

## INTRODUCTION

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

—Roland Freisler, *June 5, 1934*

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

The meeting was an important one, and a stenographer was present to record a verbatim transcript, to be preserved by the ever-diligent Nazi bureaucracy as a record of a crucial moment in the creation of the new race regime. That transcript reveals the startling fact that is my point of departure in this study: the meeting involved detailed and lengthy discussions of the law of the United

2 • INTRODUCTION

States. In the opening minutes, Justice Minister Gürtner presented a memo on American race law, which had been carefully prepared by the officials of the ministry for purposes of the gathering; and the participants returned repeatedly to the American models of racist legislation in the course of their discussions. It is particularly startling to discover that the most radical Nazis present were the most ardent champions of the lessons that American approaches held for Germany. Nor, as we shall see, is this transcript the only record of Nazi engagement with American race law. In the late 1920s and early 1930s many Nazis, including not least Hitler himself, took a serious interest in the racist legislation of the United States. Indeed in *Mein Kampf* Hitler praised America as nothing less than “the one state” that had made progress toward the creation of a healthy racist order of the kind the Nuremberg Laws were intended to establish.

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



The Nazi persecution of the Jews and others, culminating in the Holocaust, counts for all of us as the supremely horrible crime of the twentieth century, and the notion that Nazi policy makers might have been in some way inspired by American models may seem a bit too awful to contemplate. It may also seem implausible: we all think of America, whatever its undeniable faults, as the home of liberty and democracy—as a country that put all of its might into the battle against fascism and Nazism that was finally won in 1945. Of course we also all know that America was home to its own racism in the era of the Nazi ascent to power, particularly

in the Jim Crow South. In the 1930s Nazi Germany and the American South had the look, in the words of two southern historians, of a “mirror image”:<sup>1</sup> these were two unapologetically racist regimes, unmatched in their pitilessness. In the early 1930s the Jews of Germany were hounded, beaten, and sometimes murdered, by mobs and by the state alike. In the same years the blacks of the American South were hounded, beaten, and sometimes murdered as well.<sup>2</sup>

Nevertheless the idea that American law might have exerted any sort of direct influence on the Nazi program of racial persecution and oppression is hard to digest. Whatever similarities there may have been among the racist regimes of the 1930s, however foul the history of American racism may be, we are accustomed to thinking of Nazism as an ultimately unparalleled horror. The crimes of the Nazis are the *nefandum*, the unspeakable descent into what we often call “radical evil.” No one wants to imagine that America provided any measure of inspiration for Hitler. In any case, it may seem inherently improbable that Nazis would have felt the need to look to any other country for lessons in racism—perhaps least of all to the United States, which is, after all, whatever its failings, the home of a great constitutional tradition founded in liberty.

And virtually no one has suggested otherwise, with the notable exception of a shrewd paragraph in Mark Mazower’s 2008 book *Hitler’s Empire*.<sup>3</sup> Other scholars have insisted on what most of us must think of as the obvious truth: There was of course no direct American influence on Nazi race law, or at least no meaningful influence. Whatever similarities there may have been, the Nazis were the authors of their own monstrous work; certainly America had nothing to teach Hitler. The person who has given the question the most sustained attention is a German lawyer named Andreas Rethmeier, who wrote a 1995 dissertation on the Nuremberg Laws that included an examination of some of the many Nazi references to American law.<sup>4</sup> After reviewing his data Rethmeier arrived at a

disconcerting verdict: America was, for the Nazis, the “classic example” of a country with racist legislation.<sup>5</sup> Nevertheless, he insisted forcefully that the idea of American influence on the Nuremberg Laws was “not just off-base, but plain wrong.” After all, he argued, the Americans classified Jews as “Caucasian,” a gross error from the Nazi point of view.<sup>6</sup>

Others have come to similar conclusions. “[T]he few and fleeting references by Nazi polemicists and ‘jurists’ to Jim Crow laws,” writes the American legal historian Richard Bernstein, for example, “were, as far as I can tell, simply attempts to cite vaguely relevant precedents for home-grown statutes and policies to deflect criticism, not actual sources of intellectual influence.”<sup>7</sup> “[T]he segregation law of the states,” declares similarly Marcus Hanke of the University of Salzburg, “has not been of any important influence.”<sup>8</sup> Most recently, Jens-Uwe Guettel has written, in a 2012 book, of what he calls the “astonishing insignificance of American segregation laws” for Nazi policies. The Nazis, Guettel insists, regarded America as hopelessly mired in an outdated liberal outlook.<sup>9</sup> There was nothing that deserves the name of influence. All of these scholars are perfectly aware that the Nazis had things to say about American law. But their reassuring consensus is that the Nazis said them merely in order to claim a specious parallel to their racist programs in the face of international condemnation.<sup>10</sup> The Nazis were interested in taunting America, not learning from it.

The sources, read soberly, paint a different picture. Awful it may be to contemplate, but the reality is that the Nazis took a sustained, significant, and sometimes even eager interest in the American example in race law. They most certainly *were* interested in learning from America. In fact, as we shall see, it was the most radical Nazis who pushed most energetically for the exploitation of American models. Nazi references to American law were neither few nor fleeting, and Nazi discussions took place in policy-making contexts that had

nothing to do with producing international propaganda on behalf of the regime. Nor, importantly, was it only, or even primarily, the Jim Crow South that attracted Nazi lawyers. In the early 1930s the Nazis drew on a range of American examples, both federal and state. Their America was not just the South; it was a racist America writ much larger. Moreover, the ironic truth is that when Nazis rejected the American example, it was sometimes because they thought that American practices were overly harsh: for Nazis of the early 1930s, even radical ones, American race law sometimes looked *too* racist.

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



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

6 • INTRODUCTION

In part, the Nazis looked to America for the same more or less innocent reasons others did all around the globe. The United States is powerful, wealthy, and creative, and even its most visceral enemies have found things to admire about it. During the century or so since 1918 the glamour of America has proven particularly hard to resist. As interwar German racists observed, the United States had emerged after World War I as “the premier power in the world”;<sup>11</sup> it is hardly a surprise that the Nazis, like others, looked for what lessons the global powerhouse might have to teach, even as they also derided the liberal and democratic commitments of American society. Like others, the Nazis were impressed by the vigor of American industrial innovativeness and the vibrancy of Hollywood culture (though their taste for American culture was heavily qualified by their disgust for the “Negro music” of Jazz).<sup>12</sup> Hitler in particular voiced his admiration, in *Mein Kampf*, for the “wealth of inventions” generated by the United States.<sup>13</sup> None of this was peculiar to Nazi Germany.<sup>14</sup>

But historians have shown that there were also things about America that appealed to more distinctively Nazi views and goals. Some of this involved the American politics of the early 1930s. We have long known the strange fact that the Nazis frequently praised Franklin Roosevelt and New Deal government in the early 1930s. FDR received distinctly favorable treatment in the Nazi press until at least 1936 or 1937, lauded as a man who had seized “dictatorial powers” and embarked upon “bold experiments” in the spirit of the Führer.<sup>15</sup> Similar things were said more broadly about what was sometimes labeled in the 1930s “the fascist New Deal.”<sup>16</sup> The glossy *Berlin Illustrated Magazine*, seized from its Jewish publisher and converted into a kind of Nazi *Life* magazine, ran heroic photo spreads on Roosevelt,<sup>17</sup> while Nazi rags like *Will and Power*, the newsletter of the Hitler Youth, described him as a “revolutionary” who might fail

only because he lacked “a disciplined Party army like our Führer.”<sup>18</sup> Meanwhile Roosevelt, for his part, though he was certainly troubled by the persecution of the German Jews and had harsh words for “dictators,” cautiously refrained from singling out Hitler until 1937 or even 1939.<sup>19</sup> There were certainly not deep ties of friendship between the two governments in the early 1930s, but the pall of unconditional hostility had not yet clearly fallen over US–German relations either. In this connection it is worth emphasizing, as the political scientist Ira Katznelson has recently done, that the New Deal depended heavily on the political support of the segregationist South.<sup>20</sup> The relationship between the northern and southern Democrats was particularly cozy during the early 1930s, a period when, as we shall see, Nazi observers were particularly hopeful that they could “reach out the hand of friendship” to the United States on the basis of a shared commitment to white supremacy.<sup>21</sup>

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

But—and here recent scholarship on German–American relations becomes more troubling—historians have also tracked down

American influence on some of the most unambiguously criminal Nazi programs—in particular on Nazi eugenics and the murderous Nazi conquests in Eastern Europe.

Begin with eugenics. A ruthless program of eugenics, designed to build a “healthy” society, free of hereditary defects, was central to Nazi ambitions in the 1930s. Soon after taking power, the regime passed a Law to Prevent the Birth of the Offspring with Hereditary Defects, and by the end of the decade a program of systematic euthanasia that prefigured the Holocaust, including the use of gassing, was under way.<sup>25</sup> We now know that in the background of this horror lay a sustained engagement with America’s eugenics movement. In his 1994 book *The Nazi Connection: Eugenics, American Racism, and German National Socialism*, historian Stefan Kühl created a sensation by demonstrating that there was an active back-and-forth traffic between American and Nazi eugenicists until the late 1930s, indeed that Nazis even looked to the United States as a “model.”<sup>26</sup> During the interwar period the United States was not just a global leader in assembly-line manufacturing and Hollywood popular culture. It was also a global leader in “scientific” eugenics, led by figures like the historian Lothrop Stoddard and the lawyer Madison Grant, author of the 1916 racist best-seller *The Passing of the Great Race; or, The Racial Basis of European History*. These were men who promoted the sterilization of the mentally defective and the exclusion of immigrants who were supposedly genetically inferior. Their teachings filtered into immigration law not only in the United States but also in other Anglophone countries: Britain, Australia, Canada, and New Zealand all began to screen immigrants for their hereditary fitness.<sup>27</sup> Kühl demonstrated that the impact of American eugenics was also strongly felt in Nazi Germany, where the works of Grant, Stoddard, and other American eugenicists were standard citations.



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

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

Indeed as early as 1928 Hitler was speechifying admiringly about the way Americans had “gunned down the millions of Redskins to a few hundred thousand, and now keep the modest remnant under observation in a cage”;<sup>30</sup> and during the years of genocide in the

early 1940s Nazi leaders made repeated reference to the American conquest of the West when speaking of their own murderous conquests to their east.<sup>31</sup> Historians have compiled many quotes, from Hitler and others, comparing Germany's conquests, and its program of extermination, with America's winning of the West. They are quotes that make for chilling reading, and there are historians who try to deny their significance.<sup>32</sup> But the majority of scholars find the evidence too weighty to reject: "The United States policy of westward expansion," as Norman Rich forcefully concludes, for example, "in the course of which the white men ruthlessly thrust aside the 'inferior' indigenous populations, served as the model for Hitler's entire conception of *Lebensraum*."<sup>33</sup>

All of this adds up to a tale of considerable Nazi interest in what the example of the United States had to offer. It is a tale that has to be told cautiously. It is surely too much to call the United States "the" model for Nazi Germany without careful qualification; Nazi attitudes toward America were too ambivalent, and Nazi programs had too many indigenous sources. America, for its part, as we shall see, embodied too much of what the Nazis hated most, at least in its better moments. If the Nazis found precedents and parallels and inspirations in America, they nevertheless struck out on their own path. Still, what all this research unmistakably reveals is that the Nazis *did* find precedents and parallels and inspirations in the United States.



It is against that background that I ask the reader to ponder the evidence that this book has to present. In the early 1930s, as the Nazis were crafting the program of racial persecution enshrined in the Nuremberg Laws, they took a great interest not only in the way Henry Ford built cars for the masses, not only in the way Hollywood

built its own mass market, not only in FDR's style of government, not only in American eugenics, and not only in American westward expansion, but also in the lessons to be garnered from the techniques of American racist legislation and jurisprudence.

Scholars have failed to write this history for two reasons: they have been looking in the wrong place and have been employing the wrong interpretive tools. First and foremost, they have been looking in the wrong place. Scholars like Guettel and Hanke have addressed their question in unmistakably American terms. What Americans ask is whether "Jim Crow" had any influence on the Nazis; and by "Jim Crow" they mean segregation as it was practiced in the American South and fought over in the American civil rights era from the early 1950s into the mid-1960s—segregation in education, public transportation, housing, and the like. Looking for an influence of American segregation law on the Nazis, Guettel and Hanke conclude that there was little or none. Now, as we shall see, that conclusion is too hasty. The Nazis *did* know, and did care, about American segregation; and it is clear that some of them *were* intrigued by the possibility of bringing Jim Crow to Germany. As we shall see, important programmatic Nazi texts made a point of invoking the example of Jim Crow segregation, and there were leading Nazi lawyers who made serious proposals that something similar ought to be introduced into Germany.<sup>34</sup> But the principal difficulty with the conclusions of Guettel and Hanke is that they are answering the wrong question. Segregation is not what counts most.

Yes it is true that segregation in the style of the American South did not matter all that much to the Nazi regime—but that is for the simple reason that segregation was not all that central to the Nazi program. The Nuremberg Laws said nothing about segregation. Their concern, and the overwhelming concern of the Nazi regime of the early 1930s, lay in two other domains: first, citizenship, and second, sex and reproduction. The Nazis were committed

to the proposition that “every state has the right to maintain its population pure and unmixed,”<sup>35</sup> safe from racial pollution. To that end they were determined to establish a citizenship regime that would be firmly founded on racial categories. They were further determined to prevent mixed marriages between Jews and “Aryans,” and to criminalize extramarital sex between members of the two communities.<sup>36</sup>

In both respects they found, and welcomed, precedent and authority in American law, and by no means just in the law of the South. In the 1930s the United States, as the Nazis frequently noted, stood at the forefront of race-based lawmaking. American immigration and naturalization law, in the shape of a series of laws culminating in the Immigration Act of 1924, conditioned entry into the United States on race-based tables of “national origins.” It was America’s race-based immigration law that Hitler praised in *Mein Kampf*, in a passage that has been oddly neglected by American legal scholars; and leading Nazi legal thinkers did the same after him, repeatedly and volubly. The United States also stood at the forefront in the creation of forms of de jure and de facto second-class citizenship for blacks, Filipinos, Chinese, and others; this too was of great interest to the Nazis, engaged as they were in creating their own forms of second-class citizenship for Germany’s Jews. As for race mixing between the sexes, the United States stood at the forefront there as well. America was a beacon of anti-miscegenation law, with thirty different state regimes—many of them outside the South, and all of them (as we shall see) carefully studied, catalogued, and debated by Nazi lawyers. There were no other models for miscegenation legislation that the Nazis could find in the world, a fact that Justice Minister Gürtner highlighted at the June 5, 1934, meeting with which I began. When it came to immigration, second-class citizenship, and miscegenation, America was indeed “the classic example” of a country with highly developed, and harsh, race law in the early 1930s, and Nazi lawyers

made repeated reference to American models and precedents in the drafting process that led up to the Nuremberg Laws and continued in their subsequent interpretation and application. The tale is by no means one of “astonishing insignificance.”

The scholars who dismiss the possibility of American influence on Nazi lawmaking have also used the wrong interpretive tools in making their case. Our literature has taken a crass interpretive tack: it has assumed that we can speak of “influence” only where we find direct and unmodified, even verbatim, imitation. That is the assumption behind Rethmeier’s confident assertion that American race law could not have influenced the Nazis, since American law did not specifically target Jews. We find the same assumption in Hanke: Nazi law was different, Hanke declares, because the German laws of the early 1930s were “but one step on the stair to the gas chambers.”<sup>37</sup> Unlike American segregation laws, which simply applied the principle of “separate but equal,” German laws were part of a program of extermination. Now part of the problem with this argument, which Hanke is by no means alone in offering,<sup>38</sup> is that its historical premise is false: It is simply not the case that the drafters of the Nuremberg laws were already aiming at the annihilation of the Jews in 1935. The concern of early Nazi policy was to drive the Jewish population into exile, or at the very least to marginalize it within the borders of the Reich, and there were serious conflicts among Nazi policy makers about how to achieve even that goal.

But in any case, it is a major interpretive fallacy on the part of all these scholars to suppose that we cannot speak of “influence” unless Nazi laws were perfectly congruent with American ones. As we shall see, Nazi lawyers had no difficulty exploiting American law on race, even if it had nothing to say about Jews as such. In any case, influence in comparative law is rarely just about literal imitation. Influence is a complex business of translation, creative adaptation, selective borrowing, and invocation of authority. All borrowers

engage in tinkering and retrofitting; that is as true of the Nazis as it is of any other regime. All borrowers start from foreign models and then reshape them to meet their own circumstances; that is true of vicious racist borrowers just as it is true of everyone else.

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



None of this is entirely easy to talk about. There is more than one reason why it is hard to look coolly on the question of whether the racist program of the Nazis was influenced by, or even paralleled by, what went on in other Western regimes—just as it is hard to admit the continuities between Nazism and the postwar European orders that replaced it. No one wants to be perceived as relativizing Nazi crimes. Germans in particular are generally understandably reluctant to engage in discussions that might smack of apologetics. Contemporary Germany rests on the moral foundation not only of the repudiation of Nazism, but also of the refusal to deny German responsibility for what happened under Hitler. Alluding to foreign influences remains largely out of bounds in Germany for that reason. Conversely no non-Germans want their country to be accused of any part in the genesis of Nazism. It is hard to overcome our sense that if we influenced Nazism we have polluted ourselves in ways that can never be cleansed. On the deepest level it is perhaps the case that we feel, throughout the Western world, a need to identify a true *nefandum*, an abyss of unexampled modern horror against which we can define ourselves, a wholly *sui generis* “radical evil”—a sort of dark star to steer by lest we lose our moral bearings.

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

None of this is to suggest that America was a Nazi country in the 1930s. Of course it was not, appalling as the law of the early and mid-twentieth century sometimes was. Of course the racist strains in American law coexisted and competed with some glorious humane and egalitarian strains. Of course thoughtful Americans reviled Nazism—though there were certainly some who fell for Hitler. The most famous of the lawyers among them was none other than Roscoe Pound, dean of the Harvard Law School, icon of advanced American legal thought, and a man who made little secret of his liking for Hitler in the 1930s.<sup>39</sup> Nazi lawyers for their part saw plenty of things to despise about America.

The point is not that the American and Nazi race regimes were the same, but that the Nazis found examples and precedents in the American legal race order that they valued highly, while simultaneously deploring, and puzzling over, the strength of the liberal countercurrent in a country with so much openly and unapologetically sanctioned racism. We can, and should, reject the sort of simple-minded anti-Americanism that blames the United States for all the evils of the world, or reduces America to nothing but its history of

racism.<sup>40</sup> But there is no excuse for refusing to confront hard questions about our history, and about the history of American influence abroad. The American impact on the rest of the world is not limited to what makes Americans proudest about their country. It has also included aspects of the American past that we might prefer to forget.

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