Myrdal, the Swedish social scientist whose 1944 book *An American Dilemma: The Negro Problem and Modern Democracy* did so much to shake up American race relations and set the stage for the civil rights movement after World War II. Here is how Myrdal answered the question, commonplace in the 1930s and 1940s, of whether the Jim Crow South should be characterized as "fascist":

IS THE SOUTH FASCIST?

On account of the one-party system and the precarious state of civil liberties, the South is sometimes referred to as fascist. This is, however, wrong.... The South entirely lacks the centralized organization of a fascist state. Southern politics is, on the contrary, decentralized and often even chaotic. The Democratic party is the very opposite of a "state party" in a modern fascist sense. It has no conscious political ideology, no tight regional or state organization and no centralized and efficient bureaucracy. The "regimentation" which keeps the South politically solid is not an organization for anything—