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**The American Influence on Nazi Race Law**

James Q. Whitman

Yale Law School

**Introduction**

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

The meeting was an important one, and a stenographer was present to take down a verbatim transcript, to be preserved by the ever-diligent Nazi bureaucracy as a record of a crucial moment in the creation of the new race regime. That transcript reveals the startling fact that is my point of departure in this study: The meeting involved detailed and lengthy discussions of the law of the United States of America. In its very opening minutes, Justice Minister Gürtner presented a memo on American race law, which had been carefully prepared by the officials of the Ministry for purposes of the gathering; and the participants returned repeatedly to the American models for racist legislation in the course of their discussions. It is particularly startling to discover that Freisler, the most radical Nazi present, was an especially ardent champion of the lessons that American approaches held for Germany. Nor, as we shall see, is this transcript the only record of Nazi engagement with American race law. In the late 1920s and early 1930s many Nazis, including not least Hitler himself, took a serious interest in the racist legislation of the United States. Indeed in Mein Kampf Hitler praised America as nothing less than "the one state" that had made progress toward the creation of a healthy racist order of the kind the Nuremberg Laws were intended to establish.

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

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The Nazi persecution of the Jews and others, culminating in the Holocaust, counts for all of us as the supremely horrible crime of the twentieth century, and the notion that Nazi policy-makers might have been in some way inspired by American models may seem a bit too awful to contemplate. It may also seem implausible: We all think of America, whatever its undeniable faults, as the home of liberty and democracy--as a country that led the battle against Fascism and Nazism that was finally won in 1945. Of course we also all know that America was home to its own racism in the era of the Nazi ascent to power, particularly in the Jim Crow South. In the 1930s Nazi Germany and the American South had the look, in the words of two Southern historians, of a "mirror image"[[1]](#footnote-1): These were two unapologetically racist regimes, unmatched in their pitilessness. In the early 1930s the Jews of Germany were hounded, beaten and sometimes murdered, by mobs and by the state alike. In the same years the Blacks of the American South were hounded, beaten and sometimes murdered as well.

Nevertheless the idea that American law might have exerted some sort of influence on the Nazi program of persecution and oppression is hard to digest. Whatever similarities there may have been among the racist regimes of the 1930s, however foul the history of American racism may be, we are accustomed to thinking of Nazism as an ultimately unparalleled horror. The crimes of the Nazis are the *nefandum*, the unspeakable descent into what we often call "radical evil." No one wants to imagine that America served in any significant way as an example for the nightmarish work of the Nazis.

And virtually no one has suggested it, with the notable exception of a shrewd paragraph in Mark Mazower's 2008 book Hitler's Empire.[[2]](#footnote-2) Other scholars have insisted on what most of us must think of as the obvious truth: There was *of course* no American influence on Nazi race law, or at least no meaningful influence. The person who has given the question the most sustained attention is a German lawyer named Andreas Rethmeier, who wrote 1995 dissertation on the Nuremberg Laws that included an examination of some of the many Nazi references to American law.[[3]](#footnote-3) After reviewing his data Rethmeier arrived at a disconcerting verdict: He concluded that America was, for the Nazis, the "classic example" of a country with racist legislation.[[4]](#footnote-4) Nevertheless, he insisted forcefully that the idea of American influence on the Nuremberg Laws was "not just off-base, but plain wrong." After all, he argued, the Americans classified Jews as "Caucasian," a gross error from the Nazi point of view.

Others have come to similar conclusions. "[T]he few and fleeting references by Nazi polemicists and 'jurists' to Jim Crow laws," writes the American legal historian Richard Bernstein, for example, "were as far as I can tell simply attempts to cite vaguely relevant precedents for home-grown statutes and policies to deflect criticism, not actual sources of intellectual influence"[[5]](#footnote-5) "[T]he segregation law of the states," declares similarly Marcus Hanke of the University of Salzburg, "has not been of any important influence."[[6]](#footnote-6) Most recently, Jens-Uwe Guettel has written, in a 2012 book, of what he calls the “astonishing insignificance of American segregation laws” for Nazi policies. The Nazis, Guettel insists, regarded America as hopelessly mired in an outdated liberal outlook and naively oblivious to the centrality of the dangers posed by the Jews.[[7]](#footnote-7) There was nothing that deserves the name of influence. All of these scholars are perfectly aware that the Nazis had things to say about American law. But their reassuring consensus is that the Nazis said them merely in order to claim a specious parallel for their racist programs in the face of international condemnation.[[8]](#footnote-8) The Nazis were interested in taunting America, not learning from it.

The sources, read soberly, paint a different picture. Awful it may be to contemplate; but the reality is that the Nazis took a sustained, significant and sometimes even eager interest in the American model of race law. They most certainly *were* interested in learning from America. Their references to American law were neither few nor fleeting, and their discussions took place in policy-making contexts that had nothing to do with producing international propaganda on behalf of the regime. Nor, importantly, was it only, or even primarily, the Jim Crow South that attracted Nazi lawyers. In the early 1930s the Nazis drew on a range of American examples, both federal and state. Their America was not just the South; it was a racist America writ much larger.

Be it said immediately that there was certainly never anything remotely like unmixed admiration for America among the Nazis, who aggressively rejected the liberal and democratic commitments of American government. Nevertheless Nazi lawyers regarded the United States, not without reason, as the innovative world leader in the creation of racist law; and while they saw much to deplore in America, they also saw much to admire and emulate. It is even possible, indeed likely, that the Nuremberg Laws themselves reflect direct American influence.

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The proposition that the Nazis drew inspiration from American race law is sure to seem distressing; no one wants the taint of an association with Nazism. But in some ways it should come as no surprise to attentive readers of Nazi history. In recent years historians have published quite a bit of evidence of Nazi interest in, and admiration for, various American practices and programs, especially in the early phases of the regime. By the end of the 1930s, America and Germany would settle into their familiar roles as unconditional ideological enemies; but at the beginning of the decade it was not yet so. Eugenics is the prime example. Stefan Kühl, in his 1994 book The Nazi Connection: Eugenics, American Racism and German National Socialism, showed that there was active back-and-forth traffic between American and Nazi eugenicists until the late 1930s.[[9]](#footnote-9) Meanwhile, German historians have demonstrated that Franklin Roosevelt received quite favorable treatment in the Nazi press until at least 1937, lauded as a man who had seized "dictatorial powers" and embarked upon "bold experiments" in the spirit of the Führer.[[10]](#footnote-10) Similar things were said more broadly about what was sometimes labeled in the 1930s "the fascist New Deal."[[11]](#footnote-11) (For that matter, Roosevelt, though he was certainly troubled by the persecution of the German Jews and had harsh words for "dictators," cautiously refrained from singling out Hitler until 1937 or even 1939.[[12]](#footnote-12))

Even once World War II began, the luster of the United States did not entirely fade. It is well known that Carl Schmitt, the sometime Nazi legal philosopher, invoked the American Monroe Doctrine as authority for his own *Grossraum* theory, concocted during early years of the war.[[13]](#footnote-13) Most disturbingly, the American expansion into the West captured the imagination of Nazi leaders as they embarked on their expansion into what Timothy Snyder calls the "bloodlands" of Eastern Europe.[[14]](#footnote-14) Nazis, Hitler among them, made repeated reference to the American conquest of the West when speaking of their own murderous conquests in the East.[[15]](#footnote-15) In their minds their campaign to make places like Ukraine safe for "Aryan" settlers was akin to the American campaign to make the West safe for the White Man, and the Jews were, like the American Indians, dangerous tribespeople who had to be dealt with by the sword.

It is part and parcel of this history that in the process of the making of the Nuremberg Laws in the early 1930s the Nazis took a deep interest in the lessons they could learn from America race law as well. In fact the story of the American influence on Nazi race law is a major chapter in the history of modern racism--and a chapter that cries out to be written as we continue the struggle with troubled race relations in our country.

Scholars have failed to write it for two reasons: they been looking in the wrong place, and have been employing the wrong interpretive tools. First and foremost, they have been looking in the wrong place. Scholars like Guettel and Hanke have addressed their question in unmistakably American terms. What Americans ask is whether "Jim Crow" had any influence on the Nazis; and by "Jim Crow" they mean segregation as it was practiced in the American South and fought over in the American Civil Rights era from the early 1950s into the mid-1960s--segregation in education, public transportation, housing and the like. Looking for an influence of American segregation law on the Nazis, Guettel and Hanke conclude that there was little or none. Now, as we shall see, that conclusion is too hasty. The Nazis *did* know, and did care, about American segregation; and it is clear that some of them *were* intrigued by the possibility of bringing Jim Crow to Germany.[[16]](#footnote-16) But the principal difficulty with the conclusions of Guettel and Hanke is that they are answering the wrong question. Segregation is not what counts most.

Yes it is true that segregation in the style of the American South did not matter all that much to the Nazi regime--but that is for the simple reason that segregation was not all that central to the Nazi program. The Nuremberg Laws said nothing about segregation. Their concern, and the overwhelming concern of the Nazi regime of the early 1930s, lay in two other domains: first, citizenship; and second, miscegenation. The Nazis were committed to the proposition that "every State has the right to maintain its population pure and unmixed,"[[17]](#footnote-17) safe from racial pollution. To that end they were determined to establish a citizenship regime that would be firmly founded on racial categories. They were further determined to prevent mixed marriages between Jews and "Aryans," and to criminalize extra-marital sex between members of the two communities.[[18]](#footnote-18)

In both respects they found, and welcomed, precedent and authority in American law, and by no means just in the law of the South. In the 1930s the United States, as the Nazis frequently noted, stood at the forefront of race-based immigration and naturalization law, in the shape of the Emergency Quota Act of 1921 and the Immigration Act of 1924, which conditioned entry into the United States on race-based tables of "national origins." It was America's race-based immigration law that Hitler praised in Mein Kampf, in a passage that has been oddly neglected by American legal scholars; and leading Nazi legal thinkers did the same after him.[[19]](#footnote-19) The United States also stood at the forefront as a beacon of anti-miscegenation law, with thirty different state regimes--many of them outside the South, and all of them (as we shall see) carefully studied and catalogued by Nazi lawyers. There were no other models for miscegenation legislation that the Nazis could find in the world, a fact that Justice Minister Gürtner highlighted at the June 5, 1934 meeting with which I began.[[20]](#footnote-20) When it came to both immigration and miscegenation, America was indeed "the classic example" of a country with highly developed, and harsh, race law, and Nazi lawyers made repeated reference to American models and precedents in the drafting process that led up to the Nuremberg Laws and continued in their subsequent interpretation and application. The tale is by no means one of "astonishing insignificance."

The scholars who dismiss the possibility of American influence on Nazi lawmaking have also used the wrong interpretive tools in making their case. Our literature has taken a crass interpretive tack: It has assumed that we can only speak of "influence" where we find direct and unmodified, even verbatim, imitation. That is the assumption behind Rethmeier's confident assertion that American race law could not have influenced the Nazis, since American law did not specifically target Jews. We find the same assumption in Hanke: Nazi law was simply different, Hanke declares, because the German laws of the early 1930s were "but one step on the stair to the gas chambers."[[21]](#footnote-21) Unlike American segregation laws, which simply applied the principle of "separate but equal," German laws were part of a program of extermination. Now part of the problem with this argument, which Hanke is by no means alone in offering, is that its historical premise is false: It is simply not the case that the drafters of the Nuremberg laws were already aiming at annihilation of the Jews in 1935. The concern of early Nazi policy was to drive the Jewish population into exile, or at the very least to marginalize it within the borders of the Reich, and there were serious conflicts among Nazi policy-makers about how to achieve even that goal.

But in any case, it is a major interpretive fallacy on the part of all these scholars to suppose that we cannot speak of "influence" unless Nazi laws were perfectly congruent with American ones. Influence in comparative law is rarely just about literal imitation. Influence is a complex business of translation, creative adaptation, selective borrowing, and invocation of authority. All borrowers engage in bricolage and retrofitting; that is as true of the Nazis as it is of any other regime. All borrowers start from foreign models and then reshape them to meet their own circumstances; that is true of vicious racist borrowers just as it is true of everyone else.

Influence does not just come through verbatim borrowing. It comes through inspiration and example, and inspiration and example was what America had to offer Nazi lawyers in the 1930s.

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None of this is entirely easy to talk about. There is more than one reason why it is hard to look coolly on the question of whether the work of the Nazis was influenced by, or even paralleled by, what went on in other Western regimes--just as it is hard to admit the continuities between Nazism and the post-War European orders that replaced it. No one wants to be perceived as relativizing Nazi crimes. Conversely no one wants their country to be accused of any part in the responsibility for those crimes. On the deepest level it is perhaps the case that we feel a need to identify a true *nefandum*, an abyss of unexampled modern horror against which we can define ourselves, a wholly *sui generis* "radical evil"--a sort of dark star to steer by lest we lose our moral bearings. But of course history does not make it that easy. Nazism was not simply a nightmarish parenthesis in history that bore no relationship to what came before and after; nor was it a completely unexampled racist horror. The Nazis were not simply demons who shattered what was good and just within the Western tradition, until they were put down by force of arms and the authentic humane and progressive values of Europe were restored. There were traditions of Western government within which they worked. There *were* continuities between Nazism and what came before and after. There *were* examples and inspirations on which the Nazis drew, and American race law was among them.

That is not to suggest that America was a Nazi country in the 1930s. Of course it was not, monstrous as the law of the early and mid-twentieth century was. Of course the racist strains in American law coexisted and competed with some glorious humane and egalitarian strains. Of course thoughtful Americans reviled Nazism--though there were certainly some who fell for Hitler; the most famous of the lawyers among them was none other than Roscoe Pound, icon of advanced American legal thought, Dean of the Harvard Law School, and a man who made no secret of his liking for Nazi Germany in the 1930s.[[22]](#footnote-22) Nazi lawyers for their part saw plenty of things to despise about America. The point is not that the American and Nazi race regimes were the same, but that the Nazis found examples and precedents in the American legal race order that they valued highly, while simultaneously deploring, and puzzling over, the strength of the liberal countercurrent in a country with so much openly and unapologetically sanctioned racism.

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

**I. The First Nuremberg Law:**

**Safeguarding Race Purity in Immigration, Naturalization and Citizenship**

It is a curiosity to pick up the New York Times for September 16, 1935. The lead article for that day reported on one of darkest moments in the history of modern racism with the following headline, bolded and in large type: "**Reich Adopts Swastika as Nation's Official Flag**."[[23]](#footnote-23) This was how the Times reported on the promulgation, one day earlier, of the most infamous piece of race legislation of the interwar era, the Nazi Nuremberg Laws. Only below did it add, in less aggressive type, a reference what we remember, and revile, today about Nuremberg: "Anti-Jewish Laws Passed. Non-'Aryans' Deprived of Citizenship and Right to Intermarry." It is worth wondering whether the staff of the Times composed the paper that day with an uneasy consciousness that race-based citizenship and intermarriage law were nothing new in the world when the Reich embraced them. What exactly would American readers have been expected to make of a headline that read "**Reich Adopts Race-Based Citizenship and Anti-Miscegenation Laws**"?

At any rate it is perfectly true that on September 15, 1935, at Nuremberg, the Swastika banner was made the official flag of the German Reich. This was the result of the third of the three Nuremberg Laws, the *Reichsflaggengesetz* ["Reich Flag Law"]. But no German observer regarded the Reich Flag Law as the most important of the laws announced that day at the spectacularly staged "Party Congress of Freedom." What mattered most to German commentators is what matters most to us now: the first two Nuremberg Laws: the *Reichsbürgergesetz*, the "Reich Citizenship Law"; and the *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*, the "Law on the Protection of German Blood and German Honor." These were the laws that deprived German Jews of full citizenship and the right to intermarry; and the uncomfortable truth is that they brought German law significantly closer in line with American law than had previously been the case.

These first two Nuremberg Laws are so brief that their principal provisions can be quoted in full. As the Times correctly reported, the Reich Citizenship law established a distinction between "citizens of the Reich" (*Reichsbürger*)and mere "nationals" (*Staatsangehörige*--literally persons "belonging to the state"). 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 [nach den Vorschriften des Reichs- und Staatsangehörigkeitsgesetzes].

**§ 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.[[24]](#footnote-24)

The second Nuremberg Law, the Law on the Protection of German Blood and German Honor, targeted 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 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.

(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.[[25]](#footnote-25)

The question we must ask is whether the Nazis gleaned any American inspiration in the making of these ugly racist decrees.

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 new Nazi law of citizenship and intermarriage, which I will call by its American name "miscegenation." As for America: Citizenship and miscegenation were both central to American interwar race law. Segregation was only a part of it.[[26]](#footnote-26)

The latter point deserves some emphasis. When Americans think about their legal history of race, they can find it hard to shake the tendency to focus on Jim Crow segregation in the South. Brown v. Board of Education[[27]](#footnote-27) became, in the 1950s, the pivot on which our understanding of modern American race law turned; and we have commonly framed American race questions around the conflict between Brown and Plessy v. Ferguson[[28]](#footnote-28) ever since. 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 Guettel and Hanke both ask about the significance of "American segregation laws." But there was always much more to American race law than segregation, as Europeans of the Interwar period well knew.

American race-law, pre-Brown, sprawled over wide range of technically distinct legal areas, including not only "separate but equal" segregation under the rule of Plessy, but also Indian law,[[29]](#footnote-29) anti-Chinese and Japanese legislation,[[30]](#footnote-30) and *de jure* and *de facto* disabilities in civil procedure and election law.[[31]](#footnote-31) Anti-miscegenation laws on the state level,[[32]](#footnote-32) and immigration and naturalization law on the federal level, featured particularly prominently.[[33]](#footnote-33) Both had roots in American law that reached back to the seventeenth and eighteenth centuries.[[34]](#footnote-34) Both of these aspects of the American race regime held on much more tenaciously than segregation: American race-based marriage law and American race-based immigration law were to be eliminated only at the tail end of the Civil Rights Era, with Loving v. Virginia in 1967[[35]](#footnote-35) and the Immigration and Nationality Act of 1965, which came into effect in 1968.[[36]](#footnote-36) It was these most tenacious aspects of American race law that attracted the most intense interest among the Nazis.

American immigration and naturalization law was what captured Nazi attention first. "National origins" immigration and naturalization law was a creation of the Emergency Quota Act of 1921 and the Immigration Act of 1924, both of which were manifestly, and openly, "race-based," favoring "the 'Nordics' of northern and western Europe over the 'undesirable races' of eastern and southern Europe."[[37]](#footnote-37) These were significant pieces of race legislation, and they commanded considerable foreign attention. When the French social thinker André Siegfried published his study of American society in 1928, for example, his survey of American racism treated immigration policy as a central racist institution.[[38]](#footnote-38) As David Scott Fitzgerald and David Cook-Martin have recently written, "[t]he United States was the leader in developing explicitly racist policies of nationality and immigration,"[[39]](#footnote-39) and foreign observers took note.

And among the 1920s foreign commentators on American immigration law was Adolf Hitler, writing in Mein Kampf, surely the least-read major political text of the twentieth century. 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 25 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.[[40]](#footnote-40)

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

In Volume Two 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 statutes. The Nazi Leader had an ambivalent view of the US, simultaneously admiring its Fordist industrial power and at least some of its cultural dynamism, while hating Woodrow Wilson and detecting the lurking influence of Jews in much of American society.[[41]](#footnote-41) There was room in his conflicted attitude for admiration for America's race-based immigration legislation. His treatment of citizenship 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 a zone under German protection and now resides in Germany can thus give birth to a "German citizen." By the same token any Jew brat, or Pole brat, or African brat, or Asian brat can become a German citizen without further ado.

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.[[42]](#footnote-42)

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 only example of *völkisch* citizenship legislation in the 1920s.[[43]](#footnote-43)

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.[[44]](#footnote-44) He made similar declarations in his "Second Book," the unpublished sequel to Mein Kampf he drafted in 1928.[[45]](#footnote-45) At the same time he gave voice to his admiration for the American conquest of the West, which offered a model of extermination: The Americans, he reminded his followers, "gunned down the millions of Redskins to a few hundred thousand, and now keeps the modest remnant under observation in a cage"; Europeans must have the courage to do the same.[[46]](#footnote-46) These are not passages that can be casually dismissed. Assessing some of these writings of the 1920s, historian Detlef Junker has concluded that Hitler's admiration for American immigration and naturalization law and his admiration for the American conquest of the West were of a piece. 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*.[[47]](#footnote-47) Philipp Gassert has drawn a similar conclusion: It seemed manifest to the Hitler of the 1920s that America, with its unapologetically race-based immigration legislation and its epic "Aryan" colonization of the West, was a "race state" that deserved admiration.[[48]](#footnote-48)

The views of the *Führer* on the subject of the "race state," it goes without saying, carried immense weight in Nazi Germany.[[49]](#footnote-49) The passage in Mein Kampf in particular would be cited whenever Nazi jurists discussed problems of citizenship after the Nazi seizure of power,[[50]](#footnote-50) and it set the tone that remained dominant in Nazi writings on American law throughout the early '30s[[51]](#footnote-51): America was a confused and in some ways weak country, but it was the leading example of a jurisdiction groping its way toward a race law of the kind essential to the creation of a *völkisch* State. The task of Nazi law was to take these American *Ansätze*, these tentative American beginnings, and transform them into a fully realized and rigorous legal program.

Before turning to the details of Nazi-era exploitation of American immigration law, it is important to set the stage by establishing some context about the goals of the Nazi regime after it seized power. In particular it is essential to emphasize that extermination of the Jews was not the initial aim of the Nazis after the seizure of power from January to March 1933. In the early years of the Nazi regime "deportation and annihilation" were as yet "difficult to imagine"[[52]](#footnote-52); 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 disabilities.[[53]](#footnote-53) The goals of the early 1930s were nicely formulated by Wilhelm Stuckart, co-author 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.[[54]](#footnote-54) 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 Reich Citizenship Law and the Law on the Protection of German Blood and German Honor] represent the beginning of the definitive solution to the Jew 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 Germandom 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.[[55]](#footnote-55)

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

We must bear that fact in mind as we try to understand Nazi citizenship law. For a regime whose aim was to drive those of supposedly "foreign blood" to emigrate, citizenship law was centrally important. Correspondingly, after the seizure of power in 1933, the Nazis moved quickly to alter German citizenship law in order to disfavor Jews and other "foreign bodies." The project began on July 14 1933, with a Law on the Revocation of Naturalization and the Withdrawal of German Citizenship, promulgated on the same day as the basic Nazi eugenics statute.[[56]](#footnote-56) The main purpose of this first Nazi citizenship law was to facilitate the denaturalization and expulsion of *Ostjuden*, eastern European Jews who had arrived after the First World War.[[57]](#footnote-57) Reich Minister of the Interior Wilhelm Frick described this statute as "the beginning and point of departure for German race legislation";[[58]](#footnote-58) and the next two years of debate and pressure consistently emphasized the fundamental role of citizenship law, culminating in the Reich Citizenship Law that was the first of the Nuremberg Laws, and that definitively assigned Jews to second-class status.

It is an unpleasant truth that throughout this effort to degrade, demonize and expel the Jews of Germany, American citizenship law remained a regular Nazi point of reference. After the seizure of power, Hitler himself ceased holding forth on technical legal questions. But leading Nazi jurists and functionaries picked up the thread, maintaining a steady and regularly reiterated interest in American law. An important early example is Otto Koellreutter. Koellreutter was perhaps the most eminent Nazi public lawyer in the early 1930s. A sympathizer of the Nazis from 1930 onward, Koellreutter formally joined the party on May 1, 1933, the same day that Carl Schmitt joined. In that same year he was given a Chair of Public Law and made Dean of the law faculty in Munich, the home city of the Nazis. He served in leading academic positions, as journal editor and the like.[[59]](#footnote-59)

In late 1933 this official voice of juristic Nazism published a book intended to lay out the basics of public law for what the Nazis were calling their "National Revolution." Public law included immigration and naturalization; and when Koellreutter came to that subject he devoted a long discussion to the American example. He began by touching on the British Commonwealth as well as the United States. As Nazi writers noted, the British Empire had "unwritten social laws" against race mixing, which they certainly found of interest, and a few other laws as well.[[60]](#footnote-60) Nevertheless what intrigued the Nazis most was the formal legislation of America, as Koellreutter explained:

*A further necessary measure for maintaining the healthy racial cohesion of the* Volk *lies in the regulation of immigration.*  In this connection it is above all the legislation of the United States and of the British Dominions that has yielded interesting results.

Worthy of attention above all is the development of immigration legislation in the United States. Until 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" Constitution. This conception very quickly changed. 1879 witnessed the first laws aimed at banning Chinese immigration. However it was above all after the World War that American immigration legislation embarked on an entirely new path. Today that legislation represents a carefully thought-through system that first of all protects the United States from the eugenic point of view against inferior elements trying to immigrate. . . . [Regulations targeting physically inferior and unhealthy would-be immigrants] are applied strictly, and even harshly.

Alongside eugenic measures is the establishment by law of certain immigration quotas. For the World War awakened American consciousness to the fact that it is by no means the case that all immigrants can be melded in equal measure into the originally Anglo-Saxon population, and that a fully free immigration policy must inevitably endanger the stamp of the national American type. So came into the being in 1921 the first Quota Law, in which each European country was credited with a certain number of immigrants, and indeed no more than 3% of the number of immigrants from the country in question who had settled in the United States in 1910. So for example in 1924 there were 165,000 immigrants, among them 62,000 English and Irish, 51,000 Germans, 3845 Italians and 2248 Russians including the East European Jews. In the last several years immigration has been even further limited.[[61]](#footnote-61)

Two observations about this passage are warranted. First, it was carefully researched. As this and other passages soon to be quoted show, Germans were giving studious scholarly attention to American immigration law.

Second, it is impossible to characterize what Koellreutter wrote as intended for foreign consumption. He published his book in German, a language that few foreigners found easily accessible (and, following customary Nazi practice, he published it in *Fraktur*, a script that foreigners without a strong command of German find irritatingly difficult to decipher). There is nothing propagandistic about the tenor of his text. There is no sign that Koellreutter's book, which would become a standard citation in Nazi Germany,[[62]](#footnote-62) received any attention whatsoever abroad, and no good reason whatsoever for supposing that it was aimed at polishing Germany's international image. Koellreutter, as the leading German public lawyer, was engaged in a lawyerly study of a subject important to Nazi policy-making in the dawning months of the "National Revolution." This was investigation of American immigration law by Nazis, for Nazis.

Much further investigation of the same kind took place over the following two years, as lawyers and bureaucrats wrestled with the political and doctrinal challenges in creating new citizenship and naturalization law. A few examples of how the legal literature described American law will give a sense of the interest in America in the German air of the early 1930s. I begin with the National Socialist Handbook for Law and Legislation. This was an immense tome published in the winter of 1934-1935 under the editorship of Hans Frank, head of the Party Office for Legal Affairs, and later Governor-General and lord of the Nazi terror regime in occupied Poland. As its title indicates, the National Socialist Handbook was intended to mark out the path for future Nazi lawmaking. It included contributions on every aspect of the law, composed by various Nazi lawyers under Frank's direction. It is a point of some significance that the Handbook made special reference to the American model more than once:

National Socialist Handbook for Law and Legislation (1934-35):

The Law on the Revocation of Naturalization and the Withdrawal of German Citizenship of 1933 distinguishes between desirable and undesirable immigration. In this connection it is opportune to direct the reader's attention to the fact that the difference between desirable and undesirable naturalization has played an important role in the Immigration Law of the United States for some years.[[63]](#footnote-63)

Many other texts can be adduced as well, all of them painting the picture of a racist, and therefore attractive, American legal model. America was described in the standard Nazi jargon as country founded in "Gemeinschaft," the *Volk* community:

Edgar Saebisch, Der Begriff der Staatsangehörigkeit (The Concept of the "National" [as opposed to the "Citizen"), 1934:

America possesses a proud consciousness of *Gemeinschaft*. Any state, which like this one adopts a posture of fundamental rejection of would-be immigrants trying to push their way in, which subjects those immigrants whom it chooses to a series of tests and confessions of loyalty, shows that it values membership in a *Gemeinschaft* as a precious good. This high level of self-esteem grows out of a profound national consciousness, which jealously guards its closed *Gemeinschaft* against new foreign intruders.[[64]](#footnote-64)

It was a country committed to "Nordic" supremacy:

Martin Staemmler, Rassenpflege im völkischen Staat (The Maintenance of Race Purity in the *Völkisch* State) (1935):

That the Americans have begun to think about the maintenance of race purity, and thus to ask not only about eugenics, but also about membership in individual races, can be seen in their immigration laws, which completely forbid the immigration of Yellows, and place immigration from the individual European countries under sharp supervision, here principally admitting members of the decidedly Nordic peoples (English, German, Scandinavian States), whereas Southern and Eastern Europeans receive only a very weak portion of the admissions. The American knows very well who has made his land great. He sees that victory goes to Nordic blood, and seeks to refresh that blood through his immigration legislation.[[65]](#footnote-65)

It was a country whose ruling Whites were determined to keep foreign elements at bay:

Detlev Sahm, Die Vereinigten Staaten von Amerika und das Problem der nationalen Einheit (The United States and the Problem of National Unity) (1936):

The *legal and social position* of racial minorities as well as foreigners is evidence of the fact that large portions of the population do not belong to the dominant circles, and indeed stand in part in direct opposition to them. The circles of those who can trace their entry far back [in American history] try to protect their status as Masters [Oberherrschaft] and to guarantee it for all future times. For that reason they focus their efforts on assimilating the foreign bodies into the nation through *education*, and *preventing the influx of racially foreign elements* [artfremder Elemente]*.* The Immigration and Naturalization Laws speak volumes about this effort.[[66]](#footnote-66)

There are many such quotes: As one author put it, America was "sounding the loudest warning cry" about the "danger" of race-mixing; it had produced race-based immigration legislation from which all the "Nordic" world should learn; the issue was after all one of "life and death" for the white race.[[67]](#footnote-67)

These were more than casual references to the "warning cries" sounded in American immigration law. The publications of the early 1930s included lengthy and carefully documented studies of American immigration law and jurisprudence. For example Heinrich Krieger, the single most important figure in the Nazi assimilation of American race law, dedicated thirty-five well-informed and thoughtful pages to American immigration and naturalization law in his important 1936 book Das Rassenrecht in den Vereinigten Staaten, "Race Law in the United States."[[68]](#footnote-68) I will return to Krieger shortly.

Krieger was not alone. Another striking example of a Nazi closely engaging with American citizenship law is Johann von Leers. Leers was the principal lawyer "Jew expert" involved in the earliest stages of the drafting process that led to the Nuremberg Laws.[[69]](#footnote-69) He was one of the more repellant of Nazi lawyer/anti-Semites, with one of the stranger careers. A member of the Party from an early date, Leers escaped Germany after the War, at first to Argentina. In the 1950s he moved to Egypt, where he became an advisor on anti-Israel propaganda to Gamel Abdel Nasser. Convinced that Christianity had abandoned the world-historical struggle against the Jews, Leers converted to Islam, dying in Egypt in 1965 as "Omar Amin."[[70]](#footnote-70) In his 1936 book-length pamphlet Blood and Race: A Tour through the History of Peoples, Leers devoted twenty-three full pages to American race law. His review included not only an account of the Fourteenth Amendment, of Jim Crow segregation, and a state-by-state review of anti-miscegenation laws, but also thirteen pages on immigration and naturalization that included detailed statistics and discussion of the law with regard to each racial minority.[[71]](#footnote-71)

These were energetic scholarly efforts, and they carried Nazi authors into the bowels of American law in the search for doctrine that might be of use to them. For example, German writers were interested in the lessons they could learn from the American approach to the fundamental dichotomy laid out in the Nuremberg Laws, between "citizens" and lesser "nationals." Thus Detlev Sahm, in a 1936 Berlin dissertation on American law, noted that America had its own form of second-class citizenship, which applied in particular to Filipinos:

American public law distinguishes between Staatsbürger (citizens), Staatsangehörige (nationals) and Ausländer (aliens).

Staatsbürgerschaft ("Citizenship") is the highest legal level. One becomes an American citizen by birth or through naturalization. . . .

Alongside the citizens there are also nationals who do not enjoy the rights of citizenship: "*non-citizen nationals*" Such nationals include most inhabitants of the Philippines, while inhabitants of Hawaii, Porto Rico, the Virgin Islands also possess American citizenship.[[72]](#footnote-72)

This was the category of "non-citizen nationals" created by late nineteenth-century American constitutional jurisprudence.[[73]](#footnote-73) As Mazower observes, the American practice of creating such non-citizen classes, beginning with the American Indians, was of natural interest to the Nazis[[74]](#footnote-74): After all, the Nazis too had created a distinction between "citizens" and mere "nationals" in the first Nuremberg Law. Sahm also made a point of noting the American distinction between "political rights" and "civil rights." The Nuremberg Laws declared that only citizens possessed "political rights." Sahm observed that American law had precisely the same rule. He further offered a careful account of the disabilities that aliens faced under American law, also of course of interest to the Nazis, who since 1920 had been insisting that foreigners must benefit only from limited "guest right."[[75]](#footnote-75) Here were bits of American law that Nazis could profitably juggle as they developed their own forms of second-class citizenship for their own "Nordic" country.

Other authors were intrigued by the American treatment of naturalization and denaturalization. Edgar Saebisch, Nazi author of the 1934 book The Concept of the "National", was certainly something of a skeptic about the United States.[[76]](#footnote-76) Nevertheless he pointed admiringly to certain American approaches to naturalization. "The rigorous attitude of American law," he noted, "reveals itself in the provisions created for wartime." Even before the experience of World War I, the Americans, unlike the British and the French, had passed wise legislation denying the right of naturalization to citizens of any county with which America was at war.[[77]](#footnote-77) The same author also highlighted an American idea of particular interest for the history of the Nuremberg Laws. This was an idea found in the Cable Act of 1922, which until 1930 stripped American women of citizenship if they were misguided enough to marry non-citizen Asian men. Saebisch, unaware that that provision of the Cable Act had been repealed, saluted it as a healthy example of race legislation[[78]](#footnote-78):

If an American woman marries a Japanese man, then she does not retain her citizenship, as she would if she contracted other foreign marriages, but loses it upon marriage. This consequence is obviously meant as the well-deserved punishment for the female citizen who enters into a union with a person incapable of forming part of the *Gemeinschaft*.[[79]](#footnote-79)

This sort of race rule, expelling women who had polluted themselves through marriage to a "foreign body," was of great interest to Nazi writers. Leers identified another example from the Anglo-American world in his Blood and Race:

If a woman of English nationality and Christian faith marries a Mohammedan who is not a British citizen, but perhaps a subject or citizen of a Mohammedan state, she loses her British nationality as a result of her marriage, and if the husband and wife take up residence in a Mohammedan land that is neither a possession nor a protectorate of His Britannic Majesty, she falls under subjection to Mohammedan law.[[80]](#footnote-80)

What reader could have guessed that Leers himself would himself die as the "Mohammedan" Omar Amir in a "Mohammedan land" thirty years later? At any rate, Anglo-American practices of race-based denaturalization upon marriage seemed to merit serious attention from Nazi policymakers. And as we shall see, they were practices that bore some relation to an important aspect of the Nuremberg Laws: The implementation of the Nuremberg Laws focused in a similar way on marital choices: The Nazis faced the question of which half-Jewish *Mischlinge*, "mongrels," would count as "Jews" by law. The answer they gave, in part, was that "mongrels" were "Jews" if they chose to marry other "Jews," thus revealing their Jewish "inclinations"[[81]](#footnote-81) or the "strength" of their "Jewish blood."[[82]](#footnote-82) Like an American woman who took a Japanese spouse, these were individuals who had chosen to associate themselves with a foreign element abhorrent to the healthy *Volk-*community.

This was not by any means a literature of meaningless citations or "fleeting" references. The record is one of serious Nazi engagement, from Mein Kampf onward. Needless to say, Nazi writers, however closely they studied American immigration and naturalization law, were not unconditional admirers. Like Hitler, subsequent Nazi authors found American law in many respects weak and confused. They were especially taken aback by one of the legacies of Reconstruction: The Naturalization Act of 1870 accorded the right of naturalization to "aliens of African nativity and to persons of African descent."[[83]](#footnote-83)  This had the bizarre consequence, from the German point of view, that American practices of exclusion targeted Asians, but not Blacks. Some Nazis also found it bizarre, as Rehtmeier notes, that Jews, even East European Jews, could claim "Caucasian" status in America.[[84]](#footnote-84) Even a Nazi lawyer like Saebisch, who highlighted the strength of American racism, held that American race-legislation was highly "imperfect" and therefore deserving of reproach.[[85]](#footnote-85) Nevertheless, again like Hitler, the view among these authors was that America, despite its far-reaching failings, was a country groping its half-benighted way toward the policies of a healthy *völkisch* order, in obedience to the healthy American race consciousness.[[86]](#footnote-86)

In the end, despite all the Nazi rummaging in the details of American citizenship law, it would be a mistake to exaggerate the direct influence of the American model on the First Nuremberg Law. American immigration law was not the template for this aspect of Nazi law. Nor should we expect to discover unmodified borrowing. These authors were German lawyers, the representatives of a deep and proud juristic tradition, one that generally exported law to other countries, not one that borrowed. What is more, they were German lawyers who were convinced that they were participating in a "National Revolution" that represented a breakthrough in human history. It would be surprising indeed if these men had simply aped American law; and they did not do so. In immigration and naturalization the American example served, from Mein Kampf onward, not so much as a direct model, but as welcome evidence that "race consciousness" already begun to shape the law in a leading "Nordic" polity.

But it *did* serve as welcome evidence, and it would be wrong to underestimate the importance of that fact. American law offered the Nazis something that matters a great deal to modern lawyers: It offered them confirmation that the winds of history were blowing in their direction. Their America was what Hitler described it to be: a country whose race consciousness had stirred the first substantial moves toward the sort of race order that it was Germany's mission to bring to full fruition. Comparative law borrowing is not just a matter of lifting particular regulations, copying particular paragraphs, or importing particular institutions. Lawyers, even Nazi lawyers, need a sense of the propriety and necessity of their law; and the presence of foreign parallels can provide salutary comfort and inspiration. Modern lawyers in particular often want to believe that they are soldiering toward a better future--and evidence that other countries are soldiering toward the same better future, in however bumbling a way, matters to them. This is especially true of lawyers plunged into a self-consciously revolutionary situation.

And painful though it may be for us to admit it, it is not surprising that these lawyer participants in the Nazi revolution seized on the American example. American race-based immigration and naturalization law did in fact set the standard in the early twentieth century. The Nazi case suggests how right Fitzgerald and Cook-Martin are when they declare that "[t]he United States was the leader in developing explicitly racist policies of nationality and immigration."[[87]](#footnote-87) Other recent scholars too have shown that foreigners looked to American leadership in race-based immigration law in the late nineteenth and early twentieth centuries.[[88]](#footnote-88) This was a realm in which the creative legal culture of the United States set the international tone in the early twentieth century, much as it sets the tone in areas like corporate law today.

In any case, these Nazi lawyers were not writing for an international audience in the hope of whitewashing the regime. None of the material I have quoted, with the possible exception of Mein Kampf, can be read that way. They were writing for each other, in a revolutionary moment when it mattered from their own "internal point of view" to be able to invoke the example of American law.

**II. Miscegenation**

It is when we turn to miscegenation, however, the subject of the second Nuremberg Law, that we find the most provocative evidence of direct engagement with the details of American law, and the most intriguing hints of direct influence.

Nazi theorists believed that anti-miscegenation legislation was a fundamental necessity in their new order, and one intimately linked with citizenship. Helmut Nicolai, a leading Party legal theorist, explained the centrality of anti-miscegenation measures in a pamphlet published in 1932, the frightening year that preceded the seizure of power. Nicolai's account reflected the standard wild-eyed Nazi view of history. Human history was a millennia-long chronicle of race decay--of superior races that had degenerated, and eventually been completely submerged, as a result of race-mixing. With "Nordic" Germany at risk of such degeneration, Nicolai wrote, it was urgent that there be new marriage legislation. Race mixing through indiscriminate marriage was akin to race mixing through indiscriminate immigration; and the Jews were agents of pollution in both respects:

Today the different *Völker* are essentially kept separate by international borders. The fact that so far no stronger mixing [Vermischung] of all *Völker* has taken place than what has occurred, that therefore the *Völker* are racially distinguished from each at all, has to do strictly with the sedentariness of the *Völker*. That sedentariness does not exist with the Jews. It is true that they maintain their own *völkisch* unity through the strictest possible closure of the community, supported by the Jewish religion. Nevertheless they have always been nomads, and they are still nomads today. It corresponds to their sensibility and their sense of justice that state borders should be allowed to vanish and that all the ties that unite a *völkisch* community should be loosened, that the various *Völker* should mix with each other promiscuously and create a single unified humanity.[[89]](#footnote-89)

Jews were "racially foreign bodies" who violated both international and marital boundaries, and they represented a unique threat to any *völkisch* order. Indeed 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 text would put it in 1934, repeating a standard slogan, and it was a burning necessity that "future legislation" should include marriage prohibitions.[[90]](#footnote-90) Or as the basic commentary on the Nuremberg Laws proclaimed, immigration and anti-miscegenation were twin measures, both imperatively necessary in order to prevent "any further penetration of Jewish blood into the body of the German *Volk*."[[91]](#footnote-91)

As the Nazis moved to institute prohibitions against such degenerate "mixing," it was--again an unpleasant truth--American anti-miscegenation law that proved of particular interest. This was so for two reasons. First, the regime actively sought foreign models for the criminalization of mixed marriage. As Reich Minister of Justice Gürtner declared in the closed-door June 1934 meeting with which I began, it was "naturally very attractive to look around in the world to see how this problem has been attacked by other peoples"; and the United States offered the only model that the Justice Ministry found to investigate.[[92]](#footnote-92) Second, American miscegenation law offered material that could be exploited as the regime struggled with a problem that affected all of its race legislation: How to determine who should count as a "Jew." 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 what the Nazis called "Mischlinge," "mixed ones"--"mongrels," individuals of mixed parentage, spawned by the "nomad" race of the Jews as they indiscriminately mixed with "Aryans."[[93]](#footnote-93) Which mongrelized German nationals would fall under the axe of the new Nazi laws? Here again, American miscegenation law represented the only body of foreign jurisprudence offering an extensive corpus of doctrine that could be investigated and exploited by Nazi policy-makers.

Before turning to the details of what those policy-makers found in American miscegenation law, it is important once again to provide some historical context. Nazi investigation of American anti-miscegenation legislation took place against the background of two conflicts. First, there was political conflict between street radicals, who wanted to carry the Nazi revolution 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 more moderation to the Nazi ordinances and enactments. Both species of conflict colored the history of the Nazi use of American miscegenation law.

Political conflict in the streets lay in the immediate background of the Nuremberg Laws. As historians have shown, the Nuremberg Laws were promulgated in response to radical street violence. In 1933 and again in 1935, during the chaotic early years of the "National Revolution," there was widespread violence "from below"--what the Nazis called "individual actions" against Jews, many but not all fatal, that had not been sanctioned or directed by the authorities in Berlin.[[94]](#footnote-94) These were incidents that sometimes especially targeted cases of "Rassenschande," "race-scandalizing" instances in which Jews, especially Jewish men, consorted with Germans, especially German women.[[95]](#footnote-95) Krieger, the leading Nazi student of American race law, regarded these "individual actions" on the street as the German parallels to American lynch justice: Just as inhabitants of the American South, motivated by their "race consciousness," acted outside legal channels to do deplorably wild and unregulated violence against Black "race scandalizers," so too were Germans engaging in wild and unregulated violence against Jews.[[96]](#footnote-96)

The central Nazi leadership too viewed these "individual actions" as deplorable, for two reasons. First, they made for bad foreign press: as Goebbels said, they resulted in "atrocity stories." As a result the Foreign Ministry pushed hard for a crackdown, and the central party apparatus was responsive. Second, the "individual actions" reflected a breakdown in the central party control of affairs that was always integral to the Nazi ambitions. The Nazis favored official, orderly, and properly supervised state-sponsored persecution, not street-level lynchings or "actions" incited by low-level party members. It was these concerns about the dangers of German lynch justice that led to the promulgation of the Nuremberg Laws. Fretting that the "National Revolution" might slip out of control, the Party set out to calm matters by creating "unambiguous laws" that would put the business of persecution securely in the hands of the State.[[97]](#footnote-97) Over the months leading up to the Nuremberg Party Congress in September of 1935, Interior Minister Frick and others regularly declared that both immigration and miscegenation legislation was in preparation, precisely in the effort to bring order to the streets.[[98]](#footnote-98)

The preparation of the necessary "unambiguous laws" was however shadowed by bureaucratic conflict between Nazi radicals and more traditionally minded lawyers. That conflict touched both on the question of how to treat mixed marriages and on the question of how to classify "mongrels." To begin with the treatment of mixed marriages: From the point of view of conventionally trained German jurists, the radical Nazi program for banning mixed marriages posed a grave juristic difficulty. The Nazi Party demanded that mixed marriages be criminalized.[[99]](#footnote-99) Yet criminalizing marriage flouted centuries of juristic tradition. It was standard German legal doctrine that marriage was a matter for civil law, not criminal law; indeed such had been standard European doctrine for thousands of years. The only kind of marriage that was subject to any criminal penalty was bigamy, and bigamy did not offer a model easily applicable to mixed marriage.[[100]](#footnote-100) The crime of bigamy was close in spirit to fraud: A bigamy prosecution almost always deemed one party an innocent victim.[[101]](#footnote-101) Miscegenation was very different: Much or most of the time both parties would go into a mixed marriage with open eyes. Such a marriage might be declared civilly invalid; but how could people be criminally prosecuted for the free and consensual attempt to enter into it? Of course, adultery had historically been subject to criminal penalties; but adultery was by definition not marriage.[[102]](#footnote-102) From the point of view of properly trained German jurists, this was simply no cogent legal means of criminalizing mixed marriage. These were men who had bred in the German traditions of *wissenschaftlicher Positivismus*, of "scientific positivism." They thought of the law as embodying "scientific" commands that must be obeyed--though those commands emanated, not from any political sovereign, but from the logic and accumulated wisdom of the law itself. And the logic and accumulated wisdom of the law dictated that mixed marriage simply could not be criminalized.

Similar clashes dogged the problem of defining "Jews." When it came to the classification of "mongrels," Party radicals inevitably favored the most expansive definition possible; and in the July 1933 Law on the Revocation of Naturalization and the Withdrawal of German Citizenship they succeeded in declaring any person with one Jewish grandparent a "Jew."[[103]](#footnote-103) This was, by the standards of Nazi policy, a far-reaching definition--though to be sure nowhere near as far-reaching as the "one drop" rule that prevailed in some American states.[[104]](#footnote-104) Certainly it was too radical for some moderate lawyers in the regime, who wished to take a more sparing and merciful attitude, and who pushed for less aggressive definitions over the following two years.

In the debates over the definition of "mongrels," one particularly fascinating lawyer played a leading part: Bernhard Lösener. Lösener was a centrally important actor in the making of the Nuremberg Laws. He served as "Judenreferent," "reporter on the Jews" for the Ministry of the Interior, and was one of the chief draftsmen of the Laws (as well as being our [unreliable] main source for the detailed history of the drafting). He was, jarring though the phrase may sound, an authentically "moderate" Nazi anti-Semite[[105]](#footnote-105): 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.[[106]](#footnote-106)

This was a striking figure: the draftsman of the Nuremberg Laws who was eventually arrested and expelled from the Party. Like others among his colleagues, the Lösener of the 1930s displayed the conservative instincts of a trained jurist. Nazi though he was--and he was a reprehensible anti-Semite, an early member of the Party who later tried to whitewash his record--Lösener was also a cautious and methodical lawyer; and his role in the drafting process shows how juristic tradition could work as a brake on Nazi radicalism. During the early 1930s Lösener and other jurists fought to limit the definition of "Jew" to those with at least three Jewish grandparents.[[107]](#footnote-107) 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 of 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.[[108]](#footnote-108) The great bureaucratic battle over the "mongrels" thus ended in a tense compromise.

Such was the context 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. Party radicals wished to criminalize mixed marriages; moderate jurists were reluctant. Party radicals wanted an expansive definition of "Jews"; moderates resisted. In the ensuing debates, Germans went hunting for foreign models, and they found the anti-miscegenation laws of the American states.

**III. The Meeting of June 5, 1934**

Germans already had a history of interest in American anti-miscegenation law. 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 Southwest 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 the United States; and German colonial administrators pursued that model eagerly, as Guettel has shown. Their efforts included voyages through the southern states, commissioned reports from diplomats, consultation with the Harvard racist Archibald Cary Coolidge, and more; and the colonial archives include lengthy reports on U.S. law.[[109]](#footnote-109)

The anti-miscegenation measures these pre-War colonial administrators produced may or may not have directly influenced the Nuremberg Laws; historians disagree.[[110]](#footnote-110) 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, with which I opened this study.[[111]](#footnote-111) This report, preserved in the archives in two separate versions, was first published in 1989.[[112]](#footnote-112) The meeting it transcribed brought together seventeen lawyers and officials under the chairmanship of Justice Minister Gürtner. The attendees included Lösener, the "reporter on the Jews," and Roland Freisler, long-time Party member and ruthless hard-line Nazi lawyer, who would later serve as the presiding judge of the bloody Nazi People's Court--a "murderer in the service of Hitler," as one biographer calls him[[113]](#footnote-113)--and attend the Wannsee Conference. At the time of the June 5 meeting, Freisler was a State Secretary attached to the Ministry of Justice. The business of the June 5 meeting was the discussion of the anti-miscegenation measures that would eventually emerge in the second Nuremberg Law; and the great juristic question on the table was whether mixed marriages should merely be civilly invalid, or should also be criminalized, as leading Nazi figures were demanding.[[114]](#footnote-114)

The transcript is a record of conflict between radicals, most prominent among them Freisler, and juristic moderates, led by Gürtner. Gürtner and other moderate lawyers present did not quarrel with the goal of institutionalizing anti-Jewish policies; but they tried to fend off extremes of criminalization. In particular they suggested that perhaps education and a campaign of public "enlightenment" might gradually succeed in ending the evil of mixed marriages without formal criminalization. If there was to be criminalization at all, Gürtner argued, it must be done on the basis of the only traditional juristic model, the criminalization of bigamy.[[115]](#footnote-115) The implication was that there would only be prosecutions in cases where a Jew had engaged in "malicious deception" of an "Aryan" marriage partner, deliberately concealing his or her race.[[116]](#footnote-116) Other lawyers present pushed an even more moderate line: Eduard Kohlrausch, a prominent professor of criminal law who had opposed Nazi activities before 1933 but subsequently joined the Party, argued that criminalization of any kind would be actively counterproductive.[[117]](#footnote-117) Lösener argued that the very concept of a "Jew" was so elusive that criminalization was impracticable.[[118]](#footnote-118) Freisler for his part rejected all of these arguments in long and sometimes browbeating speeches that held firmly to Party insistence on a program of unconditional criminalization.[[119]](#footnote-119)

The stunning fact is that this pivotal meeting in the genesis of the Nuremberg Laws began with discussion of American law. After a brief opening statement by Gürtner, the meeting heard from two Justice Ministry officials charged with preparing reports for the Commission. The first was Fritz Grau, a Party member, later to rise to high rank in the SS,[[120]](#footnote-120) and the reporter for the hardline Party position. Grau noted that foreign affairs had made it difficult to create an anti-miscegenation statute, and that some believed that a program of "education and enlightenment " would suffice as an alternative. "Education and enlightenment" was, however, an unacceptable approach. Like other Nazis, Grau linked the question of miscegenation to the question of citizenship:

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

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

Now one could perhaps say--and here I come to the second question posed by Mr. Minister of Justice--that this goal could be gradually achieved through education and enlightenment without any express law.[[121]](#footnote-121)

It was at this point that Grau turned to America, the homeland of race-based citizenship law. Jim Crow segregation might seem to offer a possible model for an approach founded on "education and enlightenment." However, Grau maintained that segregation was not suitable to German circumstances:

Other *Völker* too, one might say, had achieved such a goal [i.e. of the elimination of race-mixing though education and enlightenment] through social segregation. That statement is however only correct with certain provisos. Among these other *Völker*--I am thinking chiefly of North America, which even has statutes along these lines--the problem is a different one, namely the problem of keeping members of colored races at bay, a problem that plays as good as no role for us in Germany. For us the problem is sharply directed against the Jews, who must be kept enduringly apart, since there is no doubt that they represent a foreign body in the *Volk*. It is my conviction that just taking the path of social segregation and separation will never achieve the goal, as long as the Jews in Germany represent a thoroughly extraordinary economic power. As long as they have a voice in economic affairs in our German Fatherland, as they do now, as long as they have the most beautiful automobiles, the most beautiful motorboats, as long as they play a prominent role in all pleasure spots and resorts, and everywhere that costs money, as long as all this is true I do not believe that they can really be segregated from the body of the German *Volk* in the absence of statutory law. This can only be achieved through positive statutory measures that forbid absolutely all sexual mixing [geschlechtliche Vermischung] of a Jew with a German, and impose severe criminal punishment.[[122]](#footnote-122)

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

It deserves emphasis that Grau went out of his way to dismiss the option of Jim Crow segregation: The fact that he felt obliged to do so suggests clearly enough that there had been debates about American law behind the scenes before this meeting took place. Somebody had been making the case for a German Jim Crow as the foundation of comparatively mild approach aiming at "education and enlightenment" of the population. Indeed we shall see momentarily that Grau was not the only participant at the meeting to address the possible attractions of Jim Crow.[[123]](#footnote-123) When Grau had finished his report, Kohlrausch then followed with his own distinctly more moderate one, which pled the case against criminalization.[[124]](#footnote-124)

Minister of Justice Gürtner then took the floor to open the general discussion. His intervention revealed that the Ministry had been working hard to collect information on the very American example that Grau had brought up:

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

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

I possess here a thoroughly comprehensible synoptic presentation of North American race legislation, and I can tell you right away, that the material was rather difficult to find. If any of you gentlemen takes a personal interest, I am ready to make this document available to you.[[125]](#footnote-125)

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

The material gives an answer to the question of what form race legislation in the American states takes. The picture is as variegated as the American map. Almost all American states have race legislation. The races that must be defended against are characterized in different ways. Nevertheless a basic idea can be very easily extracted. The laws list Negros or Mulattos or Chinese or Mongols in motley variation. They often speak of persons of African descent, thus addressing the issue historically, by which they mean Negroes, and there are a few sections which make positive reference to the Caucasian race. That is not uninteresting; since I believe there is a jurisprudence on the question of whether Jews belong to the Caucasian race.[[126]](#footnote-126)

At that point, Gürtner apparently turned to his deputy Hans von Dohanyi, another memorable figure. Dohnanyi, the son of the Hungarian composer Ernő Dohnanyi, joined the Nazi Justice Ministry in June of 1933. But only a few weeks after the June 5, 1934 meeting, he would became a clandestine opponent of the regime, embarking on the dangerous project of collecting and indexing documents that he hoped would someday be used for a prosecution of the Nazi leadership.[[127]](#footnote-127) Eventually he would be executed for participation in the resistance against Hitler.[[128]](#footnote-128)

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

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

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

State Attorney Dr. Dohnanyi: Yes.

[Gürtner]: One can see from that, and from the map, how correct the observation of Mr. Vice President Dr. Grau was, that this legislation is not directed against Jews, but protects the Jews. That gives us nothing to work with; the aim [of an American-style approach] would be the contrary [of our own.][[129]](#footnote-129)

If that were all that the participants had had to say about American law, we would have to conclude that the American model, carefully researched by the Justice Ministry, had proven of no value to the Nazis. But Gürtner did not stop with the observation that American legislation was not directed against the Jews; and he would not be the last to raise the subject. He continued with his presentation of the Ministry memo, turning to what was "interesting" about American law. The Ministry's research had turned up many facts about American anti-miscegenation statutes:

Then it is interesting to see what legal consequences are attached to sexual union. That too is variable. All sorts of expressions appear: "illegal" and "void," "absolutely void," "utterly null and void." "Prohibited" also sometimes appears. From these shifting and not very sharply juristically defined words it can be seen that civil law consequences attach in all cases, and criminal consequences in a great number of cases.[[130]](#footnote-130)

This was the critical point: In America there were "criminal consequences." The American example spoke directly to the great question that the divided the lawyers present at the meeting. It showed that the criminalization of racially mixed marriages, even outside the case of bigamy, was not unprecedented. That fact cannot have been welcome to Gürtner, who opposed such far-reaching criminalization; and he quickly made an effort to neutralize the American example. Whatever American statutes might say, Gürtner rushed to argue, it could not really be the case that Americans routinely imposed such "criminal consequences" in practice:

A question that cannot be answered on the basis of our research is how criminal law race protections are applied in practice. It seems to me that what is portrayed here does not in practice always correspond to the reality.[[131]](#footnote-131)

Gürtner simply refused to concede that the Americans actually went so far as to prosecute miscegenists. He had no evidence for that assertion[[132]](#footnote-132); but we should understand that he was doing his honorable best to grasp at some argument that would deflect the impact of the American precedent. He then returned to the question of anti-Jewish legislation. The United States, he reported, was not alone in refusing to engage in formal legal persecution of Jews:

We have not been able to find race legislation aimed at combatting the Jews in any currently existing foreign law, among the states which were the object of our research. I believe that in order to find such legislation, we would have to go back to the law of the medieval German cities.[[133]](#footnote-133)

It was true enough that there was no anti-Jewish legislation in the United States; but then, there was no anti-Jewish legislation in any contemporary system. What was nevertheless "interesting," much though Gürtner wished to minimize it, was that America had produced the very sort of law that that Nazi lawyers had gathered at the meeting to debate: It had taken the step of criminalizing race-mixing "in a great number of cases."

After Gürtner's presentation of the Ministry's memo, the participants moved on to other matters; it is certainly not the case that America was the sole subject of discussion, even if it was the first. Nevertheless, the topic did not drop. In particular, the transcript shows that as the morning wore on, the American example was highlighted by two of the more aggressively racist Nazis at the meeting, Freisler and Karl Klee, Professor of Criminal Law at the University of Berlin[[134]](#footnote-134); it seems that America had particular attractions for the more unsparing racists present.

Thus about two thirds of the way through the meeting Klee turned once again to Jim Crow segregation and its value for Germany. The question that concerned Klee was whether the new Nazi criminal law regime should be race-*based*, simply declaring the separation of the races, or rac*ist*, 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.[[135]](#footnote-135) 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 America offered a valuable model. American race law unapologetically announced its belief in racial inferiority. In particular, it did so through Jim Crow segregation, which was the American equivalent of one of the principal 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.[[136]](#footnote-136) Americans did 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.[[137]](#footnote-137)

Here was another striking Nazi interpretation of Jim Crow segregation: Segregation was a form of boycott. American racists employed Jim Crow law "on all sides" in order to raise American consciousness, just as Nazis thugs stood outside Jewish brandishing placards reading "Germans! Defend yourselves! Don't buy from Jews!" And the American example showed the true race-based criminal law ought to be unembarrassedly racist criminal law.

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

Freisler used the American example to support a critical Nazi argument against the objections of traditionally minded jurists like Lösener. It was a fundamental principle of traditional German law that criminal law required clear and unambiguous concepts: If judges were permitted to convict on the basis of vague concepts, the core requirements of the rule of law would not be met.[[138]](#footnote-138) Yet--so Lösener argued at the meeting--Nazi policy-makers had failed to find a clear and unambiguous concept of a "Jew." There was simply no accepted scientific means of determining who was "Jewish": "An effective means of determining whether a given human being has an element of Jewishness on the basis of his behavior or outward appearance [Habitus] or blood or the like does not exist, or at least at present has not yet been found."[[139]](#footnote-139) That failure constituted a bar against criminalization: It was intolerable, Lösener declared, to allow every individual judge to make decisions on the basis of mere "Gefühlsantisemitismus," of vague sentiments of Jew-hatred.[[140]](#footnote-140) The indispensable prerequisite for criminalization was a clearly delineated and scientifically acceptable definition of who counted as a racial Jew.[[141]](#footnote-141)

It was here that Freisler, showing typically bluff Nazi contempt for technical doctrinal concerns, countered by citing the United States. American law demonstrated that it was perfectly possible to have racist legislation even if it was technically infeasible to come up with a satisfactory definition of race. Freisler went into intimate detail about the laws of the American states, and the nature of American jurisprudence, to make his point:

Now as far as the delineation of the race concept goes, it is interesting to take a look at the list of the American states. Thirty of the states of the Union have race legislation, which, it seems clear to me, is crafted from the point of view of race protection. This is perhaps [particularly] with regard to the Japanese, but in other respects [too] from the racial point of view. Proof: North Carolina has also forbidden marriages between Indians and Negroes; that has after all certainly been done from the point of view of race protection. . . . I believe that apart from the desire to exclude if possible a foreign political influence that is becoming too powerful, which I can imagine is the case with regard to the Japanese, this is all from the point of view of race protection.[[142]](#footnote-142)

This American form of "race protection" 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 is it without a doubt the case that Japanese and Chinese are not to be assigned to the Mongols, but to an entirely different *Volk* blood group. Why have these states done this? I cannot believe that they have done it in order to delineate a concept. Rather I believe that they have done it, because they were targeting a kind of race image [Rassebild], and have only erroneously lumped the Japanese in with the Mongols. 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.[[143]](#footnote-143)

At any rate, 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.[[144]](#footnote-144)

Yet all this conceptual messiness did not prevent America from having a racist order. In that regard there something to learn from American legislation. What is more there was something to learn from American case law as well. American judges had no trouble applying racist law despite its fuzzy concepts. Indeed, if it were not for the lack of American attention to the Jew problem, the American style of jurisprudence would "suit us perfectly":

These states obviously all have an absolutely unambiguous jurisprudence, and this jurisprudence would suit us perfectly [würde für uns vollkommen passen], with a single exception. Over there they have in mind, practically speaking, only Coloreds and Half-Coloreds, which includes Mestizos and Mulattoes; but the Jews, who are also of interest to us, are not reckoned among the Coloreds. I have not seen that any state speaks of foreign races [as standard Nazi language would dictate] but instead they name the races in some more primitive way. . .[[145]](#footnote-145)

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

It seems to me doubtful that there would be any need to expressly mention the Jews alongside the Coloreds. I believe that every judge would reckon the Jews among the Coloreds, even though they look outwardly White, just as they do the Tatars, who are not Yellow. Therefore I am of the opinion that we can proceed with the same primitivity [*Primitivität*] that is used by these American states. A state even simply says: "colored people." Such a procedure would be crude [roh], but it would suffice.[[146]](#footnote-146)

Such was the attractiveness of the American model for this baleful figure, the avatar of the modern judicial butcher, a man guilty of "a perversion of the forms of justice that was extreme even by the standards of the Third Reich"[[147]](#footnote-147): American courts did not allow themselves to hobbled by some pedantic insistence on clear and juristically defensible concepts of race. They just went to work. Even though America did not target the Jews, this American common-law style of legal racism, with its easygoing, open-ended, know-it-when-I-see-it way with the law, had a "primitivity" that would "suit" Nazi judges "perfectly."

This was too much for Gürtner, who responded to Freisler by trying once again to dismiss the usefulness of American "models":

Reich Minister Dr. Gürtner: Well, the idea that we could get anything useful from these American models cannot be exploited in practice, since, as Herr State Secretary Dr. Freisler has already said, American law concerns itself with variants, with different nuances, of the concept "Coloreds," used now in this way, now in that, perhaps most clearly in the case of Virginia, which speaks of "coloured persons," including Mulattoes, Mestizos etc.[[148]](#footnote-148)

Such vague reference to "Coloreds" was useless to Germany, Gürtner insisted; and it was useless because there should be no general criminalization of mixed marriages. The only possible aim of the new legislation would be to criminalize malicious racial deception in marriage; and it was in the nature of things that "coloured persons" were in no position to deceive others about their race:

If our aim in the criminal law of race protection is to punish malicious deception, then the question of Coloreds falls *ipso facto* by the wayside, since malicious deception on the part of Coloreds does not seem to me very probable.[[149]](#footnote-149)

The American question was thus sharply framed as part of the conflict between hardliner and moderate. Freisler, the champion of merciless criminalization, declared that the American approach would "suit us perfectly"; Gürtner, the lawyer-moderate, destined ultimately to lose in the political battles of the next year, insisted that there was no place for "American models" in the more modest and juristically conventional approach he advocated.

Thus a stenographic transcript of a critical meeting planning what would become the Nuremberg Laws. The transcript is quite a striking datum in comparative law: It is rare indeed that we possess such an ingenuous and detailed account of how the process of influence transpires.

And needless to say what the June 5 transcript records is not evidence of the supposed "astonishing insignificance" of American law. American law was the first topic of discussion at the meeting, and it was mooted in notably well-informed detail by the participants. Moreover the American example had clearly been a subject of discussion and debate before the meeting took place, so much so that the Justice Ministry had gone out of its way to prepare a memo on the subject. In particular it is clear that there had been debates over whether the importation of Jim Crow measures might not serve to "educate and enlighten" the German populace. Some moderates had advocated Jim Crow "enlightenment" as an alternative to criminalization; while a more hardline figure like Klee thought of Jim Crow as a more broad-gauged version of the menacing Nazi boycott. Justice Minister Gürtner was manifestly uncomfortable with "American models"; but he nevertheless felt constrained to open the general discussion at the meeting by presenting the Ministry's memo. In particular he felt constrained to note that the American states engaged in the criminalization of mixed marriages. The participants had differing views on the value of American law for Nazi Germany; but those differences reflected the liveliness of the discussion that had been underway. Their meeting was certainly not by any means devoted exclusively to America; but the participants clearly took a serious interest in what they could learn from the laws of the American states.

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

All this certainly does not mean that the Second Nuremberg Law was directly or mechanically copied from some American model; but it is hardly insignificant. What it suggests, clearly enough, is that for these Nazi lawyers, in the summer of 1934, as for Hitler in the 1920s, America was the obvious pre-eminent example of a "race state," even if it was one whose lessons were not unproblematically applicable to Germany. The bottom line is this: When the leading Nazi jurists assembled in early June 1934 to decide how to institutionalize racism in their new Third Reich, they began by asking how the Americans did it.

**IV. The Sources of Nazi Knowledge of American Law**

A tantalizing question about the meeting remains. Where did the participants get their information? What has become of the "thoroughly comprehensible synoptic presentation of American race legislation" that Gürtner presented at the meeting? What was the source of the "list" of the laws of the thirty states that Freisler mentioned? Where are these historic documentary sources of the international movement of racism in the 1930s? The document or documents in question are not preserved in the archives, as far as I have been able to discover.[[150]](#footnote-150) Nevertheless they can be reconstructed with fair confidence, and they tell us some interesting things about the diffusion of American racist ideas in the mid-twentieth century.

It seems likely that Gürtner and Freisler were relying in part on a table listing the law of the American states that was published later that year in the National Socialist Handbook on Law and Legislation, to which I will return shortly.[[151]](#footnote-151) As for the Ministry's memo: It is highly probable it drew on the research of a man I have already mentioned several times: Heinrich Krieger, to whom a reference was later added to a redacted version of the stenographic transcript[[152]](#footnote-152); and it is important to turn for a moment to Krieger's research, for knowing Nazi engagement with American law in the early 1930s meaning knowing Heinrich Krieger.

Krieger was a young 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.[[153]](#footnote-153) He was deeply immersed in American law, so much so that in late 1934 he published a well wrought English-language law review article entitled "Principles of the Indian Law" in the George Washington Law Review, to which I will return.[[154]](#footnote-154) The "material" that Gürtner quoted most likely came from research included in another Krieger Article, entitled "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.[[155]](#footnote-155)

That article is a compendium of what was known in Germany in the summer of 1934. It devoted particular attention to the same questions that concerned the participants at the June 5 meeting: whether American anti-miscegenation legislation involved mere civil invalidity of mixed marriages or whether it also criminalized those marriages, and how precisely American law defined the different races. Thus Krieger reviewed for his Nazi readers the draconian state 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 assumption that there is widespread knowledge of the descent of individuals.[[156]](#footnote-156)

This was a somewhat incomplete account of the American criminalization of the "infamous crime" of race mixing in marriage--there were more statutes than Krieger had identified[[157]](#footnote-157)--but in its essentials it was sound. It was presumably this passage, or something like 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. He dwelt on the fact that American law was content to divide the population into two fundamentally arbitrary categories, "White" and "Colored." Like Freisler, Krieger emphasized that there was nothing scientific about these concepts: The two categories were the product of "ideological influences," not race reality. Nevertheless American law was able to manage as it wrestled with the same critical "problem" as Germany: how to treat "mongrels":

The problem of the legal treatment of *mongrels* has received a simple solution, at least from the point of view of American statutory law: A fundamental distinction is made between only *two* population groups: *Whites* and *Coloreds*. All of the concepts used in the regulations accordingly involve artificial line-drawing, partly driven by ideological influences.

Implicit in this was the point made by Dohnanyi at the June 5 meeting: The fact that there were only two categories meant that American law lumped Jews in under the heading "Caucasian." As Krieger would explain in the 1936 book version of his study, this was because the United States had "so far" not gotten around to the Jew problem.[[158]](#footnote-158) 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 "mongrels." For the most part, he reported, the states looked to descent, defined by fractions of blood, but they sometimes took other tacks as well:

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

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

The conceptualization of race in the *courts* is even more variable. A rare example of an extreme case of a judicial definition is a decision from Ohio [Monroe v. Collins 1867] which declares white persons to include those of more than half white descent. 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.[[159]](#footnote-159)

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

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

Nazi engagement with the American model continued over the subsequent months leading up to the formal proclamation of the Nuremberg Laws in September 1935. Almost as striking as the discussion of American law by the Commission on Criminal Reform in the summer of 1934 is the Article on "Volk, Rasse und Staat," "*Volk*, Race and State" in the National Socialist Handbook for Law and Legislation. The Handbook's Article on "*Volk*, Race and State" was the basic review of how to craft race legislation for a new Nazi order. Its author was Herbert Kier, at the time a junior academic at the University of Berlin and later one of Heinrich Himmler's operatives.[[160]](#footnote-160) After giving an overview of Nazi hopes and plans for a new racial order, Kier turned, in the closing sections of his Chapter, to the by now familiar example of the United States. Kier began by alluding to the foreign incomprehension of Nazi goals:

The national socialist ideology presented here, and the conclusions that must be drawn from it, have been widely met with complete misunderstanding, and National Socialism and the German *Volk* have been the targets of serious attacks. This is all the more incomprehensible since the United States of North America in particular has introduced statutory regulation in many areas that grow out of the racial point of view. In this regard it is worth observing that the dominant political ideology in the USA must be characterized as entirely liberal and democratic. With an ideology of that kind, which starts from the fundamental proposition of the equality of all persons who bear a human countenance, it is all the more astonishing how extensive race legislation is in the USA. Let me provide a few examples. The laws of the following American states forbid mixed marriages between White and Colored Races.[[161]](#footnote-161)

Kier then printed a two-page alphabetical table with exact description and citation of the anti-miscegenation legislation of all thirty American states.[[162]](#footnote-162) That table corresponds to the description of American law given by Gürtner and Freisler the previous June, and it seems a fair guess that it was one of the sources of their detailed information on American law, very likely the "list" to which Freisler referred at the June 5 meeting. After printing the table, 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.[[163]](#footnote-163)

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

In most of the Southern states of the Union white children and colored children are sent to different schools following statutory regulations. Most American states further demand that race be given in birth certificates, marriage licenses, and death certificates. Many American states even go so far as to require by statute segregated facilities for Coloreds and Whites in waiting rooms, train cars, sleeping cars, street cars, busses, steamboats, and even in prisons and jails. In several states, as in Florida, only Whites can be members of militia, in yet others, as in Arkansas, voter lists are separated by race and in the same state Whites and Coloreds are separated on the tax rolls.[[164]](#footnote-164)

What all this demonstrated was how natural and inevitable racist legislation was:

This variegated abundance of statutory racial regulation in the States of the Union demonstrates that the elemental force of the necessity of segregating humans according to their racial descent makes itself felt even where a political ideology stands in the way--a political ideology that denies that human beings have different worth depending on their descent. A very brief overview of American race law is given by H. Krieger in the Verwaltungsarchiv.[[165]](#footnote-165)

Immigration and naturalization came in as well, as it always did for Nazi writers; indeed the closing paragraph of Kier's Chapter was devoted to American immigration law:

In the same way, American immigration legislation shows that in the USA a clear understanding has been achieved that a unified North American *Volk* body can only emerge from the "melting pot" if wholly foreign racial population masses are not tossed in with the core population, which is English-Scandinavian-German in origin, and thus made up of racially related peoples. These two populations feel such natural antipathy that they resist being welded together. Once this fundamental recognition has been attained, it is only a matter of logical thinking to pay tribute to it in political ideology and above all in the creation of a concept of the *Volk*. National Socialism is the first to do this and the time will hopefully yet come when the *Völker* who are to be counted among the European cultural circle will acknowledge this epochal deed, which calls upon them to come to their senses and remember their original and essential values.[[166]](#footnote-166)

Thus the concluding words of the standard Nazi handbook Chapter on how to craft race legislation. America had attained the "fundamental recognition" and taken the first steps; Nazi Germany was carrying the logic forward; eventually it was to be hoped that all of the "European culture circle" would join in.

Kier did not bury his account of American law in footnotes. He devoted paragraph upon paragraph to the precise details of American law, and in particular to anti-miscegenation law; by page count a full quarter of his Chapter was about the law of the United States. His very peroration, extolling the historic mission of Nazism, identified America as Germany's forerunner despite its "liberal and democratic" ideology. Kier certainly did refer to international "misunderstanding" of the regime. But once again the Chapter cannot have been meant for a foreign audience. This was another dense text in *Fraktur*, probably with limited foreign circulation,[[167]](#footnote-167) 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 the program. 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 wish to pretend otherwise.

**V. Evaluating American Influence**

Like American immigration law, American miscegenation law was thus a regular point of reference during the years when the Nuremberg Laws emerged. The question remains whether we can say that the Nazis were in some meaningful way directly influenced by American miscegenation practice. The answer is an (only somewhat hesitant) Yes. First and foremost, there may have been something we can fairly call "influence" in the criminalization of mixed marriages. The Law on the Protection of German Blood and German Honor, decreed both the civil invalidity and the criminality of mixed marriages:

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

**§ 1**

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

\* \* \*

**§ 5**

(1) Any person who violates the prohibition of § 1 shall be punished by imprisonment at hard labor.[[168]](#footnote-168)

The language of this Law was certainly not directly copied from some American statute; but that is not the point. Legal borrowing by jurists as sophisticated as the Germans of the mid-twentieth century does not involve literal copying. Lawyers make use of larger conceptual frameworks while drafting language that suits their particular circumstances; and in this case the leading German lawyers of the early Nazi period framed their conceptual question as the question of whether marriage could ever be the subject of criminal law, outside the case of bigamy and "malicious racial deception." American law, with its democratic willingness to flout juristic tradition, offered the sole example of a Western system that broadly criminalized mixed marriages. German jurists knew that, and they discussed the American sources both in print and in closed-door meetings. In particular, the radical Nazi Freisler, who pushed for broad criminalization, appears in the June 5 1934 transcript as a vocal champion of American legislation and jurisprudence.

No doubt Nazi radicals would have succeeded in criminalizing mixed marriages no matter what. Still, it is hard to ignore all the evidence of Nazi engagement with the American example. Maybe the radicals were indeed destined to win; but that does not mean that having a foreign source of authority meant nothing in the tense political battles, hard inner moral struggles, Nazi efforts to secure the collaboration of the legal profession, and yearning for international affirmation that marked the "National Revolution" in 1934 and 1935. 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 other case in comparative law, we would not hesitate for a moment to speak of "influence."

We can also see hints of the value of the American example on the Nazi classification of racially inferior "mongrels." American law was concerned with defining "Negroes" just as German law was concerned with defining "Jews," and Nazi writers were well aware that the United States offered a 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 which 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."[[169]](#footnote-169)

This was 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.[[170]](#footnote-170)

The one-drop rule was too harsh for the Nazis (or at least for most of them[[171]](#footnote-171)), and for that reason alone the influence of American classification schemes was inevitably limited. The Nazi literature saw other obstacles as well. German Jews were simply not American Blacks. American Blacks were generally physically recognizable as such, and that meant that America could rely on "mostly clear color lines."[[172]](#footnote-172) 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.[[173]](#footnote-173)

Germany's "Jew problem" was far more insidious than America's "Negro problem": The German Jews 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."[[174]](#footnote-174)

America was different; there were limits to the possible extent of American influence on Nazi racial classifications; and Nazi authors were quite conscious of them. Nevertheless American racial classifications were of inevitable legal interest; that was a large part of the appeal in American miscegenation law. We see that in Justice Minister Gürtner's report on how American law defined the races. We see it 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 Johan von Leers' 1936 review of the laws of the American states.[[175]](#footnote-175) 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 involve 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)."[[176]](#footnote-176)

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 counter-proposal 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.[[177]](#footnote-177) It was that counter-proposal that ultimately made its way into the crucial implementation ordinance of the Nuremberg Laws[[178]](#footnote-178):

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

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

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

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

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

[minor other provisions follow][[179]](#footnote-179)

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

Also reckoned among the Jews are certain *groups of half-Jews* (persons with two full Jewish and two non-Jewish or not full Jewish grandparents), who on account of certain circumstances must be regarded as more strongly inclined toward Jewdom.[[180]](#footnote-180)

Did the American example count for something here? Krieger's article was not the only possible source for the notion that a juristic solution to the problem of classifying Jews might turn in part in on marital history. As we have seen, the Nazi literature on American immigration law praised the American Cable Act rule denaturalizing women who stooped to marry Asian men.[[181]](#footnote-181) It may have mattered, in the charged debates of the weeks after the promulgation of the Nuremberg Laws, that America, the model of a country with anti-miscegenation law, offered some support for the notion that marital history should play a role in assigning persons to one racial category rather than another.

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

**Conclusion: America in a Nazi Mirror**

On September 23, 1935, eight days after the "Party Congress of Freedom" witnessed the Führer's proclamation of the Nuremberg Laws, a delegation of fifty Nazi lawyers gathered on board the S.S. Europa, bound for the United States on a "study trip" organized by the Association of National Socialist German Jurists. The U.S. dollar, pummeled by New Deal monetary policies, was at an advantageously low exchange rate,[[182]](#footnote-182) and the participants had been assured that they could travel in style on the Europa, one of the swiftest ocean liners on the Atlantic and the pride of German engineering.[[183]](#footnote-183) The organizers--so Nazi legal journals reported--promised that the trip would give the participants "not only special insight into the workings of American legal and economic life through study and lectures, but also a broad overview of life in the New World in general."[[184]](#footnote-184) Participants had the luxury of choosing between two different programs after enjoying a reception upon their arrival in New York.[[185]](#footnote-185) In short, they were on a Nazi boondoggle.

Before they sailed, the fifty Nazi lawyers received an on-board "greeting" from Party bigwig Hans Frank, which was communicated to them by Wilhelm Heuber, Party Member since 1930 and officer of the Association of National Socialist German Jurists. The participants were, in the jargon of the Association, "upholders of German law"; and Heuber described their trip as the reward for a year of struggles on behalf of a new order:

As Dr. Heuber explained . . . [t]hrough this study trip the upholder of German law would gain the necessary compensation for an entire year of work opposing an outdated type of jurist, always inclined to ignore the realities of life.[[186]](#footnote-186)

Even at the distance of eighty years, one can almost still hear the fifty Nazi lawyers murmuring their satisfaction over the victories of the year, raising their glasses, and clicking their heels.

Sadly, it is not possible to know much about how the fifty Nazis fared on their American tour.[[187]](#footnote-187) But as this study has shown, we can know a great deal about the interest in American law in Germany during their previous "year of work opposing an outdated type of jurist." From Mein Kampf onward, America was a regular topic of discussion among Nazi jurists and policy-makers. Nazis engaged in detailed study of both American immigration law and American anti-miscegenation law. Some of them weighed the attractions of a system of Jim Crow segregation. Certain aspects of American race law struck Nazi observers as appealing; others, like the one-drop rule, struck them as disturbingly harsh. Some of the more vicious Nazis championed the lessons to be learned from America; while moderates like Justice Minister Gürtner worked to downplay the usefulness of American precedents. Nobody argued in favor of a wholesale importation of American practices; but many expressed their approval of America's "fundamental recognition" of the imperative of legal racism--though Nazi authors always added that the task of building a fully realized race state remained for National Socialist Germany to complete.

What should we think about all this? It is certainly disturbing to discover that Nazi jurists displayed so much interest in American models, and made such assiduous efforts to master the details of American law. But it is not news that America had ugly race law in this period. We all already knew that there were parallels between Jim Crow America and Nazi Germany; after all, they are obviously there. We were all already well aware that terrible evil was done to American Blacks in the Southern states.[[188]](#footnote-188) At the end of the day does it really change our vision of America all that much to learn the Nazi did not simply invent their racist order from scratch, but rather invoked and studied ours?

It does.

First of all, seeing America through Nazi eyes brings home a truth that wise scholars have recognized, but which 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. We must shake off 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. America's influential stature in twentieth-century world racism had to do with wider American campaigns and other American forms of law. In particular, it had to do with national and nationwide programs of race-based immigration and anti-miscegenation law. Those were the aspects of American race law that hung on the longest, and those were the aspects that appealed most to Nazi Germany.

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 our country: 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.

Of course that is not to say that America was the only racist country in the early twentieth century. 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.[[189]](#footnote-189) 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.[[190]](#footnote-190) By the end of the nineteenth century there was explicitly race-based exclusionary immigration legislation in Brazil[[191]](#footnote-191); and a figure like Leers was eager to argue that racist law could be found throughout human history.[[192]](#footnote-192)

Most especially there was plenty of racism among the daughter nations of British Imperialism. We must pay attention when a Nazi author 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, and fundamental, questions about the place of the Anglo-American, common-law world in the global history of racism. The background to Nazism is to be sought partly among the democracies of "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. The race-based laws of these sometime zones of the British *Imperium* have been probingly described by Marilyn Lake and Henry Reynolds in their 2008 book Drawing the Global Colour Line[[193]](#footnote-193); some of those laws were presumably what Koellreutter had in mind. The history of this Anglo settler racism extends well back to the nineteenth-century "White Australia" movement, to Jacksonian America,[[194]](#footnote-194) and to the early twentieth-century South Africa where Gandhi formed his views.[[195]](#footnote-195) Of course it also extends through the American conquest of the West that Nazis invoked so often in the 1940s. That is why it is possible for historian Norman Rich to write that "[the] United States policy of westward expansion, in the course of which the white men ruthlessly thrust aside the 'inferior' indigenous populations, served as the model for Hitler's entire conception of *Lebensraum*."[[196]](#footnote-196) That is why Hitler himself could declare that the Nazis' exterminatory conquest of the East would follow the lead of the "Nordics" of the United States, which "gunned down the millions of Redskins to a few hundred thousand."[[197]](#footnote-197) Our comfortable belief that America offered no model for German programs of extermination depends on the assumption that the right comparison is between German Jews and American Blacks. But what if the right comparison is between German Jews and American Indians?

Of course it is no easy thing to accept the idea that our Anglo traditions provided some sort of inspiration for Nazism. We are all bred in the faith of common law liberty. Nevertheless I think we must recognize that it is no accident that the Nazis looked for models in these other realms of the "Free White" world. As I have argued elsewhere, Nazism too was a kind of egalitarian White movement: The promise 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 co-equal member of the ruling class by simple virtue of membership in the Master Race.[[198]](#footnote-198) Of course this egalitarian promise could only be realized at the expense of non-"Aryans." In much the same way, the Anglo promise of equality, which represented such a daring departure from the hierarchical world of the past, could arguably only be made at the expense of excluding some disfavored population. The venture of instituting an egalitarian democracy was much bolder in the eighteenth and nineteenth centuries than we remember now. Equality was only easily imaginable if it was in *some* way restrictive. For that reason it may be right to say that the historic racism of places like America and Australia was, not an unfortunate deviation from democracy, but the price of democracy. In much the same way, Nazi racism was the price of a Nazi species of social egalitarianism.

In any case, whatever the parallels with other countries, in the common law world or elsewhere, the history I have recounted is one in which America ultimately stands out. In the early twentieth century the United States, with its vibrant and innovative legal culture, was the country in the forefront of the creation of race law. That is how the Nazis saw matters, and they were not the only ones. The scholars who have studied the various eruptions of racial exclusionism in the non-American world consistently make the same disheartening observation: At least from the late nineteenth century onward, makers of race-based legislation regularly turned to the United States for instruction and inspiration. That was true in Brazil, as Fitzgerald and Cook-Martin show[[199]](#footnote-199); just as it was true, as Lake and Reynolds show, in Australia and true in South Africa[[200]](#footnote-200); just as it was true of the German colonial administrators who went hunting for a model for the making of anti-miscegenation law.[[201]](#footnote-201) And while the Nazis liked to mention South Africa as a fellow-traveler, in practice they found very little South African law to cite.[[202]](#footnote-202) Their overwhelming interest was in the "classic example," the United States of America. To admit as much is not to relativize Nazi crimes. It is simply to recognize a basic truth about the genesis of Nazism: The Nazi movement took shape in part as racist ideas and programs that had emerged elsewhere, including notably the United States, acquired the backing of a German state apparatus far more powerful than anything to be found in the Americas, and far more ruthless than any that had ever existed in Europe west of the Elbe.

It bears emphasis that the pre-eminence of the American "classic example" in Nazi minds did not have to do only with American racism. It also had very much to do with American legal culture. What was striking about Americans in this period, as in other periods, was what struck Roland Freisler: our brash refusal to be bound by juristic traditions and conventions. When Freisler declared that the American common law approach "would suit us perfectly," it was because in America he saw none of the culture of "scientific" juristic conservatism that undergirded the resistance of figures like Gürtner and Lösener to radical Nazi programs. Freisler was attracted to American law because it bore so little resemblance to the style of the "outdated type of jurist, always inclined to ignore the realities of life": American law was law that simply took a problem in hand--for example the problem of the "danger" posed by lesser races--and set about pragmatically solving it.

As this suggests, the drama of American influence in Nazi Germany is partly a drama in the history of twentieth-century jurisprudence. The radical Nazis (contrary to a still widespread misconception[[203]](#footnote-203)) were determined anti-positivists, who favored what they proudly called a law of the "realities"; they were committed, much like the American realists, "to overcoming the alienation between life and law."[[204]](#footnote-204) In America they saw a country where such realism ran deep--a country where democratic legislatures cheerfully invented race-based immigration law and criminalized whatever seemed to need criminalizing, without regard to juristic traditions, a country where judges made racism a "reality" without bothering themselves over what the "science" of the law might dictate. That too made America what it was for the Nazis who gathered in Berlin to plan the Nuremberg Laws in June of 1934: the obvious first place to turn for wisdom on how to construct legally enforced and sanctioned racism.

"There is currently *one* state," wrote Adolf Hitler, "that has made at least the weak beginnings of a better order." When one thinks of race law, said Nazi lawyer and later SS-Obersturmbannführer Fritz Grau, one thinks of "North America." "It is attractive to seek foreign models," declared Reich Minister of Justice Franz Gürtner; and like others before them, America was the model that the lawyers of the Ministry found. To be sure, America had failed to target the Jews "so far," as Heinrich Krieger acknowledged; but apart from that "exception," declared Roland Freisler, hanging judge of the National Socialist People's Court, America had things to teach Germany: The United States had produced an admirably uninhibited racist jurisprudence, a jurisprudence that did not trouble itself about juristic niceties and that would therefore "suit us perfectly." In the eyes of these Nazis, the United States was indeed the "classic example." It was the country that produced the really "interesting" innovations, the natural first place to turn for anybody in the business of planning a "race state." That is why the National Socialist Handbook of Law and Legislation could close its Chapter on how to build a race state by describing America as the country that had achieved the "fundamental recognition" of the truths of racism, and taken the first necessary steps, now to be carried to fulfillment by Nazi Germany.

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

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

\* \* \*

How did we find ourselves playing this ghastly role? What are we to make of *this* aspect of American global leadership? That is a hard question, and not only because it necessarily gnaws at our national pride, and at our faith in the American style of democracy and the American spirit of innovativeness in law. It is a hard question because it is not entirely easy to answer.

I will not attempt to give a full answer to that question here; but I would like to close by allowing one Nazi to pose it in its sharpest form: Heinrich Krieger, author of Race Law in the United States and the main agent of the transmission of the American model to Nazi Germany.

After his year as an exchange student in Arkansas, the young Nazi lawyer Krieger returned to a Germany in the throes of the "National Revolution" in 1934. There he benefited from the sponsorship of Koellreutter among others, and became a fellow at a research institute then under the control of Frick's Ministry of the Interior.[[205]](#footnote-205) He would later join a Nazi office in Southwest Africa, where German colonial administrators had first investigated the American race-law model thirty years earlier.[[206]](#footnote-206) During his time in Africa Krieger continued to do scholarly work, publishing studies on local race law and the treatment of indigenous legal traditions.[[207]](#footnote-207) In all of his writings he showed not only his allegiance to Nazi values, but also his command of the finest techniques of German legal realist scholarship. Indeed his interpretation of America was one of the finest example of Nazi writing in what we would now call the law and society tradition.

Krieger's work interpreting American law began with his 1934 Article in the George Washington Law Review, "Principles of the Indian Law." That Article 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. It provided 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, concluded Krieger: 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.[[208]](#footnote-208) 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 the Ukraine as "Indians" in 1942.[[209]](#footnote-209) 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.

Race Law in the United States, which Krieger published in 1936, the year following the promulgation of the Nuremberg Laws, was another work that cannot be called stupid. That book, littered 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 a startling account of American legal history--startling, if for no other reason, because his heroes were Thomas Jefferson and Abraham Lincoln. Krieger's 1934 Article in the Verwaltungsarchiv took as its epigraph Jefferson's 1821 declaration of the impossibility of racial coexistence: "[i]t is certain that the two races, equally free, cannot live in the same government."[[210]](#footnote-210) Race Law in the United States now added an account of the Civil War Era that included an exact and lengthy documentation of Lincoln's many pre-1864 declarations to the effect that the only real hope of America was the resettlement of the Black population elsewhere.[[211]](#footnote-211) This was telling material in the Germany of 1936: The Nazi policy with regard to the German Jews was precisely that they must be driven out of the Reich. Lincoln was Krieger's exemplary statesman, to whom he referred frequently: He maintained that America would have become the first true healthy race-based order if only Lincoln, wise in the knowledge that the races could not inhabit the same country, had not been assassinated.[[212]](#footnote-212) Krieger's villains were the Radical Republicans, and his ultimate diagnosis of American in the 1930s was a 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.[[213]](#footnote-213)

This was certainly a deeply distasteful reading of American legal history[[214]](#footnote-214); but it was buttressed by three hundred and fifty pages of detailed study of American statutory and decisional law, presented against the background of statistical and qualitative studies in American society; and it was rich in theoretical sophistication and acute observations about workings of American legal racism. And in his grand history of American law--for he worked through the sources going back to the earliest colonization of North America--Krieger posed the question that we still must answer. When Krieger touched on the topics that mattered most in Nazi Germany, immigration and miscegenation, he made a challenging and troubling observation. American race-based law was not a creation of the 1920s or 1930s. It reached back for centuries.

For explicitly race-based anti-miscegenation law, Krieger noted in Race Law in America, has a deep American history. The oldest race-based anti-miscegenation statute in American history--and probably in the history of the Western world--was the ban introduced in Virginia in 1691.[[215]](#footnote-215) As for explicitly race-based American immigration law: That did not begin with the Emergency Quota Act of 1921, or even with the anti-Chinese measures of the late nineteenth century. As Krieger observed, Americans already took the highly unusual step of racializing citizenship with the Naturalization Act of 1790, which limited naturalization to "Free and White Foreigner[s]."[[216]](#footnote-216) American leadership in race law is not a modern phenomenon. It reaches back to the founding of the Republic, and beyond.

That is a truth about America that a Nazi legal scholar could see clearly from across the Atlantic in 1936. It is the ultimate truth that this history leaves us to ponder.

1. Johnpeter Horst Grill & Robert L. Jenkins, *The Nazis and the American South in the 1930s: A Mirror Image?*, 58 J. Southern History, 667 (1992). [↑](#footnote-ref-1)
2. Mark Mazower, Hitler's Empire: How the Nazis Ruled Europe 584 (2008). See also the clever speculations of a student paper published in 2002: Bill Ezzell, Laws of Racial Identification and Racial Purity in Nazi Germany and the United States: Did Jim Crow Write the Laws that Spawned the Holocaust?, 20 S.U.L. Rev. 1 (2002-2003). [↑](#footnote-ref-2)
3. Andreas Rethmeier, "Nürnberger Rassegesetze" und Entrechtung der Juden im Zivilrecht 138-39 (1995). [↑](#footnote-ref-3)
4. Id., 139. [↑](#footnote-ref-4)
5. H-Judaica, 31 Mar 1999. [↑](#footnote-ref-5)
6. Id. [↑](#footnote-ref-6)
7. Id., 204-06. [↑](#footnote-ref-7)
8. Id., 140. [↑](#footnote-ref-8)
9. Stefan Kühl, The Nazi Connection: Eugenics, American Racism and German National Socialism (1994). [↑](#footnote-ref-9)
10. These quotes from the Nazi Party Newspaper *Völkischer Beobachter*, reproduced in Hans-Jürgen Schröder, Deutschland und die Vereinigten Staaten, 1933-1939, 93 (1970); see generally id. 93-119. Detlef Junker sees the turning point as coming with the "Quarantine Speech" in October of 1937. Junker, Hitler's Perception of Franklin D. Roosevelt and the United States of America, in FDR and His Contemporaries: Foreign Perceptions of an American President, 150-51 [143-56] (Cornelis A. van Minnen & John Sears., eds., 1992) [↑](#footnote-ref-10)
11. Schröder, Deutschland und die Vereinigten Staaten, 93-119; and for "the fascist New Deal," James Q. Whitman, Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code,” 97 Yale Law Journal 156, 170 (1987). [↑](#footnote-ref-11)
12. While Junker, Hitler's Perception of Franklin D. Roosevelt, points to the Quarantine Speech of 1937, Steven Casey, Cautious Crusade: Franklin D. Roosevelt, American Public Opinion, and the War against Nazi Germany, 40 (2001), documents the reluctance of FDR to name Hitler until 1939. [↑](#footnote-ref-12)
13. Carl Schmitt, Völkerrechtliche Grossraumordnung 19-20 (1941). [↑](#footnote-ref-13)
14. Timothy Snyder, Bloodlands: Europe Between Hitler and Stalin (2010). [↑](#footnote-ref-14)
15. Carroll Kakel, The American West and the Nazi East: A Comparative and Interpretive Perspective 1-2 (2011) (survey of literature); David Blackbourn, *The Conquest of Nature and the Mystique of the Eastern Frontier in Germany* 152-53 in Germans, Poland, and Colonial Expansion in the East (Robert Nelson, ed. 2009); Alan Steinweis, Eastern Europe and the Notion of the "Frontier" in Germany to 1945, 13 Yearbook of European Studies 56-70 (1999); Philipp Gassert, Amerika im Dritten Reich. Ideologie, Propaganda und Volksmeinung, 1933-1945 95-97 (1997). Jens-Uwe Guettel, German Expansionism, Imperial Liberalism, and the United States, 1776-1945, 193-195, 209-211 (2012), makes unpersuasive efforts to dismiss this literature, essentially by denying the force of examples, no matter how many are given. [↑](#footnote-ref-15)
16. Below, text at notes . . . [↑](#footnote-ref-16)
17. G[ustav] K[lemens] Schmelzeisen, Das Recht im Nationalsozialistischen Weltbild. Grundzüge des deutschen Rechts 84 (3d ed. 1936). [↑](#footnote-ref-17)
18. Below, text at notes . . . [↑](#footnote-ref-18)
19. See below, text at notes . . . [↑](#footnote-ref-19)
20. See below, text at notes . . . [↑](#footnote-ref-20)
21. H-Judaica 31 Mar 1999. [↑](#footnote-ref-21)
22. On Pound, see Stephen Norwood, The Third Reich in the Ivory Tower 56-57 (2009); and on American Nazism more broadly Sander A. Diamond, The Nazi Movement in the United States, 1924-1941 (1974); and for a favorable response to Heinrich Krieger, Karl J. Arndt, *Review of Heinrich Krieger, Das Rassenrecht in den Vereinigten Staaten*, in 12 Books Abroad 337-38 (1938). [↑](#footnote-ref-22)
23. Reich Adopts Swastika as Nation's Official Flag; Hitler's Reply to 'Insult," New York Times, Sept. 16, 1935, p. A1. [↑](#footnote-ref-23)
24. 1 Reichsgesetzblatt 1146 (1935). Available at https://de.wikisource.org/wiki/Reichsb%C3%BCrgergesetz. [↑](#footnote-ref-24)
25. 1 Reichsgesetzblatt 1146 (1935). Available at https://de.wikisource.org/wiki/Gesetz\_zum\_Schutze\_des\_deutschen\_Blutes\_und\_der\_deutschen\_Ehre [↑](#footnote-ref-25)
26. For an account looking beyond the conventional focus on segregation, see Ariela Gross, What Blood Won't Tell: A History of Race on Trial in America 5-7 (2008). [↑](#footnote-ref-26)
27. 347 U.S. 483 (1954). [↑](#footnote-ref-27)
28. 163 U.S. 537 (1896). [↑](#footnote-ref-28)
29. E.g. James Falkowski, Indian Law/Race Law: A Five-Hundred Year History 47-80 (1992). [↑](#footnote-ref-29)
30. Ian Haney-Lopez, White by Law 27-28 (2006). [↑](#footnote-ref-30)
31. E.g. Christopher Waldrep, *Substituting Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court*, 82 J. Amer. Hist. 1426 (1996); Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 Nw. L. Rev. 63 (2009). [↑](#footnote-ref-31)
32. Peggy Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America (2009). [↑](#footnote-ref-32)
33. Haney Lopez, White by Law 27-34. [↑](#footnote-ref-33)
34. See below, text at notes . . . [↑](#footnote-ref-34)
35. 388 U.S. 1 (1967). [↑](#footnote-ref-35)
36. Immigration and Nationality Act of 1965 (Pub.L.  89-236, 79 Stat. 911, enacted June 30, 1968). [↑](#footnote-ref-36)
37. Mae Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. Amer. Hist. 69 (1999). In an important article, Son Thierry Ly and Patrick Weil show the 1921 statute was in fact designed to curb racist policies as much as possible. Ly & Weil, *The Anti-Racist Origin of the Quota System*, 77 Social Research 45-78 (2010). What matters for my purposes here, however, is that the 1921 statute was explicitly race-based. [↑](#footnote-ref-37)
38. André Siegfried, Die Vereinigten Staaten von Amerika. Volk. Wirtschaft. Politik 79-108 (2d ed. trans. C. & M. Loosli-Usteri, 1928), and e.g. 100 for the character of American immigration legislation. [↑](#footnote-ref-38)
39. David Scott Fitzgerald & David Cook-Martin, Culling the Masses: The Democratic Origins of Racist Immigration Policy in the Americas 7 (2014). [↑](#footnote-ref-39)
40. Nationalsozialistisches Parteiprogramm (1920), available at http://www.documentarchiv.de/wr/1920/nsdap-programm.html. [↑](#footnote-ref-40)
41. Jürgen Peter Schmidt, *Hitlers Amerikabild*, 53 Geschichte in Wissenschaft und Unterricht 714-26 (2002); cf. Inge Marszolek, *Das Amerikabild im Dritten Reich*, in Amerika und Europa. Mars und Venus? Das Bild Amerikas in Europa 49-64 (Rudolf von Thadden & Alexander Escudier eds., 2004). [↑](#footnote-ref-41)
42. Adolf Hitler, Mein Kampf 488-90 (14th ed. 1932). [↑](#footnote-ref-42)
43. Kühl rightly highlights this passage, but only for its attention to eugenics. Kühl, Nazi Connection, 26. [↑](#footnote-ref-43)
44. Hitler, *Außenpolitische Standortbestimmung nach der Reichstagwahl, Juni - Juli 1928* in 2A Adolf Hitler, Reden, Schriften, Anordnungen 92 (1995). [↑](#footnote-ref-44)
45. Hitlers Zweites Buch. Ein Dokument aus dem Jahr 1928 130, 132 (Gerhard Weinberg. ed. 1961). [↑](#footnote-ref-45)
46. Quoted partially and discussed in Ian Kershaw, Fateful Choices: Ten Decisions that Changed the World, 386-87 (2007); cf. Kakel, American West, 1. I have added a fuller and slightly altered translation of the passage quoted by Kershaw, from 3:1 Adolf Hitler, Reden, Schriften, Anordnungen 161 (1994) (orig. 1928) [↑](#footnote-ref-46)
47. Detlef Junker, *Die Kontinuität der Ambivalenz: Deutsche Bilder von Amerika, 1933-1945*, in Gesellschaft und Diplomatie im transatlantischen Kontext 171-72 (Michael Wala, ed., 1999), quoted passage at 171. [↑](#footnote-ref-47)
48. Philipp Gassert, Amerika im Dritten Reich. Ideologie, Propaganda und Volksmeinung, 1933-1945 95-97 (1997), quoted language at 96. [↑](#footnote-ref-48)
49. Id. [↑](#footnote-ref-49)
50. E.g. Hans Reimer, Rechtsschutz der Rasse im neuen Staat 47 (1934). [↑](#footnote-ref-50)
51. Junker argues that the Nazis took a generally benign view of the United States in the early 1930s. Junker, *Kontinuität*, 166-167. From the point of view of the legal history traced in this Article, it must be said that the Nazi view of the United States was more complex and ambivalent that Junker's judgment allows. [↑](#footnote-ref-51)
52. Juliane Wetzel, *Auswanderung aus Deutschland*, in Die Juden in Deutschland 1933-1945 414 (Wolfgang Benz, ed. 1988); Philippe Burrin, Hitler et les Juifs. Genèse d'un génocide 37-65 (1989). [↑](#footnote-ref-52)
53. Wetzel, *Auswanderung*, 426 [↑](#footnote-ref-53)
54. Hans Christian Jasch, Staatssekretär Wilhelm Stuckart und die Judenpolitik (2012),316-40 (Wannsee), 392-424 (war crimes trial). [↑](#footnote-ref-54)
55. Wilhelm Stuckart, *Nationalsozialismus und Staatsrecht*, 12 Grundlagen, Aufbau und Wirtschaftsordnung des Nationalsozialistischen Staates 23 (H.-H. Lammers et al., eds., 1936). The version of this passage in the Introduction to 1 Wilhelm Stuckart & Hans Globke, Kommentare zur deutschen Rassengesetzgebung 15 (1936) was more restrained. For a detailed account of Stuckart's shift from the politics of expulsion to the politics of annihilation, see Jasch, Staatssekretär Wilhelm Stuckart, 290-372. [↑](#footnote-ref-55)
56. 1 Reichsgesetzblatt 529 (1933). [↑](#footnote-ref-56)
57. Uwe-Dietrich Adam, Judenpolitik im Dritten Reich 80-81 (1972). [↑](#footnote-ref-57)
58. Id. [↑](#footnote-ref-58)
59. Jörg Schmidt, Otto Koellreutter, 1883-1972 (1995); Michael Stolleis, *Otto Koellreutter*, in Neue Deutsche Biographie 12:324-25 (1980). Much later on, Koellreutter became disaffected when one of his own relatives was targeted by the regime. [↑](#footnote-ref-59)
60. Rolf Peter, *Bevölkerungspolitik, Erb- und Rassenpflege in der Gesetzgebung des Dritten Reiches*, 7 Deutsches Recht 238 n. 1 (1937); for other British Empire laws, see below, text at notes . . . [↑](#footnote-ref-60)
61. Otto Koellreutter, Grundriß der allgemeinen Staatslehre 51-52 (1933). [↑](#footnote-ref-61)
62. E.g. among many Gerhard Röhrborn, Der Autoritäre Staat 53 (diss. Jena 1935); Adalbert Karl Steichele, Das deutsche Staatsangehörigkeitsrecht auf Grund der Verordnung über die deutsche Staatsangehörigkeit vom 5. Februar 1934 16 (diss. Erlangen 1934); Theodor Maunz, Neue Grundlagen des Verwaltungsrechts 10 n. 3 (1934).. [↑](#footnote-ref-62)
63. Robert Deisz, *Rasse und Recht*, in Nationalsozialistisches Handbuch für Recht und Gesetzgebung 47 (2d. ed., Hans Frank ed., 1935). This article was added in the second edition. For similar discussion from the first edition, see Kier, below text at notes . . . . [↑](#footnote-ref-63)
64. Edgar Saebisch, Der Begriff der Staatsangehörigkeit 42 (1935). [↑](#footnote-ref-64)
65. Martin Staemmler, Rassenpflege im völkischen Staat 49(1935). [↑](#footnote-ref-65)
66. Detlev Sahm, Die Vereinigten Staaten von Amerika und das Problem der nationalen Einheit 142 (1936). Sahm was himself most likely not a committed Nazi, but his book was inevitably directed to the existing legal orthodoxy; he was after all making a career as a jurist. [↑](#footnote-ref-66)
67. Otto Harlander, *Französisch und Englisch im Dienste der rassenpolitischen Erziehung* 44 Die Neueren Sprachen 61-62 (1936). For another contemporary example without a Nazi bent, Josef Stulz, Die Vereinigten Staaten von Amerika 314 (1934); and for more Nazi examples of the commonplace citation of American immigration law in the legal literature of the early 1930s: Wahrhold Drascher, Die Vorherrschaft der weißen Rasse 370 (1936); Steichele, Das deutsche Staatsangehörigkeitsrecht, 14; Gottfried Neese, Die Nationalsozialistische Deutsche Arbeiterpartei. Versuch einer Rechtsdeutung 169 n.19 ( 1935). [↑](#footnote-ref-67)
68. Heinrich Krieger, Das Rassenrecht in den Vereinigten Staaten 74-109 (1936). [↑](#footnote-ref-68)
69. Cornelia Essner, Die "Nürnberger Gesetze, oder die Verwaltung des Rassenwahns, 1933-45 82-83 (2002). [↑](#footnote-ref-69)
70. Kurt Daniel Stahl, *Erlösung durch Vernichtung. Von Hitler zu Nasser. Das bizarre Schicksal des deutschen Edelmannes und Professors Johann von Leers*, Die Zeit 30 May, 2010, available at http://www.zeit.de/2010/22/GES-Johann-von-Leers. [↑](#footnote-ref-70)
71. E.g. Johann von Leers, Blut und Rasse in der Gesetzgebung. Ein Gang durch die Völkergeschichte 80-103 (1936); Krieger, Rassenrecht, 74-110. [↑](#footnote-ref-71)
72. Sahm, Die Vereinigten Staaten von Amerika, 97, and the material further in 97-99. Sahm did not expressly refer to the parallels with the Nuremberg Laws, but they are inescapably present in the historical circumstances of 1936. [↑](#footnote-ref-72)
73. See e.g. Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 10 (2002). [↑](#footnote-ref-73)
74. Mazower, Hitler's Empire, 584. [↑](#footnote-ref-74)
75. Sahm, Die Vereinigten Staaten, 98-100, again without specific reference to the Nuremberg Laws, which were however obviously in the background for any juristic dissertation on this topic. [↑](#footnote-ref-75)
76. Edgar Saebisch, Der Begriff der Staatsangehörigkeit 45-46 (diss. Jena, 1935). For the 1934 date of submission of dissertation see verso of title page. [↑](#footnote-ref-76)
77. Saebisch, Begriff der Staatsangehörigkeit, 43. [↑](#footnote-ref-77)
78. The Cable Act of 1922 (ch. 411, 42 Stat. 1021, "Married Women’s Independent Nationality Act"), Sec. 3. Known to Germans from the discussion in Karl Zepf, Die Staatsangehörigkeit der verheirateten Frau 17-18 (diss. Tübingen 1929). [↑](#footnote-ref-78)
79. Saebisch, Begriff der Staatsangehörigkeit, 44-45. America was by no means the only country with a rule denaturalizing brides of foreigners, as the German literature was aware. Numerous other examples are given in Hans-Georg Otto Denzer, Die Statutenkollision beim Staatsangehörigkeitserwerb 34 (diss. Erlangen 1934); Alfons Wachter, Die Staatlosen 24-25 ( diss. Erlangen 1933). [↑](#footnote-ref-79)
80. Leers, Blut und Rasse,127 [↑](#footnote-ref-80)
81. Bernhard Lösener, *Staatsangehörigkeit und Reichsbürgerrecht*, 13 Grundlagen, Aufbau und Wirtschaftsordnung des Nationalsozialistischen Staates 32 ( H.-H. Lammers et al., eds, 1936). [↑](#footnote-ref-81)
82. Stuckart & Globke, Kommentare, 76. [↑](#footnote-ref-82)
83. E.g. Leers, Blut und Rasse, 102-103. [↑](#footnote-ref-83)
84. Saebisch, Staatsangehörigkeit, 45; Krieger, Rassenrecht, 74-109; Leers, Blut und Rasse, 87--though noting that social practices exclude Jews. Id. 87-88. Such practices, Leers held, were by no means adequate for fending off the dangers presented by the Jews. [↑](#footnote-ref-84)
85. Saebisch, Begriff der Staatsangehörigkeit, 45-46. [↑](#footnote-ref-85)
86. Id., 46 (American immigration legislation had begun to fill what the author saw as numerous gaps in American race legislation). [↑](#footnote-ref-86)
87. Scott Fitzgerald & Cook-Martin, Culling the Masses, 7. [↑](#footnote-ref-87)
88. Lake & Reynolds, Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality (2008), and below text at notes . . . [↑](#footnote-ref-88)
89. Helmut Nicolai, Die Rassengesetzliche Rechtslehre. Grundzüge einer nationalsozialistischen Rechtsphilosophie 45-46 (1932). The critical policy statement came with the so-called "Preußische Denkschrift" of 1933. Nationalsozialistisches Strafrecht. Denkschrift des Preußischen Justizministers 47 (Hans Kerrl, ed., 1933). [Hereinafter "Preußische Denkschrift."] For Alfred Rosenberg's 1930 linking of the two questions of citizenship and miscegenation, see Essner, Nürnberger Gesetze, 56; and for Hitler, id., 58. [↑](#footnote-ref-89)
90. Arno Arlt, Die Ehehindernisse des BGB in ihrer geschichtlichen Entwicklung und im Hinblick auf künftige Gestaltung 87 (diss. Jena 1935) (submitted15 December 1934). [↑](#footnote-ref-90)
91. 1 Stuckart & Globke, Kommentare 15. [↑](#footnote-ref-91)
92. Transcript of Meeting of Strafrechtskommission, June 5, 1934, 2:2, pt. 2 Quellen zur Reform des Straf- und Strafprozeßrechts 277 (Jürgen Regge & Werner Schubert, eds. 1989) [Hereinafter Regge & Schubert, Quellen]. [↑](#footnote-ref-92)
93. 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. See Essner, Nürnberger Gesetze, 136. [↑](#footnote-ref-93)
94. Peter Longerich, Holocaust: The Nazi Persecution and Murder of the Jews 36, 54-57 (2010), and the more circumstantial account in Longerich, Politik der Vernichtung. Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung 65-115 (1999). [↑](#footnote-ref-94)
95. Otto Dov Kulka, *Die Nürnberger Rassengesetze und die deutsche Bevölkerung im Lichte geheimer NS-Lage- und Stimmungsberichte*, 32 Vierteljarhshefte für Zeitgeschichte 608 (1984); Essner, Nürnberger Gesetze, 110. [↑](#footnote-ref-95)
96. Krieger, Rassenrecht, 311 ("Lynchjustiz . . . auch bei uns in ihren typischen Einzelheiten bekannt geworden ist.") While Krieger does not specifically mention pogrom violence against Jews, the phrase "auch bei uns . . . bekannt geworden" could hardly refer to anything else. [↑](#footnote-ref-96)
97. Longerich, Holocaust, 58-59; Essner, Nürnberger Gesetze, 109-112; Adam, Judenpolitk, 115, 120-24. [↑](#footnote-ref-97)
98. Adam, Judenpolitik, 115, 120-24 [↑](#footnote-ref-98)
99. In particular, this was the demand of the Preußische Denkschrift, to which the Commission Meeting of June 5, 1934, was called to respond. Preußische Denkschrift 47. [↑](#footnote-ref-99)
100. For the general background Rehtmeier, "Nürnberger Gesetze", 70-82. [↑](#footnote-ref-100)
101. See below, text at notes . . . [↑](#footnote-ref-101)
102. The question of whether to criminalize adultery played a larger part in German debates than I can discuss here. [↑](#footnote-ref-102)
103. Essner, Nürnberger Gesetze, 83. [↑](#footnote-ref-103)
104. See below text at notes . . . [↑](#footnote-ref-104)
105. This is the ultimate judgment of Essner, despite her hostility toward Lösener. Essner, Nürnberger Gesetze, 173. [↑](#footnote-ref-105)
106. # For a brief recent biography, see Jasch, Staatssekretär Wilhelm Stuckart, 481, and further details of Lösener's doings in the immediate aftermath of the war at id., 396-97. Lösener's biography is subjected to an important skeptical treatment in Essner, Nürnberger Gesetze, 113-134. An English translation of some of the relevant material is in Legislating the Holocaust: The Bernhard Lösener Memoirs and Supporting Documents (Karl Schleunes, ed., Carol Scherer, trans., 2002).

     [↑](#footnote-ref-106)
107. Adam, Judenpolitik, 141. [↑](#footnote-ref-107)
108. See below, text at notes . . . [↑](#footnote-ref-108)
109. Guettel, German Expansionism, 127-160. The enthusiasm for America led Germans into error at least once. Franz-Josef Schulte-Althoff, *Rassenmischung im kolonialien System. Zur deutschen Rassenpolitik im letzten Jahrzehnt vor dem Ersten Weltkrieg* 105 Historisches Jahrbuch 64 (1985), describes German admiration for the anti-miscegenationist views of the "American" Bishop Montgomery. Montgomery was, however, British. The remarks that enthused Germans can be found in The Pan-Anglican Congress, 1908: Special Report of Proceedings &c., reprinted from The Times 122 (1908). For the larger political setting and history, see Dieter Gosewinkel, Einbürgern und Ausschließen. Die Nationalisierung der Staatsangehörigkeit vom Deutschen Bund bis zur Bundesrepublik Deutschland 303-09 (2001). [↑](#footnote-ref-109)
110. See Birthe Kundrus, *Von Windhoek nach Nürnberg? Koloniale "Mischehenverbote" und die nationalsozialistische Rassengesetzgebung* in Phantasiereiche. Zur Kulturgeschichte des deutschen Kolonialismus 110-31 (Birthe Kundrus. ed., 2003) (summarizing views of scholars and arguing against any direct link). [↑](#footnote-ref-110)
111. For central importance of this meeting and a careful account of the debates, see Alexandra Przyrembel, "Rassenschande". Reinheitsmythos und Vernichtungslegitimation im Nationalozialismus 137-143 (2003); and Essner's account, focusing particularly on problems in the definition of race, in Essner, Nürnberger Gesetze, 99-106. [↑](#footnote-ref-111)
112. There is a full version of the transcript, and somewhat abbreviated version edited down by the participants. Regge & Schubert, Quellen, 223 n.1. In this Article I quote from the longer version. The care invested in transcribing and editing the text presumably reflects the importance of the meeting in the eyes of the Nazis. [↑](#footnote-ref-112)
113. Helmut Ortner, Der Hinrichter: Roland Freisler, Mörder im Dienste Hitlers (1993). [↑](#footnote-ref-113)
114. Preußische Denkschrift, 47. [↑](#footnote-ref-114)
115. Regge & Schubert, Quellen, 278. For the assessment of Gürtner as a "genuine conservative" working "to retain the last vestiges of a legal order," see Elisabeth Sifton & Fritz Stern, No Ordinary Men: Dietrich Bonhoeffer and Hans von Dohanyi, Resisters against Hitler in Church and State 45 (2013). [↑](#footnote-ref-115)
116. See the assessment of Przyrembel, "Rassenschande", 138; and the review of the debates over how far an approach based on "arglistige Täuschung" could extend in Essner, Nürnberger Gesetze, 103-04; alongside id., 151-52 for the subsequent regulatory drafting process. [↑](#footnote-ref-116)
117. Text at notes below . . . [↑](#footnote-ref-117)
118. Text at notes below . . . [↑](#footnote-ref-118)
119. E.g. Regge & Schubert, Quellen, 283-88. [↑](#footnote-ref-119)
120. On Grau, see Ernst Klee, Das Personenlexikon zum Dritten Reich. Wer War Was vor und nach 1945? 197 (2003), 197. The text quoted is included among leading documents in the Nazi persecution of the Jews in 1 Götz Aly, Die Verfolgung und Ermordung der europäischen Juden durch das Nationalsozialistische Deutschland 346-349 (2008). [↑](#footnote-ref-120)
121. Regge & Schubert, Quellen, 278-79. [↑](#footnote-ref-121)
122. Id., 279. [↑](#footnote-ref-122)
123. Klee, below text at notes . . . [↑](#footnote-ref-123)
124. Regge & Schubert, Quellen, 280-81. [↑](#footnote-ref-124)
125. Id., 281 [↑](#footnote-ref-125)
126. Id., 281-282. [↑](#footnote-ref-126)
127. Sifton and Stern, No Ordinary Men, 46-47. [↑](#footnote-ref-127)
128. Id., 126 [↑](#footnote-ref-128)
129. Regge & Schubert, Quellen, 282. [↑](#footnote-ref-129)
130. Id. [↑](#footnote-ref-130)
131. Id. [↑](#footnote-ref-131)
132. Though perhaps he was not too far off: Criminal prosecution was "sporadic." See Pascoe, What Comes Naturally, 135-136. [↑](#footnote-ref-132)
133. Regge & Schubert, Quellen, 282. [↑](#footnote-ref-133)
134. On Klee, see Christian Kasseckert, Straftheorie im dritten Reich 179 (2009). [↑](#footnote-ref-134)
135. Regge & Schubert, Quellen, 315. [↑](#footnote-ref-135)
136. See Avraham Barkai, Vom Boykott zur "Entjudung". Der wirtschaftliche Existenzkampf der Juden im Dritten Reich 26-28 (1987). [↑](#footnote-ref-136)
137. Regge & Schubert, Quellen, 315 [↑](#footnote-ref-137)
138. For the importance of this principle in German law, and its violation by the Nazis, see Hans-Ludwig Schreiber, Gesetz und Richter. Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena sine lege (1976). [↑](#footnote-ref-138)
139. Regge & Schubert, Quellen, 283. [↑](#footnote-ref-139)
140. Id., 306. [↑](#footnote-ref-140)
141. Id., 307. [↑](#footnote-ref-141)
142. Regge & Schubert, Quellen, 319. [↑](#footnote-ref-142)
143. Id., 319-320. [↑](#footnote-ref-143)
144. Id., 320 [↑](#footnote-ref-144)
145. Id. [↑](#footnote-ref-145)
146. Id. [↑](#footnote-ref-146)
147. Robert Rachlin, *Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror* in The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice 63 (Alan E. Steinweis & Robert D. Rachlin, eds. 2013). Cf. e.g. Uwe Wesel, *Drei Todesurteile pro Tag,* Die Zeit, February 3, 2005, available at http://www.zeit.de/2005/06/A-Freisler. [↑](#footnote-ref-147)
148. Regge & Schubert, Quellen, 320. [↑](#footnote-ref-148)
149. Id., 321. [↑](#footnote-ref-149)
150. No such documents were published in Regge & Schubert, Quellen, and I was unable to find them in Bundesarchiv Lichterfelde West series R22/20855, the series on criminal law reform. [↑](#footnote-ref-150)
151. Below, text at notes . . . [↑](#footnote-ref-151)
152. Regge & Schubert, Quellen, 227 n. 3. [↑](#footnote-ref-152)
153. Krieger, *Principles of the Indian Law and the Act of June 18, 1934* 3 Geo.Wash. L. Rev. 279 (1935). [↑](#footnote-ref-153)
154. Id. [↑](#footnote-ref-154)
155. Krieger, *Das Rassenrecht in den Vereinigten Staaten* 39 Verwaltungsarchiv 316 (1934). Before the Nazi period the main published source available in Germany seems to have been the overview of marriage law in the American states, with very cursory reference to anti-miscegenation provisions, in 3 Alexander Bergmann, Internationales Ehe- und Kindschaftsrecht 841-953 (1928). Bergmann's treatment does not discuss criminalization. [↑](#footnote-ref-155)
156. Krieger, *Rassenrecht in den Vereinigten Staaten*, 320. [↑](#footnote-ref-156)
157. See the survey in Pascoe, What Comes Naturally, 27, 29-30. [↑](#footnote-ref-157)
158. Krieger, Rassenrecht, 16. [↑](#footnote-ref-158)
159. Krieger, *Rassenrecht in den Vereinigten Staaten*, 319-320. [↑](#footnote-ref-159)
160. See Valdis Lumans, Himmler's Auxiliaries: The Volksdeutsche Mittelstelle and the German National Minorities of Europe, 1933-1945, 89 (1993). If Kier was typical of the functionaries in the Volksdeutsche Mittelstelle, he belonged to a relatively accomplished intellectual group, and one with relatively little connection with the worst abuses associated with the Waffen SS. See id., 55-56, 58. [↑](#footnote-ref-160)
161. Kier, *Volk, Rasse und Staat*, in Nationalsozialistisches Handbuch für Recht und Gesetzgebung, 25-26 (1st. ed., Hanks Frank, ed., 1935 [1934]). [↑](#footnote-ref-161)
162. Id., 26-27 [↑](#footnote-ref-162)
163. Id., 27-28 [↑](#footnote-ref-163)
164. Id., 28 [↑](#footnote-ref-164)
165. Id., 28 [↑](#footnote-ref-165)
166. Id., 28. [↑](#footnote-ref-166)
167. Of the copies held in America that I have inspected, those at both Princeton and Columbia were acquired after the War, when the holdings of Nazi libraries were distributed to American universities. The Yale copy, by contrast, was acquired in 1935. [↑](#footnote-ref-167)
168. Reichsgesetzblatt 1 (1935), 1146, available at https://de.wikisource.org/wiki/Gesetz\_zum\_Schutze\_des\_deutschen\_Blutes\_und\_der\_deutschen\_Ehre. [↑](#footnote-ref-168)
169. Philipp Depdolla, Erblehre, Rasse, Bevölkerungspolitik; vornehmlich für den Unterricht in höheren Schulen bestimmt 90 (1934). [↑](#footnote-ref-169)
170. Harlander, *Französisch und Englisch im Dienste der rassenpolitischen Erziehung*, 62. [↑](#footnote-ref-170)
171. For an example of a Nazi who was comfortable with something like a one-drop rule, see the discussion of Achim Gercke in Essner, Nürnberger Gesetze, 77-78, 81. Gercke was eventually expelled from the party in March of 1935, because he was, or on the pretext that he was, homosexual. Id., 90. [↑](#footnote-ref-171)
172. [Anon.], *Volkstümer und Sprachwechsel*, 9 Nation und Staat: Deutsche Zeitschrift für das europäische Minoritätenproblem 348 (1935). This journal was published in Vienna, but the article in question was reprinted without citation from some other, presumably German, source. [↑](#footnote-ref-172)
173. Id. [↑](#footnote-ref-173)
174. Id. [↑](#footnote-ref-174)
175. Leers, Blut und Rasse, 89-90. [↑](#footnote-ref-175)
176. The reference is to Bell v. State, 33 Tex. Cr. R. 163 (1894). Krieger's source here was presumably Gilbert Thomas Stephenson, Race Distinctions in American Law 17 (1910): "Some states have allowed facts other than physical characteristics to be presumptive of race. Thus, it has been held in North Carolina that if one was a slave in 1865, it is to be presumed that he was a Negro. The fact that one usually associates with Negroes has been held in the same State proper evidence to go the jury tending to show that he is a Negro. If a woman's first husband was a white man, that fact, in Texas, is admissible evidence tending to show that she is a white woman." [↑](#footnote-ref-176)
177. *Entwurf zu einem Gesetz zur Regelung der Stellung der Juden* in 1 Deutsches Judentum unter dem Nationalsozialismus 38 (Otto Dov Kulka, ed., 1997); also in 1 Die Verfolgung und Ermordung der europäischen Juden durch das nationalsozialistische Deutschland 123-24 (Wolf Gruner, ed., 2008). For the association of this proposal with the moderate camp, see Essner, Nürnberger Gesetze, 84. It is certainly the case that a woman's loss of nationality through marriage was a familiar and much-discussed possibility, which clearly influenced some Nazi thinking. See Steichele, Das deutsche Staatsangehörigkeitsrecht, 69. What was distinctive about the Cable Act rule was of course its specifically race-based character. [↑](#footnote-ref-177)
178. For the drafting history of these regulations, see Essner, Nürnberger Gesetze, 155-173; and the earlier account of Jeremy Noakes, *"Wohin gehören die ‘Judenmischlinge’?“ Die Entstehung der ersten Durchführungsverordnung zu den Nürnberger Gesetzen,* in  2 Das Unrechtsregime. Internationale Forschung über den Nationalsozialismus 69-89 ([Ursula Büttner](http://de.wikipedia.org/wiki/Ursula_B%C3%BCttner), ed., 1986)*.* [↑](#footnote-ref-178)
179. Text available at http://www.verfassungen.de/de/de33-45/reichsbuerger35-v1.htm. [↑](#footnote-ref-179)
180. Lösener, *Staatsangehörigkeit und Reichsbürgerrecht*, 32. The harder-line view of Stuckart and Globke held that it was a matter of blood, not inclination: "Durch seine *Verheiratung mit einem Juden* beweist ein Mischling ersten Grades, daß sein jüdischer Blutanteil stärker als sein deutscher Blutanteil wirkt." Stuckart & Globke, Kommentare, 76. [↑](#footnote-ref-180)
181. Above, text at notes . . . [↑](#footnote-ref-181)
182. In January of 1933, a dollar cost 4.2 Reichsmarks; by January of 1934 it had fallen to 2.61, and by January of 1935 to 2.48. See the tables in http://www.history.ucsb.edu/faculty/marcuse/projects/currency.htm. [↑](#footnote-ref-182)
183. *Herbst-Studienfahrt des BNSDJ. nach Nordamerika*, 5 Deutsches Recht 379 (1935). For the Europa and its sister ship the Bremen see Arnold Kludas, Record Breakers of the North Atlantic: Blue Riband Liners, 1838-1952 109-117 (2000). [↑](#footnote-ref-183)
184. *Herbst-Studienfahrt des BNSDJ. nach Nordamerika*, 379. [↑](#footnote-ref-184)
185. Id. [↑](#footnote-ref-185)
186. *Studienfahrt des BNSDJ. nach Nordamerika* 97 Deutsche Justiz 1424, col. 2 (1935). [↑](#footnote-ref-186)
187. Although we do know that they were picketed upon their arrival in New York by Jewish members of the Fur Garment Salesmen's Union. See Hotel is Picketed as Nazis Depart, New York Times Sept 28, 1935, p. L 13. Their leader responded with memorable indignation:

     "We came on a study trip to gain first-hand impressions of America, and our first impression is bad one," Dr. [Ludwig] Fischer said. "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."

     Id. The Times article reported the number of Nazi jurists as only 45, not 50--38 men and 7 women. I cannot explain this discrepancy. [↑](#footnote-ref-187)
188. Johnpeter Horst Grill & Robert L. Jenkins, *The Nazis and the American South in the 1930s: A Mirror Image?*, 58 J. Southern History, 667 (1992); George Fredrickson, Racism: A Short History 2, 129 (2002). [↑](#footnote-ref-188)
189. For the invocation of earlier Jewish expulsions, see Preußische Denkschrift 47. [↑](#footnote-ref-189)
190. There is lively disagreement over this question, beginning with the treatment of *limpieza de sangre* in sixteenth century Iberia. For the case that the Spanish regulations did not constitute anything we should call race-based legislation, see Henry Kamen, The Spanish Inquistion: A Historical Revision 239 (1997); and Kamen, *Limpieza and the Ghost of Américo Castro: Racism as a Tool of Literary Analysis* 64 Hispanic Review 20(1996); for a counter-argument, María Elena Martinez, Genealogical Fictions: Limpieza de Sangre, Religion, and Gender in Colonial Mexico 45 ( 2008). It is manifestly the case that there is a history of the sources of American racism to be sought in the Iberian tradition. See James H. Sweet, *The Iberian Roots of American Racist* Thought 54 Wm & Mary Q. 143 (1997). [↑](#footnote-ref-190)
191. See Fitzgerald and Cook-Martin, Culling the Masses, 261. [↑](#footnote-ref-191)
192. Leers, Blut und Rasse. [↑](#footnote-ref-192)
193. Lake and Reynolds, Drawing the Global Colour Line. [↑](#footnote-ref-193)
194. See especially the riveting account of Daniel Howe, What Hath God Wrought: The Transformation of America, 1815-1848 (2007). [↑](#footnote-ref-194)
195. Lake and Reynolds, Drawing the Global Colour Line; and in the earlier literature Charles Price, The Great White Walls are Built: Restrictive Immigration to North America and Australasia, 1836-1888 (1974). For Nazi interest in South Africa e.g. Rehtmeier, "Nürnberger Rassegesetze", 140 [↑](#footnote-ref-195)
196. Norman Rich, *Hitler's Foreign Policy*, in The Origins of the Second World War Reconsidered: The A.J.P. Taylor Debate after Twenty-Five Years 136 [119-136] (Gordon Martel, ed. 1986). [↑](#footnote-ref-196)
197. Above, text at notes . . . [↑](#footnote-ref-197)
198. See James Q. Whitman, *From Fascist ‘Honour’ to European ‘Dignity’* in The Darker Legacy of European Law: Perceptions of Europe and Perspectives on a European Order in Legal Scholarship during the Era of Fascism and National Socialism 243 (C. Joerges and N. Ghaleigh eds., 2003); id., *'Human Dignity’ in Europe and the United States: The Social Foundations* 25 Human Rights Law Journal 17 (2004). [↑](#footnote-ref-198)
199. Fitzgerald and Cook-Martin, Culling the Masses, 260, discussing Vargas' importation of the US national origins model. [↑](#footnote-ref-199)
200. Lake and Reynolds, Drawing the Global Colour Line 29, 35, 49-74 (influence of Bryce), 80, 119, 129-131, 138-144, 225, 269. Lake and Reynolds also note American admiration for Australia; there was certainly a larger sense of shared White mission. Nevertheless the prominence of the American example, as represented by figures like Bryce and others they survey, shines out in their study. [↑](#footnote-ref-200)
201. Above, text at notes. . . [↑](#footnote-ref-201)
202. Their main example, as Rehtmeier, "Nürnberger Rassegesetze", 140 notes, was the South African criminalization of inter-racial adultery. See e.g. Peter, *Bevölkerungspolitik, Erb- und Rassenpflege*, 238 n. 1. Again, the adultery issue deserve further attention that I cannot give it here. [↑](#footnote-ref-202)
203. Furthered most importantly by the (at base very poorly informed) Hart-Fuller debate. See especially the fundamental revisionist work of Bernd Rüthers, Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus (7th ed. 2012). [↑](#footnote-ref-203)
204. Joachim Rückert, *Der Rechtsbegriff der deutschen Rechtsgeschichte in der NS-Zeit: der Sieg des "Lebens" und des konkreten Ordnungsdenkens, seine Vorgeschichte und seine Nachwirkungen*, in Die deutsche Rechtsgeschichte in der NS-Zeit 177 (Joachim Rückert, ed., 1995), 177. For the parallel American attitude, see e.g. 2 Morton Horwitz, The Transformation of American Law 188 (1992). It was a commonplace in the 1930s that American legal realism was somehow tarred by an intellectual association was Nazism. See e.g. G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, in White, Patterns of American Legal Thought 99, 140 (1978); William Scheuerman, Morgenthau 25 (2009). [↑](#footnote-ref-204)
205. For his thanks to Otto Koellreuter and others, see Krieger, Rassenrecht, 11; and for his fellowship in the Notgemeinschaft der deutschen Wissenchaft in Düsseldorf, Krieger, *Principles of the Indian Law*, 279. [↑](#footnote-ref-205)
206. See Krieger, *"Eingeborenenrecht?" Teleologische Begriffsbildung als Ausgangspunkt für die Kritik bisherigen und den Aufbau zukünftigen Rechts*, 2 Rasse und Recht 116 (1938), dated at Windhoek and identifying Krieger as "Mitarbeiter des Rassenpolitischen Amtes der NSDAP." [↑](#footnote-ref-206)
207. # Krieger, *"Eingeborenenrecht?"*; Heinrich Krieger, Das Rassenrecht in Südwestafrika (1940).

     [↑](#footnote-ref-207)
208. Krieger, *Principles of the Indian Law*, 304, 308. [↑](#footnote-ref-208)
209. Quoted in Guettel, German Expansionism, 209--though Guettel is quite prepared to minimize the horror. [↑](#footnote-ref-209)
210. The original quotation appears in 1 Thomas Jefferson, Works 77 (Paul Leicester Ford, ed., 1904), 1:77. [↑](#footnote-ref-210)
211. Krieger, Rassenrecht, 49-53. [↑](#footnote-ref-211)
212. Krieger, Rassenrecht, 55-61. [↑](#footnote-ref-212)
213. Krieger, Rassenrecht, 327-349; and 57 on the "lebensfremder Positivismus" of the ideology of equality. At least one American reader praised Krieger's "realism." Arndt, *review of Krieger*, 338. Krieger's argument deserves a lengthier account than I can give it here. See for example his effort at Rassenrecht, 337-339 to account for the social foundations of the ideology of equality in the labor markets, and to describe the countertendency of racist sentiment to "break through." For a similar effort by two prominent contemporary scholars to describe the American scene as the product of a tension between two "racial institutional orders," a "white supremacist order" and an "egalitarian transformative order," see Desmond King & Rogers Smith, *Racial Orders in American Political Development* 99 American Political Science Review 75 (2005). [↑](#footnote-ref-213)
214. Though there were plenty of Americans who would have agreed with it, at least in part. For the teachings of Burgess, Dunning and their followers, see Hugh Tulloch, The Debate on the American Civil War Era 212-220 (1999). [↑](#footnote-ref-214)
215. Krieger, Rassenrecht, 171. The distinctive feature of this statute, unlike its 1664 Maryland predecessor, was that it barred relations with non-whites "bond or free," no longer limiting itself to master-slave relations. See Pascoe, What Comes Naturally, 19-20. Lying in the background here is an issue of obvious importance that I cannot discuss in this Article: the shift from a social-status based conception of hierarchy to a race-based conception. See Benedict Anderson, Imagined Communities 149-50 (1991). The contrast between the 1691 Virginia ban and contemporary French law is particularly striking. The relevant provision of the 1685 Code Noir, Art. 9, far from banning miscegenation, was designed to encourage marriage "dans les formes observées par l'Église." Le Code Noir 21 (Paris: L'Esprit Frappeur, 1998). Only the 1724 version introduced, in Art. 6, a ban. Id., 43-44. For the shift from the 1685 to the 1724 Code, see Peter Sahlins, Unnaturally French 182-83 (2004). For reference to some French legislation and decisions, and the observation that miscegenation rules were not in fact applied in practice, see 1 Allemand, Traité du Mariage et de ses Effets 129-30 (1853). Early anti-miscegenation legislation in the West focused on religiously mixed marriages, not racially mixed ones. There may have been race-based miscegenation bans outside the Western world. See e.g. Edward H Schafer, The Golden Peaches of Samarkand: A Study of T'ang Exotics 22 (1962). [↑](#footnote-ref-215)
216. Krieger, Rassenrecht, 74. This too seems to have been something of first in Western history. For the historic importance of the 1790 Act, see Fitzgerald & Cook-Martin, Culling the Masses, 82; for its place in the larger history of race-based immigration and naturalization law, Haney Lopez, White By Law, 31; and for its "uncontroversial" character at the time of passage Rogers Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History 159-60 (1997); sim. Douglas Bradburn, The Citizenship Revolution: Politics and the Creation of the American Union, 1774-1804 260 (2009), 260. For the absence of any French ban on foreign entry, at least on the basis of the material Sahlins has seen, Sahlins, Unnaturally French, 183-84. I note that a decree of August 9, 1777, forbade the entry of "noirs, mulâtres et gens de couleur" into France, with an exception for personal servants. Text in 23 Guyot, Repertoire Universel et Raisonné de Jurisprudence 383-86 (1778), but this ban was not directed to naturalization as such. On the contrary, it operated on the assumption that Blacks belonged only in the sugar plantations of the colonies. [↑](#footnote-ref-216)