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# TRANSFORMATIVE JUSTICE AND THE ETHOS OF NUREMBERG

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## I. INTRODUCTION

Ideally, every case has an impact beyond its immediate parties and controversy. Courts will often craft doctrines or holdings to reach beyond the confines of a given case. Such extrinsic values are often expressed by courts in terms of deterrence and bright-line rules referring to the intended impact on future cases or conduct. The role of dicta is often to speak to such extrinsic issues, to speak to the future. Occasionally, a case will have the rare confluence of timing, facts, and issues to have a pronounced effect on society.<sup>1</sup> Some cases are so influential that their names become synonymous with legal rights, such as *Miranda*.<sup>2</sup> Other cases become the symbols of the turmoil of the times, such as the Red Scare and the Rosenbergs,<sup>3</sup>

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1. Many of these trials are discussed in a study by the Author which explores the role of trials in society as well as the intrinsic and extrinsic elements that appear to elevate certain trials to national and international significance. See Jonathan Turley, *Trials and Social Discourse: The Social and Legal Role of Great Trials in the Twentieth Century* (manuscript) [hereinafter *Trials and Social Discourse*]; see also Jonathan Turley, *The Trial Attorney of the Century*, LEGAL TIMES, Nov. 29, 1999, at 50 [hereinafter *The Trial Attorney of the Century*] (discussing study as the basis for selecting the four greatest trial attorneys of the century, including the status of Clarence Darrow as the greatest trial attorney); Jonathan Turley, *The Trial of the Century*, LEGAL TIMES, Sept. 27, 1999, at 27 [hereinafter *The Trial of the Century*] (discussing study as the basis for selecting Nuremberg as the century's greatest trial as well as other top contenders).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring a full and effective warning of a defendant's constitutional rights).

3. The trial of the Rosenbergs illustrates the confluence of prejudices and fears that can come into play in a case. The Rosenbergs can also be cited as a

anti-Semitism and the Frank case,<sup>4</sup> or racism and the Scottsboro defendants.<sup>5</sup> They form an American mosaic; a collection of great trials that recorded the progress of a nation grappling with a century of social, economic, and political change.<sup>6</sup>

More than any other nation on Earth, the United States has been shaped by trials and their characters.<sup>7</sup> These trials educated, shocked, inspired, angered, and fascinated a nation. Trials can become forums for political or social conflicts left unaddressed in the political system.<sup>8</sup> Each of these trials contributed to the evolution of a society that began this century as a largely regionalized nation with little knowledge of the legal system. Some trials forced sudden confrontations and debates across the country as with the trials of Leo Frank<sup>9</sup> and the Hollywood Ten.<sup>10</sup> More often, changes were gradual and almost imperceptible. As high-profile trials became part of the regular diet for news events, citizens became more familiar with the workings and rituals of the legal system. By the end of the century, legal phrases would become part of everyday language while television would produce an army of ardent court watchers and armchair litigators.<sup>11</sup>

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case fueled by anti-Semitism in both the public and government. *See generally Trials and Social Discourse*, *supra* note 1 (exploring the legal and social influence of great trials in the twentieth century).

4. *See Trials and Social Discourse*, *supra* note 1.

5. *See infra* note 12 and accompanying text.

6. *See generally Trials and Social Discourse*, *supra* note 1.

7. *See id.*

8. Race issues are a good example of how the courts become the forum for the debate over segregation and racism in the absence of a political response. Where the state and federal legislatures proved reluctant or hostile in dealing with race issues, the federal judiciary articulated the basis for a change in civil rights law and doctrine. *See generally* WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996) (discussing the ways in which civil rights issues were worked out in the courts, rather than through the legislative process).

9. *See The Trial of the Century*, *supra* note 1; *see also The Trial Attorney of the Century*, *supra* note 1; *Trials and Social Discourse*, *supra* note 1.

10. *See The Trial of the Century*, *supra* note 1; *see also The Trial Attorney of the Century*, *supra* note 1; *Trials and Social Discourse*, *supra* note 1.

11. There has always been a strong interest among free people in the adjudication of legal disputes. This interest, however, was given a powerful technological catalyst in this century. With the advent of television, the concept of a "public trial" became far more personal and immediate for Americans.

In a century transformed in part by great trials, the task of identifying the “trial of the century” is daunting. This task is certainly made easier by the operative noun of this Symposium: “trial.” Had this Symposium asked for the “case of the century,” the task of selection would be virtually impossible to accomplish on any objective basis. Identifying the trial of the century focuses the analysis on actual trials and their inherent significance as opposed to their precedent or ultimate outcome on appeal. It is a meaningful distinction because trials often have a greater impact on average citizens than the arcane lessons of cases. It is the trial that can crystallize a concept or a right in the minds of the public with parties personifying particular symbols or values. In this way, the struggles that take place in the courtroom serve to transform abstractions into concrete terms and faces.<sup>12</sup>

The greatest trials can capture or even transform the views or prejudices of a period. Sometimes this is simply due to timing. A particular issue may be litigated repeatedly in various unknown venues and suddenly capture the attention of a nation or even the world.<sup>13</sup> Sometimes this is due to the litigants or the lawyers who bring an element of fame or infamy to a case.<sup>14</sup> Most often,

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Where a trial like the Thaw murder was followed closely through print media, television would allow an almost addictive real-time option for citizens. At first blush, this technological advantage would appear to elevate more modern cases over the earliest trials. In reality, however, it appears that the saturation of the media with trials has actually made it more difficult for trials to become distinguished to the extent of prior “great” trials. See *Trials and Social Discourse*, *supra* note 1. While the educational benefits of televised trials are often understated, television also tended to blur the line between entertainment and adjudication. Starting with the Lindbergh case, the public could switch from television dramas to actual trial dramas with increasing ease so that, by the time of the Simpson case, real trials appeared produced for public consumption.

12. See *The Trial of the Century*, *supra* note 1.

13. Such was the case with the Scottsboro defendants. See *id.* The trial of African-Americans in an atmosphere of racism based on questionable evidence was nothing new for the African-American community. Scottsboro, however, contained the right elements to raise the case to the national level and ultimately drew such renowned lawyers as Samuel S. Leibowitz to the defense. See *id.*

14. Such was certainly the case with lawyers like Clarence Darrow who brought international attention to many trials, particularly the Scopes trial. See *The Trial Attorney of the Century*, *supra* note 1.

however, it is due to the evolution of a society. Yet, this does not mean that society is always ready to change. The process of confronting prejudice or ignorance is often difficult and even violent.<sup>15</sup> Legal change often comes in a fracturing of the status quo; a convulsive response to a long-standing social or legal norm. In fact, a great trial may technically be a defeat, such as in the case of the Scopes trial,<sup>16</sup> but in reality triumph by planting a seed in the minds of millions. Where a concept like creationism was viewed as inviolate, a trial can suggest that there is an alternative view—an alternative reality.

Over the course of this century, an impressive number of cases have been given the title of “great” trials or “trial of the century.”<sup>17</sup> Despite such strong contenders as the Scopes trial and Leopold and Loeb, this Article will suggest that the trials at Nuremberg can lay the best claim to this title.<sup>18</sup> Nuremberg can be easily viewed as an American proceeding due to its heavy reliance on American prosecutors and trial process rules.<sup>19</sup> It is a trial that possessed all of the

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15. Many of the trials discussed in the article were attended by violent outbursts from the public, including the lynching of Leo Frank. *See Trials and Social Discourse*, *supra* note 1. To their considerable credit, attorneys like Clarence Darrow and Samuel Leibowitz often required physical protection from attack yet continued to press their cases with zealous commitment to their clients. *See The Trial Attorney of the Century*, *supra* note 1.

16. *See The Trial of the Century*, *supra* note 1.

17. *See generally Trials and Social Discourse*, *supra* note 1.

18. Nuremberg was obviously composed of various trials. After the first Nuremberg trial, the Allied Control Council decided to allow each nation to try war criminals in their own sector under Law No. 10. *See Richard May & Marieke Wierda, Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 731 (1999). American judges sat in judgment of 177 defendants in twelve trials in two and a half years. *See id.* However, Nuremberg is often referred to in the singular due to its symbolic role in the trial of war criminals. This Article will also refer to Nuremberg in this way.

19. In fact, twelve of the trials were entirely American proceedings conducted in the American Sector of Germany. *See id.* Professor Bush has noted that this American accent also had a certain East Coast, classist twang: “Many of the framers of Nuremberg and its American participants were from a largely closed elite of East Coast lawyers. . . . [At a time when] WASP lawyers and bankers served the public weal and the Pax Americana before returning to Wall Street, and where a bright able lawyer might, over the course of a career, work on matters involving almost all the leaders of the national legal and policy communities.” Jonathan A. Bush, *Nuremberg: The Modern Law of War*

elements of a great trial from the quality of its argument to its significance in the development of international law and values. In order to achieve justice at Nuremberg, however, the world had to break context and transcend the pain and trauma of the war.<sup>20</sup> Accomplishing this feat at Nuremberg represents one of the great achievements of modern law. Though composed of many trials, Nuremberg became synonymous with the very notion of international justice. Nuremberg prosecutor Telford Taylor once observed that “‘Nuremberg’ is both what actually happened there and what people think happened, and the second is more important than the first. . . . [I]t is not the bare record but the ethos of Nuremberg with which we must reckon today.”<sup>21</sup>

Regrettably, Nuremberg remains a trial from our time. From Rwanda to Bosnia to Kosovo, war criminals continue to plague a world already burdened by a long history of atrocities. If Nuremberg is not an absolute deterrent for world criminals, however, it remains an assurance for world citizens of the transcendence of law. It is not a symbol of the potential of war criminals but a symbol of our own potential for justice. Ultimately, it was justice on trial in Nuremberg and justice that prevailed in the trial of the century.

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*and its Limitations*, 93 COLUM. L. REV. 2022, 2056 (1993) (reviewing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992)).

20. This requirement was made plain in the trial of Eichmann before an Israeli court. Attorney General of Israel v. Eichmann, 36 I.L.R. 5, 8-9 (1961). Ben-Gurion, however, took a broader view of the trial as part of a historical continuum of persecution of Jews. See David Ben-Gurion, *The Eichmann Case as Seen by Ben-Gurion*, N.Y. TIMES, Dec. 18, 1960, at 7. By bringing Eichmann “to the Jewish state to face Jewish justice,” Ben-Gurion hoped “[to] create a sense of empowerment and healing.” Pinina Lahav, *The Eichmann Trial, The Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555, 559 (1992); see Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT’L & COMP. L.J. 199, 307 (1997); see also HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 276 (1963) (describing the judges task upon being confronted by Eichmann).

21. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 13-14 (1970) [hereinafter *NUREMBERG AND VIETNAM*]; see also Richard Falk, *Telford Taylor and the Legacy of Nuremberg*, 37 COLUM. J. TRANSNAT’L L. 693 (1999) (suggesting that the main legacy of Nuremberg can be seen in the application of laws of war to both the vanquished and the victorious).

## II. NUREMBERG AS THE TRIAL OF THE CENTURY

The new millennium has increased interest in reviewing the trials and litigators of the century.<sup>22</sup> At first blush, the task of isolating the trial of the century appears too subjective and too arbitrary for any meaningful academic judgment. Even a cursory list of famous trials yields dozens of possible claimants.<sup>23</sup> Each of these choices has a claim to the title of the trial of the century based on notoriety or significance. This initial list can be winnowed down through a series of negative criteria, particularly to eliminate trials known primarily for their sensational facts without creating any lasting legal legacy.<sup>24</sup> These eliminations leave seven cases for consideration: the trial of Leopold and Loeb,<sup>25</sup> the Scopes trial,<sup>26</sup> the Lindbergh trial,<sup>27</sup> the Nuremberg trial,<sup>28</sup> the Calley trial,<sup>29</sup> the O.J. Simpson trial,<sup>30</sup> and the

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22. See *The Trial of the Century*, *supra* note 1; *The Trial Attorney of the Century*, *supra* note 1.

23. See *Trials and Social Discourse*, *supra* note 1.

24. See *id.*; *The Trial of the Century*, *supra* note 1, at 27.

25. The 1924 trial of Nathan Leopold and Richard Loeb for the "thrill-killing" of fourteen-year-old Bobby Franks shocked a nation. Motivated by self-delusions to commit their crimes, as if they were Nietzschean Supermen, the two defendants raised issues of insanity and the death penalty to a national level under the counsel of Clarence Darrow. See *Trials and Social Discourse*, *supra* note 1.

26. The 1925 trial of John Thomas Scopes for teaching the principles of evolution placed two of the greatest advocates, Clarence Darrow and William Jennings Bryan, into a courtroom drama that attracted international attention. The trial itself had tremendous impact at the time as the public debated the quintessential issue of science and religion as well as entanglement issues. See *id.*

27. The 1935 trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindbergh, Jr. was an international sensation. While the trial was inundated with abusive tactics and unfair rulings, it was the first criminal proceeding witnessed nationally through film. See *id.*

28. See *The Trial of the Century*, *supra* note 1.

29. The 1970 court-martial of Lieutenant William Calley for his role in the My Lai massacre placed the Vietnam War and questions of personal responsibility for war crimes into sharp relief. The trial became a critical forum for defining the rules of engagement for field combat officers and personnel. See *Trials and Social Discourse*, *supra* note 1.

30. The 1996 trial of movie actor and sports hero O.J. Simpson set new records for television viewership. Accused of the gruesome murder of his ex-wife and her friend, Simpson's trial saw a skillful defense pitted against compelling DNA evidence. This trial could have been truly historic in terms of

Clinton impeachment.<sup>31</sup> Ultimately, three positive criteria can be applied to isolate the greatest trials from among the great trials of this century: (1) the quality of trial advocacy; (2) the significance of the trial itself through the introduction of new trial techniques and arguments; and (3) the transformative value of the trial. The Scopes trial and the Leopold and Loeb trial come closest in all three categories to the title of trial of the century.<sup>32</sup> One case, however, stands out as both legally and historically unique—Nuremberg.

The position of Nuremberg at the top of each of the three categories used to select the trial of the century was far from preordained. After World War II the Allies could have easily held a perfunctory version of a “drum-head” trial and simply executed German officials. This is precisely what Stalin wanted and neither Churchill nor Roosevelt objected vociferously to the notion.<sup>33</sup> While Stalin wanted 50,000 Germans summarily executed,<sup>34</sup> Churchill simply

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trial advocacy but for the poor performance and tactics of the prosecution. *See id.*

31. The Clinton impeachment and Senate trial became a national debate over the meaning and purpose of impeachment in the Constitution. *See, e.g.,* Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999); Jonathan Turley, *The Executive Function Theory, The Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment As a Madison Device*, 49 DUKE L.J. 1 (1999). Millions of citizens watched or participated in a debate over the basis for the removal of a president. The House and Senate proceedings saw extremely high levels of advocacy on both sides. *See id.*

32. *See The Trial of the Century, supra* note 1.

33. *See* Michael P. Scharf, *Have We Really Learned the Lessons of Nuremberg?*, 149 MIL. L. REV. 65, 65 n.2 (1995) (stating that Churchill favored executions for the most prominent German war criminals, and that Roosevelt was noncommittal on the issue of executions).

34. Stalin continued to press this demand, as with this notable toast at the Tehran Conference:

[F]ollowing a banquet attended by Roosevelt and Churchill, the Soviet dictator proposed a toast, stating, “I drink to the quickest possible justice for all German war criminals. I drink to the justice of a firing squad.” When Churchill objected, Stalin again raised his glass and proclaimed, “Fifty thousand must be shot.”

Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT’L L. 57, 62 n.22 (1995) (citing JOE J. HEYDECKER & JOHANNES LEEB, *THE NUREMBERG TRIAL*



differed on the number of executions, not on the manner of their adjudication.<sup>35</sup> History is replete with such examples of "victor's justice."<sup>36</sup> With the pictures of the concentration camps flooding into the world's view and millions of deaths due to Nazi aggression, it would certainly have been understandable if the world community surrendered to an impulse for immediate retribution through executions or a simple "Show Trial."<sup>37</sup>

Thus, the most extraordinary aspect of Nuremberg was that a world savaged by the unspeakable crimes of the Nazi regime was able to check such impulses in what may be the ultimate triumph of principle over passion. Associate Justice Robert H. Jackson, chief prosecutor at Nuremberg, put it best when he observed, "[t]hat four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."<sup>38</sup> Rather than resemble the war

77-78 (R.A. Downie trans., 1962)).

35. See Scharf, *supra* note 33, at 65 n.2 (noting that Churchill did not oppose execution but only the size of Stalin's demand to execute 50,000 German General Staff Officers); see also Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 210 (1998) (quoting former Nuremberg prosecutor who noted that "[r]ather than try [Axis] leaders in a long judicial proceeding, the British . . . felt that 'execution without trial is the preferable course'").

36. See generally Timothy L. H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 717 (1997) (discussing the historical development of international criminal justice).

37. After the commencement of the trial, it became clear to the defendants for the first time that they could expect both the full process and penalties of a war crimes trial.

With the presentation of the case and the opening of proceedings the hopes even of those who had thought that the IMT would be a farce and that the trial would be quickly over were gone. Göring, for instance, had initially maintained that the worst would not happen to any of them, but he now reckoned that he would probably be hanged, though he secretly harboured the hope that the Allies would be unable to agree among themselves.

WERNER MASER, NUREMBERG: A NATION ON TRIAL 91 (Richard Berry trans., 1979) (1977).

38. Prosecutor Justice Robert H. Jackson's Address to International Military Tribunal (Nov. 21, 1945), in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98, 99 (1947).

criminals that they sought to punish, the world insisted on reinforcing the core values that the Germans denied in their own courts and government.<sup>39</sup> As Jackson stated to the Court:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.<sup>40</sup>

It was the absence of legal process that facilitated the ultimate mutation of German society. It would now be legal process that would excise that mutation.

Nuremberg's lasting impact on both the conduct of nations and the consciousness of individual citizens distinguishes this trial from any other criminal adjudication.<sup>41</sup> This was due in part to the prosecution of high-level officials who authorized war crimes. The most well-known Nuremberg trial involved the highest ranking German figure captured after the war, Hermann Göring.<sup>42</sup> Göring was technically the second-highest ranking official in the Nazi regime, though this position was questionable towards the end of the war given

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39. The conflict in values was never more obvious than the trial of Nazi judges who carried out atrocities under the guise of legal process. See Lippman, *supra* note 20, at 199. These judges were tried for such acts as carrying out the 1941 "*Nacht und Nebel* (Night and Fog) Decree" under which thousands were killed or imprisoned. See AMNESTY INTERNATIONAL USA, DISAPPEARANCES: A WORKBOOK 2 (1981) [hereinafter AMNESTY INT'L USA]. Hitler personally oversaw the creation of this law and, in a letter to Nuremberg Defendant Keitel stressed that "[e]ffective intimidation . . . can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know his fate." *Id.* Ultimately, the judges were convicted for their widespread use of the death penalty, a position that once again raised questions of hypocrisy for both Russia and the United States. See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 38, at 275-76.

40. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 38, at 101.

41. Following World War I, efforts to apply international law to war crimes had been discussed but never fully implemented. See Ferencz, *supra* note 35, at 206-08.

42. See *infra* note 43.

Hitler's final orders changing his successor.<sup>43</sup> Nevertheless, Göring was the most famous Nazi leader living at the end of the war, and his co-defendants were some of the most recognizable faces of the Nazi regime. They represented the broad spectrum of Nazi leaders, bureaucrats, and field commanders that maintained the German war effort and committed war crimes.<sup>44</sup> While later trials would focus on

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43. As a Field Marshall, Göring was the head of the Luftwaffe. He would later become Chairman of the Reich Counsel for National Defense. Hitler had designated Göring as his successor, a decision later reversed in the final days of the regime. Göring had fallen out of favor in the final days of the regime when he pressed the question of his succession on Hitler. Believing that Hitler no longer possessed the freedom of action to lead the country, Göring telegraphed Hitler for approval to assume control as his successor. If Hitler did not respond, Göring would conclude that "the Führer has been deprived of his freedom of action to conduct the affairs of the Reich . . . [and] I am heir to all his offices as his deputy." MASER, *supra* note 37, at 44. Hitler responded by ordering Göring's immediate arrest and expulsion from the Nazi party. Hitler ultimately handed over command of the German forces to Admiral Doenitz. *See id.* at 153.

44. In addition to Göring, the defendants included: Martin Bormann (tried in absentia), head of the Party Chancellery; Karl Doenitz, Commander in Chief of the German Navy; Hans Frank, Reich Minister of Justice and later Governor-General of Poland; Wilhelm Frick, one of the original members of the "Beer Hall Putsch" who later served as Minister of the Interior as well as Protector of Bohemia and Moravia; Hans Fritzsche, head of the German radio News Service and a high official in the Ministry of Propaganda; Rudolf Hess, Reich Vice-Chancellor until his capture in England while attempting a secret meeting with the British Leadership; Alfred Jodl, Major-General and Chief of the Operations Staff of the Wehrmacht; Ernst Kaltenbrunner, former Austrian Minister for State Security and RSHA head with control of the Gestapo and the SS; Wilhelm Keitel, Field Marshall and Chief of Staff of the High Command; Constantin von Neurath, Hitler's first Foreign Minister who later served as Protector of Bohemia and Moravia; Franz von Papen, former Chancellor of Germany who later held ambassadorial positions during the Nazi regime; Erich Raeder, Grand-Admiral and Commander in Chief of the Navy; Joachim von Ribbentrop, Hitler's Foreign Minister; Alfred Rosenberg, head of the Nazi party Foreign Affairs Department and Minister of the Occupied Eastern Territories; Fritz Sauckel, Thuringian Minister of the Interior and head of labor mobilization; Hjalmar Schacht, President of the Reichsbank as well as Minister of Economics and Head of the War Economy; Baldur von Schirach, Nazi Youth Leader and later Governor of Vienna; Arthur Seyss-Inquart, Austrian Minister of the Interior, Austrian Chancellor and after annexation, Reich Commissioner of Austria; Albert Speer, Nazi Armaments Minister; and Julius Streicher, leading anti-Semitic publisher and propagandist. *See id.* at 78. A final defendant, Robert Ley who oversaw the use of slave labor and extermination efforts, hung himself in his cell in October 1945. *See id.* at 71-72.

judicial figures or other functional categories, the first Nuremberg proceeding placed the entire regime on trial with the ranking representatives of its various military and civilian components.<sup>45</sup> No lawyers in history have faced a trial with so many unknown elements. The only certainty in Nuremberg<sup>46</sup> was that history would be made.

### A. *Quality of Trial Advocacy*

In terms of trial advocacy and practice, the Nuremberg trials saw highly capable prosecutors, such as Robert Jackson,<sup>47</sup> and defense counsel, such as Otto Kranzbuehler,<sup>48</sup> struggle with this unprecedented legal forum. For the prosecution, the greatest challenge was to build a case primarily from documentary evidence, resulting in the

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45. A few of the defendants were anomalies, particularly people like Hans Fritzsche, who was added to the case under tremendous pressure from the Russians. See Bush, *supra* note 19, at 2047 (noting that "Hans Fritzsche was named because his boss, Joseph Goebbels, was dead, even though Fritzsche was a relatively unimportant Nazi propagandist [and] prosecutors . . . deemed it important that at least some of the defendants be persons whom the French and Russians had apprehended, and Fritzsche was one of only two defendants captured by the Soviets").

46. It has been suggested that the verdict in the first trial was all but certain. This is often cited as proof that it was a show trial despite the fact that the evidence of atrocities was easily sufficient to support the death sentences. In fact, the Nazis themselves believed that the incredible nature of their atrocities would make it all but impossible to prove through eyewitness testimony. See Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449, 451 (1995). Several of the defendants at Nuremberg were therefore shattered when they were shown a film of the death camps they helped create and maintain. See *id.* at 455-56. Until the showing of the film, Göring was actually given to joking and teasing in court but later complained that "they [then] showed that awful film, and it just spoiled everything." TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 187 (1992).

47. See Bush, *supra* note 19, at 2052 (stating that "[m]ore than any other single person, Nuremberg is the glory of Robert Jackson").

48. Kranzbuehler, a Judge Naval Advocate, was the highly respected counsel for Admiral Doenitz. See TAYLOR, *supra* note 46, at 266; see also MASER, *supra* note 37, at 153. The defendants themselves selected attorneys from a long list of options. The list included a number of the most respected German lawyers and leaders of the German Bar. See Henry T. King, Jr., *The Nuremberg Context from the Eyes of a Participant*, 149 MIL. L. REV. 37, 44 (1995). One of these lawyers, Friedrich Bergold, was famous for his defense of Jehovah's Witnesses during the Nazi regime. See *id.*; see also MASER, *supra* note 37, at 73 (stating that Bergold represented Borman in absentia).

most extensive use of such evidence in history. The prosecution had to navigate the countless issues that arose in the establishment of rules and procedures of this new world forum.<sup>49</sup>

Procedurally and logistically, the Nuremberg trial . . . presented unparalleled difficulties. . . . Trial proceedings had to be conducted simultaneously in four languages . . . and Jackson ultimately located a simultaneous translation system that the young, innovative IBM had produced. . . . Procuring witnesses from all over Europe and sifting through the mountain of captured German documents—a full twelve-year record of a modern state in action—were challenges of Herculean proportion. Most of all, there was the complexity of the facts themselves. Indeed, in an age when routine American trials, criminal or civil, often take months or years, we can look back with admiration on a prosecution team that was able to present in four months the case-in-chief against the German state, its principals and organizations, for acts occurring over the course of a decade all across Europe.<sup>50</sup>

This effort required over 15,000 pages of trial material, over 200 witnesses, and over 300,000 affidavits.<sup>51</sup> The trial also included the novel and effective use of film footage as evidence.<sup>52</sup> This “filmic witness”<sup>53</sup> was virtually unprecedented before Nuremberg.<sup>54</sup>

For the defense counsel, the challenge was not logistics as much as the preclusion of certain affirmative defenses. Defense lawyers were also at a disadvantage in both unfair restrictions as well as a lack of experience in arts such as cross-examination.<sup>55</sup> The most

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49. See Bush, *supra* note 19, at 2035.

50. *Id.*

51. See *id.* at 2035 n.39.

52. For a splendid treatment of this subject, see Douglas, *supra* note 46.

53. See Douglas, *supra* note 46, at 452. This “witness” was viewed as vital in allowing the Tribunal to imagine the unimaginable. See *id.* at 453 (noting that “[t]he Nuremberg prosecution’s turn to the filmic witness can . . . be understood as an attempt to secure an adequate representation of ‘an order of reality which the human mind had never confronted before’”).

54. See *id.* at 451 (noting that “[t]hrough motion pictures had been submitted as trial evidence as early as 1915, prior to Nuremberg, one can find no records of any court using graphic film of atrocities as proof of criminal wrongdoing”).

55. See Norman Silber & Geoffrey Miller, *Toward “Neutral Principles” in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L.

interesting element was the use of the *tu quoque* principle by the defendants to show that charged crimes often were indistinguishable from the conduct of the victorious powers.<sup>56</sup> Defense lawyers repeatedly raised such analogous acts as the American fire bombing of cities like Dresden, the failure of American submarines to pick up survivors in the Pacific, and the great variety of atrocities committed by the Russians, including well-documented massacres<sup>57</sup> of military

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REV. 854, 905-06 (1993). This disadvantage was lessened in the later "Subsequent Proceedings," where the German lawyers proved more experienced in the specific litigation of war crimes than the American teams. See Jonathan A. Bush, *Soldiers Find Wars*, 37 COLUM. J. TRANSNAT'L L. 675, 681 (1999) [hereinafter *Soldiers Find Wars*] (noting that the American prosecutors "faced defendants whose counsel, seasoned at the first Nuremberg trial, had more experience than the prosecution or bench").

56. See Gerry J. Simpson, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 806 (1997) (stating that "[t]he most successful use of [the *tu quoque* argument] occurred in the case of Admiral Doenitz who argued, with some justification, that the 'crime' of failing to pick up enemy survivors of submarine attacks was in fact the policy of U.S. forces in the Pacific under the command of General Nimitz"); see also DOENITZ AT NUREMBERG: A REAPPRAISAL ix (H.K. Thompson, Jr. & Henry Strutz eds., 1976) (discussing the perceived hypocrisy of the charge). While this argument had some resonance with the Russians who had and would continue to commit atrocities during this period, it was an argument that was primarily effective with such military figures as Admiral Doenitz. For the vast number of inhumanities committed by the Germans, such comparisons would not prove beneficial to the defendants in the long run. In the Tokyo trials, this issue was also raised and led to a stinging dissent from Indian Judge R. B. Pal who stressed the culpability of the allies in judging war crimes. See 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1159-83 (Leon Friedman ed., 1972).

57. At the time of Nuremberg, the Nazi run *Wehrmacht-Untersuchungsstelle fuer Verletzungen des Voelkerrechts* had collected ample evidence to show that the Russians were responsible for the massacre of over 4000 Polish political prisoners at Lemberg, Polish military officers at Katyn and as many as 9000 Ukrainians at Winniza. See Benjamin B. Ferencz, *Die Wehrmacht-Untersuchungsstelle: Deutsche Ermittlungen ueber allierte Voelkerrechtsverletzungen im Zweiten Weltkrieg*, 75 AM. J. INT'L L. 403, 404 (1981) [hereinafter *Die Wehrmacht-Untersuchungsstelle*] (book review). Despite this evidence, the Russians attempted to lay the blame for the massacres on the Germans. See TAYLOR, *supra* note 46, at 312-13. The Russians worked hard to avoid references to their involvement in Katyn at Nuremberg and "[t]he fact that General Rudenko was unable to keep Katyn out of the subsequent proceedings in the trial was one of the defence's achievements." MASER, *su-*

and political opponents.<sup>58</sup> The defense struggled to integrate such mitigating elements into their defense while contesting individual responsibility. Moreover, most of the defendants insisted that their ultimate defense was simply *Befehl ist Befehl* (an order is an order), which was expressly and correctly eliminated as a defense to the charges.<sup>59</sup> Nevertheless, the quality of the defense must be measured in light of these deprivations and restrictions.<sup>60</sup> The defense was able to convince many that the charges against the defendants were questionable in both law and equity.<sup>61</sup>

The prosecution of these men was not accomplished without significant mistakes<sup>62</sup> but it was an impressive effort by Jackson, Telford Taylor,<sup>63</sup> and their staffs. For the defense, there were

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*pra* note 37, at 110.

58. See *Die Wehrmacht-Untersuchungsstelle*, *supra* note 57, at 403 (noting that the use of the *tu quoque* defense was an effort to “dilute the moral stigma to show that even the prosecutors did not come with completely clean hands”).

59. See TAYLOR, *supra* note 46, at 248.

60. The quality of the defense practice must be acknowledged irrespective of their own political history. Many of the lead defense lawyers were former Nazi party members who supported the regime on trial at Nuremberg. See MASER, *supra* note 37, at 74.

61. Among those who were convinced by such arguments was Senator Robert A. Taft who objected that the trial had “helped to clothe vengeance in the forms of legal procedure, with the result that the whole idea of justice in Europe might [be] discredited.” Walter W. Ruch, *Taft Condemns Hanging for Nazis as Unjust Verdict*, N.Y. TIMES, Oct. 6, 1946, at 1, quoted in Norman Silber & Geoffrey Miller, *Toward “Neutral Principles” in the Law: Selections From the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 904 n.147 (1993).

62. See Bush, *supra* note 19, at 2049-50. In addition to procedural unfairness to the defendants in some areas, see *supra* notes 55-59, there were also tactical errors such as Jackson’s examination of Göring. Not only did Göring appear to get the upperhand during parts of the examination, but Jackson was embarrassed by the use of a mistranslated document. “[I]n trying to force Göring to concede that the so-called Reich Defense Council had been planning the liberation of the Rhine as early as 1935, Jackson confronted the witness with a document that merely stated that the Germans were clearing their river for shipping without publicizing the plan—as America presumably had done with its rivers, Göring declared . . .” Bush, *supra* note 19, at 2050.

63. Taylor was the chief prosecutor in twelve of the trials and had one of the most authoritative perspectives of the trial. See Jonathan Bush, *Soldiers Find Wars: A Life of Telford Taylor*, 37 COLUM. J. TRANSNAT’L L. 675, 680 (1999) (discussing that Taylor’s role as the lead Nuremberg prosecutor in the Subsequent Proceedings that followed the trial of the major war criminals at

extremely talented lawyers, like Kranzbuehler, who were hampered by both unfair decisions as well as unfamiliarity with some of the trial practices. Some of the finest lawyers of their time represented both sides. Through their arguments and objections, these men fashioned the rules of trial practice for dozens of future war crimes trials held over the course of five decades.

*B. The Significance of the Trial Through the Introduction of New Trial Techniques, Arguments, and Practices*

The second criterion is easily met by Nuremberg. With thousands tried for European war crimes alone, the first Nuremberg trial had an immediate significance as the trial template for the prosecution and defense of war crimes.<sup>64</sup> Yet, Nuremberg's significance obviously extends far beyond the crimes of World War II. While precursors existed,<sup>65</sup> Nuremberg is rightfully regarded as the birth of modern human rights laws and international tribunals. Rather than simply hold the actors responsible for direct acts in the field, Nuremberg enforced command responsibility principles that, for the first

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Nuremberg); Falk, *supra* note 21, at 697 (same); Benjamin B. Ferencz, *Telford Taylor: Pioneer of International Criminal Law*, 37 COLUM. J. TRANSNAT'L L. 661, 662 (1992) (same).

64. Over 15,000 defendants would face trials for crimes in World War II under this model. See Bush, *supra* note 19, at 2037.

65. Professor Jonathan Bush put Nuremberg in historical perspective:

There had . . . been a sprinkling of earlier war crimes trials. Most of these trials, however, were unilateral affairs in which a victorious nation tried captives or, infrequently, members of its own forces for excesses on the battlefield. The trial before the International Military Tribunal ("IMT") at Nuremberg represented a major extension of this paradigm in every regard. Nuremberg was a multinational rather than unilateral effort; its procedure was deliberative rather than summary; the court and the prosecution consisted not of mid-level military officers, but of leading civilian jurists; and its defendants were not sociopathic foot soldiers or overzealous junior officers, but the surviving heads of the armed forces and the other leading institutions of what had been the Nazi German state. Finally, the charges at Nuremberg were based not only on atrocities in war, but also on the preparation for and instigation of war itself. In the vocabulary of the medieval "just war" theorists, the charges at Nuremberg went to *jus ad bellum* as well as *jus in bello*.

Bush, *supra* note 19, at 2023.



time, offered a potential for deterrence.<sup>66</sup> This was accomplished through painstaking case development by the incorporation of thousands of documents and individual accounts into a cohesive trial narrative. From the use of the "filmic witness" to the application of the *tu quoque* principle, the Nuremberg lawyers created new methods and models for future trials.

The Nuremberg trials also saw the development of legal cases against doctors, judges, and other professionals for the mistreatment of patients and citizens. Principles of informed consent and standards on medical ethics and experimentation can be traced to Nuremberg's trial of Nazi doctors. International principles in opposition to the general use of the death penalty can be traced to the trial of Nazi judges.<sup>67</sup> Some of these principles continue to be cited with reference to Nuremberg in contemporary policy debates.<sup>68</sup>

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66. One of the difficulties of the trial, which led to the need for creative methods of proof, was precisely the choice to target the high-level officials ultimately responsible for the atrocities. Jackson addressed this problem in his report to the Secretary of the Army:

Few of the defendants committed atrocities with their own hands, and in fact they were rarely visible at or within many miles of the scenes of their worst crimes. They made plans and transmitted orders, and the most compelling witnesses against them were the documents which they drafted, signed, initialed, or distributed.

TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10. 86 (G.P.O., 1949).

67. See generally 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 38.

68. For example, the American experimentation with radiation in the 1940s and 1950s (and CIA experiments with LSD in the 1960s) raises analogous issues. See Rae Tyson, *Thawing Out Cold War Secrets: Radiation Testing Shown in Documents*, USA TODAY, Dec. 21, 1993, at 1A (discussing CIA testing as well as the infamous Tuskegee study in which "the Public Health Service conducted a study of syphilis by leaving black males infected and lying about having treated them"). In the last decade, some documents were disclosed showing the concern among some Americans that their practices in experimentation contained elements similar to those conducted by Mengele. See Michael D'Antonio, *Atomic Guinea Pigs*, N.Y. TIMES MAG., Aug. 31, 1997, at 38 (noting the realization of an Army doctor in 1982, who despite his support of human experiments, believed that "[t]hose concerned in the Atomic Energy Commission would be subject to considerable criticism, as admittedly this would have a little of the Buchenwald touch"). When the documents from the 1950s were made public in 1993, the United States government struggled with

Nuremberg and its rules would be the basis for fifty years of investigations and trials,<sup>69</sup> including the most recent trials of Serbian war criminals. The first General Assembly of the United Nations would unanimously affirm the principles and charter used at Nuremberg, start work on the Genocide Convention, and model future trials on Nuremberg.<sup>70</sup> The legacy would extend to our own conduct in Vietnam<sup>71</sup> and war crimes committed by individuals like Lieutenant Calley.<sup>72</sup> No other trial can point to such a legacy.

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the very principles that it helped establish at Nuremberg:

One of the issues the Energy Department is studying is whether any of the radiation experiments violated the 1947 Nuremberg Code, which was established after the Nazi war crimes trials, and is regarded as the universal standard for human experimentation. The code requires full, informed and voluntary consent for all experiments involving human subjects, along with demanding that test subjects be protected "against even remote possibilities of injury, disability, or death."

Keith Schneider, *1950 Note Warns About Radiation Test*, N.Y. TIMES, Dec. 28, 1993, at A8.

69. Professor Bush correctly noted that the most lasting contribution from the Nuremberg trials was probably the "Subsequent Proceedings" as opposed to the higher profile first trial:

For lawyers, such principles as the accountability of private actors in international law and the centrality of disclosure and informed consent in human experimentation trace their roots to the Subsequent Proceedings. The modern defense of superior orders, the requirement of an ethical dimension to law, and the narrowing of liability for waging aggressive war to the seniormost active participants also derive from these trials. For historians of postwar Germany, the evolution in official attitudes toward the trials illustrates the policy of integrating western Germany into the Western alliance, whatever the cost. For students of the Holocaust, these cases, perhaps more than the first Nuremberg trial, the Auschwitz cases in Poland and West Germany, or even Eichmann, represent an attempt at full judicial scrutiny of Nazi genocide. Despite various shortcomings, the Subsequent Proceedings—not the unique first Nuremberg trial, the deeply flawed Tokyo war crimes trial, or fledgling efforts in the Hague and Tanzania—are the most sustained and successful efforts at international penal justice to date . . . .

*Soldiers Find Wars*, *supra* note 55, at 681-82.

70. See Ferencz, *supra* note 35, at 218.

71. See NUREMBERG AND VIETNAM, *supra* note 21, at 96-97.

72. See MICHAEL BILTON & KEVIN SIM, *FOUR HOURS AT MY LAI* (Penguin 1993) (1992).

### C. Transformative or Educational Value of the Trial

The final criterion is the most important reason why Nuremberg must be viewed as the trial of the century. Nuremberg displayed more than the mere triumph of power, but as Jackson notes, it was a tribute to our power of reason.<sup>73</sup> Around the world, citizens watched the perpetrators of massive injustice treated with the legal process that they denied to their victims. Nuremberg showed that the goal of the world war was to bring justice and not simply domination. It was in the final moment that the trial distinguished World War II from all prior wars. It was through the trial that the world turned away from retributive justice and embraced transformative justice.<sup>74</sup>

In this sense, the Nuremberg trial was not about the defendants, but about those with the legitimate right to accuse them.<sup>75</sup> After years of close struggle with these leaders, the world was able to separate itself from them in a final adjudication of their crimes.

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73. See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 38, at 99.

74. Ultimately, too few Germans were prosecuted to be able to claim true justice for all of the victims. Thousands of German soldiers participated in these war crimes without facing trial and punishment. For example, the SS *Einsatzgruppen* units, which followed front-line troops to collect Jews and categorize victims, were primarily tasked with the daily duty of war crimes and genocide. Many of these individuals were never brought to justice. Other war criminals continued to live openly in Germany, including the commander responsible for the massacre of American prisoners at Malmedy at the Battle of the Bulge. See *Herr Mohnke - Ex-Nazi General Escapes Prosecution* (ABC television broadcast, June 6, 1994). Wilhelm Mohnke was a SS general who was responsible for a variety of war crimes. See Ron Lowman, *With a Desire for Revenge*, TORONTO STAR, Mar. 21, 1998, at M14. By the time Mohnke had returned from a Russian prisoner of war camp, the Nuremberg trials had ended. Dozens of German defendants connected to this massacre were prosecuted and convicted, but not the person ultimately responsible for the orders. When the German government investigated Mohnke, the government found insufficient evidence, a claim roundly condemned as absurd given the record of the trials on the massacre and documents clearly incriminating Mohnke. See *Die Wehrmacht-Untersuchungsstelle*, *supra* note 57, at 403-04.

75. The obvious discontinuity of having Stalinist officials judge anyone for war crimes was galling. This hypocrisy was never higher than when Russians attempted to use Nuremberg to shift blame to the Germans for the Katyn massacre in which thousands of Polish soldiers and leaders were executed by the Russians. See TAYLOR, *supra* note 46, at 466-72; see also Masha Hamilton, *Gorbachev Documents Soviet Guilt at Katyn*, L.A. TIMES, Apr. 14, 1990, at A1.

Moreover, in the exercise of restraint in the use of power, the victors gave a voice to both the victims and the values savaged by the German government. The victims did not receive the simple satisfaction of vengeance, but a world judgment on those who had caused such terrible injuries. Their experiences and injuries were given voice through the act of confrontation in the trial setting.<sup>76</sup> It is true that this element gave the trial an appearance of a “show trial” or political trial. However, all great trials can be accused of such an element. The imposition of a criminal penalty has an undeniable political element in the judgment of a society on the accused. For instance, the Manson trial occurred in the midst of a political environment longing for retribution, but it was not a show trial. Nor was Nuremberg. The defendants were not denied a defense or railroaded into conviction.<sup>77</sup> The most powerful political element in Nuremberg was not the international lynching of hated individuals, but the reaffirmation of core

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76. This was especially evident in showing films of the camps, a moment that produced notable impacts on the defendants themselves as well as defense counsel. See Douglas, *supra* note 46, at 455-56.

77. The Nazi courts offer one of the best points of comparison. In the judicial system created by the defendants, thousands were arrested and prosecuted under the Night and Fog Decree of 1941. See AMNESTY INT’L USA, *supra* note 39, at 2. The primary function of this law, and the court system that enforced it, was to terrorize, and the concept of due process was expressly rejected in the decree:

The secrecy surrounding this process was intended to deter dissent and to terrorize the victim’s relatives and friends. The prosecutions failed to fulfill the standards of due process. Defendants were arrested, abused, and secretly transported to Germany. They were held incommunicado and, in many instances, were denied the opportunity to introduce evidence, to confront the witnesses against them, and to introduce witnesses on their own behalf. The defendants were refused counsel of their choice and, in many cases, were denied representation completely. They typically were only informed of the charges against them a few moments prior to trial and records of the proceedings were not maintained.

Lippman, *supra* note 20, at 268. The defendants were faced with the contrast through the use of the “filmic witness” at Nuremberg. One of the films shown to the Court was the trial of defendants accused of the 1944 assassination attempt on Hitler. Surrounded by a court affording them considerable rights of defense, the defendants watched as their own courts and prosecutors abused their own war-time defendants before the People’s Court of Berlin. See *generally* Douglas, *supra* note 46.

values of legal process.<sup>78</sup> This process led to the acquittal of a significant number of defendants, including the *Sturmabteilung* (SA or "Brownshirts"), and the General Staff of the Wehrmacht,<sup>79</sup> who would certainly have met different fates in a show trial.

This is not to say that Nuremberg was perfect justice. It was not. The legal deficiencies of Nuremberg were numerous.<sup>80</sup> Judicial bias was not used as a basis for removal in either Nuremberg<sup>81</sup> or Tokyo,<sup>82</sup> and some of the judges were facially unsuited to serve on these courts. Some verdicts appeared in conflict and motivated by politics rather than the law.<sup>83</sup> Likewise, material information was withheld from the defendants and defense counsel were not given adequate time to prepare.<sup>84</sup> While the tribunal exercised a

78. However, this was not a view held by some leading lawyers and jurists. See WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIME TRIALS 133 (1970) (quoting Chief Justice Harlan Stone referring to Nuremberg as a "high grade lynching party").

79. See Bush, *supra* note 19, at 2036.

80. See generally May & Wierda, *supra* note 18, at 727, 733, 764 (noting that trials were criticized for constituting "victor's justice").

81. In Nuremberg, Soviet General and War Crimes Judge I.T. Nikitchenko rejected the notion that a judge could not have prior knowledge or must be disinterested. See generally Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291 (1998) (citing various examples of judicial bias).

82. For example, one justice in Tokyo was a survivor of the Bataan death march. See RICHARD MINEAR, VICTOR'S JUSTICE 81-82 (1971). It has been suggested that this background had a demonstrative effect on the rulings of some judges in the war crimes trials:

Despite the claim of the tribunals to be applying law in an impartial manner, the positions of the particular justices did indeed, to some extent, reflect their and their nations' losses. In the Nuremberg trial, the Soviet judge wrote a dissenting opinion in which he objected to the tribunal's leniency. In the Tokyo tribunal, two justices dissented: Justice Jaranilla of the Philippines, who was a survivor of the Bataan Death March, objected to the tribunal's leniency; and Justice Pal of India, a country which had suffered very little at the hands of Japan, acquitted all defendants, partly on the grounds that the tribunal was a political rather than judicial entity, which had no right or jurisdiction to try the defendants.

Joy Gordon, *The Concept of Human Rights: This History and Meaning of its Politicization*, 23 BROOK. J. INT'L L. 689, 782 (1998).

83. See Bush, *supra* note 19, at 2047.

84. See, e.g., Pejic, *supra* note 81 (discussing the failure to give defendants a critical appendix to the draft 1944 U.S. Army Plan showing approval of

case-by-case judgment on the introduction of affidavits as evidence,<sup>85</sup> defendants were denied their right to confrontation through the use of ex parte affidavits.<sup>86</sup> A practice that was repeated in the recent trial of Dusko Tadic,<sup>87</sup> the use of such affidavits effectively strips the defendant of any meaningful opportunity to contest the credibility of the witness or the basis of his knowledge. In addition, hearsay was allowed as evidence at trial.<sup>88</sup> Judicial appeal was unavailable.<sup>89</sup> Finally there was the fundamental objection of holding defendants accountable to ex post facto laws.<sup>90</sup>

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many of the same acts taken by the accused); *see also* May & Wierda, *supra* note 18, at 733.

85. *See* TAYLOR, *supra* note 46, at 240-43.

86. *See id.* at 241; May & Wierda, *supra* note 18, at 749-50. Some authors, however, have noted that, while such evidence was widely received, it was "not heavily relied upon by the Tribunal." May & Wierda, *supra* note 18, at 751. This practice has also continued in modern war crimes trials, such as the trial of Tihomir Blaskic. *See* Decision on the Defense Motion to Admit into Evidence the Prior Statement of Deceased Witness Midhat Haskic, Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber, Int'l Crim. Trib. Former Yugo., Apr. 29, 1998), *cited in* May & Wierda, *supra* note 18, at 753 n.109.

87. *See* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadic, IT Doc. IT-94-I-T (Aug. 10, 1995) (allowing ex parte affidavits).

88. *See* May & Wierda, *supra* note 18, at 745-46. Despite criticism, this practice has continued and hearsay was allowed into the Tadic trial. *See* Decision on the Defense Motion on Hearsay, Prosecutor v. Tadic, Case No. IT-94-1 (Trial Chamber, Int'l Crim. Trib. Former Yugo., Aug. 5, 1996); Opinion and Judgment, Prosecutor v. Tadic, Case No. IT-94-1 (Trial Chamber, Int'l Crim. Trib. Former Yugo., May 7, 1997), at ¶ 555 (stating that "deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value . . ."), *noted in* May & Wierda, *supra* note 18, at 746 n.71.

89. Since there was no higher court or tribunal for appeals, the only recourse was to the Allied Control Council, which could grant clemency under the authority of joint executive authority. *See* Bush, *supra* note 19, at 2080.

90. At Nuremberg, the Tribunal held that the ex post facto rule simply had no relevance "to a treaty, a custom, or a common law decision of an international tribunal." III Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1946-1949, at 975. In the *Ein-satzgruppen* trial, the U.S. tribunal rejected the ex post facto defense as based on a flawed assumption since "the specific enactments for the trial of war criminals which have governed the Nuremberg trials, have only provided a machinery for the actual application of international law theretofore existing . . . [criminals] are amenable to punishment . . . without any prior designation of

Nuremberg, however, must also be judged in light of the principles of the time. The Nuremberg defendants often received advantages that would have been denied in most states during the 1940s. Nuremberg defendants were guaranteed counsel at a time when the constitutional right to such assistance was not guaranteed in the United States. The right to counsel for federal trials, recognized under the Sixth Amendment until 1938,<sup>91</sup> was not even applied to the states until 1963.<sup>92</sup> Nuremberg defendants were given a list of over eighty attorneys from which to select their defense team, including some of the leading German attorneys.<sup>93</sup> Nuremberg defendants were also guaranteed legal resources when such resources were not guaranteed to others and were routinely denied in the United States.<sup>94</sup> Likewise, while some rulings were unjust to the defendants, the restriction on the defense arguments was not out of line with rulings in other cases. None of these rulings would materially alter the outcome of the defendants' trial.<sup>95</sup> Nevertheless, there were clear

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tribunal or procedure." *In re Ohlendorf*, 15 I.L.R. 656 (U.S. Military Tribunal at Nuremberg 1948); see also Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUM. L. REV. 1515, 1533 (1987) (discussing how "the rejection of the ex post facto claim with respect to . . . crimes against peace and crimes against humanity" can be viewed as problematic since "these crimes were not international crimes [like war crimes] over which universal jurisdiction could be exercised as a matter of customary law when committed"). Notably, however, the United Nations moved to correct this perceived deficiency by codifying principles used in the trials. See Paul D. Marquart, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 76-77 (1995).

91. See *Johnson v. Zerbst*, 304 U.S. 458 (1938). Such a right was not accepted as part of due process until 1942. See *Betts v. Brady*, 316 U.S. 455 (1942).

92. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

93. See Timothy W. Murphy & Jeff E. Whitfield, *Excerpts from the Nuremberg Trials*, 6 U.S.A.F. ACAD. J. LEGAL STUD. 5, 10 (1995/1996).

94. The defendants at Nuremberg were given twenty-seven lead counsels with over fifty legal assistants and a large administrative staff. See JOE J. HEYDECKER & JOHANNES LEEB, *THE NUREMBERG TRIAL* 94 (R.A. Downie trans., 1962).

95. The verdicts reflected overwhelming evidence of participation in war crimes. Since the Allies began with the most responsible high-ranking officials, the high number of guilty verdicts is not particularly surprising. Ultimately, death sentences were handed down for Martin Bormann (in absentia),

violations of the rights of the defendants at Nuremberg. Jackson was among those who acknowledged the deficiencies and stated that "many mistakes have been made and many inadequacies must be confessed."<sup>96</sup> However, Jackson noted with some justification that "in proceedings of this novelty, errors and missteps may also be instructive to the future."<sup>97</sup> Jackson was correct. Some of the inadequacies have in fact been addressed in later war crimes trials.<sup>98</sup>

In judging any great trial, we must judge it in the context of its own time. The opportunity for a legal defense and the trial protections at Nuremberg represented massive departures for much of the world, particularly for the Russian system. It also represented a level of protections not unlike those in the United States and England. The question is not whether the court could have done more to assure

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Hans Frank, Wilhelm Frick, Hermann Göring, Alfred Jodl, Ernst Kaltenbrunner, Wilhelm Keitel, Joachim von Ribbentrop, Alfred Rosenberg, Fritz Sauckel, and Julius Streicher. Sentences of life imprisonment were handed down for Walter Funk, Rudolf Hess, and Erich Raeder. Terms of incarcerations were handed down for Karl Doenitz (ten years), Constantin von Neurath (fifteen years), Baldur von Schirach (twenty years), and Albert Speer (twenty years). *See id.* at 377. An acquittal was handed down for Hans Fritzsche, Hjalmar Schacht, and Franz von Papen. *See id.* at 374.

96. Robert H. Jackson, *Report to the President by Mr. Justice Jackson, October 7, 1946*, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 440 (U.S. Dept. of State 1945).

97. *Id.*

98. A central principle of equality was later embraced for modern war crimes trials. These expanded rights of defendants were expressly included as part of the Yugoslav and Rwanda trials. *See Statute of the International Criminal Tribunal for the Former Yugoslavia, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, Annex, art. 21, at 27, U.N. Doc. S/25704/Add.1/Corr.1 (1993); *Statute for the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, art. 20, 3453d mtg., at 11, U.N. Doc. S/RES/955 (1994). These rights were a direct result of criticism of the Nuremberg and Tokyo trials:

The post-World War II trials have been criticized on the grounds that there was an inequality of resources between the parties, that the defense was denied access to relevant material, and that the defense had inadequate time to prepare. These concerns have been addressed by the development of human rights law to include the concept of "equality of arms," a concept which has been applied by the [International Court] such that a procedure for disclosure is in place and adequate time is allowed for preparation of the defense.

May & Wierda, *supra* note 18, at 733.



a fair trial. There is little question that more could have and should have been done for the defendants. The question is whether the court was able to break from the context of anger and revulsion over these war crimes to focus on the process of adjudication and the rendering of a defensible verdict. At the end of World War II, the world was in the mood for a lynching. Like a small town responding to a gruesome crime, the mob had the ability and the taste for "the quickest possible justice."<sup>99</sup> If justice is best understood as an act of restraint, Nuremberg must be ranked as the most fundamental example of justice and justifiably a symbol for future generations.

### III. CONCLUSION

In the opening argument at Nuremberg, Jackson warned the Tribunal that "[t]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."<sup>100</sup> Recent war crimes, however, show that the seed for such inhuman acts are never completely excised from our system, but merely rest dormant like a terrible virus. Perhaps it is for this reason that we prefer to call the Eichmanns and the Tadic<sup>101</sup> "monsters," to suggest that they are outside our species; mutated by a foreign element into a non-human with a human likeness.<sup>102</sup> The Rape of Nanking, however, was not committed by monsters, but by thousands of average Japanese citizens serving in the army.<sup>103</sup> Eichmann was not a monster but a small and pathetic man. Those who wanted

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99. HEYDECKER & LEEB, *supra* note 94, at 77 (quoting Josef Stalin at the Tehran Conference).

100. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 38, at 98-99.

101. See Opinion and Judgment, Prosecutor v. Tadic, Case No. IT-94-1, (Trial Chamber, Int'l Crim. Trib. Former Yugo., May 7, 1997) (discussing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991).

102. See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 276 (stating that "[t]he trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal").

103. See *The Tokyo War Crimes Trial* (Nov. 1948), reprinted in 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1060-61 (Leon Friedman ed., 1972).

to see monsters in the dock of these trials were disappointed. Yet, for the meaning of Nuremberg and these other trials, one must look beyond the faces of the defendants.

Nuremberg will continue to mean different things to different people. In my case, I will always associate Nuremberg with my colleague and friend, Thomas Buergenthal, who personifies the promise and meaning of that trial. At just ten years old, Tom began a terrifying odyssey that would take him through the Jewish ghetto at Kielce, Poland, where virtually every inhabitant was killed at the Treblinka camp.<sup>104</sup> Tom would survive only to be sent to Auschwitz-Birkenau. He would be selected for death repeatedly, only to escape or be spared by chance.<sup>105</sup> He would work around the gas chambers and watch other children be taken away to the crematoriums.<sup>106</sup> In the end, Tom would be the only child to make it out of the infamous "Gypsy Camp" alive. During the course of his confinement, he would face the infamous Dr. Mengele, who would amputate two of Tom's toes.<sup>107</sup> After surviving Kielce, Auschwitz-Birkenau, Sachsenhausen, and the infamous "Death March," Tom found himself in an orphanage for two years in Ottwoch, Poland.<sup>108</sup> Assuming that he had no surviving relatives, he was in the process of being taken to Palestine when, miraculously, he was reunited with his mother, Gerda, on a train station platform in Goettingen.<sup>109</sup> While his father, Mundek, had been killed, Gerda had barely survived Ravensbrück and Dachau. She spent the next two years searching throughout Germany and Poland for her son. Tom would eventually come to the United States and study law under the tutelage of the great Louis

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104. See generally Ed Vulliamy, *Judaism's Witness*, THE OBSERVER MAG., Apr. 4, 1999, at 10.

105. On one such occasion, Tom was given a card sending him to the gas chamber with other children. As he slept, however, a doctor replaced the card with a card without the death marking for some unknown reason. Tom woke to find himself alone in the room. The other children had all been murdered. See *id.*

106. These scenes would leave lasting and painful memories. In one tragic scene, Tom watched the Germans take a six-year-old girl for execution as she asked, "Why must I be shot?" *Id.*

107. This horrific encounter occurred after two of Tom's toes appeared frost-bitten. See *id.*

108. See *id.* at 15-16.

109. See *id.* at 16.

Sohn. He would become a law professor and one of the world's greatest experts on human rights law. Tom would serve as a member of some of the world's most important international courts and investigations in the evolution of human rights laws and international courts of justice.<sup>110</sup>

While his professional accomplishments are remarkable, however, this is not why Tom Buergenthal is so extraordinary. What is remarkable about Tom is that he harbors no hatred or prejudice after his ordeal. The number 3930 is tattooed on Tom's wrist.<sup>111</sup> It is a constant reminder of his loss of family and his own childhood. If there is anyone who deserves to demand retributive justice, it is this man. Yet, he would dedicate his life to assuring international standards of legal process and fairness. I have learned many things from Tom Buergenthal, but perhaps the most important lesson is that the defeat of evil requires a personal triumph over hatred. He teaches by example, not only the potential of international law, but the potential of individuals to transcend their conditions and history to do simple justice. For me, Tom Buergenthal is the face of Nuremberg.

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110. Tom would serve as the head of the United Nations' Truth Commission in El Salvador and as a judge on the Inter-American Court. He was also the founder of the Inter-American Institute of Human Rights, a member of United Nations Human Rights Committee, the Chairman of the Human Rights Committee of UNESCO, a significant contributor to the Helsinki agreement, an adviser and advocate of the creation of the Holocaust Memorial Museum, and, the Vice-Chair for the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Most recently, in January 2000, President William Clinton nominated Tom to serve as a judge on the International Court of Justice. *See id.*

111. *See id.*