

BOOK REVIEW

## Book Review: James Whitman's *Hitler's American Model. The United States and the Making of Nazi Race Law*

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This book was an absolutely fascinating read, especially for someone who is Austrian-German and who has been working on how American Critical Race Theory does or does not travel from the United States to continental European civil rights systems. Discovering that almost 100 years earlier a radically opposite form of race theory and practice had crossed the Atlantic Ocean to Germany was particularly ironic.

But, first things first. In his book, Professor Whitman demonstrates how American race law provided inspiration for the infamous Nuremberg Laws (*Nürnberger Gesetze*).<sup>1</sup> These laws were adopted unanimously by the Nazi German Parliament (the *Reichstag*) on September 15, 1935 and constituted the cornerstones of other legislation that over the years intensified the persecution of racial minorities in Germany—for example, such as legislation prohibiting Jews from working in certain professions and from accessing certain public spaces. Two main pieces of legislation are grouped under this expression: The Reich Citizenship Law (*Reichsbürgergesetz*)<sup>2</sup> and the Law on the Protection of German Blood and Honor (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*).<sup>3</sup> The former introduced new citizenship rules which essentially reduced German Jews to second class citizens, whereas the latter *inter alia* criminalized marriage amongst Jews and Aryans. These two statutes later allowed the deportation and extermination of millions of Jews. Others, including the author, also include the Reich Flag Law (*Reichflaggengesetz*)<sup>4</sup>—which declared the Swastika flag to be the national flag—amongst the Nuremberg Laws because it was adopted on the same date as the two explicitly racial laws.

The author, nevertheless, also groups them together for another reason. In fact, in all three pieces of legislation the United States played an important role. In the case of the Reich Flag Law, Louis Brodsky, a Jewish judge from New York, had released a group of demonstrators—who had earlier thrown the Nazi swastika from a German boat, the *Bremen*, into the Hudson River—with a fiery opinion defending American constitutional values. This diplomatic and legal incident prompted Nazi Germany to adopt the swastika as its official flag.

As to the other two statutes, the American influence is possibly even more profound. Surprisingly, earlier research had downplayed American influence of southern Jim Crow segregation laws on the German legal system, mainly because even for Nazi lawyers that solution

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<sup>1</sup>JAMES WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017).

<sup>2</sup>Reichsbürgergesetz [Reich Citizenship Law], Sep. 15, 1935, RGBl I at 1146.

<sup>3</sup>*Id.*

<sup>4</sup>Reichflaggengesetz [Reich Flag Law], Sep. 15, 1935, RGBl I at 1145.

seemed to be too extreme and not feasible. But, according to the author, previous work had looked “in the wrong place and ha[d] been using the wrong interpretive tools.”<sup>5</sup> What Professor Whitman convincingly demonstrates is that one should have been looking at the influence of American anti-miscegenation laws and of American immigration and citizenship legislation on Nazi German law, which at the time were based on explicit racial categories. In both these areas, the Nazis did find useful inspiration for their own legislation.

The place where Whitman mostly draws these conclusions from are the stenographic minutes of a session on June 5, 1934, in which the leading lawyers of Nazi Germany gathered to draft what would become the Nuremberg Laws. What becomes clear is that during that meeting there was a profound engagement with the abovementioned American legislation which the author not only deduces from the records but also by analyzing the biographies of the single individuals participating in that meeting, and how they had already performed in-depth research of American racial laws in the 1920s.

In the conclusion entitled “America through Nazi Eyes,” the author deals with some of the broader observations which can be gleaned from this book and which he subdivides into two parts, namely (i) “America’s Place in the Global History of Racism” and (ii) “Nazism and American Legal Culture.” In the first part, Professor Whitman addresses briefly the broader role that America and the British common law systems played in legally constructing white supremacist racial thought and legislation while at the same time being seen as the beacon of freedom and liberty. In the second part, instead, he analyzes the disturbing links between the emerging open-ended non formalist American legal culture of legal realism as enacted via New Deal legislation and jurisprudence and Nazi scholars.

Without wanting to reveal too much of the book to its future readers, it is impressive how Professor Whitman weaves these stories together to unveil and describe some of the difficult to believe aspects in this reality. Moreover, his analyses in this emotionally laden domain always remain nuanced. For instance, whereas Judge Brodsky—indeed the whole book is dedicated to him, or, rather, to his ghost—is clearly depicted as a sort of hero, at the same time the author does not shy away from mentioning his less heroic links to corruption. Also, the point he wants to make is not to just discard all the achievements of American legal culture and institutions because the Nazis found inspiration in them, but rather to point to the shadows existing to this day. What the book clearly shows is how far those shadows were cast, and he concludes this should also become part of the American national narrative.<sup>6</sup>

This book raises a number of interesting reflections in particular with regard to the study of legal transplants and the migration of constitutional ideas in comparative, as well as with regard to the transatlantic connections on race and race legislation analyzed in ethnic and racial studies. The book does not engage directly and openly with the literature of either of these areas and can rather be read as a study of critical and subversive legal history. Nevertheless, that does not mean that it does not have any bearing on or relationship with the scientific debates of those two broad areas.

First of all, this book is a clear example of how legal transplants, constitutional borrowing or migration of constitutional ideas occurred well before these terms were coined.<sup>7</sup> Moreover, it undermines the ideas and hopes underpinning the scholarship concerning these constitutional terms, which has largely held the belief that only the good, progressive, and liberal ideas of constitutionalism and rule of law would circulate. Comparative constitutional lawyers have come to

<sup>5</sup>WHITMAN, *supra* note 1, at 11.

<sup>6</sup>WHITMAN, *supra* note 1, at 161.

<sup>7</sup>The expression “legal transplants” has been mostly used by private comparative lawyers and has been coined by a legal historian, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993). The other two metaphors—constitutional borrowing and migration of constitutional ideas—have been deployed mostly by comparative constitutional lawyers. See *Symposium on Constitutional Borrowing*, 1 INT’L J. CONST. L.177 (2003); *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed. 2006).

realize that bad, illiberal, anti-constitutional ideas can also migrate.<sup>8</sup> Thus, in a certain way this book constitutes another early example of such circulation.

Second, the book also engages indirectly with scholarship from ethnic and racial studies which deal with the transatlantic racial links. In fact, what this book demonstrates clearly is that such links did not just exist via the transatlantic slave trade but actually extended also to the circulation of racial ideas and legislation. Such literature is probably best illustrated by the title of Paul Gilroy's famous book, *The Black Atlantic*,<sup>9</sup> which highlights and discusses the common roots of black populations around the Atlantic. In a similar vein, this book illustrates the circulation of an explicit white, racist transatlantic culture. The travel of racial thought was not only a one-way ticket from Europe to the United States but actually was a return ticket where European racial thought was elaborated and adapted to the North-American context and then travelled back—in this case to the Nazi regime. Much more than a “Black Atlantic,” via this timely book the ocean becomes an explicitly “White Atlantic” where racial states<sup>10</sup> openly borrowed from each other's regimes to upkeep white supremacy. To scholars from this area, the conclusions Professor Whitman draws do not come as such a surprise or contradiction, because they had already been looking at the racial shadows cast by white supremacy more than focusing on the light of American and European legal culture and legislation.

In that sense, one wonders how the circulation of such ideas and legislation also involved other racial regimes and states in or around the Atlantic Ocean. In his *Discourse on Colonialism*, Aimé Césaire had already demonstrated the discursive links and similarities as well as differences between colonialism and Nazism without, however, engaging in detail the question of how far law and the state themselves were engaged in such links.<sup>11</sup> First, one could ask whether and how far South Africa's Apartheid regime may have borrowed from—or at least considered—the American and German experiences and statutes by adapting them to its own local reality. Second, the potential consideration of such legislation on other racial regimes, such as the Dominican Republic under General Trujillo during 1930-1961,<sup>12</sup> also comes to one's mind and may provide interesting information. In particular, in the late 1930s, Trujillo encouraged Jewish refugees to move to the island to whiten its populations as a bulwark against predominantly black Haiti.<sup>13</sup>

One last point which this book only implicitly addresses, is the often-heard contemporary argument that we should not import American experiences and ideas of race and racism to the European context where they have not played out in the same way. True, the specific realities and context of slavery and segregation in the American South, colonialism, anti-Semitism, and anti-gypsyism—just to name a few of the most egregious forms of racism—would seem to caution against insisting too much on the commonalities between these forms and contexts of racism. That the Nazis ultimately did not find racial segregation legislation viable for their purposes, as highlighted in this book, also seems to corroborate such arguments. Nevertheless, the book clearly demonstrates that for other purposes miscegenation and citizenship legislation was very useful for Nazi Germans, and also shows that the European and American legal dialogue on race

<sup>8</sup>See for an early reference to such migration: Kim Lane Scheppele, *The Migration of Anti-constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 347 (Sujit Choudhry ed. 2006).

<sup>9</sup>PAUL GILROY, *THE BLACK ATLANTIC. MODERNITY AND DOUBLE-CONSCIOUSNESS* (1993).

<sup>10</sup>This expression stems from another important publication, see DAVID THEO GOLDBERG, *THE RACIAL STATE* (2002).

<sup>11</sup>AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* (Joan Pinkham trans., Monthly Review Press 2000) (1955).

<sup>12</sup>Needless to say, there are studies on this regime from this perspective. See e.g., DAVID HOWARD, *COLORING THE NATION. RACE AND ETHNICITY IN THE DOMINICAN REPUBLIC* (2001). It is not clear, however, whether the Trujillo regime considered American and German racist laws and ideas and, if so, how much inspiration this regime drew from them.

<sup>13</sup>For more details on this history, see HANS-ULRICH DILLMANN & SUSANNE HEIM: *FLUCHTPUNKT KARIBIK. JÜDISCHE EMIGRATION IN DER DOMINIKANISCHEN REPUBLIK* (2009).

and racial legislation was always open and had common roots. In that sense, insisting too much on the differences might be just as pernicious—if not more so—than insisting on the similarities.

These are clearly subjective observations, but this is what a book review allows one to do and what some readers probably expect. Given the wealth of material and arguments analyzed in this wonderfully disturbing book, I am convinced that readers will have many other thoughts as they plunge back into these dark times via Professor Whitman's prose. Possibly they may wonder what parallels can be drawn with today's reality and how Nazi rhetoric and symbols reappear in contemporary far-right American public arenas in a renewed and re-elaborated westward travel of racial thought. But this would be the material of another book.