Introduction

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In recent years, the conspicuous advance of globalization has inspired many historians to rethink the past in cross-national and comparative terms.[1] Frustration with the limits of traditional, national approaches to history has spawned interesting comparative work in such fields as women's history,[2] labor history,[3]

1. For definitions of these methodological terms, see Deborah Cohen and Maura O'Connor, *Comparison and History: Europe in Cross-National Perspective* (New York: Routledge, 2004), ix–xxiv. For evidence that "[r]ecent discussions of 'globalization'" have prompted historians to transcend traditional national approaches to history, see Thomas Bender, ed., *Rethinking American History in a Global Age* (Berkeley: University of California Press, 2002); and Organization of American Historians, "The LaPietra Report: A Report to the Profession" (2000), available at http://www.oah.org/activities/ąlapietra/index.html.

2. For some examples of cross-national, comparative scholarship from the field of women's and gender history, see Susan R. Grayzel, "Fighting for their Rights: A Comparative Perspective on Twentieth-Century Women's Movements in Australia, Great Britain, and the United States," *Journal of Women's History* 11 (1999): 210–18; Ulla Wikander, Alice Kessler Harris, and Jane Lewis, eds., *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880–1920* (Urbana: University of Illinois Press, 1995); Mary Jo Maynes, *Gender, Kinship, Power: A Comparative and Interdisciplinary History* (New York: Routledge, 1996); and "Mother India/Mother Ireland: Comparative Gendered Dialogues of Colonialism and Nationalism in the Early 20th Century," *Women's Studies International Forum* 25 (2002): 301–13.

3. See James Bennett, "Reflections on Writing Comparative and Transnational Labour History," *History Compass* 7 (2009): 376–94; James E. Cronin, "Neither Exceptional Nor Peculiar: Towards the Comparative Study of Labor in Advanced Society," *International Review of Social History* 38 (1993): 59–75; John Breuilly, "Comparative Labour History," *Labour History Review* 55 (1990): 6–9; Stefan Berger and Greg Patmore,

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economic history,[4] and imperial history.[5] Although legal history tends to be somewhat parochial by tradition, it, too, has taken a cross-national and comparative turn.[6]

The present forum continues this fruitful trend by exploring the legal history of racial categorization in three different national contexts: the Jim Crow South, British colonial Africa, and Nazi Germany. The forum aims both to advance historical understanding of race and the law in these three areas and to illustrate the benefits of cross-national comparison as a way of studying legal history.

All three articles in this forum concern the first half of the twentieth century, a heyday of institutionalized racism. During these years, imperialism, "scientific" racism, and bureaucratic modernization combined to produce new laws—and strengthen old ones—that sorted people into racial categories. Legal institutions enforced these laws and resolved disputes that arose under them. Among such disputes were "racial determination" cases brought by people who challenged their categorization. All three articles discuss cases of this sort. Together, the articles illuminate similarities and differences among the three jurisdictions. They also invite additional studies of race and the law in other places and times.

"Comparative Labour History in Britain and Australia," *Labour History* 88 (2005): 9–24; and Gregory S. Kealey and Greg Patmore, "Comparative Labour History: Australia and Canada," *Labour History* 71 (1996): 1–15.

4. See Timothy J. Hatton, Kevin H. O'Rourke, and Alan M. Taylor, eds., *The New Comparative Economic History: Essays in Honor of Jeffrey G. Williamson* (Cambridge: MIT Press, 2007); Daniel Little, "Eurasian Historical Comparisons: Conceptual Issues in Comparative Historical Inquiry," *Social Science History* 32 (2008): 235–61; R. Bin Wong, "Early Modern Economic History in the Long Run," *Science & Society* 68 (2004): 80–89; Stanley Trapido and Gavin Williams, "South Africa in a Comparative Study of Industrialization," *Historia* 53 (2008): 10–23; Mira Wilkins, "Chandler and Global Business History," *Business History Review* 82 (2008): 251–66; and Rondo Cameron, "Comparative Economic History," *Research in Economic History* (1997, supplement 1): 287–305.

5. See Matthew S. Seligmann, "German and British Imperialism in Comparative Perspective," *German History* 20 (2002): 225–28; Benno Gammerl, "Subjects, Citizens and Others: The Handling of Ethnic Differences in the British and the Habsburg Empires," *European Review of History* 16 (2009): 523–49; Charles S. Maier, *Among Empires: American Ascendancy and Its Predecessors* (Cambridge: Harvard University Press, 2006); Alexander Keese, *Living with Ambiguity: Integrating an African Elite in French and Portuguese Africa, 1930–1961* (Stuttgart: Franz Steiner Verlag, 2007); and Robert Gregg, *Inside Out, Outside In: Essays in Comparative History* (New York: St. Martin's, 2000).

6. For example, the European Society for Comparative Legal History was founded in 2009. See also the *Journal of Legal History*'s special issue on comparative legal history in August of 2004 (vol. 25, no. 2).

The three articles share many themes. First, they all demonstrate how contested "race" was as a legal category, notwithstanding the day's scientific pretentions. None of the racial laws described in the forum, no matter how precisely drawn, managed to end debate about how to categorize "mixed-race" people. On paper, racial classifications typically emphasized such seemingly measurable factors the race of one's ancestors. These factors, however, proved difficult to apply in practice. Moreover, legal officials in all three contexts made room for less formal factors, including community reputation, "racial instinct," physical appearance, and cultural habit. Such considerations did little to clarify the law. They do, however, suggest the extent to which race continued to be legally as well as socially constructed throughout the period.

A second theme shared by the three articles is the relationship between racial classification and modern state building. Legally enforced racial hierarchy was fundamental to the ruling systems in all three areas. Legislatures constructed elaborate systems of racial separation, the administration of which resulted in enhanced governmental powers. In the Jim Crow South, "separate but equal" laws not only multiplied public facilities—such as schools—but also enhanced the powers of the public officials who administered these laws. In British colonial Africa, a racially discriminatory legal regime, although masked by such colonial euphemisms as "native" and "non-native" and the purported application of local African customary law, was fundamental to colonial state formation. In Nazi Germany, the need to enforce racial laws and resolve racial disputes empowered such governmental bodies as the Reich Agency for Kinship Research. Everywhere, the administration of racial laws prompted power struggles among different branches of government and led to the enhancement of government power generally.

Third, the articles all highlight the historical agency of non-elite litigants. In all three jurisdictions, mixed-raced plaintiffs turned the gears of legal history by challenging their racial designations as members of subordinate groups (black, "native," Jew), and by seeking membership in privileged groups (white, non-native, German). Although these litigants did not always win their cases, their efforts prompted legal responses. Occasionally, they spurred legal revisions. These mixed-race litigants, however, were hardly civil rights crusaders. They attacked neither racial separation nor racial hierarchy. Their goal was something less noble: to be re-categorized as members of the dominant race. Whether successful or not, their efforts confirm that real power remained in the hands of the racially privileged legal elites who decided their lawsuits.

Fourth, in all three jurisdictions, no matter how oppressive the political systems were, legal systems continued to operate—with contradictory

results. Everywhere, the legal process provided at least some members of subordinate groups with opportunities to improve their circumstances. The resulting cases may have undermined the credibility of racial categories somewhat, by exposing their uncertainty. On the whole, however, the legal process appears to have bolstered racist systems by stamping them with the imprimatur of legal regularity. It is depressing but instructive to observe how compatible legal elites considered the rule of law and institutionalized racism to be.

The forum's cross-national comparisons reveal differences, as well as similarities. Although legalized racial distinctions were oppressive everywhere, the degree of oppressiveness differed substantially. In British colonial Africa, "native" status ostensibly brought at least some benefits. British imperial law putatively sought to protect native Africans from economic exploitation at the hands of white colonists. In Nazi Germany, in contrast, legal designation as a Jew brought only legal disabilities, up to and including extermination. For many Nazi-era Germans of alleged Jewish descent, racial categorization was literally a matter of life or death. The Jim Crow South appears to have occupied an intermediate position on this spectrum.

The vastly different social contexts considered in the three articles affected the local operation of racial determination law. In rural South Carolina, for example, race was determined largely by community reputation. Legal elites in Columbia, the state capital, placed great stock in the face-to-face perceptions of agrarian neighbors. In urbanized Nazi-era Upper Bavaria, in contrast, racial classification was extraordinarily bureaucratic and centralized. Principal responsibility for racial determination fell not to neighbors, but to public functionaries and scientifically trained experts. Nazi-German courts often forced litigants and their relatives to undergo "racial examinations" at the hands of university-based anthropological institutes, racial biology "experts," and the Berlin-based Reich Kinship Office.

The legal systems themselves also varied. South Carolina was a common law jurisdiction. Its appellate courts possessed extraordinary power to make law. Judges in Nazi Germany, a civil law system, technically lacked law-making power, although, as Thomas Pegelow Kaplan argues later in this forum, they enjoyed more discretionary authority than scholars typically assume. Of the forum's three jurisdictions, British colonial Africa was home to the most open and robust debates about racial definitions, a reflection of the diversity that existed within the African portion of the British Empire, which stretched from South Africa to Egypt and from Ghana to Kenya. As Christopher Lee argues, imperial officials in London declined to impose uniform racial determination rules throughout their African holdings. Accustomed to administering a far-flung, diverse

empire, these officials were more accommodating to local legal differences than were their counterparts in Columbia or Berlin.

Race has long functioned as a category of modern identity, and law has long been a domain within which the meaning of race has been contested. As this forum shows, legalized racism had both conceptual and material consequences. Racial categories shaped the way people viewed the world and affected the sorts of lives they could live. Although the worst excesses of legalized racism may have passed into history, that history must be remembered, for its legacies linger.