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## The Outcome of Influence: *Hitler's American Model* and Transnational Legal History

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# THE OUTCOME OF INFLUENCE: *HITLER'S AMERICAN MODEL AND* TRANSNATIONAL LEGAL HISTORY

Mary L. Dudziak\*

HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW. By *James Q. Whitman*. Princeton and Oxford: Princeton University Press. 2017. P. 161. Cloth, \$24.95; paper, \$14.95.

On July 17, 1935, William E. Dodd, the U.S. Ambassador to Germany, sent a disturbing dispatch to the Secretary of State: "SIR: I have the honor to report that the anti-Jewish wave, which evidence from all sides [is] showing to be gaining accumulative strength, has lately entered upon a particularly ugly phase."<sup>1</sup> American concern about anti-Semitism in Germany was not new, but Dodd warned that what had been an "ever-present undercurrent seems now to be developing into an offensive distinguished as much by the efficacy of its apparent organization by official quarters as by its brutality and ruthlessness."<sup>2</sup> Germans were now using a "new device . . . the forces of the law, in contravention to the terms of the law itself," to prevent intermarriage between Jews and "Aryans."<sup>3</sup> The episode precipitating Dodd's report was a court decision upholding the refusal of a clerk in the town of Bad Sui-za, Germany, to grant a marriage license to a Jewish woman and a man identified as Aryan. Such marriages were not unlawful in Germany at that time, but the court thought that the clerk "could not be expected to sanction a union 'adulterating Aryan blood and rendering it useless for all time from the national point of view.'<sup>4</sup> More disturbing, the State Secret Police of Breslau apprehended six Jewish men and "six so-called German women" for "racial disgrace of a character dangerous to public safety and order."<sup>5</sup> Their crimes were being engaged to each other, or simply being seen together. Their dis-

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1. Letter from William E. Dodd, Ambassador in Ger., to the Sec'y of State (July 17, 1935), in 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1935, THE BRITISH COMMONWEALTH; EUROPE 401, 401 (1952), <https://history.state.gov/historicaldocuments/frus1935v02/d302> [<https://perma.cc/8G98-5NSL>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

regard for “the racial commandments of our Reich,” the local press reported, meant that these couples would be sent to a concentration camp.<sup>6</sup>

The concerned tone of Dodd’s dispatch, and the fact that punishment for intermarriage warranted diplomatic notice on the part of the United States, evokes different kinds of reactions from contemporary readers. Knowing the brutality and inhumanity that would be coming to Hitler’s Germany,<sup>7</sup> it is chilling to read this account and welcome to see American concern. But Dodd’s response is also curious. In the United States in 1935, thirty states outlawed marriage between whites and blacks, with some more broadly outlawing interracial marriage.<sup>8</sup> African Americans were brutally tortured and killed for perceived violations of racial norms.<sup>9</sup> Did American diplomats reflect on the similarity? If German practices warranted international attention, was the same true of American racism? And perhaps most important of all, had American race law found its way to Germany so that American law itself might be complicit?

In his powerful book, James Q. Whitman<sup>10</sup> answers this last question with his title: *Hitler’s American Model: The United States and the Making of Nazi Race Law*. He does *not* argue that American law helped enable the Holocaust. His argument is careful and is more focused: “[W]hen the leading Nazi jurists assembled in early June 1934 to debate how to institutionalize racism in the new Third Reich, they began by asking how the Americans did it” (p. 113). The Germans did not directly copy American law. Instead, U.S. examples showed “how natural and inevitable racist legislation was” (p. 123). Whitman’s book is a focused examination of a troubling episode in transnational legal history and a reflection on the morality of American law.

In Part I, this Review will first trace Whitman’s forensic examination of Nazi uses of American law. It will then examine an aspect of this history that the author repeatedly notes but does not deeply explore: the relationship between domestic law and foreign relations. Part II sets the writing of the Nuremberg Laws within the context of Nazi foreign policy, suggesting the kind of reasoning that may have informed concerns about the impact of domestic German law on foreign relations. Part III compares the transnational history of Nazi race law with the transnational history of American civil rights during the early Cold War era. Bringing together *Hitler’s American Model* and the international impact of American civil rights reveals two insights. First, deeply contextualizing transnational histories reveals the way domestic law is a feature of international relations and the global history of ideas. Second,

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6. *Id.* at 402.

7. See 1 RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (3d ed. 2003).

8. See PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 191–93* (2009).

9. See AMY KATE BAILEY & STEWART E. TOLNAY, *LYNCHED: THE VICTIMS OF SOUTHERN MOB VIOLENCE* (2015); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2002).

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and most important, American law can serve as a global example, promoting both reform and also evil.

#### I. AMERICAN LAW AS AN EXAMPLE

“No one wants to imagine,” Whitman writes, “that America provided any measure of inspiration for Hitler” (p. 3). He seeks to correct “what most of us must think of as the obvious truth”: that there was no American influence on Nazi law (p. 3). Whitman writes in a tone of moral outrage, carefully revealing his argument to readers he expects share his deep discomfort with the idea that American law played a role in what would become the murderous Nazi regime. Most scholarship directly on point, Whitman writes, rejects the idea that U.S. law was influential (pp. 3–4). This is in spite of the fact that, as the author details, historians have written of Nazi interest in other aspects of American life, from their praise for President Franklin D. Roosevelt’s New Deal government in the early 1930s,<sup>11</sup> to engagement with the American eugenics movement,<sup>12</sup> to Hitler’s admiration for the removal of and warfare against Native Americans.<sup>13</sup>

Historians of the United States and the world are less likely to think it to be “obvious” that American ideas had no impact on the Nazis,<sup>14</sup> but all readers will appreciate Whitman’s care and precision in examining the evidence. In two lengthy chapters, and introductory and concluding essays, he focuses deeply on important Nazi texts, and traces within them the appearance of American influence. Of great help to Americanists, Whitman provides his own translations of excerpts of key German sources.<sup>15</sup> He works to carefully dismantle the previous literature denying that the U.S. example influenced the Nazis. Because references to American law are, in some cases, explicit,

11. P. 6; *see also* KLAUS P. FISCHER, *HITLER & AMERICA* 49 (2011).

12. Pp. 8–9; *see* EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* 269–77 (2003); DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* (1985).

13. Pp. 9–10. In a comparative study of American westward expansion and Nazi thought, for example, CARROLL P. KAKEL, III, argues that Hitler “clearly saw America’s westward expansion, as well as US Indian policy, as a prototype for Nazi notions and practices.” CARROLL P. KAKEL, III, *THE AMERICAN WEST AND THE NAZI EAST: A COMPARATIVE AND INTERPRETIVE PERSPECTIVE* 215–16 (2011).

14. Even if Whitman is correct about what “most of us” think, in the aftermath of the transnational turn in U.S. historiography, historians would be more likely to assume a currency in American legal ideas about race in Germany. On transnational approaches to U.S. history, *see*, for example, DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998); IAN TYRRELL, *TRANSNATIONAL NATION: UNITED STATES HISTORY IN GLOBAL PERSPECTIVE SINCE 1789* (2d ed. 2015); and *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE* (Thomas Bender ed., 2002). Historians of the United States embraced transnational history in the last decade of the twentieth century, but Robin D.G. Kelley notes that African American history has always been transnational. Robin D.G. Kelley, *How the West Was One: The African Diaspora and the Re-Mapping of U.S. History*, in *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE*, *supra* at 123, 124.

15. *See, e.g.*, pp. 84–86 (translating selections from the 1933 Prussian Memorandum).

Whitman's approach enables him to be convincing on his core question of whether Nazis were influenced by American law. In essence, they themselves said they were.

Whitman argues that scholars have missed the influence of American law on Nazi legal development because they have looked in the wrong places and used the wrong interpretive tools (pp. 12–13). An overly narrow understanding of the legal history of American racism has led some scholars to restrict their search to segregation law (p. 33). Whitman, in contrast, makes his case for American influence by focusing more broadly on race-related legislation other than segregation: immigration and citizenship law and anti-miscegenation law.

The Nuremberg Laws, enacted in 1935, conferred full rights only on citizens of the German Reich (pp. 17, 29). A Reich citizen was a person “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.”<sup>16</sup> The laws banned marriage between Germans and Jews and had other restrictions intended to protect what was thought of as the “purity of German blood” (pp. 30–32).

When crafting the Nuremberg Laws, Germans looked to other countries for examples of how to draft immigration and citizenship law that would ensure ethnic homogeneity (p. 16). “[T]he United States came to be regarded as ‘the leader in developing explicitly racist policies of nationality and immigration’” from the nineteenth century on, Whitman writes.<sup>17</sup> U.S. racial limits on immigration and naturalization were longstanding. The Naturalization Act of 1790 allowed naturalization of “any alien, being a free white person.”<sup>18</sup> Anti-Asian legislation in the late nineteenth and early twentieth centuries was of particular interest. For example, in 1917 Congress created what was called the “Asiatic Barred Zone,” which expanded upon previous restrictions on Chinese and Japanese immigration and prohibited entry into the United States of persons from much of Asia and the Pacific Islands.<sup>19</sup> These kinds of provisions put the United States “at the vanguard” of racist immigration restrictions (p. 36).

Also useful to Germans was the American law of second-class citizenship. Until 1924, Native Americans were “nationals” but not citizens, and residents of Puerto Rico were “foreign . . . in a domestic sense,” lacking U.S. constitutional rights.<sup>20</sup> African Americans were constitutionally entitled to

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16. P. 30 (translating Reichsbürgergesetz [Imperial Citizenship Law], Sept. 15, 1935, RGBL I at 1146, § 2(1) (Ger.)).

17. P. 36 (quoting DAVID SCOTT FITZGERALD & DAVID COOK-MARTÍN, *CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS* 7 (2014)).

18. P. 34 (quoting Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795)).

19. See pp. 35–36; Asiatic Barred Zone Act, Pub. L. No. 64–301, 39 Stat. 874 (1917) (repealed 1952).

20. See pp. 38–42 (quoting MARK MAZOWER, *HITLER'S EMPIRE: HOW THE NAZIS RULED EUROPE* 584 (2008)).

vote under the Fifteenth Amendment, but Southern states restricted access to the ballot through poll taxes, literacy tests, and “grandfather clauses” (p. 39).

The Nazis were familiar with these American laws (p. 43). Adolf Hitler upheld the American example in *Mein Kampf*. After criticizing German law for lacking needed restrictions, he wrote that “[t]here is currently one state in which one can observe at least weak beginnings of a better conception. This is of course . . . the American Union,” which “categorically refuses the immigration of physically unhealthy elements, and simply excludes the immigration of certain races.”<sup>21</sup> In Hitler’s view, this allowed the United States to retain its positive “Nordic” racial character (p. 47).

There is ample praise for American law in Nazi writings, but Whitman does not overread his sources. The Germans did not directly borrow American citizenship and disenfranchisement law in the sense of using American statutes as a direct template (pp. 70–72). Instead, Whitman makes a modest, well-supported argument that American law served as “a point of reference,” turned to as a positive example as the Nazis codified their own brutal forms of repression (pp. 50, 70–72).

In the Law for the Protection of German Blood and German Honor, however, Whitman finds more: “the most unsettling signs of direct influence” of American law (pp. 72, 76). His chapter on the “Blood Law” will be disturbing even for readers unsurprised to find that American ideas about race informed the policies of the German government. A 1933 memorandum circulated by Nazi radicals explicitly invoked American law as a positive example, and U.S. law was regularly discussed in a 1934 planning meeting (p. 76). “American models were championed by the most radical Nazi faction” (pp. 76–77). Whitman provides careful and convincing support for his argument that “the Blood Law itself that emerged at Nuremberg bore the marks . . . of American influence” (p. 77).

Both Germany and the United States had racist extremists (p. 77). The distinct U.S. contribution to the Nazis was technique (p. 77). In particular, the country had “*the* model of anti-miscegenation legislation” (p. 78). Laws of thirty states invalidated forms of interracial marriage (p. 78), but many went beyond that. They criminally punished the couples, which was rare among other nations with bans on mixed marriages (p. 78). Under Maryland law, for example, anyone violating the anti-miscegenation law “shall be deemed guilty of an infamous crime, and be punished by imprisonment in the penitentiary for not less than eighteen months nor more than ten years.”<sup>22</sup> The Nazis specifically discussed American criminalization of interracial marriage when debating a section on “causing harm to the honor of the race” (p. 86). According to the memorandum, “[i]t scandalously flouts

21. Pp. 45–46 (translating 2 ADOLF HITLER, *MEIN KAMPF: EINE KRITISCHE EDITION* 1115–17 (Christian Hartmann et al. eds., 2016)).

22. P. 79 (emphasis omitted) (quoting MD. CODE ANN., CRIMES & PUNISHMENTS § 398 (1957) (repealed 1967)).

the sentiments of the *Volk* when, for example, German women shamelessly consort with Negroes.”<sup>23</sup> Criminal prohibition only applied when “the association takes place in public and occurs in a shameless manner and gives gross offense to the sentiments of the *Volk* (for example indecent dancing in a pub with a Negro).”<sup>24</sup> A rationale for this racist provision was that this kind of “[p]rotection of racial honor” was “already practiced by other *Völker*. It is well-know[n], for example, that the southern states of North America maintain the most stringent separation between the white population and coloreds in both public and personal interactions.”<sup>25</sup>

In order to ban interracial marriage, Germans and Americans had to be able to put people into racial categories. The Nazis took great interest in the American law of racial classification (pp. 79–80). Some states had a “one drop rule,” classifying a person as black if they had any black ancestry.<sup>26</sup> Examining this area led Whitman to “the most uncomfortable irony in this history” (p. 80). The Nazis declined to adopt the American approach because they thought U.S. law was too harsh (p. 80).

Once the Nuremburg Laws were written, however, one of the drafters reported with great regret that, at that time, “[f]or foreign policy reasons” the criminalization of all interracial mixing of a sexual nature “could not be instituted.”<sup>27</sup> In addition, the importance of Jews in the German economy made an effort to impose complete social segregation—like the model attempted by some American states—impractical, so radicals had to give up on full implementation.<sup>28</sup> “Some of them admitted that diplomatic pressures made it impossible, for the moment, to carry out the measures that they deemed necessary; the objections of so many countries to targeting ‘colored Races’ were too grave” (p. 96). This passage is significant because it clearly demonstrates Nazi interest in American segregation law, and because the Nazis found the practices of some American states to be too harsh to be ac-

23. P. 86 (translating NATIONALSOZIALISTISCHES STRAFRECHT: DENKSCHRIFT DES PREUSSISCHEN JUSTIZMINISTERS [NATIONAL SOCIALIST CRIMINAL LAW: MEMORANDUM OF PRUSSIAN ATTORNEY GENERAL] 47–49 (Hanns Kerrl ed., 1933)).

24. P. 86 (translating NATIONALSOZIALISTISCHES STRAFRECHT: DENKSCHRIFT DES PREUSSISCHEN JUSTIZMINISTERS [NATIONAL SOCIALIST CRIMINAL LAW: MEMORANDUM OF PRUSSIAN ATTORNEY GENERAL] 47–49 (Hanns Kerrl ed., 1933)).

25. P. 86 (translating NATIONALSOZIALISTISCHES STRAFRECHT: DENKSCHRIFT DES PREUSSISCHEN JUSTIZMINISTERS [NATIONAL SOCIALIST CRIMINAL LAW: MEMORANDUM OF PRUSSIAN ATTORNEY GENERAL] 47–49 (Hanns Kerrl ed., 1933)).

26. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 20* (rev. & updated 10th anniversary ed. 2006); PASCOE, *supra* note 8, at 119.

27. *Id.* at 97–98 (translating Statement of Fritz Grau (June 6, 1934), *reprinted in 2 QUELLEN ZUR REFORM DES STRAF- UND STRAFPROZESSRECHTS* [SOURCES FOR REFORM OF CRIMINAL AND TRIAL LAW] pt. 2, at 277, 278–79 (Jürgen Regge & Werner Schubert eds., 1989)).

28. See pp. 98–99.

ceptable by other nations.<sup>29</sup> Because of this, they restricted interracial association only when Germans and nonwhites consorted in public (pp. 86–87).

Whitman's evidence of direct and substantial Nazi discussion of U.S. law when writing the Nuremberg Laws makes his core claims indisputable. Along the way, however, Whitman assumes too little of his audience. In explaining the reasons American influence on Nazi law has largely been ignored, he invokes too narrow a conception of how the history of race in the United States is understood. He writes that "our general culture has so far been slow to grasp" that "[t]he history of American racism is not just a history of the Jim Crow South," remembered principally for the battle against racial segregation (pp. 32–33, 137). Whitman also criticizes scholars who have argued that the United States was not a Nazi model for failing to understand the importance of immigration and citizenship restrictions based on race (pp. 11–13). If this criticism fits that literature, it is, at best, outdated as applied to "our general culture." Although the Black Lives Matter movement is relatively new,<sup>30</sup> an understanding that American racism is not simply a Jim Crow South history has long been evident in the history of concerns about police brutality and mass incarceration, including the police beating of Rodney King in Los Angeles, California, in 1991.<sup>31</sup> During the second half of the twentieth century, there was widespread news coverage of racial conflict in the North as well as the South over school desegregation and police brutality.<sup>32</sup> Similarly, awareness of the role of race in immigration restrictions long precedes the contemporary immigration crisis. This has been central to the fields of Asian American and Latinx American history, and there has been substantial debate in the press about racial profiling and travel restrictions imposed on Muslims since 2001.<sup>33</sup> Important accounts by historians regarding race and immigration, and civil rights battles in the northern United

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29. American anti-miscegenation laws were found to be unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967). On interracial marriage in U.S. history, see generally PASCOE, *supra* note 8, and RENEE C. ROMANO, *RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA* (2003).

30. See BARBARA RANSBY, *MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE TWENTY-FIRST CENTURY* (2018).

31. See generally ANNA DEAVERE SMITH, *TWILIGHT: LOS ANGELES, 1992* (1994); *READING RODNEY KING/READING URBAN UPRISING* (Robert Gooding-Williams ed., 1993).

32. See generally JANET L. ABU-LUGHOD, *RACE, SPACE, AND RIOTS IN CHICAGO, NEW YORK, AND LOS ANGELES* (2007); GERALD HORNE, *FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S* (1995); J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1985); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008).

33. See, e.g., MOUSTAFA BAYOUMI, *HOW DOES IT FEEL TO BE A PROBLEM?: BEING YOUNG AND ARAB IN AMERICA* (2008) (on the experience of Arab and Muslim Americans); IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (on the Chicano community and protest in Los Angeles, California); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (on undocumented migrants); Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575 (2002) (on immigrants after 9/11).

States, appear in public history programming,<sup>34</sup> and civil rights history is incorporated into K–12 curricula.<sup>35</sup> This weakness does not undermine Whitman’s core arguments, however. It simply means that readers would be advised to turn to historians of race and American culture for an examination of civil rights and historical memory.

## II. RACE LAW AND NAZI FOREIGN POLICY

Whitman leaves much for other scholars to build on. The book does not rely on the methods of contemporary transnational historians who trace the path of ideas and movements through research in archives on different continents.<sup>36</sup> He comments that relevant German sources are likely to be unavailable (p. 113). If they are unlikely to be in German government archives, copies could be elsewhere, including private collections and the archives of other governments. For example, it is highly *likely* that records relevant to some aspects of Whitman’s story are in U.S. diplomatic records.<sup>37</sup> Such rec-

34. See, e.g., *American Experience: The Chinese Exclusion Act* (PBS May 29, 2018); *Eyes on the Prize: The Keys to the Kingdom (1974–80)* (Blackside Feb. 26, 1990) (documentary film episode); *Separate Is Not Equal: Brown v. Board of Education*, SMITHSONIAN NAT’L MUSEUM AM. HIST., <http://americanhistory.si.edu/brown/history/index.html> [<https://perma.cc/GT3Y-J4AR>] (educational website).

35. Though K–12 curricula often incorporate race, immigration, and the civil rights battles, a study of K–12 curricula by LeGarrett J. King argued that coverage is simplistic, overly celebratory, and incomplete. See, e.g., LeGarrett J. King, *The Status of Black History in U.S. Schools and Society*, 81 SOC. EDUC. 14 (2017).

36. A classic account is RODGERS, *supra* note 14. For transnational histories related to race, see KEISHA N. BLAIN, *SET THE WORLD ON FIRE: BLACK NATIONALIST WOMEN AND THE GLOBAL STRUGGLE FOR FREEDOM* (2018); JAMES T. CAMPBELL, *MIDDLE PASSAGES: AFRICAN AMERICAN JOURNEYS TO AFRICA, 1787–2005* (2006); MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL’S AFRICAN JOURNEY* (2008); ADRIANE LENTZ-SMITH, *FREEDOM STRUGGLES: AFRICAN AMERICANS AND WORLD WAR I* (2009); and NICO SLATE, *COLORED COSMOPOLITANISM: THE SHARED STRUGGLE FOR FREEDOM IN THE UNITED STATES AND INDIA* (2012).

37. For example, there is surely information about the trip of the Association of National Socialist German Jurists to the United States in September 23, 1935, in U.S. State Department archival records at the U.S. National Archives, College Park, Maryland. See pp. 132–34. Whitman writes that “it does not seem possible to learn more about how Fischer and his group fared on their study trip,” p. 134, however he does not indicate that he consulted U.S. State Department records, p. 191. In addition, original records from the U.S. Embassy in Germany are likely to contain details about the 1934 meeting to draft the Nuremberg Laws. Sources about actions in Germany may also be present in the archives of the United Kingdom and other countries.

Multiarchival transnational research is now the gold standard in foreign relations history, but some information about law development in other nations can be found in archives within the United States. Dispatches from American diplomats in U.S. State Department archives regularly include documents from other nations, including translations. This makes them an outstanding, though underused, source for comparative and transnational legal history research. For a description of what diplomatic archives contain and how to access them, see Mary L. Dudziak, *On Using U.S. Diplomatic Records for Research on African Constitutions: A Guide to the Archives*, NEWSL. AFR. SEC. ASS’N AM. L. SCHOOLS (2002), *available at*

ords can especially illuminate German and American thinking about the diplomatic consequences and how they were managed. This would have enabled Whitman to show with particularity the intersection between German domestic law and foreign relations. The absence of such sources does not undermine Whitman's conclusion that American law was a model, which is amply demonstrated in the German materials he relies upon, but archival records would explain the foreign relations references in his sources and would illuminate the fuller history of the intersection between international relations and domestic law.

The dispatch from Ambassador Dodd mentioned at the opening of this Review makes clear that the U.S. Embassy in Germany and the American State Department kept tabs on Nazi law and legal figures.<sup>38</sup> Aspects of this history can be seen in the selected U.S. diplomatic records that have been digitized by the State Department Historian's Office. For example, Ambassador Dodd reported to the Secretary of State on January 8, 1934, about an issue of *Deutsche Juristen Zeitung*, the official publication of the leading German jurists' organization, which reviewed new anti-Jewish legislation. The dispatch noted internal disagreement about harsh new provisions and their possible impact on business interests.<sup>39</sup> These records also make clear

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=319700](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=319700) [<https://perma.cc/8JUW-SQGX>]. Because research in diplomatic history sources can be especially challenging, simply showing up at the archives without advance planning will not be successful. The Society for Historians of American Foreign Relations has posted a useful guide: *Know Before You Go: What You Should Know Before You Head to the National Archives*, SOC'Y FOR HISTORIANS AM. FOREIGN REL., <https://shaftr.org/research/know-before-you-go> [<https://perma.cc/2U9P-T7Z7>]. See also *Plan Your Research Visit*, NAT'L ARCHIVES, <https://www.archives.gov/research/start/plan-your-visit> [<https://perma.cc/7PTC-C5GV>]. A limited selection of U.S. State Department records is published in the series *Foreign Relations of the United States*, which is available in most research libraries and has recently been fully digitized. See *About the Foreign Relations of the United States Series*, OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/about-frus> [<https://perma.cc/9KBB-QB8P>].

On methodologies combining legal and foreign relations history, and resources for this kind of research, see Mary L. Dudziak, *Legal History as Foreign Relations History*, in *EXPLAINING THE HISTORY OF AMERICAN FOREIGN RELATIONS 135* (Frank Costigliola & Michael J. Hogan eds., 3d ed. 2016).

38. See Letter from William E. Dodd, *supra* note 1.

39. Letter from William E. Dodd, Ambassador in Ger., to the Sec'y of State (Jan. 8, 1934), in 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1934, EUROPE, NEAR EAST AND AFRICA 291, 291-93 (1951), <https://history.state.gov/historicaldocuments/frus1934v02/d237> [<https://perma.cc/3Z6V-RQRY>]. This record can be found using the search engine of the Historian's Office website. Careful page-by-page review of the volume would likely reveal more about American diplomatic concern about German anti-Semitic law. This would just be the tip of the iceberg, however, because only a small percentage of State Department records are published or digitized. See generally WILLIAM B. MCALLISTER ET AL., OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, TOWARD "THOROUGH, ACCURATE, AND RELIABLE": A HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES SERIES (2015), <https://s3.amazonaws.com/static.history.state.gov/frus-history/ebooks/frus-history.pdf> [<https://perma.cc/EN36-3QH6>]. The full history would require on-site archival research at the U.S. National Archives. See generally *supra* note 37 (discussing archival sources).

that American diplomats knew that U.S. racism harmed their ability to call out Nazi practices. For example, on January 19, 1934, Assistant Secretary of State Robert Walton Moore wrote to Secretary of State Cordell Hull to raise concern about a proposed congressional resolution calling upon President Roosevelt to condemn Nazi persecution of Jews. If the president complied, Moore argued, the German government would resent it, and there could be “a very acrimonious discussion . . . which conceivably might, for example, ask him to explain why the negroes [sic] of this country do not fully enjoy the right of suffrage; why the lynching of negroes [sic] . . . is not prevented or severely punished; and how the anti-Semitic feeling in the United States, which unfortunately seems to be growing, is not checked.”<sup>40</sup>

These sources show that traces of a broader transnational history can be found in readily accessible sources. Deeper archival research could uncover the fuller history of the currency in legal ideas between the United States and Nazi Germany. This kind of research could show a transnational legal history that goes beyond Whitman’s core point of the U.S. model for the Nazis. It could reveal the degree to which diplomatic troubles helped shape domestic law in both Nazi Germany and the United States.

Whitman notes the impact of foreign relations on the formation of the Nuremberg Laws, but his references are brief and cursory. He writes that “[r]adical Nazi plans to pass legislation disfavoring ‘colored’ races met with angry protests from many parts of the world, including Japan, India, and South America” (p. 81). The Nazis faced the threat of boycotts, so “policy makers felt pressure to tone their racist legislative program down” (p. 81). This problem, along with domestic political conflict and internal bureaucratic conflict, “colored the history of the Nazi use of American law on marriage and sexual mixing” (p. 81).

American-style law, based on a presumption of racial inequality, could have negative foreign policy consequences for the Germans. East Asians, South Asians, and South Americans were offended by the proposal making “[c]ausing harm to the honor of the race” criminally punishable.<sup>41</sup> When the Nazis debated whether the Nuremberg Laws should be simply race *based*, without reference to inferiority, or *racist*, implying not only the need for separation but the inferiority of non-Aryans, Whitman writes that some argued that “avoiding any claim that Jews were inferior . . . would improve Germany’s international public relations” (p. 104). Their advice was rejected, but this episode nevertheless shows an awareness of the impact of discrimination on foreign relations.

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40. Memorandum by Assistant Sec’y of State (Moore) to Sec’y of State (Jan. 19, 1934), in 2 FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 39, at 293, 293, <https://history.state.gov/historicaldocuments/frus1934v02/d238> [<https://perma.cc/Q8CB-T3A6>].

41. P. 86 (translating NATIONALSOZIALISTISCHES STRAFRECHT: DENKSCHRIFT DES PREUSSISCHEN JUSTIZMINISTERS [NATIONAL SOCIALIST CRIMINAL LAW: MEMORANDUM OF PRUSSIAN ATTORNEY GENERAL] 47–49 (Hanns Kerrl ed., 1933)).

Although *Hitler's American Model* makes clear that foreign relations mattered to the Nuremberg Laws, Whitman is not clear just what those foreign relations problems were and how they manifested themselves. In U.S. Cold War history, for example, race discrimination harmed the U.S. global image, but not all diplomatic offense mattered. American diplomats initially dismissed foreign concern about American race discrimination but began to pay attention when they came to understand that concrete U.S. interests were at stake and that important alliances might be threatened.<sup>42</sup> When the United States sought to appeal to the hearts and minds of peoples in emerging independent countries, African and Asian criticism of race discrimination mattered, but Soviet criticism was dismissed as propaganda.<sup>43</sup>

Foreign relations turn on conceptions of national interest. It was clearly not the Nazis' objective, as a general matter, to keep from offending the world.<sup>44</sup> Instead, it is deeply interesting that one of the most despicable regimes in world history cared enough about its global image that, at least in 1934, in certain respects, it took steps to guard against foreign offense. Just what German interests were at stake when other countries criticized the Nuremberg Laws? Whitman writes that "many countries" objected (p. 96). He singles out Japan and India, and he mentions more broadly East Asia, South Asia, and South America (pp. 81, 86). Foreign relations historians would want to know: Why these countries and regions? Why not others? Foreign criticism is only a diplomatic problem when it interferes with something a state cares about. Precision about what was at stake—for Germany and other nations—could help illuminate the impact of Nazi law on foreign relations in Germany before World War II.

The leading historian of Nazi foreign policy, Gerhard L. Weinberg, writes that Hitler's foreign policy was driven by two principles: race and space. In his racial ideology—"a vulgarized version of Social Darwinism"—progress depended on the purity of the race and the importance of selective breeding.<sup>45</sup> German power and prosperity would derive from its racial superiority, and anything that undermined racial purity was a threat to its standing in the world.<sup>46</sup> Jews were Hitler's principal target, in part because he believed they were responsible for the outcome of World War I.<sup>47</sup> Second in line for Hitler's hatred was "the Negro."<sup>48</sup> He thought of France as Germa-

42. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 29–39, 79–102 (2d ed. 2011).

43. See *id.* at 29–39.

44. See FISCHER, *supra* note 11, at 48 ("Hitler[']s . . . single-minded goal [was] to expand German power."); see also ARISTOTLE A. KALLIS, *NAZI PROPAGANDA AND THE SECOND WORLD WAR* (2005).

45. GERHARD L. WEINBERG, *HITLER'S FOREIGN POLICY 1933–1939: THE ROAD TO WORLD WAR II*, at 6–7 (rev. ed. 2010).

46. *Id.*

47. *Id.*

48. *Id.* at 7–8.

ny's great enemy in part because of the French embrace of human equality, and he greatly despised French introduction of black troops from Africa in World War I and the growing presence of blacks in Europe.<sup>49</sup>

Under Hitler's concept of space, racial vitality depended on territorial expansion. Increased agricultural land mattered to a nation's strength because it would feed a growing populous.<sup>50</sup> Increased population would provide the manpower for war, and war would, in turn, enable Germany to expand its territory.<sup>51</sup> The focus on space made war an inevitable feature of foreign policy.<sup>52</sup> Race and space informed Hitler's approach to day-to-day matters of foreign policy.<sup>53</sup> He was not interested in diplomacy for its own sake. When Nazi diplomats urged minor changes in policy for the purpose of improving Hitler's international reputation, they were shunted aside.<sup>54</sup>

The principles of race and space help explain Hitler's approach to relations with different nations, Weinberg argues.<sup>55</sup> For example, he looked upon Great Britain differently than France, with a mix of admiration as well as hatred, because he thought of the British upper class as the product of selective breeding—a model for Germany.<sup>56</sup> Principally concerned with continental Europe, Hitler was initially not especially interested in the Far East and the United States.<sup>57</sup> He admired racist U.S. immigration law, which he initially thought of as the source of American strength, but during the Depression he concluded that the United States was a weak country because it was a “mongrel society.”<sup>58</sup>

When German proposals to prohibit interracial marriage in 1933 “produced an especially violent reaction in the Far East” and protests from the Japanese and Chinese governments,<sup>59</sup> the German government issued a statement attempting to reassure the objecting countries and told the press “not to refer to the ‘Yellow Peril.’”<sup>60</sup> The problem remained sensitive, however, due to incidents involving Asians in Germany.<sup>61</sup> The Germans re-

49. *Id.* at 8–9.

50. *Id.* at 8.

51. *Id.* at 8–9. Nazi leaders were “obsessed” with what they thought of as “North American precedent”—westward expansion—but sought to exceed American racial and territorial accomplishments, writes Kakel. See KAKEL, *supra* note 13, at 216.

52. WEINBERG, *supra* note 45, at 8.

53. *Id.* at 10.

54. *Id.* at 13.

55. *Id.*

56. *Id.* at 15.

57. *Id.* at 19–20.

58. *Id.* at 20.

59. *Id.* at 96.

60. *Id.* at 96–97.

61. *Id.*

sponded with special treatment for them, which was not extended to blacks and Jews.<sup>62</sup>

What German interests would have led the Nazis to want to improve their image in parts of Asia? Early in Hitler's term as chancellor, Germany especially sought to expand its trade with China.<sup>63</sup> Exporting German armaments to China would help build up Germany's arms industry.<sup>64</sup> Payments would lead to greater purchasing power for acquiring needed raw materials.<sup>65</sup> Germany also had a trade-related interest in Japan involving soybeans in Manchuria (which Japan occupied), used by Germany for agricultural feed.<sup>66</sup> Trade was paramount as well in relations with Latin American countries in an effort to increase German exports, especially armaments.<sup>67</sup> The Germans also hoped to displace U.S. trade in South America and to acquire raw materials for war readiness.<sup>68</sup> Whether Germany moderated its discrimination in order to protect these specific trade relations can only be confirmed archivally, but there were distinct interests which may have been of sufficient importance for the German government to be responsive when domestic practices offended these trading partners.

Hitler's approach to foreign policy makes the concern about foreign reaction at the 1934 meeting on the Nuremberg Laws more curious. It appears to be different from the American concern during the Cold War about the U.S. need to tamp down criticism that undermined the U.S. image and hampered global leadership.<sup>69</sup> It would appear that Germany was not seeking to signal its respect for the humanity of Asians by moderating their treatment of non-Aryans. Instead, their interest was likely more specific and strategic. Because feed for German agriculture aided Hitler's goal of an expanding *Volk*, and arms exports built the capacity of an arms industry essential to using war for German expansion, criticism by particular nations like China and Japan threatened Nazi pursuit of the principles of race and space.<sup>70</sup>

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62. *Id.* at 97.

63. *Id.*

64. *Id.* at 98. German-Chinese relations in 1933–36 were also driven by Chinese leader Chiang Kai-shek's parallel interest in the confluence of trade and militarization. See WILLIAM C. KIRBY, *GERMANY AND REPUBLICAN CHINA* 102–44 (1984).

65. WEINBERG, *supra* note 45, at 97–98.

66. *Id.* at 100–05. German outreach to Japan was moderated, however, in part in an effort to maintain German relations with China, thought to be of greater importance. *See id.*

67. *Id.* at 124–25.

68. *Id.* Secondary to trade was the growing interest in the National Socialist party among Germans and persons of German descent in South America. *Id.* Weinberg notes that “the main effect of German policy appears to have been to lend impetus to American attempts to convert the Monroe Doctrine into something resembling a defensive alliance against Germany.” *Id.* at 125. In this way, “unintentionally, Germany was helping to bring together the nations of the Western hemisphere.” *Id.*

69. *See* DUDZIAK, *supra* note 42.

70. *See* WEINBERG, *supra* note 45, at 97–98, 100–05, 124–25.

It is not Whitman's goal to fully examine this diplomatic history. His effort instead turns on close examination of a particular set of German and U.S. texts, and these sources enable his important contributions. There is a fuller story, however, of the currency of ideas between Nazi Germany and the United States and the role diplomatic pressure played in drafting the Nuremberg Laws. *Hitler's American Model* is thereby suggestive of lines of inquiry that other scholars could explore archivally. Illuminating this history, and comparing it with the experience of other nations, could deeply further our understanding of the intersection between foreign affairs and domestic law. Part III illustrates the value of comparison by turning briefly to an important example of the impact of domestic law on foreign relations: American civil rights during the early years of the Cold War.

### III. RACISM, DIPLOMACY, AND TRANSNATIONAL HISTORY

A prominent example of the way diplomacy can affect race law is the way American race law figured in foreign relations during the Cold War, a topic historians have amply documented.<sup>71</sup> The impact of American law on U.S. Cold War foreign relations was, in essence, a negative history that gave the United States an incentive to support social change. Racial segregation and state-supported discrimination undermined the image of the United States in the world. This was at a time when the United States emerged as the leader of the "free world" and promoted democracy over communism as a form of government. Because the U.S. government claimed that democracy was superior to other forms of government and was characterized by broad protection of political rights,<sup>72</sup> the nation was vulnerable to criticism when news about lynching, disenfranchisement, and discrimination against African Americans was widely covered in the world press. Peoples of other nations asked why their countries should follow the U.S. example when within the world's leading democracy African Americans were segregated and denied voting rights. Diplomatic records reveal the negative impact on U.S. standing in many countries.<sup>73</sup>

U.S. State Department records and other archives show the ways American leaders came to believe that international media coverage of disenfranchisement, segregation, and police brutality against African Americans undermined the U.S. image, and the way they attempted to manage the harm to U.S. foreign relations.<sup>74</sup> U.S. diplomats examined the impact of this issue on relations with particular countries and developed strategies for countering

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71. See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955* (2003); THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* (2001); DUDZIAK, *supra* note 42; BRENDA GAYLE PLUMMER, *RIISING WIND: BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935-1960* (1996).

72. See DUDZIAK, *supra* note 42, at 27.

73. *Id.* at 29-30, 42.

74. *Id.* at 46-49.

it.<sup>75</sup> This carried over to the realm of law reform. The United States filed briefs in civil rights cases, relying on State Department evidence that segregation harmed U.S. foreign relations.<sup>76</sup> The John F. Kennedy Administration relied on Senate testimony by Secretary of State Dean Rusk on what would become the Civil Rights Act of 1964.<sup>77</sup> He explained that the Act would help undo the harm that race discrimination was doing to U.S. foreign relations.<sup>78</sup> Law reform at the state level also mattered. When diplomats from newly independent African nations were denied service by restaurants in Maryland, generating diplomatic crises, Pedro San Juan, Director of the State Department Office of Special Protocol, urged the Maryland state legislature to pass a bill prohibiting race discrimination in public accommodations, arguing that it was needed to help the country win the Cold War.<sup>79</sup>

When a country moderates its domestic law in the face of foreign criticism, the response can be carefully calibrated. For example, foreign affairs affected President Dwight D. Eisenhower's response to the Little Rock, Arkansas, school desegregation crisis in 1957, but not less high-profile aspects of segregation.<sup>80</sup> When the world press widely condemned Arkansas Governor Orval Faubus's defiance of a federal judicial order, and the resulting mob violence blocking desegregation in Little Rock, Eisenhower sent federal troops to resolve the crisis and restore the American image.<sup>81</sup> Once the immediate crisis was over, however, intense global attention did not continue. When Arkansas and other states passed laws bureaucratizing school attendance—ensuring that, for a time, very few African Americans would attend previously white schools—there was no diplomatic crisis because the foreign press did not notice.<sup>82</sup> In this way, foreign pressure informed federal actions aiding image management but had less of an impact when it came to on-the-ground social change. The international interest was not driven by the absence of substantive equality, but by the brutal extremes that made front pages around the world.

This Cold War history broadens the implications of Whitman's recognition that seemingly domestic legal matters can figure in foreign relations, and foreign relations can affect domestic law. The international role of do-

75. *Id.* at 55–56.

76. *Id.* at 79–82. See generally Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (discussing the Justice Department's involvement in civil rights cases through filing amicus briefs arguing that racial segregation harmed U.S. foreign policy interests).

77. DUDZIAK, *supra* note 42, at 184.

78. *Id.* at 184–85.

79. *Id.* at 167–69; Renee Romano, *No Diplomatic Immunity: African Diplomats, the State Department, and Civil Rights, 1961–1964*, 87 J. AM. HIST. 546, 569–71 (2000).

80. See DUDZIAK, *supra* note 42, at 128–31; Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997).

81. See DUDZIAK, *supra* note 42, at 119, 128–41.

82. *Id.* at 149–51.

mestic law is not limited to the borrowing of legal texts,<sup>83</sup> the transnational promotion of legal norms (like the efforts to take American-style law to other nations),<sup>84</sup> or the kind of transnational influence of a nation's law demonstrated by *Hitler's American Model*. Domestic law can also be an aspect of a nation's diplomacy. This raises a research question for others of how, exactly, the confluence of American and Nazi law mattered in international relations, for Germany and the United States, during the period when the implications of Nazi ideology became clear. Such scholarship might more broadly conceptualize the transnational history of domestic law.

#### CONCLUSION

In revealing the way American law helped normalize racist legislation for the Nazis, *Hitler's American Model* is more than a snapshot of a regrettable past. Whitman is careful to hew to the goal of tracing the relationship between U.S. and Nazi texts. He does not step beyond this to offer a lesson from history for the contemporary world, but the contemporary implications of his work amplify its importance.

Germany in the 1930s slightly moderated the formal law of the country's racist practices in the face of international criticism. The United States, in later years, came to believe that seeking to overcome its most blatant racial injustices was in the nation's interest and was crucial to American world leadership. During our own era, when the American president uses the bully pulpit for bullying, *Hitler's American Model* provides a chilling example of the way the United States can influence the world, for good or for ill. History also offers hope, however, showing that global opprobrium can have a moderating effect, as it did for both Nazi law and American practices. For now, the regret and moral outrage with which Whitman offers his evidence is fitting, for it is a time when the possibility that the United States serves as a model for evil is all too real.

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83. See generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006).

84. See PAUL D. CARRINGTON, SPREADING AMERICA'S WORD: STORIES OF ITS LAWYER-MISSIONARIES (2005); SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW 35-39, 86-89 (2000).