

Alabama Song? Lotte Lenya? No. Adolph Hitler!

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Date : March 8, 2018

James Q. Whitman, [Hitler's American Model: The United States and the Making of Nazi Race Law](#) (2017).

Professor Whitman – without doubt a leader in the field of comparative law – manifestly wishes he hadn't learned what he's learned:

Awful as 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. ... In fact, ... 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.... Nor, importantly, was it only, or even primarily, the Jim Crow South that attracted Nazi lawyers. ... Their America was not just the South, it was a racist America writ much larger. (Pp. 4-5.)

More concretely:

American immigration and naturalization 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* ... 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 citizenships 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. ... America was a beacon of anti-miscegenation law, with thirty different state regimes – many of them outside the South, and all of them ... carefully studied, catalogued, and debated by Nazi lawyers. There were no other models for miscegenation legislation that the Nazis could find in the world.... (P. 12.)

"None of this is entirely easy to talk about." (P. 14.)

Whitman carefully details German use of American "models." He finds "direct American influence" in connection with "the criminalization of racially mixed marriage." (P. 79.) With regard to immigration and citizenship laws "the American example served not so much as a direct template but as welcome evidence." (P. 71.)

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 American was what Hitler described it to be: a dynamic 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. (Pp. 71-2.)

"[H]ow did it come to pass that America produced law that seemed intriguing and attractive to Nazis?" (P. 136.) Professor Whitman looks very closely at a June 5, 1934 meeting of the German commission on criminal law reform considering whether "mixed marriages" (here Jew and non-Jew) "should be criminalized." (P. 95.) Conservative jurists observed that 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." (P. 105.) But there was, it seemed, no "clearly delineated and scientifically acceptable definition of who counted as a racial Jew." (P. 105.) Committed Nazis contended, however, that "American

law ... demonstrated that it was perfectly possible to have racist legislation even if it was technically infeasible to come up with a scientifically satisfactory definition of race." *The problem at hand might be met by a "purely 'primitive' and 'political' response," as in the United States.* (P. 106.) "[I]t was possible to manage a functioning legal system without the sorts of clear concepts German lawyers cherished." (P. 107.) "American judges had no trouble applying racist law despite its fuzzy concepts." (P. 108.)

Whitman concludes – not just on the basis of this one debate – that "Nazi law was marked by a strong commitment to what Americans call 'Legal Realism,' the style of legal scholarship that also dominated in New Deal America." (P. 115.)

Nazi law ... was not a crass form of legal positivism, reducing the law to a duty of obedience to the command of the superiors. Nazi law was law that was liberated from the juristic past – it was law that would free the judges, legislators, and party bosses of Nazi Germany from the shackles of inherited concepts of justice, allowing them to "work toward" the realization of the racist goals of the regime.... (P. 152.)

So too American Legal Realism, he proposes: "long ... described as one of the great products of an American pragmatic style, ready to tackle social problems in a can-do spirit and displaying a healthy resistance to dogmatism." (P. 153.) Whitman notes that in 1934 Karl Llewellyn was told Germans regarded him "as a true Nazi, fit to be amalgamated in the lifeblood of the new Reich." (P. 155.) (Llewellyn was enraged.) "What attracted Nazi lawyers was not just American racism but American legal culture...." (P. 146.) American law, we need to remember, is not without risk. If "the traditions of the law do indeed have little power to ride herd on the demands of the politicians, ... when the politics is bad, the law can be very bad indeed." (P. 159.) A predilection to *renvoi*, a felt need to learn how our approaches work out when put to use elsewhere – "[t]his too has to be part of our national narrative." (P. 161.)

* * *The Nazi legal thinkers, interestingly, appear within Whitman's study to have learned another lesson from their American studies that Professor Whitman notes but does not give much direct attention. He stresses that the American racial order was not simply an artifact of the Civil War, white supremacy not peculiarly a southern phenomenon, rather nationally manifest. But German analysts, he shows us even so, were acutely aware in particular of recurring attention-getting, often publicly staged lynchings of mainly African Americans. This was a practice (we know) flowering in parallel with emerging white supremacy following on often-enough successful anti-reconstruction insurgency. It was nationally evident, but also manifestly regionally-marked too. Nazi jurists saw structural parallels with anti-Semitic street violence accompanying their own rise to power, violence persisting (at least early on) after Hitler's ascendancy. "What is lynch justice, if not the natural resistance of the Volk to an alien race that is attempting to gain the other hand?" (P. 65.) In Germany, though, popular violence (even if anti-Semitic) could not be squared with the premises of the larger Nazi order.

[T]he 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 such concerns about the dangers of German street violence that led to the promulgation of the Citizenship Law and Blood Law at Nuremberg. Concerned 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. (Pp. 82-83.)

This "efficient state apparatus" (P. 145.), alongside its "open system of racist citizenship," (P. 70.) the Nazis thought, was quite different from the American institutional set up. "Americans had to work around the requirements of the Fourteenth Amendment, and more broadly around their announced traditions of equality; and in consequence their law was a law of covert devices and legal subterfuges." (P. 70.) "[T]here was always a tension between two racial orders in America." (P. 143.)

The Nazi jurists, it is not hard to recognize right away, picked out primary pieces of a structural difficulty in American constitutional law, a source of distinctive *shape* – if never exclusively. This difficulty emerges out of a series of originating juxtapositions – of slavery and its acknowledgement and protection in 1787, the eventual civil war, and subsequent efforts at reconstruction. But more pressingly, it traces to the fierce insurgency catching up the Fourteenth Amendment especially (and constitutional reconstruction generally), within a surprisingly short time pushing far out to the side federal constitutional understandings keyed to reconstruction, putting in place a competing regime of white supremacy, chiefly culturally installed, distinctly invigorated and re-affirmed (again, mainly independently of governments and courts) by recurring, prominent, if randomly scattered public exercises in open torture and showily brutal killings of African Americans. Much of the time overt American legal institutions treated this confounding constitution as irresistible fact, occasion for sometimes resigned, sometimes eager accommodation, attending instead, *inter alia*, to Fourteenth Amendment ideas not immediately pulled into the maelstrom.

Is racism in the United States — in the form of white supremacy — an ideology pointing to totalitarianism akin to Hitler's anti-semitism? For Hannah Arendt, in *The Origins of Totalitarianism*, the key to ideology as engine of totalitarian elaboration was ruthless logic and not institutional layout: the logic of a first concern drives politics, becomes the context informing and informed by terror. The concern of white supremacy was white protection and its governing logic was segregation, as a means to protect whites from blacks (sometimes also blacks from whites). This form was infinitely elaborate, in principle addressed all interactions. It was therefore both totalizing and always at risk, inviting therefore a terror of fear and rage ever trigger-able, ubiquitous. The idea of overflowing or infilling terror, we may think, is counterpart to ever-refining, ever-elaborating logic. Within American white supremacy only (or almost only) African Americans had to treat lynching as an ever-present possibility. But grotesque public killings, tortures, dramatic confinements or other sharp hardships perhaps functioned to discipline the larger population too (even as it entertained them), to implicate all emotionally, to create the potential for crowd-raising, to make non-participation look like dissent. Lynchings and their deeply disturbing, manifestly excessive violence plainly worked to inform and propel a distinctive constitutional and political order. Grotesque deadly display declared victims to be living beings with no claims to sympathy (anything might be done to them), but at the same time the claim to sympathy is not entirely erased since the victims otherwise are often persons who live and work among and with their assailants. This tension was the work product of the killing exercise. The terror-constitution deployed terror aiming to minimize need for terrorist display, in this way giving force to white supremacy. Terrorist displays – for their audiences — prompted constitutional thinking: *constitutional terror*. ...

* * *What way out of hell?

Professor Whitman is right. White supremacy – its concatenations and interplays – reverberated nationally. He abstracts, however: the particulars of American constitutional sequences, formations, and dynamics are not, plainly, his principal subject. Whitman wants to introduce us to the Nazi jurists and their efforts – in this context, to underscore their American enthusiasms. He sees no need to stress where the Nazis were headed (whatever they thought circa 1934) – to Wannsee, to camp-building, to Hell (most of them anyway: we're quite sure). He puts to the side American constitutional movements too. These developments were occasional, to be sure: invitations also, we know, to significant opposing moves and more legal rethinking. *Even so*.... Circa 1934, piece by piece reimaginings of courts as jurisdictional redoubts, as sites for legal resistance, were already emerging as adjudicative counters to white supremacist popular constitutionalism and its implementing atrocities. Subsequent constitutional generalizings of these efforts – re-imagining the Fourteenth Amendment as incorporating the Bill of Rights, for example – would work to marginalize prominent defeatist realisms, to introduce new institutional counters. *Plessy's* sense of popular mores as intransigent no long occupied the field. *Hirabayashi's* conclusion that hitherto-victimized “discrete and insular minorities” might consequently prove sufficiently dangerous to society at large to justify further repression disappeared from view – so too maybe, some especially pessimistic readings of Llewellyn's idea of “The Constitution as an Institution.”

A little later on, there would also be genuinely unanticipated emergences of African American cultural and political theaters of provocative nonviolence, movements and moments radically delegitimizing and demoralizing white

supremacy, occasions prompts to dramatic, important legal change. Walter Benjamin – dead in 1940, one among the millions of individuals Nazi jurists grouped as “problematic” – might well have noted, had he lived, the aptness of his startling term *messianic*: abrupt, unanticipated, important changes in direction, quickly accomplished and quickly concluded, surely affirmative. The map of these changes, he might have suggested, had come (freighted phrase) to refigure American constitutional culture.

Editor’s note: For another review of **Hitler’s American Model**, please see Anders Walker, [Heil Jim Crow?](#), JOTWELL (March 8, 2018).

Cite as: Pat Gudridge, *Alabama Song? Lotte Lenya? No. Adolph Hitler!*, JOTWELL (March 8, 2018) (reviewing James Q. Whitman, **Hitler’s American Model: The United States and the Making of Nazi Race Law** (2017)), <https://conlaw.jotwell.com/alabama-song-lotte-lenya-no-adolph-hitler/>.