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Judy Scales-Trent

*University at Buffalo School of Law*

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# Racial Purity Laws in the United States and Nazi Germany: The Targeting Process

*Judy Scales-Trent\**

White people were, and are, astounded by the holocaust in Germany. They did not know they could act that way. But I doubt very much whether black people were astounded—at least, in the same way.

James Baldwin<sup>1</sup>

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\* *Judy Scales-Trent* is a professor of law at the State University of New York at Buffalo. She has written extensively on the complicated nature of “race” in the United States. This includes articles on the intersection of race and gender in US law, as well as a book on the relationship between race and color. More recently, Scales-Trent has moved beyond US borders to study the intersection of race and gender in France, by exploring legal and policy issues confronting African immigrant women in that country. The recipient of a Fulbright Fellowship to Senegal for 2000-2001, she is studying the professional lives of women lawyers in that country, and will also teach law school at *Université Cheikh Anta Diop de Dakar*.

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1. JAMES BALDWIN, *THE PRICE OF THE TICKET* 355 (1985).

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## I. INTRODUCTION

In 1994, the Office of Management and Budget (OMB) published a notice in the Federal Register asking for public comment on the possible revision of Statistical Policy Directive 15, which sets out the definitions for six groups: Black, White, Asian, Hispanic/Latino, American Indian/Alaska Native, and Native Hawaiian or other Pacific Islander. The government had used these particular definitions for two decades to tell us, for example, who is "white" or "black" in the United States, and to collect data on "race." Now the OMB was soliciting comments on whether those categories were adequate. Should they be changed? Should the government define and add other racial or ethnic groups? Should it try to find a way to classify those persons who were of "mixed" racial and ethnic origin?<sup>2</sup>

The government held hearings at the Capitol and around the country, taking testimony on this issue. By 1997, it had reached its conclusions, just in time for the census of the year 2000. However, the answers the government reached are far less important than the questions themselves, for simply by formally posing these questions, the government reminds us that it is still creating and re-creating "races," as it has for hundreds of years. Similarly, it reminds us that although it now considers that some US citizens might be of "mixed" racial origin, as a general proposition people in the United States are racially "pure."

Hearing the federal government address so casually the notion of "racial purity" in the United States is frightening, for that discussion leads ineluctably to theories of "racial purity" in Nazi Germany, and the role this concept played in the destruction of millions of lives. Is there a relationship between US notions of "race" and Nazi concepts of racial purity? Is there a core of sameness within the two theories? If there are similarities, how do

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2. See 59 Fed. Reg. 29831–29835 (1994).

they manifest themselves? If our country does have profound ideological similarities with Nazi Germany, the paradigmatic outlaw country, what are the implications for US self-identity and self-understanding?

This article will explore these questions through a comparison of the racial purity laws in both countries focusing on Jews in Nazi Germany and blacks in the United States. The comparison will suggest an answer to that question. It will also allow us to see the underlying structural framework of legal systems of racial purity.

By "racial purity laws," I mean two sets of laws. The first set is the definitions themselves. How does the US government define "black" and "white"? How did Nazi Germany define "Jew" and "Aryan"? The second set of laws is those the state creates to maintain "racial purity," by prohibiting sexual intercourse and marriage between certain racial groups. In both countries, this body of law concerning miscegenation includes statutes, regulations, and decisional authority.

Many are puzzled by the notion that the government would go about the business of defining who is "Jew," who is "black," and who is "white." To find out if someone is Jewish, why not just ask her? If you want to know if someone is "black" or "white," why not just look at him or ask him? This, however, would miss the key point here, which is that when we talk about racial purity laws, we are not talking about internal group definitions. There are many Jewish groups, with many varied definitions of who is Jewish. Similarly, when slavers kidnaped 22 million farmers and artisans from Africa, they did not kidnap and enslave "Negroes" or "colored" people. The people they brought to the Americas were Yoruba, Ibo, Akan, Mende, Wolof; they were Fon, Dinka, Bakongo, Temme, Angolan, Malinka. These people saw themselves as separate ethnic groups; they had their own internal definitions of group membership. So, when this article talks about "racial purity" laws, it means something different: it means those externally imposed definitions of a group that the state creates for its own ends.

Why would a state go to the effort of creating definitions to distinguish different groups of people? As one historian explained, when discussing the situation in Nazi Germany: "If a group is to be eliminated from society, members of the group must be detected. . . . Precise legal definition of a targeted group is crucial to the destruction process."<sup>3</sup> In Nazi Germany, for example, the first statutory definition of a "non-Aryan" was enacted on 11 April 1933.<sup>4</sup> Several weeks later, the Nazis decreed that all "non-Aryans"

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3. RICHARD LAWRENCE MILLER, *NAZI JUSTIZ: LAW OF THE HOLOCAUST* 9 (1995).

4. AMERICAN JEWISH COMMITTEE, *THE JEWS IN NAZI GERMANY: THE FACTUAL RECORD OF THEIR PERSECUTION BY THE NATIONAL SOCIALISTS* 2 (1933).

must be removed from the civil service.<sup>5</sup> Similarly, at a certain point in US history, the state needed a precise legal definition of those workers from Africa whom it was targeting for exploitation and oppression. The US has variously reworked that definition over the past 350 years to include the descendants of those initial African workers. In Virginia, in the same 1866 term that the legislature defined a “colored person,” it also ruled that “colored persons” could testify only in cases involving other “colored persons.”<sup>6</sup> Thus, the state first defines the group, then it enacts legislation against that group.

In order to compare the racial purity laws defining “Jew” and “Aryan” in Nazi Germany with US racial purity laws defining “black” and “white,” one must first locate them. Finding those laws in Nazi Germany is a relatively straightforward task, for two reasons. First, the major laws were promulgated by one central authority. Secondly, they were enacted within a relatively short time period between 1933 and 1935. The US situation is far different. From 1630 until now, both the federal government and states have enacted various and conflicting racial purity laws. There are, thus, more governmental sources of racial purity laws, sources which have been defining the “races” in the United States over a much longer period of time.

Just locating all the racial purity laws in the United States would be the task of an intrepid scholar; working with all of them would make comparative analysis unmanageable. Therefore, this article will focus on the racial purity laws created by one state and by the federal government. The state of Virginia will serve as an example, as there is rich documentation about that state’s racial purity laws. Reference to federal racial purity laws and similar laws in other states will show that it is not only Virginians—not only Southerners—who have created racial purity laws in order to target African-Americans. It is a national obsession, it has always been a national obsession, and it implicates us all.

Section II begins with a comparison of Virginia’s first law defining “colored” and Nazi Germany’s first law defining “non-Aryan.” Because both statutes define these groups in terms of descent, the next discussion is about how one goes about proving “descent.” Who had the burden of proof in both systems? What kind of evidence did one need, and how much evidence was sufficient to meet the burden?

Comparing the two sets of racial purity laws enables us to see that the major characteristic of these laws is their instability. Because “race” in this context is a legal construct, it can be changed simply by changing the legal rules. This is a great advantage for the group which has targeted another

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5. *Id.*

6. JANE PURCELL GUILD, *BLACK LAWS OF VIRGINIA* 33, 170 (1969).

group for oppression, for it can vary the size and composition of that group to suit its needs. Section IIIA will explore the unstable nature of racial purity systems by comparing the varied definitions and exemptions used in both countries—military exemptions, political exemptions, and definitions which changed over space and over time. Exploring the complicated system of definitions and exemptions will help us see the ideological underpinnings of racial purity in both countries: to what extent are the definitions and exemptions, hence ideologies, similar?

Instability in the racial purity system becomes a problem for the oppressor group, however, when it is the oppressed themselves who manipulate the system created to target them. The key problem here is miscegenation. How can the state maintain a clear boundary between the target and oppressor groups if members of these groups have sex together and produce children? How should the state categorize the children? That is, how should the state *treat* the children? In both Nazi Germany and the United States, ideologies of race defilement and contamination provided the foundation for their antimiscegenation laws. Section III will look at the ideological framework in both countries, as well as the laws which set out prohibitions against miscegenation and created sanctions for violating those laws.

Because these laws were not obeyed, Nazi Germany created a complicated system of laws that defined children with both Aryan and Jewish parents and that limited their participation in the community. In effect, they created a third group which existed somewhere between “Aryan” and “non-Aryan.” Section IIIB will also look at both Virginia and the United States to see they have done the same.

The problem of state control over the instability inherent in racial purity systems is further complicated by the fact that, in both countries, there are at least two definitional systems operating at the same time. The first one is the formal state identity, the identity created and recorded by the state. Both countries allowed some people to change this formal state identity through administrative and judicial procedures. Section IIIC will describe these procedures in both Nazi Germany and Virginia. The second definitional system is the system of informal public identity. In the public mind, one can tell simply by looking at a person whether that person is “black” or “white,” “Jewish” or “Aryan.” Section IIIC will discuss the various body markers used to define group membership for purposes of public identity. It will also show how the state used these markers to help it decide formal state identity in problem cases.

Because “race” is not a biological category, the system of physical markers never works for all members. There was, and still is, much slippage between formal and informal racial identity. Both white Americans and Nazis have been troubled by the notion that there are no infallible

biological markers for groups they consider biologically distinct and inferior: many Jews and black Americans simply did not match popular stereotypes. As a result, many in the targeted groups simply pretended that they did not have the formal group identity imposed on them by the oppressor state. How did both states address this problem?

In Section IV, this article looks at the US racial purity laws more broadly. It begins with a description of racial purity laws in states other than Virginia, and shows that this phenomenon is not limited to Virginia nor to the South: racial purity laws are a US phenomenon. Nor are African-Americans the only group targeted by racial purity laws in this country. Various states, as well as the federal government, have also used them to define and control other groups.

Section V looks at supporting systems of racial purity—other methods used to maintain “racial purity,” and to keep power in the hands of white persons. These systems are restrictions on immigration, restrictions on citizenship, and forced sterilization. This Section will describe those practices in the United States and Nazi Germany. It will also describe Hitler’s admiration for these practices in the United States, as well as the links between Nazi and American eugenicists.

Section VI reverses the focus of this study by comparing Nazi treatment of Africans and Afro-Germans with US treatment of Jews. It begins with the German colonial history in Africa, then discusses the German response to the presence of colonial African troops stationed in Germany after World War I. It continues by describing how the Nazi regime targeted Afro-Germans for oppression. This Section then looks at how the United States has treated Jews. Did the United States target Jews in the same way that it targeted African-Americans? If it did not, what does that say about the United States?

The Conclusion summarizes the earlier material, then goes on to address questions that have been raised about the soundness of this comparison. It ends by revisiting Miller’s statement that targeting a group through legal definition is the first step in the process of destroying that group—revisiting it in the context of US treatment of African-Americans. Is Miller’s analysis appropriate to an understanding of the United States today?

## II. DEFINITIONS AND PROOF

In order to compare racial purity systems in Virginia and Nazi Germany, this article will first look at the texts of the laws themselves. How did the two political systems define “Jew” and “Negro” through their legal systems? How would one prove his identity as “Aryan” or “white”? Who had the burden of proof for this question?

In 1866, the Virginia legislature stated that “[e]very person having one-fourth or more Negro blood shall be deemed a colored person.”<sup>7</sup> On 11 April 1933, the Nazi government defined “non-Aryan descent” as “descent from non-Aryan, and especially Jewish, parents or grandparents, even though only one of the parents or grandparents was of the Jewish religion.”<sup>8</sup> The conceptual similarities are obvious. In both cases, descent is key—the presence of only one grandparent (“one-fourth Negro blood”; “one Jewish grandparent”) is sufficient to place a person in the targeted group.

Both political systems changed these laws over time. For example, the November 1935 First Regulation to the Reich Citizenship Law defined a “Jew” as anyone who had at least three Jewish grandparents, or who had two Jewish grandparents, and met certain other suspect criteria, such as marriage to a Jew.<sup>9</sup> In Virginia, by 1910, the legislature had redefined “colored person” to include “every person having one-sixteenth or more Negro blood.”<sup>10</sup> Although both states manipulated the definition to increase or decrease the size of the targeted group, the concept of descent remained crucial to that definition.

It is clear, then, that the formal, definitional notion of “race” in both political systems was not related to a particular person’s color (Virginia) or religious beliefs (Nazi Germany). The Nazis were quite clear about this. A 1933 ruling that required the firing of Jewish employees, explained that “[i]t is not religion but race that is decisive. Christianized Jews are thus equally affected.”<sup>11</sup> Similarly, Walter Plecker, head of Virginia’s Bureau of Vital

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7. *Id.* at 33. Although the legislature spoke in terms of “blood,” this was not a biological concept, but, instead, referred to a person with at least one Negro grandparent.

The first statutory definition of a racial group in Virginia was a 1785 definition of “mulatto.” *Id.* at 29. I chose the 1866 statute for purposes of comparison because the larger focus of my paper is US treatment of black Americans.

Virginia enacted laws limiting the rights of “Negroes” and “mulattoes” before it enacted this 1866 statute. See generally *id.* at 24–33. Thus, states do sometimes enact oppressive legislation against a group before creating a statutory definition of the group itself. Some scholars think that it was the very dangerous fluidity within Southern society after the Civil War that led to the creation of many state definitions. See A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *GEORGETOWN L. J.* 1967, 1968 (1989); F. JAMES DAVIS, *WHO IS BLACK: ONE NATION’S DEFINITION* 55 (1991). Before the war, of course, white Southerners could easily control the status of most African-Americans through the definition of “slave.”

8. AMERICAN JEWISH COMMITTEE, *supra* note 4, at 2.

9. RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 72 (1985).

10. GUILD, *supra* note 6, at 35.

11. MILLER, *supra* note 3, at 18.



Statistics for over thirty years, declared: "I think it would be unwise to base the distinction on outward appearances. Many individuals strongly admixed with colored blood show no visible traces of it."<sup>12</sup> As the US Supreme Court noted in 1922, when trying to define "white person" for purposes of federal naturalization laws, one could not rely on color as a marker.<sup>13</sup>

Both societies, thus, use the language of descent in an effort to transform the sociolegal categories they are creating into biological categories. In the ideology of both cultures, there is a very real genetic taint that can be transmitted from grandparent to parent to child through "blood." As a reflection of the value both societies placed on the biological necessity of maintaining the "purity" of "Aryan" or "white" blood, both societies separated their blood supplies—Aryan from Jewish, white from colored.<sup>14</sup>

Because descent was crucial to these definitions, the key issue became proving descent. In both societies, it became necessary to gather documentation about family history to prove one's racial identity. In Nazi Germany, when the definition stated that having one Jewish grandparent made a person Jewish, a person needed seven documents to prove that she was "Aryan": her own birth or baptismal certificate, as well as the birth or baptismal certificate of both parents and all four grandparents.<sup>15</sup> In Virginia, people used tax records, federal census returns, and confederate war records to document the race of their parents and grandparents.<sup>16</sup>

Who had the burden of proof on this issue? The answer in both societies was the same. In Nazi Germany, the burden was on the person who wanted, for example, to hold public office or to engage in a profession, and therefore, had to prove he was Aryan. That person was required to submit the requisite documentation. Where there was doubt, he was to request an opinion from the expert for racial research attached to the Minister of the Interior.<sup>17</sup> In Virginia, in order to not be considered a "colored person" within the meaning of state legislation, the burden of proof was on the individual, not the state, to show the nonexistence of an "alien strain."<sup>18</sup>

It became crucially important, therefore, for the state to keep records of "race." To this end, Nazi Germany enacted the Law for the Protection of the

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12. Brian William Thomson, *Racism and Racial Classification: A Case Study in the Virginia Racial Integrity Classification 156–57* (1978) (unpublished Ph.D. dissertation, University of California (Riverside)) (on file with author).

13. *Ozawa v. United States*, 260 U.S. 178, 197 (1922).

14. MILLER, *supra* note 3, at 16 (Nazi Germany); FOSTER RHEA DULLES, *THE AMERICAN RED CROSS: A HISTORY* 419–20 (1971).

15. HILBERG, *supra* note 9, at 73.

16. See Thomson, *supra* note 12, at 202–03.

17. See OSCAR J. JANOWSKY & MELVIN M. FAGEN, *INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES* 150–52 (1937).

18. Thomson, *supra* note 12, at 144, 229.

Hereditary Health of the German People, which required the registration of all members of "alien races."<sup>19</sup> Even later, when World War II was at its height, the Nazi government removed thousands of men from the battlefield to compile heredity charts of the people it had conquered.<sup>20</sup>

In Virginia, an 1853 statute required the commissioner of revenue in each district to make an annual registration of births and deaths, and to record, for each birth, the color of the child.<sup>21</sup> A 1924 law stated that "[f]or the preservation of racial integrity, registration certificates shall be made out and filed for those persons born before June 14, 1912, showing the racial mixture for whom a birth certificate is not on file." The legislature went on to clarify that falsification of this information was "a penitentiary offence."<sup>22</sup> By 1943, the state registrar of vital statistics, Walter Plecker, was delighted with Virginia's success in registering the race of Virginians. The state's "pedigree charts" were so detailed, he wrote, "that Hitler's genealogical study of the Jews is not more complete."<sup>23</sup>

Because descent could only be proved through documentation, creating and keeping accurate records was crucial to the state. Without proper documentation, the state ran several risks: it might target the wrong people for bad treatment; it might authorize good treatment for "racial degenerates"; or it might unwittingly allow the defilement of "Aryan," or white, blood.

### III. INSTABILITY WITHIN THE RACIAL PURITY SYSTEM

In the previous Section, one Virginia definition was compared with one Nazi definition, a comparison that suggested a certain stability. However, that stability is misleading. Because "race" is a socially created way to categorize people, society can simply change its mind about whom to define and how to define them. Thus, a major characteristic of systems of racial definitions is instability.

The oppressor group, for example, can change the definitions to suit its own political ends. It can enlarge the targeted group, for example, if it needs more slave labor, or it can reduce the target group, if it needs more

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19. SAUL FRIEDLÄNDER, *NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933–1939* (Vol. I) 152–53 (1997).

20. See NORMAN RICH, *HITLER'S WAR AIMS: IDEOLOGY, THE NAZI STATE, AND THE COURSE OF EXPANSION* 57 (1973).

21. See GUILD, *supra* note 6, at 32.

22. *Id.* at 35.

23. Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 449 (1988).

professional workers, and the law excludes members of the target group from the professions. It can exempt some groups and include others.

On the other hand, it can become fairly problematic to the oppressor group when members of the target group control the boundaries of group membership. This can happen, for example, when members of the oppressor group and of the targeted group have children together, thus creating people who are "out of bounds." It can also happen when members of the oppressed group simply decide not to accept the state-imposed identity: a Jew hides the star on her jacket with a scarf; a black American with white skin checks the box marked "white" when applying for a job. This Section will explore all these examples of instability.

### A. State Controls Instability

The very flexibility inherent in state definitions of "racial" groups can be helpful to the oppressor group: it can change the definitions to suit its needs. It can also create exemptions from the racial purity laws for political purposes. For example, both Nazi Germany and the United States created military exemptions.

In Nazi Germany, the 1935 Military Service Law stated that one had to be Aryan to be eligible for military service, although in certain limited circumstances, non-Aryans qualified for service.<sup>24</sup> "Mischlinge" were banned from the army in 1940, but "second-degree *Mischlinge*" were not.<sup>25</sup> Jews were not allowed to become officers.<sup>26</sup> However, as the war progressed, and as the Nazi state needed more army officers, Hitler granted exceptions to this rule. In 1944 alone, he personally signed documents for seventy-seven high-ranking army officials "of mixed Jewish race or married to a Jew," declaring that they were of "German blood."<sup>27</sup>

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24. See KARL A. SCHLEUNES, *THE TWISTED ROAD TO AUSCHWITZ: NAZI POLICY TOWARD GERMAN JEWS 1933-1939*, at 116 (1970).

25. MARION A. KAPLAN, *BETWEEN DIGNITY AND DESPAIR: JEWISH LIFE IN NAZI GERMANY* 149 (1998). "*Mischlinge*" means "mixed," and refers to the Nazi classification of those people who were not full Jews. "First-degree *Mischlinge*" had two Jewish grandparents, no Jewish spouse, and did not belong to the Jewish faith; "second-degree *Mischlinge*" had only one Jewish grandparent. *Id.* at 77.

Although the 1940 decree said that *Mischlinge* were supposed to leave the army, many stayed due to confusion, subterfuge, and mixed signals from above. See John M. Steiner & Jobst Freiherr von Cornberg, *Willkhr in der Willkhr: Befreiungen von den antisemitischen Nürnberger Gesetzen*, 46 *VIERTELJAHRESHEFTE FÜR ZEITGESCHICHTE* 170-71 (1998).

26. See Steiner & von Cornberg, *supra* note 25, at 170.

27. William D. Montalbano, *Stories Bared of Jews who Served in Nazi Army*, *N.Y. TIMES*, 29 Dec. 1996, at A12.

In the United States, federal law enacted in 1790 stated that only “white persons” could become citizens.<sup>28</sup> For this reason, there were many cases of immigrants petitioning the courts to declare them “white persons” so they could become citizens.<sup>29</sup> In 1940, at about the same time that Hitler was allowing Jews to become Aryan so they could become, or remain, army officers for the Reich, Congress enacted legislation to grant citizenship to “certain Filipinos who had served honorably in the armed forces of the United States.”<sup>30</sup> Because citizenship in the United States was limited to those immigrants who were “white,” this statute moved Filipinos, who were not “white,” to the status of “white persons.”

Thus, in the United States, as well as in Nazi Germany, the state created a military-service exemption to membership in the targeted group. If certain Jews (in Nazi Germany) or people who were not white (in the United States) served in the military, under certain circumstances, it was possible for them to become “Aryan” or citizens, that is, “white.”

The Nazis had other political exemptions. They exempted the Japanese from their racial purity laws.<sup>31</sup> The Nazis also allowed other foreign nationals to retain the “mixed blood” status in cases where Germans with similar family histories would be classified “Jewish.”<sup>32</sup>

Virginia, too, created political exemptions. In 1924, it changed the definition of “white person” to include “persons who have one-sixteenth or less of the blood of the American Indian, and no other non-Caucasic blood.”<sup>33</sup> The previous definition had excluded any one “having one-fourth or more of Indian blood.”<sup>34</sup> Thus, this legislative change allowed many people formerly considered “Indian” to become “white.” According to Walter Plecker, head of Virginia’s Bureau of Vital Statistics, the political reason for this change was to “recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas, and also to

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28. IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSEQUENCES OF RACE* 1 (1996). Congress amended this statute in 1790 after the Fifteenth Amendment was ratified, to include “persons of African nativity, or African descent.” However, of the fifty-two published decisions involving plaintiffs seeking to naturalize under this statute, only one involved a plaintiff who claimed citizenship because of his “African descent.” *Id.* at 49. This is not surprising. Clearly there was no point in becoming a citizen of the United States if all one could expect was the rights granted black Americans. Congress did not remove this requirement until 1952. *Id.* at 43.

29. *See id.*

30. Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237, 248 (1945).

31. *See* Otto Klineberg, *Racialism in Nazi Germany*, in *THE THIRD REICH* 859 (Int’l Council for Philosophy & Humanistic Stud. eds., 1955).

32. MILLER, *supra* note 3, at 18–19.

33. GUILD, *supra* note 6, at 35.

34. *Id.* (referring to the 1910 statute).

protect other white citizens of Virginia who were descendants of members of the civilized tribes of Oklahoma."<sup>35</sup>

Both states not only made exemptions for political reasons, they also changed their definitions over time. In 1866 Virginia, any person with "one-fourth or more Negro blood" was considered "colored";<sup>36</sup> in 1910, that fraction was changed to "one-sixteenth or more Negro blood";<sup>37</sup> and by 1930, Virginia law decreed that "[e]very person in whom there is ascertainable any Negro blood shall be deemed a colored person."<sup>38</sup> In Nazi Germany, in April 1933, as noted earlier, one was "non-Aryan" if even one parent or grandparent was Jewish.<sup>39</sup> But in November 1935, the Nazis declared that one was Jewish if he had two Jewish grandparents and was married to a Jewish person on or after 15 September 1935.<sup>40</sup>

Varied Nazi statutes also set out different standards of racial purity. For example, under the School Law of April 1933, a child with one Aryan parent and one Jewish parent was still considered Aryan.<sup>41</sup> However, the Peasants' Farm Law of September 1933, which stated that only "Germans" could be farmers, required proof of racial purity back to 1800 in order to inherit peasant land.<sup>42</sup> To become a member of Himmler's elite SS unit, an applicant had to prove Aryan ancestry back to 1750.<sup>43</sup> Anyone who could prove pure Aryan blood this far back was listed in the national Kinship Book ("*Sippenbuch*"), given a certificate stating that his wife and future children would be Aryan, and awarded gifts at the birth of each child.<sup>44</sup>

Nazi Germany's racial purity regulations also varied across space. For example, the Nazi regulations in occupied France had a different set of exemptions: one could escape from the classification "Jewish" if one was the child of Christian parents, was a Christian, or had "assimilated" into the non-Jewish culture.<sup>45</sup> They were also more severe: the Vichy regime refused to exempt two groups which German occupying forces did not consider Jews.<sup>46</sup>

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35. Lombardo, *supra* note 23, at 434 n.60.

36. GUILD, *supra* note 6, at 33.

37. *Id.* at 35.

38. *Id.*

39. HILBERG, *supra* note 9, at 66.

40. *See id.* at 72.

41. *See* SCHLEUNES, *supra* note 24, at 106–07.

42. *Id.* at 112; *see generally* GERALD L. POSNER & JOHN WARE, MENCELE: THE COMPLETE STORY 13, 15 (1986).

43. *See* SCHLEUNES, *supra* note 24, at 130.

44. POSNER & WARE, *supra* note 42, at 15–16.

45. DONNA F. RYAN, THE HOLOCAUST AND THE JEWS OF MARSEILLES: THE ENFORCEMENT OF ANTI-SEMITIC POLICIES IN VICHY FRANCE 38 (1996).

46. *See id.* at 34. These groups were the Karaites, from Russia, and the Tugutis, from Central Asia. *See id.*

Although the Virginia definition was the same throughout the state, racial purity laws in the United States varied from state to state. Thus, just as a Virginian could be white one day and black the next, if the legislature changed the definition of “white” or “black,” it was equally true that a person could be white in one state and black in another at the very same time, if the states had different racial definitions.<sup>47</sup>

At the same time that both Nazi Germany and Virginia created fixed racial definitions based on descent and conceptualized these as biological categories, they also exempted some groups from the definitions and changed the definitions over time; Nazi definitions changed over space, as did the definitions throughout the United States. Interestingly enough, neither state seemed particularly troubled by the confusion between “race” as a fixed biological category, and “race” as a category which society could change at will. There was a desire to target some people for oppression, a desire to legitimize this act through legislation, and a simultaneous desire to hide the cruel purpose behind so-called biological imperatives. In a sense, then, both states were claiming that it was Nature, not them, who was creating these differences: their hands were clean.

## B. Target (sometimes) Controls Instability

Instability, however, becomes a problem for the group in power if the target group sometimes controls the instability. This problem arises when miscegenation takes place. In a system that separates out favored and disfavored groups based on the notion of “descent,” if the group in power cannot control descent, how can that group keep the target group separate? The first problem the state faces, then, is to control sexual intercourse between members of the two groups. However, this is never completely successful. Therefore, the state has to decide how to categorize and how to treat the children born from these unions.

Miscegenation undermines the very premise of racial purity laws, which is that the blood of Aryans or white people must be kept pure. Jewish blood was evil and could contaminate Aryan blood;<sup>48</sup> the blood of black people could contaminate white people.

One can see notions of contamination and defilement in the first of Virginia’s legislative enactments (1630) that mentioned a “Negro.” In that document, the governor and council of Virginia held that one Hugh Davis was to be “soundly whipped . . . for abusing himself to the dishonor of God

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47. See *infra* text accompanying notes 123–24.

48. See SCHLEUNES, *supra* note 24, at 118.

and shame of Christians by defiling his body in lying with a Negro."<sup>49</sup> In one of its later statutes, the Racial Integrity Act of 1924, the legislature spoke in terms of the "pollution" of America if miscegenation were allowed to continue.<sup>50</sup> Both Nazi Germany and Virginia tried to control miscegenation by criminalizing sexual intercourse between members of the oppressor and target groups.

In September 1935, the Nazis promulgated the Law for the Protection of German Blood and Honor, which prohibited both sexual intercourse and marriage between Jews and Germans.<sup>51</sup> Some couples tried to avoid prosecution by getting married outside Germany, but upon their return, they were often prosecuted nonetheless.<sup>52</sup> If a couple married despite the law, the state sent both parties to the penitentiary. If the couple had sexual intercourse without being married ("dishonor to the race"), the men, whether Aryan or Jewish, were punished. Punishment, however, was more serious for Jewish men, who faced not only prison and concentration camps as "political offenders," but were sometimes sentenced to death for "race defilement."<sup>53</sup> Also, although death sentences were rare, a long prison sentence usually led to death. Finally, prisoners were generally turned over to the Gestapo after serving their sentence. Thus, in effect, the Nazis sentenced them to death.<sup>54</sup> During the war, when sanctions for "race defilement" were more severe, both Jewish men and women found guilty of this crime were deported to their death or executed.<sup>55</sup>

Virginia also criminalized miscegenation. As early as 1691, the Virginia legislature ruled that any white man or woman who married a "Negro" would be banished forever from that "dominion."<sup>56</sup> A free "English woman" who had a "bastard child by a Negro" had to pay a fine.<sup>57</sup> Failing that, she would be indentured for five years.<sup>58</sup> If she was already an indentured servant, the state added five more years to her indenture.<sup>59</sup> In 1705, the legislature added a prison term of six months and a fine for white men and women who married Negroes.<sup>60</sup> The state increased the prison sentence to

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49. GUILD, *supra* note 6, at 21.

50. VA. CODE ANN. § 20-54 (Repl. Vol. 1960).

51. See Gabriele Czarnowski, *Hereditary and Racial Welfare (Erb- und Rassenpflege): The Politics of Sexuality and Reproduction in Nazi Germany*, SOCIAL POLITICS 125 (1997).

52. See KAPLAN, *supra* note 25, at 81.

53. Czarnowski, *supra* note 51, at 125.

54. See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 115 (1991).

55. KAPLAN, *supra* note 25, at 80.

56. GUILD, *supra* note 6, at 24-25.

57. *Id.*

58. *See id.*

59. *See id.*

60. *See id.* at 26.

one year (and the fine to \$30.00) in 1848;<sup>61</sup> and in 1878, the sentence for intermarriage increased to between two and five years.<sup>62</sup> The 1878 statute also stated that if a Virginia resident left the state in order to get married, when she returned, she would be considered guilty of violating this statute.<sup>63</sup> In 1932, the legislature again spoke on the crime of intermarriage by making it a felony, punishable by one to five years in the penitentiary.<sup>64</sup>

There was no statutory death sentence for miscegenation in Virginia. However, throughout the United States, there have been extensive extra-legal sanctions, including murder, to punish African-American men who allegedly had sexual intercourse—or tried to have intercourse—with white women. The state's refusal to protect blacks from these attacks suggests that although these sanctions were "extra-legal" in theory, they were state-sanctioned in practice.<sup>65</sup>

As noted above, because antimiscegenation statutes are notoriously ineffective, states whose ideology is predicated on racial purity must decide how to treat the children born from these unions—children with one racially pure parent and one racially degenerate parent. Should the state treat them as targets? As members of the favored group? Or, as something else altogether?

Both the United States and Nazi Germany had similar theories about the children who were born from these unions. They thought that such "race crossing" produced forms of "racial degeneration," including infertility.<sup>66</sup> The belief that these children could not reproduce, called "mulism" in the United States, was widespread. One US court used this "fact" to justify laws against miscegenation.<sup>67</sup>

The Virginia Supreme Court defined people produced through

61. *See id.* at 32.

62. *See id.* at 34.

63. *See id.*

64. *See id.* at 36.

65. Throughout the country, white citizens of the US lynched at least 1,111 African-Americans between 1890 and 1900; there were at least 1,354 lynchings between 1900 and 1920. A commonly alleged justification was the rape or attempted rape of a white woman. Law enforcement officers often joined those who engaged in these and other acts of terrorism. *See* DAVIS, *supra* note 7, at 53–54. For one example where the Supreme Court found that a sheriff and other law enforcement officers facilitated, and participated in, the lynching of a black prisoner, *see* MARK CURRIDEN & LEROY PHILLIPS, JR., *CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM* (1999).

There were 100 recorded lynchings in Virginia between 1882 and 1968. Of that number, eighty-three were African-Americans. *See* ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950*, at 5 (1980).

66. ROBERT N. PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* 136 (1988); DAVIS, *supra* note 7, at 25.

67. Lombardo, *supra* note 23, at 426 n.18.



miscegenation as "a mongrel breed of citizens."<sup>68</sup> In Nazi Germany, Hitler called these children "monstrous beings, half man, half monkey."<sup>69</sup> Yet, because these "monstrous beings" were part Aryan, Germany could not justify treating them exactly as it treated the target group. How should it treat them? However, before enacting statutes dictating how to treat these children, the state first had to define them.

In November 1935, Nazi law defined two categories of people of "mixed Jewish blood":

- (1) any person descended from two Jewish grandparents (half-Jewish), but who (a) did not adhere (or adhered no longer) to the Jewish religion on September 15, 1935, and who did not join it at any subsequent time, and (b) was not married to a Jewish person on September 15, 1935, and who did not marry such a person at any subsequent time (such half-Jews were called "Mischling" of the first degree"); (2) any person descended from one Jewish grandparent ("Mischling" of the second degree").<sup>70</sup>

Once it had defined this group, the state could target group members, and it did. The Nazi regime enacted laws prohibiting them from working for the civil service or joining the Nazi party; from becoming officers in the army; from marrying Germans without the permission of the government; and from entering certain schools or professions.<sup>71</sup> Because they were considered part-Aryan, however, the state did not target them for destruction. At one point, they were completely excluded from deportation to death camps. Later on, "half-Jews" were given the choice of being deported or of getting sterilized "voluntarily."<sup>72</sup> The point of sterilization, of course, was to ensure that there would be no way for "mischlinge" to reproduce: the Aryan race would be preserved and would predominate.

Virginia, too, started out conceptualizing a third group of people, the offspring of Negroes and whites. In 1785, the state legislature defined "mulatto" as "[e]very person of whose grandfather or grandmother is or shall have been a Negro, although all his other progenitors . . . shall have been white persons." In other words, rephrasing this principle in terms of descent and "blood," the legislature decided that "every person who shall

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68. *Naim v. Naim*, 197 Va. 80, 90 (1955).

69. MILLER, *supra* note 3, at 35.

70. HILBERG, *supra* note 9, at 72. The definitions appeared in the First Regulation to the Reich Citizenship Law. The designation "Mischlinge" was not in this decree, but was added later by the Ministry of Interior. *Id.*

71. *See id.* at 78.

72. LEON POLIAKOV, *HARVEST OF HATE: THE NAZI PROGRAM FOR THE DESTRUCTION OF THE JEWS OF EUROPE* 61 (1954). *See* KAPLAN, *supra* note 25, at 83–84; FRIEDLÄNDER, *supra* note 19, at 157 (for further discussion on how the status of these *Mischlinge* changed over time).

have one fourth or more Negro blood shall . . . be deemed a mulatto."<sup>73</sup> The 1860 code, however, conflated the two terms, stating that "the word Negro in any section shall be construed to mean mulatto as well as Negro."<sup>74</sup> Thus, all prohibitions that limited the rights of Negroes applied equally to mulattos. In a sense, the 1860 legislature was simply ratifying its ongoing practice, for mulattos had not been treated any better than Negroes under state law.<sup>75</sup>

One might conclude, therefore, that unlike Nazi Germany, Virginia did not create a third group with a social status somewhere between that of whites and that of blacks. If "Negro" and "mulatto" meant the same thing, there were only two groups, white and Negro/mulatto.

It is important to note, however, that between 1850 and 1920, the federal government required census enumerators to record whether a person was "white," "black," or "mulatto."<sup>76</sup> Thus, for much of this country's history, the federal government did, indeed, conceptualize a third group, somewhere between white and black.<sup>77</sup>

Despite the fact that neither Virginia nor federal law targeted blacks and mulattos in distinct and different ways, one researcher who studied how census takers determined racial classification in 1880, concluded that that task has been taken up by the larger US society. Her study demonstrated that the higher one's occupation or income, the more likely that person was to be classified "white" rather than "mulatto," and the less likely that person was to be classified "black" rather than "mulatto."<sup>78</sup> In other words, there was a correlation between light skin color of black Americans and the perception of high social status and income. Historians and social scientists have concluded that that correlation still exists today. Indeed, studies demonstrate that those black Americans with lighter skin still enjoy higher socioeconomic status than black Americans with darker skin.<sup>79</sup> A recent

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73. GUILD, *supra* note 6, at 29. Note that the word "mulatto" refers to a mule, the sterile offspring of a horse and donkey. For further reflection on the use of this word, see JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE COLOR, COMMUNITY 99–103 (1995).

74. GUILD, *supra* note 6, at 30 n.7.

75. See HIGGINBOTHAM & KOPYTOFF, *supra* note 7, at 1977.

76. JOAN FERRANTE & PRINCE BROWN, JR., THE SOCIAL CONSTRUCTION OF RACE AND ETHNICITY IN THE UNITED STATES 113 (1998).

77. In 1890 there were four census categories for African-Americans: black, mulatto, quadroon, and octoroon. See *id.* at 113. Several states accorded "white" legal standing to certain mulattos with light skin. *Id.* at 125. For a summary of the various state rules on the middle group, see DAVIS, *supra* note 7, at 31–50.

78. Mary Lynn Washington, White, Black, or Mulatto: A Sociological Exploration of the Meaning of Racial Classification in the United States Census of 1880, at 207 (1997) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with author).

79. See Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 69

study of young men in Los Angeles showed that whether or not they found a job depended on their color. Controlling for three variables—level of education, criminal record, and participation in a job training program—researchers discovered that the unemployment rate for black men with light skin was 20 percent, whereas for their dark-skinned cohort group, the unemployment rate increased to 27 percent.<sup>80</sup>

In other words, there is, and has always been, an intermediate group in the United States, the offspring of the two groups that were not supposed to mate, and, as in Nazi Germany, this group has a middle social status, somewhere between the top (white) and the bottom (black). What Nazi Germany did overtly, the United States has done covertly.

We have seen that where instability exists with the system of racial purity laws because of miscegenation, the state intervenes to control that instability through a process of definition. In Nazi Germany, the state defined two categories of *Mischlinge*, then statutorily limited their rights. In Virginia, the state defined the category *mulatto* and limited that group's rights in two ways: first, by listing them along with "Negroes" in prohibitory statutes; and second, by later redefining "mulatto" as "Negro." Therefore, the group that was conceptually in the middle was moved to the bottom, and its rights were similarly limited by law. But through nonstatutory mechanisms, the United States created a third group whose socioeconomic status defines it as the third group, the one that exists somewhere between black and white.

### C. State Renews Efforts to Control Instability

As noted above, unstable racial purity laws are a problem for the state since a society based on racial hierarchy awards goods, services, and punishment based on the "race" of those in the society. How will the state know whom to favor and whom to target if group membership is not clear? Both Virginia and Nazi Germany tried to address this problem by defining those with both

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SOC. FORCES 1105 (1990); Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 775 (1991); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 U.C.L.A. L. REV. 1705 (2000).

80. James H. Johnson, Jr. & Walter C. Farrell, Jr., *Race Still Matters*, CHRON. HIGHER EDU. 7 July 1995, at A48.

Medical researchers are beginning to notice the derivative effect of color on the health of black Americans. See, e.g., Michael J. Klag et al., *The Association of Skin Color with Blood Pressure in US Blacks with Low Socioeconomic Status*, 265 J.A.M.A. 599 (1991); Robert F. Murray, Jr., *Skin Color and Blood Pressure: Genetics or Environment?*, 265 J.A.M.A. 639 (1991).

Aryan and Jewish, or black and white, parents. Both states also created formal procedures that could be used to challenge one's formal state identity.

After defining people of "non-Aryan" descent in its April 1933 decree, the Nazis created the Reich Genealogical Office (*Reichssippenamt*) to clarify questions of descent in close cases.<sup>81</sup> When presented with an inquiry, this office first tried to put together a complete genealogy of the claimant with documentary evidence.<sup>82</sup> Then, if certain documents were unavailable, for example, marriage or birth certificates, the agency requested an official study by one of the twenty-two institutes and twelve individual experts to issue genetic and racial reports for the *Reichssippenamt*.<sup>83</sup> The agency then based its conclusion on this "genetic and racial report."<sup>84</sup> Beginning in 1938, the regime authorized state prosecutors to go to court to challenge the legitimacy of a child, if there was some question about its racial classifications. By 1939, individuals could petition the courts to determine their own genealogy.<sup>85</sup>

In 1935, Nazi Germany created a procedure for reclassifying *Mischlinge* into a higher category. Not surprisingly, the process, named "*Befreiung*," means "liberation." There were two kinds of "*Befreiung*."<sup>86</sup> The first, "pseudoliberalation" ("*unechte Befreiungen*"), was available where there was a clarification of fact or of the law.<sup>87</sup> One could obtain this kind of reclassification if one could show, for example, that a grandfather who had been considered Jewish was not really Jewish.<sup>88</sup> The second kind, "real liberation" ("*echte Befreiungen*"), was based on the applicant's merit.<sup>89</sup> According to Hitler, this meant a showing of some positive acts, for example, fighting for the party even before 1933, without awareness of one's tainted ancestry.<sup>90</sup> As noted earlier, many of those who received "*Befreiung*" were high officials of the Nazi state.<sup>91</sup> As the war progressed and the army mortality rate climbed, Hitler found himself in the position of granting "*Befreiung*" to "*Mischlinge*" in order to fill personnel gaps.<sup>92</sup>

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81. Georg Lilienthal, *Anthropology and National Socialism*, in *ENCYCLOPEDIA OF THE HOLOCAUST* 48–49 (Israel Gutman ed., 1990).

82. See *id.* at 49.

83. See *id.*

84. *Id.*

85. See *id.* at 48–49.

86. HILBERG, *supra* note 9, at 78.

87. *Id.*

88. See *id.*

89. *Id.*

90. See *id.* at 78–79.

91. *Id.*

92. Montalbano, *supra* note 27.

Virginia also created an administrative procedure for those who wanted to challenge their state-imposed racial identity. In 1833, Virginia created a procedure by which “free person[s] of mixed blood” could get a certificate stating that they were not Negroes, and were, therefore, not subject to the “penalties and disabilities to which free Negroes are subject.”<sup>93</sup> The procedure required that the person offer “satisfactory proof . . . of the fact.”<sup>94</sup>

Court records show that one could also challenge the state’s racial designation through a mandamus petition.<sup>95</sup> If a clerk refused to issue a marriage license because one of the parties was designated “white” and the other, “Negro,” the person labeled “Negro” could go to court to request that it order the clerk to issue the marriage license forthwith.<sup>96</sup>

In 1924, the state clerk refused a marriage license to Robert Painter, designated “white,” and Altha Sorrells, who considered herself a member of the Irish Creek Indians.<sup>97</sup> The clerk rejected their marriage application on the grounds that Sorrells was really Negro, and that this marriage would therefore violate state law.<sup>98</sup> Sorrells had the burden to prove that she was not Negro—that is, according to the trial judge, she had to prove the nonexistence of “alien strain” over the previous twenty-five generations.<sup>99</sup> Sorrells offered testimony by relatives, employers, and the school board clerk, as well as documentary proof that one of her ancestors had received a license to marry a white woman.<sup>100</sup> She also showed that, in 1876, one of her paternal great-grandparents had been declared “white.”<sup>101</sup> On the other side, Walter Plecker, head of Virginia’s Bureau of Vital Statistics, offered documentary proof that one of Sorrell’s grandmothers was “free colored,” and that that term really meant “Negro.”<sup>102</sup>

There is an underlying similarity in both systems of appeal. In a sense, in a petition for mandamus, an applicant, like Sorrells, was requesting an *unechte Befreiung*, a “pseudo-liberation,” from the *mischlinge* category, so as to escape the “penalties and disabilities to which free Negroes are subject.”<sup>103</sup> She was stating that there was an error in fact which must be corrected. Virginia also used the second format, the “real liberation,” that existed in Nazi Germany. For example, when the Virginia legislature revised

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93. GUILD, *supra* note 6, at 32.

94. *Id.*

95. See Thomson, *supra* note 12.

96. See *id.*

97. See *id.* at 227.

98. See *id.* at 229.

99. See *id.*

100. See *id.* at 228.

101. See *id.*

102. See *id.*

103. GUILD, *supra* note 6, at 32.

its definition of “white” in 1924, in order to protect certain members of the “white” Virginia aristocracy who had performed services for the state, it was granting them *echte Befreiungen*, reclassification based on merit. In this case, it was inherited merit, merit based on services Pocahontas presumably performed to benefit the “white” Virginia community.<sup>104</sup>

At the same time that both states created formal definitions based on documentation of descent, in order to determine and designate citizens’ “race,” there was also an informal system of racial identity in place—an informal code of public identification based on how one looked. At times, in close cases of racial identity, the state used these informal clues to make its formal racial designations.

According to the Nazis, one could identify a “Jew” by examining the color of hair and eyes, as well as the shape of the nostrils and skull.<sup>105</sup> Mengele thought that one could tell by looking at the jaw: he wrote his doctoral thesis on the “Lower Jaw Section of Four Racial Groups.”<sup>106</sup> Hitler considered earlobes important and requested a picture of Stalin’s ears in order to determine if he was Jewish.<sup>107</sup> Similarly, it was thought that one could tell whether one was Jewish or Aryan by looking at posture, at the position of the feet at rest, and at the way of walking.<sup>108</sup> The expression in the eyes and height were also important. As one commentator noted, in Nazi Germany, “[b]lond hair or an extra inch of height could thus decide a man’s life.”<sup>109</sup>

Racial “experts” in both Virginia and Nazi Germany believed that one could tell if a person was Jewish or black, by examining the “half-moon” at the base of the fingernails.<sup>110</sup> In Virginia, one would have expected that color would be dispositive in determining who was “Negro” and who was “white.” In a sense, this is true: the black man who would be attacked for whistling at a white woman was the one with brown skin, not the one with white skin. However, the two tests often collapsed into one: high theory about genealogy and descent was conflated with the reality of visual clues. As Plecker noted, “[w]e depend more upon the pedigree than upon . . . examination unless the features, color, and possibly the hair indicate clearly Negro admixture.”<sup>111</sup> Thus, like Nazi Germany, in close cases, Virginia also

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104. See *supra* text accompanying notes 33–35.

105. See MILLER, *supra* note 3, at 13.

106. POSNER & WARE, *supra* note 42, at 10.

107. See PROCTOR, *supra* note 66, at 150.

108. See *id.* at 110–11.

109. POLIAKOV, *supra* note 72, at 270.

110. PROCTOR, *supra* note 66, at 110.

111. Thomson, *supra* note 12, at 297. As the Supreme Court stated in 1922, “the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race.” *Ozawa v. United States*, 260 U.S. at 197.

looked at “features, color, and . . . hair” to determine an individual’s “race,” although physical features were not controlling.<sup>112</sup>

Unfortunately for the oppressor group, a system of physical body markers is not infallible: since “race” is not a biological concept, but a social one, physical type is never an infallible proxy for “race.” As a result, another source of instability in racial purity systems is the refusal of certain members of the targeted group to accept their definition as a “target.” Thus, in Nazi Germany, some Jews whose physical features did not match the Nazi stereotype for Jews, simply rejected that definition, calling themselves “Aryan.”<sup>113</sup> Some African-Americans whose features did not match the physical stereotype for “Negro” did the same.<sup>114</sup>

To control this kind of instability, in 1938, the Nazis required that racial identification cards and passports be stamped with the “J,” for Jew.<sup>115</sup> Yet, because these markers were not readily visible to the casual observer, a more visible marker was needed. Therefore, they created a body marker, the yellow star: if the body itself did not proclaim Jewish identity, then the yellow star would. The requirement to wear the star on outer clothing was instituted in Poland in 1939, in Germany in 1941, and in all the occupied European countries in 1942.<sup>116</sup> In this way, even if a particular Jewish person did not look the way the Nazis thought she should look, the yellow star would identify her as a target.

Although one might argue that in the United States, the state requirement that race be noted on each driver’s license served the same function as racial identification cards in Nazi Germany,<sup>117</sup> the same problem arises: if a group is to be targeted for bad treatment, the state simply needs a more visible marker for public identity—for the daily interaction between groups,

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112. Other body parts were also considered markers of “race.” For example, one Georgia court had plaintiffs show their feet to the jury, since expert medical testimony had indicated that feet were one of the distinguishing markers of race. Brief for Plaintiff in Error Homer A. Plessy at 40, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

113. See KAPLAN, *supra* note 25, at 201–12, 218–23.

114. See DAVIS, *supra* note 7, at 55–57.

115. See MILLER, *supra* note 3, at 73–74.

116. See Philip Friedman, *The Jewish Badge and the Yellow Star in the Nazi Era*, in *ROADS TO EXTINCTION: ESSAYS ON THE HOLOCAUST* 12–13 (Ada June Friedman ed., 1980).

In a sense, the Germans were merely reworking a European custom that dated back to 1215, when Pope Innocent III decreed that Jews had to wear different clothes than Christians. The garment marker varied from, for example, a special hat in the German Empire to a cloth circle, sometimes red (Austria), sometimes yellow (France). See L. POLIAKOV, *L’ETOILE JAUNE* 14–15 (1949).

117. According to Police Chief Ronald Neubauer, all states used to mark race openly on drivers’ licenses; now some of them use bar codes to do the same. Telephone interview with Ronald Neubauer, Police Chief and former past President of the International Association of Chiefs of Police (11 May 2000).

and between state actors and the targeted group. But Virginia did not create a marker like the yellow star. Why not?

The most likely answer is that white Virginians thought that skin color and hair texture were sufficient markers of "race." For those who understood that, indeed, many in the targeted group did not match the stereotype for African-Americans,<sup>118</sup> perhaps they thought that the use of skin color and hair texture swept in so much of the target group that it was not necessary to create other markers.

This notion also was (and is) probably conflated and confused, with the assumption that being a "Negro" is indeed biological in a way that being "Jewish" was not. Hence, biology will supply whatever markers the state needs. This assumption appears, interestingly enough, in the literature on the requirement that Jews wear yellow stars, literature written by both Nazi apologists and by scholars of the Nazi era. For example, in 1940, German authorities in France issued travel restrictions for both Jews and blacks ("*nègres*").<sup>119</sup> However, according to the Vichy government head of police in Greater Paris, while it was easy to identify the blacks, it was difficult to identify the Jews, who had no distinguishing mark ("*signe distinctif*").<sup>120</sup> Discussing this enforcement problem, the scholar Leon Poliakov stated that "divine Providence" had already marked blacks.<sup>121</sup> Similarly, while criticizing the use of genetic reports to determine whether someone was a Jew or *Mischling*, the scholar Georg Lilenthal noted that "[a]nthropologists closed their eyes to the fact that Jewish descent could not be determined in the way that Negroid descent, for example, could be."<sup>122</sup> Thus, many who seem to understand that the Nazi-created category "Jew" was not a biological category but a social one, sometimes have a hard time seeing the category "Negro" in the same way. This difficulty, I suggest, was probably a factor in the fact that Virginia did not create and impose the wearing of a marker to clarify and "fix" the racial identity of blacks.

What is similar in both Virginia and Nazi Germany, however, is that members of the target group sometimes created instability within the state's system of racial purity, either through miscegenation or by refusing to allow the state to define them as a target. What is also similar is how hard both systems worked to control that instability.

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118. See, e.g., Alice Dunbar-Nelson, *Brass Ankles Speaks*, in *THE WORKS OF ALICE DUNBAR-NELSON* (VOL. II) 311 (Gloria T. Hull ed., 1988); Adrian Piper, *Passing for White, Passing for Black*, in *NEW FEMINIST CRITICISM: ART, IDENTITY, ACTION* (Joanna Frueh et al. eds., 1994); GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995); SCALES-TRENT, *supra* note 73.

119. Friedman, *supra* note 116, at 13.

120. *Id.*

121. POLIAKOV, *supra* note 72, at 55.

122. Lilenthal, *supra* note 81, at 51.



#### IV. THE US SYSTEM: A BROADER VIEW

We have seen that Virginia, like Nazi Germany, created a statutory definition for “Negro” in order to create a target for bad treatment: once the statutory target existed, it was easy to draft legislation excluding that group from the normal rights of citizenship. In Germany and in Virginia, the state changed this statutory definition over time to suit its own purposes. Like the Nazis, Virginia was concerned about the purity of “white blood,” and criminalized miscegenation in order to ensure that members of the oppressor and target groups did not have children together. In both Virginia and Nazi Germany, the state had administrative and judicial mechanisms for determining racial identity in close cases.

It must be remembered, however, that this article compared Nazi laws with laws in Virginia simply for ease of analysis. Racial purity laws were neither unique to Virginia, nor to the South, and they are not limited to the past. They are an important part of US society and the US legal system, and always have been. This Section will widen the lens through which we are looking at these two systems by looking at racial purity laws throughout the United States.

##### A. States

As the Supreme Court noted in *Plessy v. Ferguson*, in 1896, many states had differing definitions of “the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person.”<sup>123</sup> In North Carolina, for example, a person was “colored” if he had “any visible admixture of black blood”; in Ohio, the standard was “the preponderance of blood”; and in Michigan, as in Virginia, “the predominance of white blood must only be in the proportion of three fourths.” To the Supreme Court, then, it did not matter if there was no stability in the state definitions. It did not matter if a person was “colored” in Michigan and “white” in Ohio. Rationality did not matter. What was important was that the decision as to who was “colored” was a question of state law, and the Court would defer to the states.<sup>124</sup>

It is also clear from this opinion that the states with statutory definitions of “white” and “colored” were not all in the South, and the definitions did not die out after the Reconstruction era. As late as 1950, statutory definitions were still in existence in Alabama, Arkansas, Florida, Georgia, Kentucky,

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123. *Plessy v. Ferguson*, 163 U.S. at 552.

124. *Id.*

Louisiana, Mississippi, Oklahoma, and Tennessee.<sup>125</sup> Louisiana's definition was part of its legal code until 1993.<sup>126</sup>

The states needed a statutory or judicial definition of "white" and "colored," in order to enforce the statutory prohibitions which limited the rights of African-Americans. Similarly, they needed these definitions in order to enforce their laws against miscegenation.

By the mid-1700s, six of the thirteen colonies had enacted laws forbidding miscegenation.<sup>127</sup> Michigan enacted a similar statute in 1838; Indiana, in 1843; and Ohio in 1861.<sup>128</sup> As late as 1964, in five states, one could be sentenced to up to ten years in jail for miscegenation.<sup>129</sup> In 1927, twenty-nine of the forty-eight states had such laws.<sup>130</sup>

By 1950, all the states which had statutory definitions of "black" also had antimiscegenation laws. The following states also prohibited miscegenation: Arizona, California, Colorado, Delaware, Idaho, Maryland, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.<sup>131</sup> In Arizona, a mulatto could not marry at all.<sup>132</sup> Again, these are not only southern states; indeed, they span the continent.

Because white Americans wanted to protect the racial purity of the "white race" against assault by groups that were not "black" but were not "white" either, there were also different target groups. For example, Maryland prohibited marriage between whites and "Malay."<sup>133</sup> Mississippi, Missouri, Oregon, and Idaho forbade intermarriage between whites and "Mongolians."<sup>134</sup> Wyoming, Nevada, and California didn't allow marriage between "whites" and "Mongolians" or "Malay."<sup>135</sup> To "Mongolian" and

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125. See generally PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR* (1951). For a discussion of how Louisiana used its legal, judicial, and administrative systems to maintain racial purity, see generally VIRGINIA R. DOMÍNGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* (1986).

126. See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2112, n.248. (1993).

127. See Paul Knepper, *The Prohibition of Biracial Legal Identity in the States and the Nation: An Historical Overview*, 5 STATE CONST. COMMENTARIES & NOTES 14, 15 (1994).

128. See John Roy Squibb, *Roads to Plessy: Blacks and the Law in the Old Northwest: 1860–1896*, at 75–76 (1992) (unpublished Ph.D. dissertation, University of Wisconsin (Madison)) (on file with author).

129. See ROBERT J. SICKELS, *RACE, MARRIAGE AND THE LAW* 71 (1972).

130. In those nineteen states with no laws, the black population was 5 percent or less of the population, and in seven of them, it was less than 1 percent of the population. *INTERMARRIAGE WITH NEGROES—A SURVEY OF STATE STATUTES*, 36 YALE L.J. 858, 59 (1927).

131. See generally MURRAY, *supra* note 125.

132. See SICKELS, *supra* note 129, at 72. Hence, "mulattos" would indeed become, like mules, "sterile hybrids."

133. MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 231 (1946).

134. *Id.* at 231–32.

135. *Id.* at 232.

"Malay," South Dakota added a prohibition against marriage with Koreans, and Arizona included "Hindu" in its antimiscegenation statute.<sup>136</sup> The Nebraska legislature did not allow marriage between "white" persons and Chinese or Japanese.<sup>137</sup> South Carolina forbade whites to marry any persons who was Indian, mulatto, mestizo, or half-breed and that definition included Chinese and Filipinos.<sup>138</sup> Louisiana law stated that whites could not marry any "persons of color," and Virginia stated that whites could only marry whites.<sup>139</sup>

Although the language of the statutes varied from state to state, and although the group(s) targeted also varied, the underlying dynamic was the same. People who were not "white" could have children with each other, but not with "white" people: the white race must remain pure.

In 1954, the Supreme Court for the first time held one component of the US apartheid system, segregated education, unconstitutional.<sup>140</sup> It did not hold antimiscegenation laws unconstitutional until 1967, over ten years later. At the time of its ruling, sixteen states still prohibited interracial marriage.<sup>141</sup>

## B. Federal Government

The United States Census Office was formally established in 1850.<sup>142</sup> Over its 250 year history, it has created twenty-three categories, categories which it changed over time, to classify people in the United States: twenty-two of those categories classified people who were not "white."<sup>143</sup> Thus, as one scholar has noted, the "most enduring theme" in the census classifications since its inception has been "[t]he separation of the US population into a dichotomy based on skin colour (white and non-white)."<sup>144</sup>

From the beginning of the census, the federal government created various categories of "black" Americans. Between 1850 and 1920, the government conceptualized two groups of African-Americans: black and

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136. *Id.*

137. *Id.* at 231.

138. *Id.* at 232.

139. See SICKELS, *supra* note 129, at 72.

140. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

141. See *Loving v. Virginia*, 388 U.S. 1, 6, n.5 (1967).

142. See Washington, *supra* note 78, at 75.

143. *Id.* at 101.

144. Sharon M. Lee, *Racial Classifications in the US Census: 1890–1990*, 16 *ETHNIC & RACIAL STUD.* 75, 81 (1993). Note, however, that Lee erroneously conflates race and color, thus suggesting a biological basis for "race," despite her careful analysis of the federal government's creation of racial categories.

mulatto. The only exception occurred in 1890, when there were four categories: black, mulatto, quadroon, and octoroon.<sup>145</sup> In 1930, "Mexicans" were listed as a separate racial group; ten years later, census enumerators were instructed to count "Mexicans" as "white."<sup>146</sup> Before 1890, Asian Indians were considered "white"; the government then redefined them as Asian/Pacific Islanders.<sup>147</sup> Thus, another enduring theme has been the same instability seen earlier in the racial purity systems of Virginia and Nazi Germany. Here again, it is the oppressor group which controls the instability by changing the categories and by moving groups in and out of the privileged class of "white."

The most basic principle of the census categories, however, has been the notion that there are indeed "races," and that these "races" are somehow "pure." Up until 1980, any person who considered herself of "mixed parentage," was required to identify herself by the race of the parent who was not white.<sup>148</sup> In the 1990 census, if a respondent wrote "black-white" in the space for "race," census officials were required to change that person's identity to "black"; if the person wrote "white-black," she was counted as "white."<sup>149</sup>

In 1977, the Office of Management and Budget issued Statistical Policy Directive No. 15, which defined "basic racial and ethnic categories for Federal statistics and program administrative reporting."<sup>150</sup> That directive created and defined five groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black; Hispanic; White.<sup>151</sup> "White," for example, is defined as "[a] person having origins in any of the original peoples of Europe, North Africa, or the Middle East"; while "Black" is defined as "a person having origins in any of the black racial groups of Africa."<sup>152</sup>

The point here is not to notice, for example, the tautology inherent in defining membership in the "black" racial group, as someone who "has origins in . . . a black racial group." It is not to point out that knowing what group one "has origins in" implies knowing what groups one does not have origins in, or that it is impossible to prove a negative that goes back to the

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145. See Washington, *supra* note 78, at 77.

146. Lee, *supra* note 144, at 79.

147. *Id.* at 81.

148. FERRANTE & BROWN, *supra* note 76, at 3–4.

149. *Id.* at 111. If the person had mixed Native American/Negro ancestry, that person was to be designated "Negro." *Id.* at 4. For a more thoughtful look at those with ancestry from both Africa and Native America, see generally JACK D. FORBES, *AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES* (1993).

150. Office of Management and Budget, "Standards for the Classification of Federal Data on Race and Ethnicity; Notice," 60 Fed. Reg. 44674, 44692 (1995). It is this directive that was under discussion for possible changes for the year 2000 census. See *supra* note 2.

151. See *id.*

152. *Id.*

dawn of humanity. Definitions of "race" never are rational. The point here is simply to notice that the federal government always has been, and still is, active in the process of creating and defining "races"; that is, in separating people into categories it calls "races" as part of the targeting process.

The federal government also created and controlled racial identity by regulating how state governments determined the "race" of newborns for their birth records. Between 1950 and 1989, the National Center for Health Statistics' (NCHS) formula for determining the race of a child stated that "[i]n cases of mixed parentage where only one parent was white, the child was assigned to the other parent's race."<sup>153</sup> Two important principles are in play here: (1) the notion that races are pure (one can be a member of one group, not of two or more); and (2) the purity of the "white" race must be maintained. If there is any hint that pure white "blood" has been tainted by that of people who are not white, the child cannot be white.

The NCHS regulation went on to say that "[w]hen neither parent was white, the child was assigned the race of the father."<sup>154</sup> In other words, if the federal government is not engaged in the business of protecting the pure blood of white Americans, then it will default to its next "enduring theme," the protection of patriarchy. Whiteness matters most in the United States, but male privilege is a close second.

The federal government has also enacted racial purity regulations to define American Indians. Once again, it did this through notions of descent and blood. In 1887, Congress dissolved collectively-held reservation land holdings to assign individually deeded parcels of reservation land to those who could prove that they were "Indian."<sup>155</sup> In this legislation, the General Allotment Act, Congress defined Indians as persons who could document that they had "one-half or more Indian blood."<sup>156</sup> Those who did not fit this definition, or could not prove their ancestry, received no land. As a result, within the next fifty years, the federal government reduced the Indian land base in the United States from 138 million acres to 48 million acres.<sup>157</sup> Since then, the federal government has used this "blood quantum" requirement for eligibility for federal services such as food, health care, and educational

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153. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1257 (1994).

154. *Id.* NCHS changed this regulation in 1989. The new rule states that the race of the child is the same as the race of the mother. See FERRANTE & BROWN, *supra* note 76, at 111.

155. M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America*, in NATIVE AMERICANS AND PUBLIC POLICY 116-17 (Fremont J. Lyden & Lyman H. Legters eds., 1992).

156. *Id.*

157. *See id.* at 117.

benefits. Limiting the number of Indians through federal definition has thus limited the federal government's financial obligation to them.<sup>158</sup>

## V. SUPPORTING SYSTEMS OF RACIAL PURITY

In general, the US public knows that Jews had their German citizenship taken away.<sup>159</sup> It knows about the sterilization program for those who were considered "racially unfit" to bear children.<sup>160</sup> These acts, in Nazi Germany, are seen, recognized, and deplored. Most do not know, however, that the US government engaged in the same acts. The United States, like Nazi Germany, denied citizenship to those who were not "white." The United States, like the Nazis, also sterilized those it considered unfit to have children. This Section will describe the United States history of eugenics, as well as those immigration and citizenship policies which excluded people whom the United States did not consider "white." It will also describe Nazi admiration toward the United States and its racist policies and acts.

### A. Immigration Control and Citizenship Restrictions

In 1790, in its first legislation on immigration and naturalization, Congress restricted citizenship to "white persons."<sup>161</sup> Thus, from its inception, the United States has been clear that the racial purity of the white race was crucial to US ideology and to the "American dream." Although the Fifteenth Amendment to the Constitution required Congress to amend this statute to grant citizenship rights to blacks in the United States, for most of the following hundred years, this was a meaningless gesture. The Supreme Court did not hesitate to uphold laws taking these rights away from US blacks—laws, for example, which created apartheid in public accommodations and education; "neutral" regulations which denied the right to vote to

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158. See *id.* Similarly, in 1920 the federal government imposed a "blood quantum" test to define "Native Hawaiians" for purposes of land distribution. The United States took ownership of all public land in Hawaii through the Annexation Act of 1898. See Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 *YALE L. J.* 537, 551–53 (1996).

The Supreme Court recently decided that Hawaii's use of this criterion in a state election used ancestry as a proxy for race, thereby violating the Fifteenth Amendment. *Rice v. Cayetano*, 120 S. Ct. 1044, 1048 (2000).

159. See generally PROCTOR, *supra* note 66.

160. *Id.* at 106, 108, 132.

161. LOPEZ, *supra* note 28, at 1.

black "citizens."<sup>162</sup> For the US populace, then, "citizenship" has long been conflated with "whiteness."

As a result, many immigrants had to prove that they were "white" in order to become citizens. It was this citizenship prerequisite which led to two Supreme Court rulings in the early 1920s, when the Court struggled to define the word "white" in a way that would preserve the racial purity of "white" people.<sup>163</sup>

In the first case, *Ozawa v. United States*, the Court decided that "white" meant members of the Caucasian race and had nothing to do with color.<sup>164</sup> Mr. Ozawa could, therefore, not become a citizen. Only three months later, the same Court was called on to decide whether a person from India was "white," for purposes of the same statute. Immediately realizing that under the "Caucasian race" test, this person would become a citizen, the Court changed the definition of "white person" from "Caucasian" to whatever is "the understanding of the common man."<sup>165</sup> In order to flesh out this definition, the Court set up two ways of interpreting its "common man" rationale. The first was an "astonishment" test:

It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today . . . We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.<sup>166</sup>

Note that the definition rests on the "astonishment" of white Americans, not of those who are not. Thus, the oppressor group tries to maintain control of the instability inherent in the term "white person," by moving the power to define that term from the white legislature, to the white judiciary, to the "average well-informed white American."<sup>167</sup>

In this same decision, the Court presented an "assimilation" test to define a "white person":

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162. See, e.g., *Plessy v. Ferguson*, 163 U.S. at 537 (segregation of public accommodations held constitutional); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (segregation of public schools held constitutional); *Guinn v. United States*, 238 U.S. 347 (1915) (literacy tests for voting held constitutional). The Supreme Court did not hold poll taxes unconstitutional until 1966. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

163. See generally LOPEZ, *supra* note 28.

164. 260 U.S. at 197.

165. *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214–15 (1923).

166. *Id.* at 209, 211.

167. In much the same context, Walter Rosenberg, head of the Department of Socialist Affairs of the National Socialist Party, stated: "Law is what the Aryan man deems to be right; legal wrong is what he rejects." JANOWSKY & FAGEN, *supra* note 17, at 193.

The children of English, French, German, Italian, Scandinavian, and other Europe parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry . . . [and] the great body of our people instinctively recognize it and reject the thought of assimilation.<sup>168</sup>

Citizenship was thus predicated on “whiteness,” and the definition of “whiteness” was intimately linked with the notion of racial purity. “Assimilation” with people who look different is a concept “our people . . . reject.”

One legal scholar who reviewed the naturalization statutes of thirty-five other nations in existence in 1945, noted that only Nazi Germany and the United States had limited citizenship to members of certain “racial” groups.<sup>169</sup>

Both countries also gendered their citizenship requirements in the same way. Nazi law stated that German women who married foreigners lost their citizenship; similarly, in 1907, Congress enacted legislation which stated that a US woman who married an alien lost her citizenship.<sup>170</sup> In Germany, “foreigner” meant not German, therefore, not Aryan; in the United States, “alien” meant not white. Thus, the prohibition against marrying a foreigner or alien was a prohibition against marrying someone who was not Aryan, not white. Both states feared that Aryan/white women would have children with “racial degenerates” and bear children who were not racially pure. These laws, then, made it clear that not only would the children of such a union never be citizens, but that their mothers would lose citizenship as well.

Although some who were not “white” were allowed to immigrate to the United States, but denied citizenship because they were not “white,” at a certain point, the United States denied immigrant status completely to many foreigners who were not white. Congress passed the Chinese Exclusion Acts in 1882, thereby barring the immigration of Chinese workers for ten years.<sup>171</sup> Two years later, it extended that bar to exclude all Chinese.<sup>172</sup> In 1917, Congress barred the immigration of everyone from Asia.<sup>173</sup>

Having already excluded Asians, in 1924, Congress enacted the Immigration Restriction Act, in order to limit the number of southern and

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168. *United States v. Bhagat Singh Thind*, 261 U.S. at 215.

169. Gordon, *supra* note 30, at 251.

170. See KAPLAN, *supra* note 25, at 150 (in Nazi Germany); LOPEZ, *supra* note 28, at 46–47 (in the United States).

171. See LOPEZ, *supra* note 28, at 37.

172. See *id.* at 37–38.

173. See *id.* at 38.



eastern Europeans who could enter the country.<sup>174</sup> In this way, the United States could maintain a preponderance of pure Nordic stock.<sup>175</sup> Congress managed to do this without mentioning the notion of racial purity, by fixing the quota from these countries to 2 percent of the number from that country who lived in the United States in 1890, that is, before the massive immigration from southern and eastern Europe.<sup>176</sup> In 1921, Congress also limited the total number of immigrants from all of Africa, Asia, and Oceania to 1,000.<sup>177</sup>

From 1913 to 1914, immigrants from southern and eastern Europe comprised 75.6 percent of all immigrants to the United States.<sup>178</sup> By 1924, that number fell to less than 15 percent.<sup>179</sup> Between 1921 and 1929, while the immigration quotas allotted to Northern/Western Europe dropped from 197,630 to 127,266, the quotas allotted to Southern/Eastern European countries dropped dramatically from 155,585 to 23,235.<sup>180</sup>

The Nazis were impressed by the US effort to maintain Nordic stock through immigration and naturalization laws. In *Mein Kampf*, Hitler wrote these admiring words:

I know that people do not like to hear all this; but anything more thoughtless, more hare-brained than our present-day citizenship laws scarcely exists. There is today one state in which at least weak beginnings toward a better conception are noticeable. Of course, it is not our model German Republic, but the American Union, in which an effort is made to consult reason at least partially. But . . . by simply excluding certain races from naturalization, it professes in slow beginnings a view which is peculiar to the folkish state concept.<sup>181</sup>

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174. See *id.*

175. See MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR: AN ANALYSIS OF U.S. IMMIGRATION POLICY SINCE 1820, at 81 (Ku Klux Klan supports bill), 84 (House Committee majority wants immigrants like "Aryan" forbears) (1987). Although President Coolidge could have vetoed this law, it clearly did not go against his beliefs. A few years earlier, in an article exploring which groups should be allowed to immigrate to the United States, he wrote: "There are racial considerations too grave to be brushed aside. . . . Biological laws tell us that certain divergent people will not mix or blend. The Nordics propagate themselves successfully. With other races, the outcome shows deterioration." ALLAN CHASE, THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM 175 (1977).

176. See LEMAY, *supra* note 175, at 86.

177. See *id.* at 91.

178. Frances Hassencahl, Harry T. Laughlin: Expert Eugenics Agent for the House Committee on Immigration and Naturalization 1921-1931, at 228 (1970) (unpublished Ph.D. dissertation, Case Western University) (on file with author).

179. *Id.* That quota was lifted in 1965. See LOPEZ, *supra* note 28, at 38.

180. See LEMAY, *supra* note 175, at 91. The quotas allotted to all of Asia, Africa, and Oceania increased during this period from less than one thousand in 1921 to 3,233 in 1929. See *id.* However, this higher number represents only 2.14 percent of the total immigrant population allowed into the United States in 1929. See *id.*

181. ADOLF HITLER, MEIN KAMPF 439-40 (1927).

Other Nazis agreed. At a 1932 conference for the Nazi Physicians' League, one speaker praised the United States for leading the way on racial hygiene by limiting the entry of "dirtier southern European stocks."<sup>182</sup> In 1933, the head of the doctors' association stated that Nazi Germany must follow the American example with respect to immigration.<sup>183</sup> Medical journals in Germany were particularly impressed with the 1924 legislation: an article in the official journal of the Nazi Physicians' League spoke highly of that same law.<sup>184</sup>

## B. Forced Sterilization

The eugenics movement was important in the United States long before Nazis arrived in power. Between 1907 and the late 1920s, twenty-eight states enacted laws allowing sterilization on eugenics grounds.<sup>185</sup> In 1927, the Supreme Court upheld their constitutionality.<sup>186</sup> By that time, approximately 8,500 patients in state institutions had been sterilized.<sup>187</sup> For the next ten years, this country would sterilize approximately 2,500 persons a year.<sup>188</sup>

The Nazis studied the theory and practice of this system in the United States, and used it in developing their own program of eugenics. Some of the early work by the US eugenicians were translated into German and cited by German racial hygienists.<sup>189</sup> For example, a 1939 book by von Hoffman, *Racial Hygiene in the United States*, devoted a full chapter to sterilization.<sup>190</sup> The leading Nazi text on racial hygiene, *Human Selection*, cited with approval the work of Harry Laughlin, an influential American eugenicist.<sup>191</sup> Many believe that the Nazis based their sterilization law on Laughlin's "Model Sterilization Law."<sup>192</sup>

The admiration worked both ways. There was much scholarly praise in the United States after the 1927 publication in Germany of *Outline of Human Genetics and Racial Hygiene*, by three leading scholars in the field

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182. PROCTOR, *supra* note 66, at 173.

183. *See id.*

184. *See id.* at 100.

185. *See id.* at 97.

186. *See* EDWARD J. LARSON, *SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 121 (1995).

187. *See id.*

188. *See id.* at 119.

189. *See* PROCTOR, *supra* note 66, at 99–100.

190. *See id.* at 16.

191. *See id.* at 99.

192. *Id.* at 101.

of anthropology, genetics, and racial hygiene.<sup>193</sup> Many eugenicists initially thought that the Nazi sterilization campaign would serve as a boost for that same effort in the United States.<sup>194</sup> Leading philanthropic organizations in the US gave money to support Nazi research in this area.<sup>195</sup>

In 1921, the US House Committee on Immigration and Naturalization appointed Harry Laughlin, a proponent of eugenical sterilization in the United States, as its "Expert Eugenics Agent." He held that position until 1931. During this period, he conducted research for the committee. He also testified three times before the House Committee as it considered the passage of the 1924 Immigration Act.<sup>196</sup> The Nazis rewarded Laughlin for his work in the United States, by awarding him a honorary doctorate in 1936, at the University of Heidelberg.<sup>197</sup> The award stated: "We honor him as the pioneer of practical eugenics and the farseeing representative of racial policy in America."<sup>198</sup>

## VI. AFRO-GERMANS IN NAZI GERMANY, AND JEWS IN AMERICA

Just as the United States defined, marginalized, and quarantined many groups that were not "white," in order to protect the "racial purity" of white people, so, too, did Nazi Germany isolate and oppress groups other than Jews. Most are aware that the Nazis oppressed gypsies, communists, the feeble-minded, and homosexuals.<sup>199</sup> What is generally not known, however, is that the Nazi regime also targeted and oppressed Africans and Afro-Germans, in much the same way that the United States has targeted and oppressed African-Americans. This Section will first describe the nature of that oppression. It will then compare Nazi oppression of Afro-Germans to American treatment of Jewish immigrants to this country. Did the United States target Jews in the same way? Are there ideological and legal similarities? Are there differences? This comparison will deepen our understanding of the concept of racial purity in both countries.

While the United States colonized and enslaved Africans within its borders, Germany colonized and enslaved Africans in Africa itself. In 1884,

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193. See *id.* at 50, 58.

194. See LARSON, *supra* note 186, at 146.

195. See PROCTOR, *supra* note 66, at 349 n.115.

196. See Hassencahl, *supra* note 178, at 179, 190, 227.

197. See *id.* at 350.

198. *Id.* at 353. Although two European universities that were invited to the ceremony refused to send representatives, all twenty US colleges and universities which received invitations accepted, including Harvard and Columbia. *Id.* at 352-53.

199. See PROCTOR, *supra* note 66, at 212.

Germany claimed Togo, Cameroon, Tanzania (formerly German East Africa), and Namibia (formerly German Southwest Africa) as its colonial possessions. It also sanctioned slavery in Togo and in Cameroon.<sup>200</sup> In Africa, Germany enacted "Native Authority ordinances," legislation which required and created housing ghettos, travel passes, and registration with the state; it also ruled that "natives" could not own land.<sup>201</sup> In 1904, in response to an attack by the Herero people in Namibia, angered by the invasion of their land, General von Trotha ordered the extermination of the Hereros, leading to a massacre that many later saw as a precursor of Nazi genocide.<sup>202</sup> Those Herero who were not killed outright were sent to slave labor camps, where the Germans either starved them to death or killed them with overwork, and if they did not die from overwork or starvation, they died of disease. In 1904, there were 80,000 Herero; by 1911, only 15,000 remained.<sup>203</sup> Hannah Arendt would later link Germany in colonial Africa and Nazi Germany in this way:

African colonial possessions became the most fertile soil for the flowering of what later was to become the Nazi elite. Here [the Germans] had seen with their own eyes how peoples could be converted into races and how . . . one might push one's own people into the position of the master race.<sup>204</sup>

In 1920 and 1921, during the occupation of Germany after World War I, the French victors sent troops from its colonies into the Rhineland. A majority of the soldiers came from Algeria, Morocco, and Tunisia, although some were from Madagascar and Senegal.<sup>205</sup> Others came from Martinique, Guadeloupe, Reunion, and Indochina.<sup>206</sup> In effect, then, the African colonies came to Germany, and Germany went into shock.

The Germans turned this occupation into an international cause: a "black plague" had been placed on their land;<sup>207</sup> Germans were being "polluted, both by miscegenation and by disease."<sup>208</sup> Germans used novels, movies, pamphlets, demonstrations, the press, and radio, in an effort to

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200. See May Opitz, *The Germans in the Colonies*, in *SHOWING OUR COLORS: AFRO-GERMAN WOMEN SPEAK OUT* 21 (May Opitz et al. eds., 1986).

201. *Id.* at 25.

202. See ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST* 282 (1998).

203. See Donald G. McNeil, Jr., *Its Past on Its Sleeve, Tribe Seeks Bonn's Apology*, *N.Y. TIMES*, 31 May 1998, § 1, at 3.

204. Jon Swan, *The Final Solution in Southwest Africa*, 3 *MHQ: Q. J. MIL. HIST.* 36, 54 (1991).

205. See Keith L. Nelson, *The "Black Horror on the Rhine": Race as a Factor in Post-World War I Diplomacy*, 42 *J. MODERN HIST.* 606, 611 (1970).

206. See Sally Marks, *Black Watch on the Rhine: A Study in Propaganda, Prejudice and Prurience*, 13 *EUR. STUD. REV.* 297, 298 (1983).

207. Nelson, *supra* note 205, at 615-16.

208. Marks, *supra* note 206, at 301.

eliminate this "black curse" ("*schwarze schmach*") from German soil. The government encouraged these efforts and contributed its own.<sup>209</sup>

Most of the propaganda played into the fear of "pollution" of the white race, and centered on the rape of German women.<sup>210</sup> A 1920 medal from the Bavarian mint, captioned "black infamy," portrayed a black soldier on one side, and, on the other side, a blonde woman shackled to a huge penis with a helmet on it.<sup>211</sup>

This "cause" quieted down after the French moved into the Ruhr region in 1923,<sup>212</sup> but the Nazis would later be troubled by the very existence of the Afro-German children born during this period, for when the Nazis were coming to power, these children were reaching puberty. The fear, of course, was that they might reproduce, thus increasing the number of "racial degenerates" within the country.<sup>213</sup>

The Nazis saw links between Jews and "Negroes" everywhere. In their view, Afro-Germans, like Jews, had a "hybrid character," one which led to a host of "racial maladies," as well as mental defects.<sup>214</sup> Hitler often commented on the relationship between the two groups. He thought that it was the Jews who had brought African soldiers into the Rhine region of Germany.<sup>215</sup> When Hitler said that it was important to protect "not only against Jewish, but also against any and every racial infection,"<sup>216</sup> he was thinking also about Africans and descendants of Africans. When he described the "racial chaos and confusion" that would ultimately allow the "Hebrew" to "slowly rise to world domination," he meant "a bastardization and Negrification of cultural mankind and thereby ultimately to . . . a lowering of its racial value."<sup>217</sup> He not only saw Jews everywhere, he also saw Negroes everywhere. In his opinion, Roosevelt was a "half-caste Jew," and "[t]he completely negroid appearance of his wife" indicated that she, too, was "half-caste."<sup>218</sup>

Because Nazi ideology found similarities between those with Jewish or

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209. See *id.* at 314–16.

210. *Id.* at 302. Both US and German investigators discovered that, in fact, German women were chasing the African soldiers; many of the latter complained to their superiors about this harassment. See *id.*

211. See Opitz, *supra* note 200, at 47, for a picture of the medal.

212. Nelson, *supra* note 205, at 623.

213. There were other Afro-Germans besides these children. See, e.g., HANS J. MASSAQUOI, *DESTINED TO WITNESS: GROWING UP BLACK IN NAZI GERMANY* (1999) (child of German woman and African diplomat in Germany). Others were African immigrant workers and their children. See generally Opitz, *supra* note 200.

214. PROCTOR, *supra* note 66, at 197.

215. See HITLER, *supra* note 181, at 325.

216. ADOLF HITLER, *SECRET CONVERSATIONS: 1941–1944*, at 527 (1953).

217. ADOLF HITLER, *HITLER'S SECRET BOOK* 105 (1961).

218. HITLER, *SECRET CONVERSATIONS*, *supra* note 216, at 510.

Negro ancestry, Nazis took steps hostile to Germans of African descent, in some of the same ways they did for Jews. The first step, of course, was identification of the target group. Once that was done, statutes limiting that group's rights and privileges followed. The 1933 Peasants Farm Law stated that "a person is not considered German . . . if his paternal or maternal ancestors have Jewish or colored blood in their veins."<sup>219</sup> Since only peasants could take land under this statute, and only Germans could be peasants,<sup>220</sup> the "colored" were excluded from this land program along with Jews. Afro-Germans could not be members of the Nazi party, as all applicants for membership had to certify that they had neither "colored blood" nor Jewish blood.<sup>221</sup> Local public health offices were required to make out a card for each individual who visited it: one of the questions on the form was whether that person was Negro.<sup>222</sup> Also, since Africans and Afro-Germans were considered "non-Aryans," all legislation which defined and limited the rights of the group "non-Aryans," similarly limited their rights.

In 1935, the First Supplementary Decree to the Law for the Protection of German Blood and Honor, forbade miscegenation between Germans and all persons of "alien blood."<sup>223</sup> The government later clarified that that term encompassed "Gypsies, Negroes, and their bastards."<sup>224</sup> Although miscegenation was prohibited by law, lesser offenses were punished also: German men could end up in prison if they were seen on the street with an Afro-German woman.<sup>225</sup>

As noted above, the Nazis imposed travel restrictions on Negroes, as well as on Jews. Africans and Afro-Germans were also evicted from their homes, denied work, ousted from schools, insulted and spat upon in public, and denied public accommodations.<sup>226</sup>

During this period, there were between 500 and 800 Afro-German children who had been born during the occupation by francophone African troops at the end of World War I.<sup>227</sup> These children were excluded from playgrounds, secondary, and university education, sports competition, and

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219. MILLER, *supra* note 3, at 15.

220. See Karl Loewenstein, *Law in the Third Reich*, 45 *YALE L. J.* 779, 799 (1936).

221. PROCTOR, *supra* note 66, at 114.

222. See Czarnowski, *supra* note 51, at 119.

223. FRIEDLÄNDER, *supra* note 19, at 152–53.

224. *Id.*

225. See Doris Reiprich & Erika Ngambi Ul Kuo, *Our Father was Cameroonian, Our Mother, East Prussian, We Are Mulattoes*, in *SHOWING OUR COLORS: AFRO-GERMAN WOMEN SPEAK OUT* 66 (May Opitz et al. eds., 1986).

226. See *id.* at 58–64.

227. See MICHAEL BURLEIGH & WOLFGANG WIPPERMANN, *THE RACIAL STATE: GERMANY 1933–1945*, at 130 (1991).

military service.<sup>228</sup> Because these children were such an affront to the notion of the racial purity of the Aryan race, by 1937, the Nazis had decided to sterilize or castrate them. The Gestapo created a special commission charged with finding the children.<sup>229</sup> By the end of the Nazi regime, the state had located and sterilized approximately 500 of these Afro-Germans.<sup>230</sup>

Nazis sent many Africans and Afro-Germans to slave labor camps and concentration camps.<sup>231</sup> Others were killed when, in 1939, Hitler decreed the direct "medical" killing of the "mentally ill." Selections for euthanasia were to be based on the information written on questionnaires by doctors in psychiatric institutions, hospitals, and nursing homes. One of the questions on the form asked if the person was "Negro."<sup>232</sup>

At the end of the war, British military policy authorized assistance for "Jews, displaced foreign nationals, non-German prisoners of war, and former concentration camp detainees."<sup>233</sup> Afro-Germans who had suffered under the Nazi regime were entitled to nothing.<sup>234</sup> Those who had been sterilized were also given no compensation. Since the United States had long sanctioned sterilization, the Allies did not consider it a war crime.<sup>235</sup>

Did the United States target Jews in the same way? Certainly this country did not welcome those who wanted to escape Nazi terror by coming to the United States. Between July 1933 and June 1943, the US government permitted only 165,756 Jews to enter this country.<sup>236</sup> A large part of this was due to immigration legislation in the 1920s, which made such a dramatic cut in European immigration and eventually reduced the maximum annual quota to 153,774 immigrants per year.<sup>237</sup> Not only was the absolute number reduced, but Congress also reserved 83,575 of that number for Great Britain and Ireland, thus making entry even less likely for immigrants from those countries with large Jewish populations like Poland, France, and Romania.<sup>238</sup> Other restrictions, both statutory and administrative, reduced even further the likelihood that Jews would be able to find sanctuary in the United States: these included the statutory provision

228. See generally MASSAQUOI, *supra* note 213.

229. See BURLEIGH & WIPPERMANN, *supra* note 227, at 130.

230. See PROCTOR, *supra* note 66, at 114.

231. See Reiprich & Ngambi Ul Kuo, *supra* note 225, at 66–68. Magupye Kassj, *Fremdwahrnehmung Deutschland: Afrika im Kontext des Nationalsozialismus 10* (Africans held in Mauthausen, Ravensbrück, Dachau, Neuengamme) (unpublished article on file with author).

232. ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 62–68 (1986).

233. MASSAQUOI, *supra* note 213, at 261.

234. See *id.*

235. See PROCTOR, *supra* note 66, at 117.

236. See ARTHUR D. MORSE, *WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY* 94 (1968).

237. See *id.* at 134–35.

238. See *id.*

denying admission to any immigrant “likely to become a public charge,” and the requirement that applicants provide a certificate of good character from their local police department.<sup>239</sup> As a result of these restrictions, even the small annual immigration quota was not filled. Between 1933 and 1943, the years of Nazi terror, 1,244,858 immigrant slots were not filled.<sup>240</sup> As Hitler himself noted: “Through its immigration law, America has inhibited the unwelcome influx of such races as it has been unable to tolerate in its midst. Nor is America now ready to open its doors to Jews fleeing from Germany.”<sup>241</sup>

Those Jews who managed to get into the United States, however, lived significantly better lives than they did in Germany. The most important indicator of this change in status is that the US government did not exclude Jews from citizenship for failing to meet the “white person” standard in naturalization law.<sup>242</sup> When Jews arrived in the United States, they became “white,” and they became citizens. Similarly, the federal government did not create a census category for Jews; it did not list “Jews” as a separate racial or ethnic group in Directive 15. It did not give directions to the states on how to define Jews for the purposes of birth certificates. Also, states did not enact statutes defining the group “Jews” as a target for oppression: one would not expect to find, therefore, laws limiting the rights of Jews. Similarly, states did not have antimiscegenation laws to ensure that Jews did not defile “white” blood. States did not mark “Jew” on drivers’ licenses. Thus, the US government did not create and target Jews for oppression the way that the Nazi regime did, and it did not create and target the group “Jews” the way it created and targeted the group “African-Americans.”

This is not to say that there was no discrimination against Jews. Before 1880, when there was a relatively small number of Jewish immigrants, they found assimilation fairly easy. However, around the turn of the twentieth century, anti-immigrant sentiments grew along with the size of the immigrant population.<sup>243</sup> Jews were excluded from many colleges and universities, many occupations, and many corporations.<sup>244</sup> Some craft unions excluded Jews altogether, while others had segregated organizations within the union.<sup>245</sup>

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239. *Id.* at 135–37.

240. *See id.* at 130–31.

241. *Id.* at 145.

242. *See* LOPEZ, *supra* note 28, at 203–08 (list of racial prerequisite cases between 1878 and 1944).

243. *See* KAREN BRODWIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* 27–28 (1998).

244. *See id.* at 30–34.

245. *See* James R. Barrett & David Roediger, *Inbetween Peoples: Race, Nationality and the New Immigrant Working Class, in AMERICAN EXCEPTIONALISM?: US WORKING-CLASS FORMATION IN AN INTERNATIONAL CONTEXT* 199 (Rick Halpern & Jonathan Morris eds., 1997).



After World War II, however, there was more mobility for Jews in the United States for several reasons: postwar economic prosperity; education and housing provided by the GI Bill and by federal loans through the Federal Housing Authority and the Veterans' Administration; and a decrease in the popular acceptance of anti-Semitism.<sup>246</sup> Thus, through the combination of a lack of racial restriction and access to federal programs as racial privilege,<sup>247</sup> Jews were given greater access to the "American dream."

History shows, then, that although those Jews who managed to emigrate from Nazi Germany to the United States would be able to improve their lives, those Afro-Germans who managed to escape Nazi terror by coming to the United States would find, once more, a state which defined them as a target for exploitation and oppression.

## VII. CONCLUSION

This Conclusion will take up three separate tasks. The first task is to summarize the material already presented, and the second, to address questions that have been raised about the soundness of this comparison. At the end, this article returns to the overriding theme, which is how the state creates a group to target as the initial step in the process of destroying that group. This is how the Nazis operated: they used legislation to create a group they called "Jews," then proceeded, step by step, to destroy that group. The final question addressed in this article, then, is whether this analysis helps us understand the position of black Americans in the United States today.

This article has shown that in order to target a specific group for exploitation and oppression, the state first defines the group into existence. Once it has defined the group "Jew" or "Negro," it can then enact legislation to deny citizenship, housing, or work to "Jews" or "Negros." This article has shown that both Virginia and Nazi Germany created groups to target for cruel treatment through similar laws. With respect to the structure of the laws, the exemptions, the underlying ideology, and concerns about unstable boundaries, in all these ways, their systems were alike. This article has also shown that what took place in Virginia reflects the larger US society.

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246. See BRODKIN, *supra* note 243, at 36–51.

247. See *id.* for an explanation of how the federal government denied these same education and housing benefits to African-American veterans. Brodtkin suggests that the progress of Jews in the US has been the rise from "off white" to "white." *Id.* at 1. To the extent she is talking about public creation of racial identity, she is right. She is not addressing, however, state-created identity, which has always considered Jews as "white."

The laws which define the groups based their definition on the concept of descent, of "blood." Thus, one can immediately see that both states are trying to redefine a social construct as a biological reality. If these groups really are different biologically from one another, then state-created "differences" gain scientific legitimacy. This "scientific" foundation justifies treating certain groups in different and oppressive ways and takes away any sense of guilt: "These people are simply not like us."

Both states also allowed individuals within the targeted group to challenge their state-imposed identity. Providing this escape hatch, of course, does not change the system of oppression. Indeed, it reifies the state's power to create "races" and to maintain a racial hierarchy.<sup>248</sup> Thus, at the same time that the state appears to provide relief from the oppressive racial hierarchy it has created, it maintains and intensifies its control.

Furthermore, Nazi Germany and the United States both had formal state definitions and informal public definitions of race, definitions which they used singly or together to maximize the state's control. Both states, thus, used the instability inherent in the system for their own ends. When it appeared that the target group was ignoring the state's racial boundaries—for example, by engaging in miscegenation—both states used the criminal justice system to control this instability. They also limited the rights of those children born from miscegenation. Since they were not Aryan/white, they could not enjoy that status, but since they were not complete racial degenerates, they would not be treated as badly as "Jews" or African-Americans with darker skin. Thus, the federal government's 1997 decision to allow a person to list more than one "race" on the census form, if, for example, he has a black mother and a white father,<sup>249</sup> reminds us that the United States has only gotten as far as Nazi Germany in 1933, when it, too, decided that some people were not racially pure and created the category "*mischlinge*." This was not a progressive act. It was an effort to rationalize the US system of "race"; it was yet another way to reify the racial hierarchy.

This article has also shown that states other than Virginia, as well as the federal government, enacted legislation over the centuries to define "racial" groups and to enact prohibitory legislation based on those definitions. This is not simply a Southern concern, and it is not simply of historical interest. Targeting groups for oppression has been, and continues to be, a national project.

This article has also compared supporting systems of racial purity in

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248. See Estelle T. Lau, *Can Money Whiten? Exploring Race Practice in Colonial Venezuela and its Implications for Contemporary Race Discourse*, 3 MICH. J. RACE & L. 417, 451–54 (1998).

249. See 62 FR 58782, 58786 (1997).

both countries. Both the United States and Nazi Germany thought it crucially important to limit the immigration of racially undesirable people and to limit citizenship to "Aryans." They had, as well, a similar understanding of the importance of sterilizing undesirable people, in order to protect the superior genetic pool of the Nordic "race." This article has also described the mutual admiration of Nazi and US scholars and politicians on matters of racial purity.

It is not surprising, then, to hear similar rhetoric about the two target groups: *These people have criminal instincts: there wouldn't be any crime if they weren't around.*<sup>250</sup> *They are thieves and drug dealers.*<sup>251</sup> *They are immoral: they engage in prostitution, and their men want to rape our women.*<sup>252</sup> *They are lazy, and simply don't want to work. They have chased people from the cities into the suburbs.*<sup>253</sup> One might think that these comments are about African-Americans, but they are not: this is Nazi rhetoric about Jews, a similar rhetoric to justify similar cruelty against another targeted group.

The similarities between the two countries are easy to see. Indeed, they are so obvious that when international public opinion condemned Germany for the way it was treating Jews, the Nazis defended themselves by pointing to the United States. "Why criticize us," they said, "when there is still lynching in the United States? When thirty American states still prohibit miscegenation? When segregation is common and lawful?"<sup>254</sup> Indeed, after the defeat of the Nazis, victims of sterilization in Nazi Germany were not able to get reparations for this harm: sterilization ordered by the state could not be a war crime, since the United States Supreme Court had held such laws constitutional.<sup>255</sup>

The US government also noticed the similarities. At least one government official warned the government not to condemn Nazi oppression of Jews officially, as that "could lead to German denunciation of American treatment of the Negro."<sup>256</sup> The black press pointed out the similarities as early as 1933.<sup>257</sup>

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250. See, e.g., MILLER, *supra* note 3, at 24; PROCTOR, *supra* note 66, at 204.

251. See, e.g., MILLER, *supra* note 3, at 24; PROCTOR, *supra* note 66, at 204.

252. See, e.g., MILLER, *supra* note 3, at 26–28.

253. See, e.g., *id.* at 40. One German newspaper told its readers that "for the first time in centuries, the Jew has been forced to change his lifestyle; for the first time, he is required to work. For this purpose, Jews have been organized into forced labor brigades." PROCTOR, *supra* note 66, at 205.

254. STEFAN KÜHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM* 98–99 (1994).

255. See PROCTOR, *supra* note 66, at 117.

256. Johnpeter Horst Grill & Robert L. Jenkins, *The Nazis and the American South in the 1930s: A Mirror Image?* 58 J.S. Hist. 693 n.66 (1992).

257. See *id.* at 688–89. The black press also noticed, and criticized, Nazi oppression of Africans and Afro-Germans. See *id.* at 690.

Finally, this article reversed its earlier comparison of Jews in Nazi Germany and black people in the United States to look at Africans and Afro-Germans in Nazi Germany, and Jews in the United States. What does this teach about how these states conceptualize racial purity? It has been shown that Nazi statutes explicitly referred to "colored," and included those of African ancestry in the term "non-Aryan," thereby creating a statutory target. They treated them in many of the same ways that they treated Jews. The Nazi regime excluded them from housing, schools, and work; it denied them the right to marry Germans; it sterilized them; and it sent them to slave labor camps and concentration camps. When Jews arrived in the United States, however, this country did not target them for exploitation and oppression: indeed, since it awarded them citizenship, it is clear that the US considered them "white." Although this suggests some differences between the United States and Nazi Germany, in fact, it only underlines the similarities. Both countries were obsessed with racial purity, and both targeted people of African descent in order to emphasize and maintain that purity. The only difference is that they conceptualized "white" to include different groups.

The similarities in theory, rhetoric, legal structure, and practice show, then, that Nazi Germany and the United States have much in common when it comes to the dream of "white" racial purity. They also have in common steadfastness of purpose, cruelty, and a willingness to ruin millions of lives to achieve their terrible goal.

While I was researching and thinking about this article, I discussed these ideas with others. This is my usual practice, and, as usual, I had no preconceived ideas of what questions might be raised. Some people were surprised by the comparison; but many others were upset and angry.<sup>258</sup> The responses were so strong that I decided to address them in this article.

There were three basic responses to this comparison between the United States and Nazi Germany. The first was to focus on the racial categories created by the state on the labels themselves: if creating such labels causes harm, then, perhaps the labels should be eliminated. This comment often led to strong debate. When some suggested doing away with the categories of "race" in order to eliminate racial oppression, others answered that it was impossible to do away with racial categories, as they were needed to remedy racial oppression. How could there be statutes prohibiting racial discrimination, how could there be affirmative action based on race, if the categories "black" and "white" did not exist?

Yet, a focus on labels alone is a red herring. The categories themselves do not matter. It is the use of the categories to create targets that counts. The

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258. However, as James Baldwin suggested, it was white listeners who were surprised and upset, not African-Americans. See BALDWIN, *supra* note 1.

federal government has changed census categories dozens of times over the past 150 years, but the hierarchy of exclusion and exploitation has not changed because the underlying value system in the United States has not changed. In essence, the United States has always wanted to count two groups of people—white people and everyone else. “White” means, and has always meant, those with full citizenship rights: it means the group on top, the group that gets to target others for oppression. If this underlying dynamic does not change, changing categories or eliminating labels will make no difference.

And the underlying dynamic can change. This is not impossible. Ideologies change all the time. There are many examples of this within the history of the United States. Former enemies of the state—a group called, for example, “Japanese,” become friends of the state, citizens, respected members of the community. Former despised immigrants, like the Irish, become so valued that a favorite son can become president.<sup>259</sup> Mississippi labeled Chinese immigrants “black” when they brought them in as peasant labor after the Civil War, then changed the label to “white” a hundred years later when the white community decided to treat them better.<sup>260</sup> By the 1960s, the state put “white” on their drivers’ licenses, and members of the local White Citizens Council were inviting the Chinese to join their group.<sup>261</sup> Changing the label has no meaning if it is not accompanied by a change in the status of the group, and changing a group’s status is simply a question of national will. As Barbara Jeanne Fields reminds us, “[r]ace is neither biology nor an idea absorbed into biology by Lamarkian inheritance. It is ideology, and ideologies do not have lives of their own. . . . If race lives on today, it does not live on because we have inherited it from our forbears . . . but because we continue to create it today.”<sup>262</sup>

The second set of comments sought to shift the focus away from the United States: “But why are you just comparing America to Nazi Germany? What about Venezuela . . . or India . . . or Brazil? Don’t these countries do the same thing?”

I understand these comments to be, at one level, an intellectual inquiry, another reference point, a way to contextualize the information they have just heard. However, I am certainly not suggesting that these are the only two nation-states that have targeted certain groups for exploitation, oppression, and destruction. One need only think of Rwanda, Burundi, Cambodia, and Kosovo. Yet, I focus on the United States because it is a country that

259. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995).

260. JAMES W. LOEWEN, *THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE* 59, 96 (1971).

261. See *id.* at 96.

262. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 *NEW LEFT REV.* 95, 117 (May/June 1990).

holds itself out as a beacon for the world, an exemplar of freedom, justice, and equality. At its most basic level, then, I think that the desire to quickly shift focus to other countries expresses an inability to sit quietly for a while with the thought that the United States and an outlaw country known for its cruelty have acted in such similar ways for such a long time. It expresses an inability to reflect for more than a second on what this might say about the United States. One's thoughts would very likely be distressing: Is it possible that dreams of white racial purity and domination are, and have always been, at the heart of the "American dream?" If so, what does that mean about the secret longings of individual, white US citizens: "What does that mean about me?" If, on the other hand, this kind of cruelty takes place in every other country, then perhaps this is simply human nature. Since human nature cannot be changed, then all countries are like Nazi Germany, the United States is not really so bad, and there is nothing that can be done.

Finally, some argued that my comparison is not sound because the underlying facts are erroneous. There have been two factual criticisms. Some argued that people are, indeed, Jewish through "blood" because Jewish identity is carried by the mother: if your mother is a Jew, so are you. My response is that although this may well be the contemporary social rule, it is not a biological rule; and that, in any case, I am not comparing the rules of group membership created by group members themselves, but the identity imposed on group members by their oppressors. In any event, this "rule" simply begs the question of Jewish identity by moving it back one generation: the next question is "how can one tell that *the mother* is a Jew?"

The second argument is that my comparison is not sound because the Nazis killed six million Jews, and the United States has not exterminated African-Americans. My response, of course, is that I am comparing the targeting process here, the process by which each country used its legal system to create and define the group which it would oppress, based on its concept of "racial purity." The exploitation and oppression have taken many similar forms, but different ones too. Who can tell what form that oppression will take next? As Richard Lawrence Miller explains, in his book *Nazi Justiz*, "by definition a 'process' is something that continues."<sup>263</sup>

Miller outlines the steps in the destruction process. It starts with the *identification of the group*, then uses that group identity to *ostracize* the group from community life, through denial of employment, revocation of legal rights, and forced labor. After this comes *confiscation of property*, then *concentrating group members* into specific geographical localities. The next step in the destruction process is *annihilation*, either through *preventing birth* (marriage and birth regulations, contraception, sterilization) or through

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263. MILLER, *supra* note 3, at 3.

"infliction of death"—indirectly, through exposure and starvation or directly, through killing operations.<sup>264</sup>

The last part of the Conclusion will track African-Americans through this process.

This article focuses on the "identification of the group" to be oppressed, the targeting process. This is where Miller starts. The United States used this new group label, "colored," "Negro," "black," to ostracize the group from community life. As one element of "ostracism," one can look at employment discrimination, which ruins the lives of so many African-Americans. One recent study of unemployment in Los Angeles showed that when researchers controlled for level of education, presence of a criminal record, and participation in a job-training program, only 8.6 percent of the white men studied were unemployed, compared to 23.1 percent of similarly situated black men.<sup>265</sup> Intermarriage rates also show the "ostracism" of black Americans from community life. In 1980, the intermarriage rate for Jews was over 50 percent; for Asians, it was 25 percent; for Latino groups, 13 percent. The black-white intermarriage rate, however, was only 2 percent.<sup>266</sup>

"Concentrating group members into specific geographic localities," is the last step before "annihilation." In this country, residential segregation has been imposed on African-Americans in a way that has been imposed on no other group. Segregation of other ethnic groups has been both temporary and less severe. The *highest* isolation index for any ethnic groups other than African-Americans was 56 percent, and that was in 1920 (Italians in Milwaukee), at the height of European immigration.<sup>267</sup> European spatial isolation decreased steadily after that date. By 1970, residential segregation of black Americans was so great that their *lowest* level of segregation anywhere in the country was 56 percent (San Francisco).<sup>268</sup> Little has changed since then.<sup>269</sup>

This segregation is not random. It has been created by a series of individual and institutional acts by white Americans. At the individual level, there have been violence, restrictive covenants, and "blockbusting." At the institutional level, there has been systematic discrimination by the federal government and banks, as well as segregative decisions by city councils, mayors, and elite institutions in urban areas to raze black neighborhoods and replace them with high-density units.<sup>270</sup> This segregation has concentrated the poverty of African-Americans. Then, segregation and poverty

264. *Id.*

265. See Johnson & Farrell, *supra* note 80.

266. See BRODKIN, *supra* note 243, at 74–75.

267. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 33 (1993).

268. See *id.* at 33, 49.

269. See *id.* at 223.

270. See *id.* at 17–57.

have combined “to deliver an exogenous shock to black neighborhoods that pushes them beyond the point where physical decay and disinvestment become self-perpetuating.”<sup>271</sup>

Another way to think about both “ostracism” (revocation of legal rights) and “concentrating group members into specific geographic localities” is to consider the incarceration rate of African-Americans. In 1989, nearly 25 percent of all African-American men between the ages of twenty and twenty-nine, were lost somewhere in the criminal justice system—either in jail, on probation, or on parole.<sup>272</sup> By 1995, that number had increased to almost one in three.<sup>273</sup> The percentage of black women imprisoned increased between 1985 and 1995 by 204 percent.<sup>274</sup> Half of all those in jail today are black.<sup>275</sup> Additionally, because so many states deny the right to vote to prisoners, probationers, parolees, and former felons, in 1998, 13 percent of all black men in the United States could not vote.<sup>276</sup> In Iowa, Mississippi, New Mexico, Virginia, Washington, and Wyoming, that percentage increased to 25 percent.<sup>277</sup> In Alabama and Florida, nearly 33 percent of all black men are permanently disenfranchised.<sup>278</sup>

I am not suggesting that those who commit crimes not be punished. What I am suggesting is that it is not random that so many African-Americans are lost to the criminal justice system. There is no African gene for criminality. Those who kidnapped some 22 million Africans to work in the Americas did not seek out criminals for this work: they wanted farmers, ironsmiths, weavers—men and women with the skills to create farms, villages, and communities. So, it is both astonishing, and cruel, that some 500 years later, this country has criminalized so many of the descendants of these workers. Marc Mauer, director of The Sentencing Project, reminds us that there is racial bias in the state’s decisions as to what acts to criminalize, as well as in its decisions about whom to prosecute and whom to sentence to jail.<sup>279</sup> He is right, but it is more complicated than that, for it is these very

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271. *Id.* at 132.

272. See MAUER, *RACE TO INCARCERATE: THE SENTENCING PROJECT* 124 (1999).

273. See *id.* at 124–25.

274. See *id.* at 125.

275. See *id.* at 118–19. In 1990, only 12.1 percent of the US population was black. See Claudette E. Bennett, *Selected Tables from “The Black Population in the United States: March 1994 and 1993”* (U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census) (visited 13 Aug. 2000) <<http://www.thuban.com/census/index>> (on file with author).

276. See MAUER, *supra* note 272, at 186.

277. See *id.*

278. See Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (The Sentencing Project, Washington D.C., and Human Rights Watch, New York 1998).

279. See MAUER, *supra* note 272, at 118–70. A recent study of minority youth in California shows differential treatment in the criminal justice system at every stage of the process. For example, a comparison of white and black youth charged with the same offense,



decisions to target a group for bad treatment that create “race” in the first place. As Barbara Jeanne Fields explains, “race” does not explain phenomena like this: “*race* is just the name assigned to the phenomenon.”<sup>280</sup> White Americans have been creating “race” for a very long time.

The acts Miller outlines in the destruction process—targeting black Americans, ostracizing them from community life, and segregating them from the rest of society—all circle around and reinforce each other. They create “race” and they create poverty at the same time. Then after a while, the targeted group, African-Americans, begins, in fact, to look “different.” The reality of poverty, ghettos, and jail, compared to the reality of suburbs, prosperity, and freedom, makes “race” seem even more real. As one commentator explains, “[r]ace is not an immanent phenomenon located only in our heads, but an injurious material reality that constantly validates the common knowledge of race.”<sup>281</sup>

Following Miller’s tragic schema, then, for African-Americans, the destruction process is well underway.<sup>282</sup> Recently, President Clinton called for a “conversation on race” in the United States: how can we begin to bridge the “racial divide?”<sup>283</sup> I find his question frightening, for it suggests that he does not know that “race” means “divide.” It suggests that he does not know, or want to know, that the United States, like Nazi Germany, decided to create groups of people called “races” as a way to define certain populations for exploitation—that he, like other US citizens, really does not know that the courts, legislatures, and administrative agencies have expended enormous energy over the past 400 years creating and maintaining a complicated system of racial purity laws precisely so this country could target certain groups for oppression.

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and with no prior admission to jail, showed that black youth were six times more likely to be jailed than white youth. In drug offense cases, so many more black youth were referred from juvenile to adult court than similarly situated white youth and that black youth had a 24 percent “waiver *disadvantage*,” compared to a 24 percent “waiver *advantage*” for white youth. These disadvantages accumulate over time. As a result, black youth are the largest proportion of any racial or ethnic group that is locked up. Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* 1–3 (Youth Law Center, Washington D.C., April 2000).

280. Fields, *supra* note 262, at 100.

281. LOPEZ, *supra* note 28, at 133.

282. For Native Americans, of course, the destruction process is pretty much over. Since Europeans arrived on this continent, their population has been reduced by 98 percent. Before the arrival of Europeans, there were approximately 14 million Native Americans in what are now the United States and Canada; by 1880, that number was reduced to 250,000. See JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* 74 (1995). See also WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 1492 TO THE PRESENT* (1997).

283. William Powers, *Oh My!*, *NEW REPUBLIC*, 11 & 18 Aug. 1997,

The words and analyses are now such a familiar part of US vocabulary and thought processes that people do not even think about what they are reading or hearing or saying. The sports section in a newspaper mentions a “full-blooded Native American” golf player; the book review section describes a “mulatto artist who is systematically butchering blacks.”<sup>284</sup> People read that President Clinton’s favorite writer, “the son of a Jewish mother and an African-American father,” is a “black mystery writer.”<sup>285</sup> We do not even blink because we all know the enduring rule of racial purity in this country: one can only be “white” if both parents are white.

Thus, the language and underlying concepts of “race” endure—“mulism,” blood quantum, and the importance of protecting the purity of white blood. They are firmly embedded in our language and in our minds, where they order the universe and the way we understand our place within it, where they show us how we should think about ourselves, and how we should treat others in our everyday acts. And what is so stunning is that the government has done such a good job that “race” seems normal, seems natural, seems . . . well, biological, and no one ever thinks that the state had anything to do with it. No one even knows that the state has used the concept of “race” as a way to create a target.

Miller says that once a state “targets a group of ordinary people for exclusion from everyday life,” the destruction process is underway.<sup>286</sup> He also says that the annihilation that took place in the Third Reich could take place “in any country holding the values of Western civilization. Not only could happen, but *will* happen” if that state does not have the will to abandon the process.<sup>287</sup> This article has shown that the United States has targeted African-Americans in the same way that Nazi Germany targeted Jews. Unfortunately, it has not been able to show that the United States has the will to abandon the destruction process now underway.

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284. Harry Blauvelt, *Begay: New Face of Golf*, USA Today, 6 Jan. 2000, at 1C (“full-blooded Native American”); Larry Muhammad, *Duplicity, Originality and Questions of Race Leaven “Cookie Cutter,”* USA Today, 6 Jan. 2000, at 6D (“mulatto . . . butchering blacks”).

In an astonishing blend of twentieth century technology and racist delusion, the federal government recently solicited bids for the creation of a “customizable commercial off-the-shelf tribal enrollment data management system” which will produce “automated blood calculations”—software which will provide tribal identification through an “auto-reducing fractional display of blood quantum.” “Customizable Commercial Off-The-Shelf Tribal Enrollment Data Management System,” U.S. Department of the Interior, Albuquerque, NM (Solicitation No.: SOL K00992300051). Commerce Business Daily, 16 Feb. 1999 (page unavailable online) (on file with author). My thanks to Paul Prasarn, University of Buffalo Law School Class of 2000 for this reference.

285. Felicia R. Lee, *Bracing Views From a Man of Mysteries*, N.Y. TIMES, 20 Mar. 2000, at E1.

286. MILLER, *supra* note 3, at 9.

287. *Id.* at 3–4.