

The Americans and the Nazis: Who Copied Whom?

Michael Livingston

Professor of Law
Rutgers Law School

James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* Princeton University Press, 224pp., \$15 paper

Notwithstanding their many similarities, the Nazi Holocaust and its predecessor, the Nuremberg Laws, have traditionally been treated separately from racial discrimination in the United States and other Western countries. Part of this is a question of professional specialization: relatively few scholars of American history speak German, and experts in European history do not very often return to their own country. Part of it regards the divergent futures of the two phenomena, European anti-Semitism having culminated in mass murder while American race relations have (so we tell ourselves) turned in a more positive direction. There may also be a willful avoidance of comparison, Americans being loath to admit that anything here could resemble Nazi Germany, and Holocaust experts reluctant to suggest anything that might compromise the uniqueness of their topic. The reluctance is especially strong among lawyers, who

tend to be more locally focused than scholars in other fields, and are reluctant to undertake comparative work even in the best of circumstances.

James Whitman is less easily deterred. A renowned comparativist who has previously considered criminal law, the law of war, and other challenging subjects, Whitman here turns his attention to the Nuremberg Laws and (by implication) the ensuing Holocaust. Nor is Whitman's conclusion an especially pleasant one. Not only does he find significant parallels between German and American racism, but he suggests that the Americans were the originators—the model for modern racism—who served as an inspiration for the Germans even when they rejected American precedents in the drafting process. A more convincing refutation of the idea of American “innocence” would be difficult to imagine.

Whitman's argument is based on a close reading of the drafting and brainstorming sessions that preceded the actual drafting of the Nuremberg Laws. These include a comprehensive treatise on American racial

law by one Heinrich Krieger¹ and the contributions of two individuals, Minister of Justice Franz Gürtner and Bernhard Lösener of the Interior Ministry, who attended the relevant sessions and (in the latter case) served as a principal draftsman.² The sources make clear that two distinct strands of American law, the second class (Jim Crow) citizenship imposed on African-Americans in the South and the exclusionary rules applied to nonwhites in American immigration law, were known to the Germans and directly influenced the drafting process. It is true, notes Whitman, that many American precedents were rejected, in some cases because they were deemed too harsh for the German situation. For example, while the Germans followed the American example in prohibiting mixed (i.e., interracial) marriages, they failed to adopt the so-called “one drop” rule, which might have resulted in a large part of the German population being classified as Jews. But this does not mean that the American laws lacked influence: rather, that they were one of several influences that had to vie with other sources and differing practical realities in creating a finished product. Nor was the American influence surprising, Whitman argues: the United States was not a small player but a world leader in racism during the relevant period, and it was all but inevitable that its example would be followed.³

How persuasive is Whitman’s argument? As a general rule, I would say: pretty persuasive. At very least, he has exploded

the myth—never very convincing—that there was no meaningful contact between American racism and European anti-Semitism, that the two proceeded on more or less separate tracks. Nor does it appear, as some would like to think, that the influence was all in one direction. Instead Americans are shown to have provided a model for anti-Semitism at its most extreme, on both an ideological and a technical level. This has previously been acknowledged with respect to Britain, France, and other European powers, but much less so regarding the United States. From this perspective, Whitman makes an important and original contribution, one that I hope will lead to further research.

As historical record, then, I am admiring and even enthusiastic about Whitman’s book. That said, I see two potential dangers, one internal and the other external in nature. I consider these in turn.

A more convincing refutation of the idea of American “innocence” would be difficult to imagine.

The internal issue relates to Whitman’s evidence and the “correlation vs. causation” problem. While establishing that the Nazis were aware of American precedents, and that these precedents had at least some influence on their deliberations, it does not tell us how significant they were as compared to other historical sources. In this respect, it must be noted that the Germans had literally hundreds of years of European anti-Semitic laws to look at, some of which had been in effect within the lifetime of the draftsmen.⁴

1 *Race Law in the United States (Das Rassenrecht in den Vereinigten Staaten)*, 1936. The author apparently became an advocate of international peace and understanding after 1945.

2 The most important meeting appears to have been held on June 5, 1934; it is discussed by Whitman on pages 93-113.

3 Whitman writes that “In the early twentieth century the United States was not just a country with racism. It was the leading racist jurisdiction...” (emphasis in original).

4 See, e.g., in Raoul Hilberg, *The Destruction of the European Jews* (New Haven: Yale University Press, 1961).

For example, denial of citizenship to Jews, and such subsequent regulations as the ghetto and the yellow star, had precedents in medieval and early modern Europe: they were not so much inventions as reversions to earlier practice. It would be interesting to see how important these precedents were, and what happened when they conflicted with the more recent American laws.

The external issue concerns less Whitman's book itself than how I fear it will be used. There is a current intellectual trend that associates 21st century populist movements—the Trump administration, the Orban government in Hungary, the Brexiteers in Great Britain, and so forth—with the Nazi and Fascist movements of the 1930s.⁵ Such authors call attention to assorted features of the populist movements, ranging from charismatic leaders to disregard for democratic forms to racism, sexism, and a violent, militarist orientation, that are said to parallel that earlier era. While some of this work is of high quality, it has a tendency to lapse into anachronism. For example, some authors have described the 1930s-era Fascists as anti-immigrant, anti-female, and anti-intellectual in character, attitudes that may indeed apply to some of them, but which sound suspiciously like contemporary issues being read into the historical record for political effect. Some conservatives have done the same to contemporary liberals, to whom they wish to attribute the sins of Lenin, Stalin, and similar figures.

In the hardcover version of his book, Whitman—who began his research before Trump was elected—largely steers clear of this ahistorical tendency. In the preface to

the paperback edition, he is more explicit, stating that the election of Donald Trump means that “[t]he same aspects of American life that appealed to the Nazis seventy-five years ago are with us again” and expressing his fear that “[t]he supremacy of the rule of law was abandoned during the high era of American race law, just as it was abandoned in Nazi Germany, and we ought to tremble when we see it creaking and shuddering in 2018.” Whitman attributes the persistence of American racism to what Nazi judge Roland Freisler called the “primitive” and “political” character of American law—its willingness to allow popular sentiment to remain unrestrained by higher principle—and wonders openly if Freisler may have not been correct.

There is a certain liberty that authors take in prefaces and conclusions, and the musings above do not discredit Whitman's scholarly work. But I can't help wondering if there isn't a touch of anachronism to his broader project. Put more bluntly, I wonder if the explicit parallel between contemporary America and Nazi Germany that informs Whitman's preface does not at times affect his judgment of prior events, causing him to overrate the American influence in the earlier period and (implicitly) to reduce the influence of other causes.

History is a tricky business. One has to learn from the past, and at the same time keep it distinct from the present. James Whitman has produced an important work, which I hope will stimulate further efforts in an important and underrepresented area. Let us hope that future scholars will be as careful as he, for the most part, has been. **A**

⁵ I address this point further in Michael A. Livingston, *The Other F-Word: Fascism, The "Rule of Law," and the Trump Era*, SSRN Abstract #3272256 (October 24, 2018).