A New Deal for the Nuremberg Trial: The Limits of Law in Generating Human Rights Norms

ELIZABETH BORGWARDT

This article distills several arguments from a larger book project, framed as an international history of the idea of crimes against humanity, with the 1945–46 Nuremberg trial serving as a fulcrum. The project as a whole first traces the origins of the idea of a "crime against humanity," before this concept was crystallized in the Nuremberg charter; followed by a large central section on the unfolding of the Nuremberg trials themselves; with a concluding section on some of the post-Nuremberg legacies of these ideas. This article draws on material from all three sections, but focuses on how we might understand the politics of the flagship Nuremberg trial itself, as opposed to its antecedents or longer-term legacies.[1]

In the wake of World War II, the Nuremberg trial served simultaneously

1. For the limited purposes of this article, "Nuremberg" refers to the trial of twenty-two top-ranking Nazi leaders at the Palace of Justice in Nuremberg during 1945–46. It explicitly does not include the twelve subsequent U.S.-sponsored trials or other so-called "zonal trials." The larger project also discusses the way the subsequent trials address the theme of crimes against humanity.

Elizabeth Borgwardt is associate professor of History, Washington University in St. Louis <eborgwar@artsci.wustl.edu>. Earlier versions of this article were presented at the Charles Warren Center for Studies in American History at Harvard University; at the Legal History Workshop at Stanford Law School; at a workshop on "Human Rights, International Law, and Refugees in Twentieth-Century Europe" at Rice University; and at a conference on "Law, War, and History" co-sponsored by Boalt Hall School of Law, University of California at Berkeley and the William S. Boyd School of Law, University of Nevada at Las Vegas. The author thanks the Heidelberg Center for American Studies, the Junior Faculty Manuscript Group at Washington University in St. Louis, Amber Aragon, and especially, Yuma Totani for their helpful suggestions.

Law and History Review Fall 2008, Vol. 26, No. 3

as one of the last acts of the war and one of the first acts of the peace. The Nuremberg idea has been losing some of its particularity as it becomes a way-station on the road to a wider theorization of "transitional justice" issues. As a corrective, a more textured and detailed inquiry into the trial's political context, that also sets the Nuremberg approach in a wider comparative framework, might still yield a few mildly prescriptive notions about using law and legal institutions to move a polity beyond an era of mass atrocities.[2] But such an approach is never going to yield a grand overarching model of transitional justice, and arguably we do not want such a model.

Instead, the most we can responsibly say is that juridical institutions such as Nuremberg do best when they are part of a much larger set of both forward-looking and backward-looking initiatives across multiple sectors of society. Legal institutions serve as just one tool for assisting a polity in moving away from authoritarianism and toward a more democratic regime.[3] The architects of the Nuremberg trial saw themselves as contributing to "a system of institutions that cooperate and complement each other in the imposition of normative order and the rule of law, which in turn safeguard conditions of social peace and individual security," as Zygmunt Bauman has summarized the mission of modern civilization more generally.[4] Yet there were sharp constraints to the implementation of these purposes, some of which were inherent in the purposes themselves. Any analysis of the

2. On transitional justice, a term about twenty-five years old, see, for example, Chandra Lekha Sriram, Review Essay, "Transitional Justice Comes of Age: Enduring Lessons and Challenges," *Berkeley Journal of International Law* 23 (Summer 2005): 506–23; Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004); Eric A. Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117 (Jan 2004): 761–825; Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); Carla Hesse and Robert Post, eds., *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999); Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes,* 3 vols. (Washington, D.C.: U.S. Institute of Peace Press, 1995); John Herz, ed., *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* (Westport, Conn.: Greenwood Press, 1982).

3. Prominent analyses of alternatives to juridical processes in the realm of transitional justice include John Torpey, ed., *Politics and the Past: On Repairing Historical Injustices* (Lanham, Md.: Rowman & Littlefield, 2003); Naomi Roht-Arriaza, "Punishment, Redress, and Pardon: Theoretical and Psychological Approaches," in *Impunity and Human Rights in International Law and Practice,* ed. Naomi Roht-Arriaza (New York: Oxford University Press, 2001), 13–23; Robert I. Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000); and Roy L. Brooks, ed., *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York: New York University Press, 1999).

4. Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca: Cornell University Press, 1992); see also Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" *International Law Quarterly* 1.2 (1947): 153–71.

"success" of the Nuremberg model must account for this impaired legitimacy, taken up in this article by means of a comparison with the 1946–48 "Tokyo trial," which relied on a charter very similar to Nuremberg's.

Three Contexts for Nuremberg: "The Program to Prevent Germany from Starting a World War Three"

The Nuremberg trial lies at the intersection of three different sets of contexts in the international law and relations of the postwar world: first, as a chapter in a much longer history of the treatment of defeated states in wartime; second, as a set of controversies over the tribunal's underlying legal ideas; and finally, as an institutional history, touching on the question of what studying particular approaches to transitional justice such as Nuremberg might be able to tell us about the interaction of politics, ideas, and institutions.

As an episode in the policy history of transitions from war to peace, key issues at Nuremberg were implicated in a series of broader controversies over what soon came to be known as the "Four Ds"—demilitarization, decentralization, democratization, and especially, "denazification"—the re-education and rehabilitation of ordinary Germans and their leaders.[5] There is of course a spectrum of responses to defeated enemies that do not involve reforms at all, ranging from the Roman sack of Carthage, supposedly provoked by Roman outrage at Carthaginian atrocities such as tossing infants into furnaces, where the Romans "left no stone upon another and sowed the fields with salt," in G. K. Chesterton's iconic account; to exile and enslavement of entire populations, as in the early sixteenth-century Turkish conquest of Bosnia and Herzegovina; to holding only elites re-

5. Work on this topic that has informed my analysis includes G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton: Princeton University Press, 2001); Paul Kennedy and William I. Hitchcock, eds., *From War to Peace: Altered Strategic Landscapes in the Twentieth Century* (New Haven: Yale University Press, 2000); on denazification, see, for example Christopher Gehrz, "The Reeducation of Germany and the Education of the West, 1945–1949" (Ph.D. diss., Yale University Department of History, 2002); Robert G. Moeller, ed., *West Germany under Construction: Politics, Society, and Culture in the Adenauer Era* (Ann Arbor: University of Michigan Press, 1997); Richard L. Merritt, *Democracy Imposed: U.S. Occupation Policy and the German Public, 1945–1949* (New Haven: Yale University Press, 1995); Michael Ermarth, ed., *America and the Shaping of German Society, 1945–1955* (Providence, R.I.: Berg, 1993); Jérôme Vaillant, ed., *La denazification par les vainqueurs: La politique culturelle des occupants en Allemagne, 1945–1949* (Lille: Presses Universitaires de Lille, 1981); Constantine FitzGibbon, *Denazification* (London: Michael Joseph, 1969); Raymond Ebsworth, *Restoring Democracy in Germany: The British Contribution* (London: Praeger, 1960).

sponsible, as in the example of the exile of Napoleon (and a long list of his supporters).[6]

Different devices for reckoning with former regimes are nothing new, and specialists whom the sociologist John Torpey rather dismissively calls "transitologists" tend to emphasize an ever-finer parsing of the typologies of objectives that successor regimes might pursue. The most common approaches include retribution, incapacitation of leaders, making a record of wrongdoing, financial restitution, and economic and constitutional reconstruction. Much of this literature seems to be struggling to develop an overarching theory or at least a template for making appropriate choices and, in general, to be privileging processes that are "forward-looking," that is, most instrumentally useful in establishing future democracy and the rule of law.[7]

Any given set of policy tools, however, has both forward-looking and backward-looking elements embedded in it. Retribution, for example, may be forward or backward looking depending on whether it is focused on deterrence or vengeance. Incapacitation of leaders may be both forward and backward looking in that locking somebody up—to take one kind of incapacitation—is both a punishment and a way of removing threats to future regimes, while making a record of wrongdoing generates documentation for posterity and may also serve to shame perpetrators.[8]

Searching for an overarching theory of transitional justice may indeed be something of a quixotic enterprise. Closer examination of just one strand of the Nuremberg story—the role of U.S. public opinion in shaping the range of approaches to denazification—illustrates the way a variety of purposes are inevitably stewed together in response to highly contingent circumstances.

We can see a welter of U.S. objectives in the initial plans for postwar Germany being developed in the autumn of 1944. One way of framing the proposal for what became the Nuremberg trial would be to portray it as a reaction by the U.S. War Department under Henry Stimson against the Treasury Department's much more thoroughgoing approach to denazifi-

6. See Ikenberry, *After Victory;* Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000); Eric Carlton, *Occupation: The Policies and Practices of Military Conquerors* (London: Routledge, 1992).

7. Torpey, ed., *Politics and the Past;* Elster, *Closing the Books;* Teitel, *Transitional Justice.* Historians also play various roles in the ongoing politics of restitution and reconciliation. See Gerald Feldman, "The Historian and Holocaust Restitution: Personal Experiences and Reflections," *Humbolt Kosmos: Mitteilungen der Alexander von Humboldt-Stiftung* 82 (December 2003), 30–32; Charles S. Maier, "Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission," in *Truth v. Justice,* 261–78.

8. Elster, *Closing the Books,* xi, 77–88.

cation, popularly known as the Morgenthau Plan and actually called the "Program to Prevent Germany from Starting a World War III."[9]

The Morgenthau Plan envisioned a root and branch attack on Nazism, which would have included the breaking up of Germany into several zones, including a UN-administered zone; the so-called pastoralization and de-industrialization of the Ruhr valley; a forced-labor program for former party members to participate in rebuilding the countries they had devastated; and even removal of at least some children from the homes of party leaders to be resettled as foster children in Allied countries. It also envisioned the summary execution of approximately 2500 top Nazi leaders. Despite the distinctions it made regarding the higher echelons of party leadership, the Morgenthau approach partook of an essentialist view of Nazi evil as basically identical with the embedded warlike nature of the German people as a whole and focused on provisions aimed at the social and educational "reform of the German character."[10]

The Morgenthau Plan was initially quite popular and, not coincidentally, had President Franklin Roosevelt's full backing, but it became less so in the autumn and winter of 1944–45 with the stiffening of German resistance at Arnheim, for which the well-publicized harshness of the Morgenthau Plan was widely blamed in the American press. The timing is very important here: the presidential election was about seven weeks away as FDR definitively distanced himself from the ever-less-popular Morgenthau approach. Telling the story this way highlights the importance of domestic politics, yet a number of accounts of the demise of the Morgenthau plan do not even mention that there was a presidential election in the autumn of 1944.[11]

9. U.S. Treasury Department, "Program to Prevent Germany from Starting a World War III," September 9, 1944, in *Foreign Relations of the United States, Quebec, 1944,* 131–40; this proposal elaborated on a September 5, 1944 memorandum from Morgenthau to Roosevelt entitled "Suggested Post-Surrender Policy for Germany" in ibid., 101–6; see also Henry Morgenthau, *Germany Is Our Problem* (New York: Harper, 1945); Warren F. Kimball, *Swords or Ploughshares? The Morgenthau Plan for Defeated Nazi Germany, 1943–1946* (New York: Lippincott, 1976).

10. Morgenthau Diary, entry for September 2, 1944 in John Morton Blum, ed., *From the Morgenthau Diaries* (Boston: Houghton Mifflin, 1959–67), 3:353; see also the summary of the Morgenthau approach in Elster, *Closing the Books,* 199–207.

11. Drew Pearson, "Morgenthau Plan on Germany Splits Cabinet Committee," *New York Times* (September 24, 1944); Editorial, "Morgenthau's Plans for Germany," *Washington Times-Herald* (September 26, 1944); Ted Lewis, "Morgenthau Plan Blamed for Stiffening of Nazis," *Washington Times-Herald* (September 30, 1944); Fred Smith, "The Rise and Fall of the Morgenthau Plan," *United Nations World* (March 1947), clipping in Box 12, Bernstein Papers, Harry S. Truman Presidential Library; see also Steven Casey, *Cautious Crusade: Franklin D. Roosevelt, American Public Opinion, and the War against Nazi Germany* (New York: Oxford University Press, 2001), 183.

Throughout 1944 and early 1945 very wide-ranging and thorough denazification plans diminished in scope and ambition under pressure from policymakers who were suddenly realizing that they would be responsible for occupying and administering a defeated Germany. Basically, they were trying to groom U.S. public opinion to support these more scaled-down plans, especially as relations with the Soviet Union deteriorated rapidly in the wake of the German surrender. What would become the Nuremberg option was first circulated among the Allies in the spring and early summer of 1945, and one way to frame this option would be as a pale echo of the harsher and more comprehensive Morgenthau approach.[12]

The variety of approaches to denazification generally, and the problem of German war guilt specifically, may be illustrated more concretely with a few political cartoons from the spring and summer of 1945, reflecting shifting attitudes toward punishing and reeducating Nazi Germany. This was when the Nuremberg approach was being publicly debated in the United States and when what would become the Nuremberg charter was being privately negotiated. It was also a time when U.S. outrage over German atrocities, specifically against U.S. servicemen at Malmédy the previous December, was reaching its full flowering.

"Malmédy fever" was the press's label for the way the machine-gunning of seventy American servicemen taken prisoner as part of the December 1944 Battle of the Bulge served as a turning point for U.S. public opinion, establishing in the public mind the irredeemably evil nature of the Nazi regime. This was the event that persuaded then-Attorney General Francis Biddle—later to serve as the American judge at Nuremberg—that the Nazis were indeed perpetrating a criminal conspiracy to violate the laws of war. Malmédy fever was spiking just as the death camps received their first official American visitors, and, not coincidentally, when the Morgenthau Plan from the previous September was finding new popularity. It was thus the peak time for debate and competition among different approaches.[13]

The political cartoons on the following pages, drawn from regional pa-

12. Samuel Rosenman draft of what would become the Nuremberg charter, appended to "Memorandum: Prosecution of War Criminals," Department of State, Office of the Legal Adviser (April 21, 1945), referencing an April 20, 1945 meeting attended by Rosenman and State Department Legal Adviser Green Hackworth, Assistant Secretary of War John J. McCloy, Assistant Attorney General Herbert Wechsler, and Colonel Ammi Cutter of the War Department. In the memo, "Judge Rosenman reports that all British officials with whom he discussed the matter, including Churchill, are opposed to such a [war crimes trial] procedure and proposed that [war criminals] be dealt with politically by the Governments." Papers of Edward M. Stettinius, Jr., Albert and Shirley Small Special Collections Library, University of Virginia.

13. The most remarkable feature of "Malmédy fever" may have been its belated and provincially partisan nature. While the slaughter of these seventy military prisoners was doubtlessly very shocking to American sensibilities, it is in its own way at least as shocking

pers around the United States, reflect a shift in American attitudes in terms of the way they depict "the guilty party" responsible for German atrocities in World War II. They represent a trend in the caricatures and political cartoons during these months, although, of course, a wide variety of views was expressed through this medium. Still, the consistency of this transition is striking, along with how closely the shift reflected in these images maps the ideology of the Nuremberg approach—that the German people would be able to learn from a symbolic cleansing of Nazism orchestrated by the Allies and focusing on the top ranks of the leadership of the Third Reich.

Such an approach was by no means a given at the moment of Germany's unconditional surrender in May 1945.[14] It would be a mistake to make too much of the progression reflected in such a narrow time frame as a precise map of public attitudes—nevertheless, June 1945 was a time of unusually widespread awareness of the U.S. role as a world opinion leader, due to the extensive press coverage and public interest in the United Nations San Francisco Conference, in session from April 25 to June 26. The San Francisco conference had of course been convened to negotiate the United Nations charter, and the atmosphere there had a strong emotional undercurrent, with the opening session held not even two weeks after Roosevelt's unexpected death.[15]

The first image illustrates the Morgenthau approach: Germany as a whole, as represented by this ordinary German male, is the "unrepentant criminal" who must not be allowed to "slip through" again, as he did in the wake of World War I.

In the second image, the prisoner in the dock is no longer an ordinary German, but rather a Nazi in uniform, and his punishment is to be "re-educated" rather than crushed. The iron fist of the Allies, so literally present in the first illustration, is replaced by an implicit vision of the Allies as the condescending schoolmasters of a scorned and humiliated child.

In the third image, the Allies are present as a large and powerful cleansing force, but now they are being assisted by the ordinary German in his

---

that the slaughter of millions of noncombatant European Jews of all ages and both genders over the preceding three and a half years had failed to generate even a fraction of this outrage. Francis Biddle, "Memorandum re: Punishment of War Criminals," Jan. 5, 1945; see also James J. Weingartner, *A Peculiar Crusade: Willis M. Everett and the Malmédy Massacre* (New York: New York University Press, 2000).

14. As discussed in the Memorandum referenced in note 12, above.

15. Lower-level assistants in the State Department were exchanging memoranda over what to do with the tens of thousands of messages of condolence related to the death of FDR that were pouring in during the San Francisco conference. Eventually they decided to compile them into hundreds of massive scrapbooks that were presented to Eleanor Roosevelt. Stettinius Diaries, April 1945, Stettinius Papers.

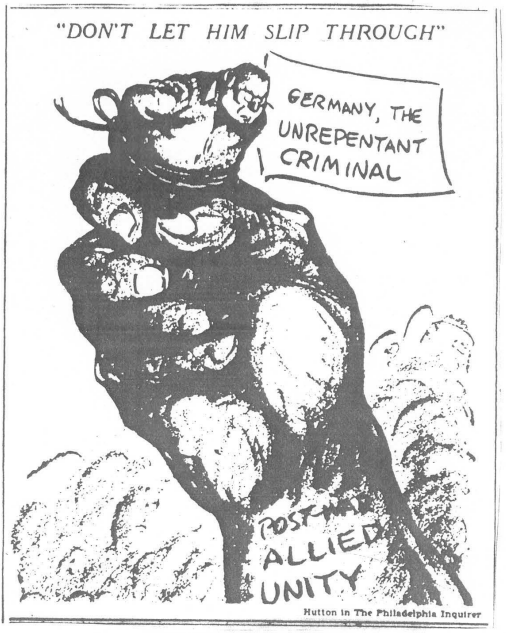

Figure 1. "Don't Let Him Slip Through." *Philadelphia Inquirer,* May 20, 1945.

Figure 2. "Problem Child." *Hartford Courant,* June 10, 1945.

https://doi.org/10.1017/S0738248000002613 Published online by Cambridge University Press

Figure 3. "It Will Take a Lot of Patient Scrubbing." *Christian Science Monitor,* August 5, 1945.

role as a helpful waterboy. The stain of "naziism and prussianism" is being vigorously scrubbed out, but the label on the Allied sleeve highlights peace and reconstruction, not punishment or reeducation. Nothing about these stories, however, lends itself to a typology matching ends and means, much less a clean parsing of forward-looking or backward-looking objectives.

Legal and Institutional Perspectives

The second overarching context for the Nuremberg trial was the development of its legal ideas. One might go as far back as Augustine and talk about the development of conceptions of just and unjust wars, or look at Grotius's writings on the laws of war, meaning rules about battlefield practices and treatment of prisoners.[16] But for the Allied planners mak-

16. This aspect of the Nuremberg trial is probably the most well-articulated aspect of the existing secondary literature on the trial. See, for example, Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992); Jean-Marc Varaut, *Le Procès de Nuremberg* (Paris: Perrin, 1992); Ann Tusa and John Tusa, *The Nuremberg Trial* (London: Hodder & Stoughton, 1988); and Whitney Harris, *Tyranny on Trial: The Trial of*

https://doi.org/10.1017/S0738248000002613 Published online by Cambridge University Press

ing decisions as World War II was drawing to a close, the relevant legal context for them was the end of World War I. World War I–era treatment of major war criminals was a kind of negative example that was not to be repeated: where German courts had been allowed to try their own nationals in the infamous Leipzig trials, and where war guilt and punishment clauses had been integrated into the terms of the peace treaty. Competing ideas were of course in play about what were the correct lessons to be drawing from World War I. In late 1944 and the first half of 1945, the peace conference of 1919 was only twenty-five years in the past. The narrowness of this span may be worth highlighting when we consider what a live issue the perceived "lessons of Vietnam" continue to be in contemporary American political culture, from now roughly thirty-five years in the past.[17]

Nuremberg's architects and prosecutors saw the gist of their legal enterprise as codifying the Kellogg-Briand Pact of 1928, banning aggressive war. Far from being a tribunal litigating about genocide or crimes against humanity, the center of gravity of the trial's charter and indictment emphasized the outlawry of aggressive war and the responsibility of Hitler's "henchmen" as a criminal gang who had hijacked the German state. This perspective was arguably an outgrowth of Nuremberg proponent and U.S. Secretary of War Henry Stimson's own legal training and experience, as reflected in the internal memos of his staff, that the design of such an in-

---

the Major War Criminals at the End of World War II at Nuremberg, Germany, 1945–1946, rev. ed., (Southern Methodist University Press, 1999); as well as treatments that discuss other trials in addition to Nuremberg, notably Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (New York: Oxford University Press, 2001); Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001); Gary Bass, *Stay the Hand of Vengeance;* Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1999); and Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction Publishers, 1997).

17. For contemporaneous assessments of the Leipzig trials, and the decision not to try the Kaiser, see Editorial, "Convicting Itself," *New York Times* (July 9, 1921), 9; Claud Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (London: H. F. & G. Witherby, 1921); Quincy Wright, "The Legal Liability of the Kaiser," *American Political Science Review* 13 (February 1919), 120–28; extensive World War II–era assessments seeking the "lessons" of the Leipzig approach may be found in various memoranda in the war crimes files of Sheldon Glueck of Harvard Law School, a legal adviser at Nuremberg, particularly in documents circulated by the London International Assembly Commission II on the Trial of War Criminals. Glueck Papers, Reel 40, Harvard Law School microfilm collection. See also the discussion in Bass, *Stay the Hand of Vengeance,* chap. 2; and in James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, Conn.: Greenwood, 1982).

ternational military tribunal could benefit from the example of U.S. "trust-busting" during the Progressive era.[18]

The third important context for Nuremberg was institutional. The trial had been intended to play a role in a wider postwar order of international relations, and many contemporaries saw it as a first step on the way to a permanent international criminal court. The contours of the Nuremberg charter emerged from a series of informal negotiations taking place behind the scenes at the San Francisco Conference of June 1945, as noted. San Francisco was the venue for the first Four-Power discussions of the trial's draft charter (France, the United Kingdom, Soviet Union, United States), which these same negotiating partners than finalized in August 1945 in London. Despite a patina of multilateralism, a number of the institutions that were designed at the end of the war, of which Nuremberg was one, may also be seen as outgrowths of a characteristically American approach to postwar multilateralism.[19]

First, on a very practical level, by and large the same set of characters was active across multiple sets of negotiations; to take a sampling: FDR's adviser Sam Rosenman, Treasury Secretary Henry Morgenthau, Morgenthau's deputy Harry Dexter White, Supreme Court Justice Robert H. Jackson, and presidential adviser Harry Hopkins (who was initially slated to be appointed as governor-general of the American Occupation Zone in Germany). These were all New Dealers. One critic noted that these New Dealers were sort of like Jesuits: more loyal to each other than to their individual departments.[20]

The Nuremberg charter, the United Nations charter, and the 1944 Bretton

18. Secretary Stimson may in turn have absorbed such a perspective from the international relations of his own mentor, Elihu Root, who had served as President McKinley and Theodore Roosevelt's secretary of war and the elder Roosevelt's secretary of state. (Root had served as one of the prosecutors of the infamous "Boss Tweed.") For more discussion of the genesis of the aggressive war charge, see the chapter on Nuremberg in Kirsten Sellars, *The Rise and Rise of Human Rights* (London: Sutton Publishing, 2002).

19. The London Conference began on June 26, 1945, the day the UN Charter was signed in San Francisco, and ended August 7, 1945, the day news reports were published announcing the previous day's explosion of an American atomic weapon over Hiroshima. The memoranda and summaries of negotiating sessions of the London Conference are reprinted in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: US GPO, 1949).

20. Robert E. Sherwood, *Roosevelt and Hopkins: An Intimate History* (New York: Harper & Bros, 1948); on the junior New Dealers at the Nuremberg trial, see assistant prosecutor Telford Taylor's memoir, *Anatomy of the Nuremberg Trials;* Nuremberg interpreter Edith Helga Simon Diary, "My Trip to the Nuremberg Trials," private collection, entry for November 12, 1945. See generally Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca: Cornell University Press, 2007), 183–86 ("From a pluralist nation to a pluralist world").

Woods charters (setting up the World Bank and the International Monetary Fund) may be seen as an attempt to institutionalize a New Deal orientation, more specifically, FDR's so-called "Four Freedoms" in the sphere of international relations.[21] While space does not permit an extended exegesis on the genesis of the Four Freedoms as both rhetorical device and policy initiative, the more limited scope of this article offers the opportunity for a brief analysis of FDR's brief checklist as a manifesto about international security.[22]

Early in 1941, as part of his State of the Union address, FDR had proclaimed that he sought to establish what he called "the four essential human freedoms . . . everywhere in the world." These included freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. "Freedom," the president elaborated, "means the supremacy of human rights everywhere. Our support goes to those who struggle to gain these rights or keep them."[23] By the summer of 1941—six months before the Pearl Harbor attack—Roosevelt had become interested in capitalizing on the favorable international attention garnered by these so-called Four Freedoms through "some kind of public statement of the objectives in international relations in which the Government of the United States believed," in order "to keep alive some principles of international law, some principles of moral and human decency" for both U.S. and world opinion. (This was very unusual language for FDR, who was of course himself a lawyer, trained at Columbia.)[24]

The architects of Nuremberg saw themselves as contributing to this new, integrated idea of "security," encompassing all of Roosevelt's Four Freedoms, much in the way individual security had been redefined by the programs of the domestic New Deal. To these historical actors, Nuremberg was initially

21. Marquis Childs, "They Hate Roosevelt!" pamphlet circulated by the Democratic National Committee, Hotel Biltmore, New York (New York: Harper & Bros, 1936); Franklin D. Roosevelt, "Annual Message to Congress, January 6, 1941," *Public Papers and Addresses of Franklin D. Roosevelt,* 1940 volume, compiled by Samuel I. Rosenman (New York: Harper, 1940), 672.

22. Elizabeth Borgwardt, "'All the Clauses in the Preamble to the Constitution Are Worth Fighting For': FDR's Four Freedoms and Social and Economic Rights in America's World War II," in *Bringing Human Rights Home: A History of Human Rights in the United States,* ed. Cynthia Soohoo, Catherine Albisa, and Martha F. Davis (New York: Praeger, 2007), 1: 31–55.

23. For a discussion of the older locution "human rights" as becoming infused with a newer and more widely understood content in the early 1940s, see Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge: Belknap/Harvard, 2005), 53–61.

24. Sumner Welles testimony before Congress, Nov.–Dec. 1945, *Report of the Joint Committee Investigating the Pearl Harbor Attack,* Part 2, 536ff.

designed to be about freedom from the fear of aggressive war, in line with their analysis of the 1928 Kellogg-Briand Pact.[25]

As part of the transitional justice typology, mentioned earlier, one category of responses to mass violence may be to try to change the underlying political structure going forward. Francis Biddle, who served as the American judge at Nuremberg, wrote in 1947 that in the wake of the Nuremberg judgment, the obvious next step was "to set about drafting a code of international criminal law." The trial was not exclusively about changing political structures within Germany—the Nuremberg approach was embedded in what were once wider designs for enduring international institutions.[26]

It might seem an odd project to resituate Nuremberg as a "New Deal" institution. But the trial is an example of the kind of pragmatic administrative pastiche favored by New Dealers, who saw a future of broad-gauge institutional initiatives designed and implemented by experts such as themselves. By the early 1940s these professional bureaucrats looked out across the devastated European landscape and saw an opportunity to leverage America's war-time boom into a leadership role in devising New Deal-style blueprints for multilateral institutions. Cultural historian Wolfgang Schivelbusch paints a "deromanticized" New Deal with a much broader brush than most American historians, arguing that the New Deal orientation had a great deal in common with early-1930s Germany and Italy—two other systems promising a "brighter future" and emphasizing factors such as "a strong leader; an ideology stressing the nation . . . . state control of economic and social affairs; and finally, the quality and quantity of government propaganda."[27]

Many accounts of the New Deal limit themselves to developments within the United States, pointing to a fading-out of the policy initiatives we associate with the New Deal era well before the advent of the war, by 1938 or at the latest 1940. At a press conference in 1943, FDR himself held the door for the departure of "Dr. New Deal," while announcing the housecall of "Dr. Win-the-War." The return of domestic prosperity had presumably consolidated a sense of economic security—the very conditions that New Deal programs had been struggling to generate, with mixed success.[28]

25. For a fuller version of this argument, see Borgwardt, "'When You State a Moral Principle, You Are Stuck With It': The 1941 Atlantic Charter as a Human Rights Instrument," *Virginia Journal of International Law* 46.3 (Spring 2006): 501–62.

26. Francis Biddle, quoted in Gordon Ireland, "*Ex post facto* from Rome to Tokyo," *Temple Law Quarterly* 21 (1947): 27, 54–55.

27. Wolfgang Schivelbusch, *Three New Deals: Reflections on Roosevelt's America, Mussolini's Italy, and Hitler's Germany, 1933–1939* (New York: Metropolitan Books, 2006), 10, 15.

28. For a traditional two-part parsing of the New Deal, see, for example, Rexford G. Tugwell, *The Democratic Roosevelt* (Garden City: Doubleday, 1957); Arthur M. Schlesinger, Jr.,

But just because the New Deal had expanded the idea of "security" to encompass economic and social security did not mean that the concept was somehow confined to those domestic dimensions. Such a perspective discounts the powerful and widespread anxieties generated by the unsettled strategic landscape of the late 1930s. Whether Americans looked out across the Atlantic or across the Pacific, the idea of security was never exclusively economic or domestic. Rather, it was firmly engaged with ideas about national security—or insecurity. After the U.S. entry into World War II, Americans continued to express anxieties about the shape of the postwar world, predicting widespread unemployment and even chaos in the conflict's wake. It seemed only natural that the New Deal's sweeping institutional approaches to intractable social problems would be translated to the international level by Roosevelt administration planners.[29]

As an innovation in international organization as well as international law, journalist Ernest O. Hauser rhetorically forged the Nuremberg link to the experimental New Deal approach to problem solving. Writing in early 1946, he explained how

> . . . the ambitious project of creating rather than merely applying international law, and of setting a new standard for good conduct in the family of nations, is essentially Rooseveltian. It can be traced directly to the late President, and it is fascinating to observe how the grandiose concepts as well as the vagueness characteristic of Franklin Roosevelt, are in evidence at Nuremberg.[30]

Nor, as the previous quotation suggests, does the broad-brush "New Deal" label imply a sunny assessment of either process or product. Military historian Alfred Vagts developed the analogy further, in his even more clearly

---

The Age of Roosevelt: The Politics of Upheaval (Boston: Houghton Mifflin, 1960), 392. For skeptical commentary on this bifurcated approach, see William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940* (New York: Harper & Row, 1963), 162–64; Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Belknap/Harvard, 2001), 410.

29. FDR, Press Conferences (Dec. 28, 1943), *PPA,* 1943, 569–572. Historian John W. Jeffries finds a "new" New Deal extending from 1937 to 1945; similarly, Alan Brinkley sees a transformed New Deal in the turn toward social Keynesianism that New Dealers pursued after what Brinkley calls "the end of reform" in 1937. Policy historian Ira Katznelson's forthcoming book, *The Southern Cage: New Deal Democracy and the Origins of Our Time,* posits the international security dimensions of the New Deal as enduring well into the Truman administration, while Wolfgang Schivelbusch's *Three New Deals* places the New Deal's "cultural moment" in transnational perspective. John W. Jeffries, "The 'New' New Deal: FDR and American Liberalism," *Political Science Quarterly* 105 (1990): 397–418; Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995), 3–10.

30. Ernest O. Hauser, "The Backstage Battle at Nuremberg," *Saturday Evening Post* (January 19, 1946), 18, 138.

unfavorable assessment of Nuremberg, written roughly a decade after the trial:

> Perhaps this is New Deal justice; the overriding of precedent, the fight against the "nine old men" who successfully stood out for precedent against administrative absolutism—transferred to the international scene, where no carefully administered law stood in its way. It is also New Deal jurisprudence without the tempering of justice with humanitarianism in which it usually prided itself.[31]

The Nuremberg charter, indictment, and judgment teemed with internal contradictions. But in true pragmatic New Deal style, the trial also got the job done, while generating the minimal level of legitimacy denied to both the sterile Hague Convention approach and the sentimental Pact of Paris approach to the development of international humanitarian law.[32]

The Nuremberg trial can be resituated along three intersecting axes: as one episode in a broader panoply of denazification programs; as the product of earlier and halting steps in the institutionalization of its legal ideas; and as a projection of what might be called a New Deal ideology or a Four Freedoms ideology into the international sphere. If one is trying to argue that the meaning of an event such as Nuremberg changed over time, then we first need to know what it is changing *from.*

The Role of Norms in International Law

We need not stop at merely "resituating," however. I am in accord with the perspective expressed by the historian Matthew Connolly, who argued in a recent forum on "Transnational History" that as historians we need not be satisfied with simply "interrogating" and "problematizing" issues. In addition, we ought to offer some sense of what we think are the relevant engines of historical change in an effort to explain how we got from A to B.[33]

Many of the institutions designed to advance objectives we might label as "transitional justice," in the World War II era and at other times, link back to what are at root different conceptions lumped together under the

31. Alfred Vagts, *Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations* (New York: King's Crown, 1956), 327. The German-born Vagts had served as a decorated officer in the Imperial Army in World War I; he was an early critic of National Socialism and emigrated to the United States in 1933.

32. On the Hague Conventions of 1899 and 1907 and the 1928 Kellogg-Briand Pact (Pact of Paris), and their respective approaches to regulating international lawlessness, see Borgwardt, *A New Deal for the World,* 61–68.

33. "*AHR* Conversation: On Transnational History," *American Historical Review* 111.5 (December 2006): 1440–64.

undifferentiated label of "law." A brief analogy from social theory might shed some light: following Hegel and Habermas, the social theorist Avishai Margalit makes a separation between notions of *ethics*—a more context-rich and rule-oriented realm where we deal with people with whom we are already in some kind of relationship, and *morality*—the thin obligations that we owe to each other because we are humans. At the broadest and most attenuated level, one's nation-state or co-religionists may be the subject of ethics, but not humanity as a whole. So ethics is thick, as in specific municipal rules; and morality is thin, as in more aspirational and general norms related to justice and fair dealing that would actually be quite difficult to apply in an individual case.[34]

To reframe this split between thicker ethics and thinner morality in a legal context, we might see a similar split between specific "laws," as in, for example, municipal codes where the scope of their application is reasonably clear, and "norms," meant as more general principles of justice. One classic Western example of such aspirational principles would be the Ten Commandments: some people clearly consider them to be rules, yet they are constantly violated and there are millions of exceptions; what relationship could they possibly have to ideas about law? We may find general principles like this in many world religions, as in Mahayana Buddhism's description of a Bodhisattva's six perfections; or the Qu'uran's citation of "eternal principles of righteousness and fair dealing." There is also no shortage of secular examples, such as the Persian Charter of Cyrus, or the American Declaration of Independence. These general principles are really much more about what Margalit would call morality—they are thin.[35]

34. Avishai Margalit, *The Ethics of Memory* (Cambridge: Harvard University Press, 2002), 7–9. The terms "thick" and "thin" are drawn from the cultural anthropology of Clifford Geertz, who famously advocated "thick description" in the struggle to understand diverse societies from the position of an outsider. On "thick and thin" in the context of ethics and politics, see Kenneth Cmiel, "Review Essay: The Recent History of Human Rights," *American Historical Review* 109.1 (February 2004): 117, 126 n.26; Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 2004); Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973). See generally, Michel Rosenfeld and Andrew Arato, eds., *Habermas on Law and Democracy: Critical Exchanges* (California: University of California Press, 1998).

35. Micheline R. Ishay, ed., *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present* (London: Routledge, 1997), 5, 42; David Armitage, *The Declaration of Independence: A Global History* (Cambridge: Harvard University Press, 2007). I note in passing that the Nuremberg judgment was analogized to the Ten Commandments by no less sober a commentator than Walter Lippmann: "For my own part, I do not think it rash to prophesy that the principles of this trial will come to be regarded with the Magna Charta, the *habeas corpus* and the Bill of Rights as landmarks in the development of law." Lippmann, "The Meaning of the Nuremberg Trial," *Ladies' Home Journal* 63 (June 1946), 32.

The charters of the international institutions of the 1940s, notably Nuremberg but also the United Nations and Bretton Woods charters, were meant to thicken international politics to the point where they could basically take us from morality to ethics and from thin precepts to thicker rules, in the sense of injecting some kind of perceptions of community standards and even a mild enforceability into the international realm. Not that an international community would be created that is somehow just like a more local community; the idea here is much more diluted, related to using transnational institutions to create what international lawyers call *jus cogens*—the idea that if you violate this norm you know you are doing wrong. Not that the norm is not violated—it may be all the time—or that there are even necessarily specific sanctions when it is violated—but with genocide and slavery and, until recently, torture, if you are doing it, it is just not that plausible to say that you did not know you were doing wrong.[36]

Human rights discussions are often framed in terms of "thin" notions about human dignity or respect. At the most fundamental level, Nuremberg was about how are we going to thicken that notion by using legal institutions and norms. Rather than looking at transitional justice as a place, a sort of sub-optimal zone en route to a substantive stopping-point in the realm of something better, it may be more useful to explore the mechanisms by which we might hop across from morality to ethics, how we could ever go from, say, a human rights norm about dignity to a body of human rights law about accountability. What could ever confer legitimacy on such a leap, which by definition would be an innovation the first time it was tried?

Contrasting the Nuremberg and Tokyo Trials: Varying Verdicts on Legitimacy

One way to get some purchase on this question is by means of the last substantive example of this article, relating to the contrast between the two flagship international criminal tribunals of the 1940s, the Nuremberg and

36. Gennady M. Danilenko, "International *Jus Cogens*: Issues of Law-Making," *European Journal of International Law* 2.1 (1991), 42–65; Susan Hyde, "Observing Norms: Explaining the Causes and Consequences of Internationally Monitored Elections" (Ph.D. diss., University of California, San Diego, 2006). On norm identification and consolidation, see generally Arie M. Kacowicz, *The Impact of Norms in International Society: The Latin American Experience, 1881–2001* (Notre Dame: University of Notre Dame Press, 2005); Andrew P. Cortell and James W. Davis, Jr., "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms," *International Studies Quarterly* 40 (1996): 451–78; Martha Finnemore, "International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy," *International Organization* 47 (1993): 565–97.

Tokyo trials.[37] Even commentators who take issue with the legitimacy of the Nuremberg trial because of concerns about victors' justice, *ex post facto* law, or the trial's streamlining of legal procedure—and I include myself in this group—tend ultimately to give Nuremberg a "pass," basically conceding that it was better to have the trial than not to have it.[38]

Nuremberg scores at least passing well regarding two of the three pillars of the rule of law: procedural fairness and personal culpability, although it staked out a troubling space with regard to the third such criterion, applying pre-existing rules.[39] The organization of the prosecution's briefs highlights the individualized nature of the Allied litigation strategy. For example, unlike the oral presentations, the underlying briefs were extensively cross-referenced to highlight which defendants were implicated by the resulting analysis, supported by a lengthy précis for each defendant, listing and sometimes summarizing all the relevant documentary exhibits.[40] At Nuremberg, the rights of defendants were placed at least in part ahead of other "societal" goals such as truth-seeking and education, and each defendant's situation was considered on an individualized basis in light of particularized, demonstrated evidence within an adversary system.

In the terminology of the transitional justice literature, these aspects of the trial's design might be examples of what makes vengeance into retribution: when punishment is curbed by the intervention of someone other than the victim, and by the introduction of norms such as proportionality and respect for individual rights. While it may seem obvious that in an organized, modern society victims would not be exacting vengeance personally, Jon Elster reminds us that in the wake of World War II, special legislation needed to be passed in France and the Netherlands, among other

37. For an overview of the Tokyo trial, including a table summarizing charges, verdicts, and sentences, see Elizabeth Borgwardt, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial," reprinted in *War Crimes Law,* ed. Gerry Simpson (London: Ashgate, 2004), 373–443.

38. Commentators contrasting the legitimacy of the Tokyo trial unfavorably with Nuremberg include Judith Shklar in *Legalism,* Kirsten Sellars in *The Rise and Rise of Human Rights* (Stroud: Sutton Publishing, 2002), Geoffrey Robertson in *Crimes against Humanity: The Struggle for Global Justice* (New York: New Press, 1999), and Jon Elster in *Closing the Books.*

39. There are of course many broader and more elaborate ways of delineating rule of law ideals, several of them sketching the rule of law as basically co-extensive with liberalism itself; for a sampling, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004). Each of the various permutations summarized by Tamanaha emphasizes protection from *ex post facto* legislation, however.

40. See, for example, "The Individual Responsibility of the Defendant Hermann Goering for Crimes Against the Peace, War Crimes, and Crimes Against Humanity," Box 301, Thomas J. Dodd Papers, Nuremberg Series, Archives and Special Collections at the Thomas J. Dodd Research Center, University of Connecticut.

countries, to curb widespread instances of "vigilante justice" being taken by mobs against perceived collaborators.[41]

But what about that third pillar of the rule of law, applying pre-existing rules? Here is the key role for norms, because somewhat counterintuitively, as the political theorist Judith Shklar has argued, the charge in the Nuremberg indictment that was the most novel was also the most legitimate, in her eyes—namely, crimes against humanity. To say that the Nazis somehow did not know that they were transgressing when they committed their extreme atrocities, when lesser-included subsets of such behavior had long been outlawed in European-devised international law, really strained credulity for Shklar.[42] The need for pre-existing legal rules is at root a fairness argument, about potential defendants needing to be put on notice that they might be called to account. Yet, even German critics of Nuremberg almost never argued that the defendants had been treated unfairly.

The Tokyo trial simply has not fared as well under these three rule-of-law criteria (procedural fairness; personal culpability; and pre-existing rules). The trial was held from 1946–48 for twenty-eight of Japan's wartime leaders. Seven defendants were hanged and eighteen given prison sentences

41. Elster, *Closing the Books.* The image of using institutional mechanisms to transform vengeance into retribution is from Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

42. The Nuremberg charter defined crimes against humanity as:

> [M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Original intentions, and the plain meaning of this wording, point to this definition as encompassing pre-war Nazi atrocities against German Jews. In practice, however, the Nuremberg tribunal interpreted limiting language in the charter as circumscribing the more radical dimensions of these provisions. Specifically, the tribunal decided to interpret crimes against humanity as justiciable only when committed in connection with the two other categories of crimes outlined in the charter, namely crimes against peace (waging a war of aggression) and conventional war crimes (committing battlefield atrocities). Accordingly, the tribunal held that prewar atrocities against Jews did not fall within its jurisdiction.

The technical rationale for this astonishing interpretation is as follows: The semicolon after "war," which appeared only in the English and French versions, was also held to divide the list into two distinct categories of crimes against humanity: the murder-like crimes before the semicolon, and the persecution-related crimes, which were limited by the extra clause about jurisdiction. The tribunal later issued a "protocol" changing the semicolon to a comma, in order to clarify that the jurisdictional limitations were meant to apply to the entire list of crimes against humanity. International Military Tribunal, *Trial of the Major War Criminals, Official Text,* 42 vols. (Nuremberg: Secretariat of the International Military Tribunal, Allied Control Authority for Germany, 1947) 1:11; 22:498; "Protocol to Agreement and Charter, Oct. 6, 1945, in Papers of Wilhelm Keitel, Institute of Contemporary History, Munich.

ranging from seven years to life. (The ten surviving defendants were all released in 1958.) This was a trial with a charter virtually identical to Nuremberg's, founded on the same legal principles and procedurally very close to its German counterpart. Yet Shklar was clearly in good company when she diagnosed the Tokyo trial's deficiencies as featuring "cultural narrowness, ethical dogmatism, and historical emptiness."[43]

Why such disparate reactions to two institutions that were really remarkably similar in their conceptualization, design, and functioning? A variety of factors worked together to interfere with the legitimacy of the Tokyo trial, both in terms of the trial's actual functioning and its later legacies.[44] One problem was the way the tribunal interpreted its charter. The charter's conspiracy charge, drastically downplayed by the Nuremberg tribunal in its own judgment, became the central focus of the Tokyo tribunal's judgment, just as it had been at the center of the prosecution's case. The Tokyo judgment in effect treated all of Japanese politics and culture since the 1928 murder of the Manchurian warlord Zhang Zuolin (Chang Tso-lin) as a vast and unitary conspiracy, even in the face of significant disconfirming evidence regarding factions, purges, and high turnover of responsible officials.[45]

43. Among the few differences between the Nuremberg and Tokyo charters was that an international team handled the prosecution at Nuremberg, sharing responsibility more or less equally, whereas the Tokyo charter provided for a single American chief of counsel, chosen by Supreme Commander General Douglas MacArthur, to lead an "International Prosecution Section." Other differences included the fact that the Tokyo charter provided for eleven judges rather than Nuremberg's four, with no alternates, and the Tokyo charter provided for review of the sentences by MacArthur. The text of the Tokyo trial's judgment itself asserted that "in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical." See "Special Proclamation: Establishment of an International Military Tribunal for the Far East" (Tokyo Charter), January 19, 1946, in *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East,* ed. R. Pritchard and S. Zaide, 22 vols., 20: Annex No. A-4, 16–18; Borgwardt, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial"; Shklar, *Legalism,* 156.

44. This list of factors is a modified version of a list explained to me by Yuma Totani in a recent conversation: she offers her own, somewhat different list in her current book project. Although I take issue with her interpretation at several points, just the idea of developing such a list at all has been very helpful in clarifying my thinking.

45. Under the Nuremberg charter, conspiracy was not listed as one of the three categories of justiciable crimes (crimes against peace, war crimes, and crimes against humanity), but it was mentioned in two places in the same part of the charter listing and explaining these three categories of crimes. First, at the end of the paragraph defining crimes against peace, described as the "planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, *or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.*" Because aggression was the only crime that included conspiracy as part of the underlying offense,

Heavy reliance on the concept of conspiracy as a catch-all category was linked to another shortcoming of the Tokyo process, namely the persistence of basic cultural misunderstandings. One American associate prosecutor admitted frankly that "[f]ew of the prosecution staff knew anything about Japanese history, customs, and government." The Japanese defense division also had a limited understanding of the role of the defense attorney in an adversarial trial. For instance, one harsh critic of the trial concluded that "the Japanese lawyers as a group were thoroughly unacquainted with Anglo-American legal procedure and did not know what the trial was about." Persistent disputes over translations of documents or interpretations of testimony also hampered the defense.[46]

The fact that Emperor Hirohito was never placed in the dock was considered an additional major shortcoming of the Tokyo trial, by both Allied commentators and reform-minded Japanese analysts. (Nuremberg planners did not have to confront the decision about whether to try Hitler, of course, although early planning documents point to a consensus that he would have been tried.) Historian Yuma Totani in a forthcoming book has articulated the controversial thesis that the Tokyo trial's American planners never made a firm commitment *not* to place Hirohito on trial, possibly as a way of keeping the emperor pliant and off-balance during the U.S. occupation. Nevertheless, Chief Prosecutor Joseph Keenan announced that the emperor would not be a defendant shortly before the June 1946 opening session. Subsequent commentators have pointed to MacArthur's insistence on a more

---

the Nuremberg tribunal limited the application of conspiracy to evidence related to waging a war of aggression. It basically chose to ignore the second appearance of the term, in a catchall provision at the end of the entire list of crimes, as follows: "Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

The Tokyo charter used the same wording, but its tribunal took a different interpretive tack, focusing more on this catchall provision. The Tokyo approach meant that all three categories of crimes had a conspiracy dimension, and indeed two Tokyo defendants were found guilty *only* of conspiracy and sentenced to life in prison. "Agreement by the Government of the United States, the Provisional Government of the French Republic, the Government of the United Kingdom of great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis" (Nuremberg Charter), *IMT* 1:8–16; *Special Proclamation: Establishment of International Military Tribunal for the Far East* (Jan. 19, 1946) (Tokyo Charter) in *IMTFE Transcript,* Annex No. A-4 at 16–18.

46. Eventually, Japanese counsel were backstopped by a more aggressive and vigilant U.S. defense team, and an arbitration board was formed within the interpreters' division to decide translation questions on the spot. Sutton, "The Trial of Tojo: The Most Important Trial in All History?" *ABA Journal* 36 (Feb. 1950): 95; Gordon Ireland, "Uncommon Law in Martial Tokyo," *Year Book of World Affairs* 4 (1950), at 71.

easily governable Japan as the key backstory for this decision; in British war crimes prosecutor Geoffrey Robertson's recent summary, "MacArthur and his right-wing advisers decided that the imperative of avoiding communism and chaos required the Emperor to remain in place, as an American puppet, even though this meant rigging the Tokyo trial to pretend he was innocent." According to this assessment, cynical trade-offs were accordingly charged against the more abstract demands of international justice, further diminishing the impact and reach of the Tokyo trial legacy.[47]

There were, in addition, no acquittals at the Tokyo trial. The fact that there were three at Nuremberg has always boosted assessments of that trial's legitimacy, and analysts sometimes point to Soviet outrage over the Nuremberg acquittals as showing how the Soviets were intent on politicizing the trial and did not take rule-of-law precepts seriously. The possibility of an acquittal is meant to be a major criterion differentiating "political trials" from real trials, what the legal theorist Otto Kirchheimer has termed the essential factor of "irreducible risk."[48]

A further critique of the Tokyo trial is the continuing refrain that Tokyo was even more of an "American show" than Nuremberg. The prosecution was run by a single American chief prosecutor, and the structure of the overarching occupation was of course entirely run by MacArthur, with an Allied Far Eastern Commission in a toothless advisory role. Other allies felt less responsibility for the workings of the occupation generally and the trial in particular, and less pressure to work closely together when opinions differed than was the case in the European theater.[49]

47. Yuma Totani, "The Tokyo War Crimes Trial: Historiography, Misunderstandings, and Revisions" (Ph.D. diss., University of California at Berkeley, 2005), under contract with Harvard University Press. Totani agrees that Keenan's announcement—and of course the fact that the emperor was indeed never tried—had a big impact on Japanese perceptions of the trial, calling into question the whole point of having one, even though she argues that Keenan's announcement was in error. Totani's important new interpretation will challenge a great deal of received wisdom about the role of MacArthur, as well. See, for example, Geoffrey Robertson, *Crimes against Humanity,* 224; Herbert Bix, *Hirohito and the Making of Modern Japan* (New York: HarperCollins, 2000). On preliminary plans to try Hitler, see Glueck Papers, notes in Reel 40.

48. Kirchheimer quoted in Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil,* rev. and enl. edition. With a new introduction by Amos Elon (1963; New York: Penguin Classics, 2006), 244. On the Soviet role, see Francine Hirsch, "The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order," *American Historical Review* 113.3 (June 2008): 701.

49. The premier example of such a free-spirited participant at Tokyo would doubtlessly be Justice Pal of India, who refused to sign a memorandum early on circulated by members of the tribunal calling for consensus among the judges and used his lengthy dissent to criticize the entire system of public international law as a Eurocentric club, hypocritically conspiring to exclude new members. This astonishing document remains the most trenchant critique of

The final common critique of the Tokyo trial was the fact that the members of the U.S. team—in particular, the chief prosecutor and judge—were not as qualified and competent as the team sent to Nuremberg. U.S. leadership was central to whatever success the Nuremberg process enjoyed, and it sent a demoralizing message when the "B" team failed to function well at Tokyo, in addition to suggesting a cavalier attitude on the part of the United States.[50]

Yet with the exception of this last item, each element of this critique of the Tokyo process is at root a more intense version of all the most common criticisms of the Nuremberg trial. Tokyo saw even greater cross-cultural difficulties than Nuremberg, including increased reliance on a problematic Anglo-American conspiracy theory and fewer demonstrated concerns with procedural rectitude and with the defendants as individuals. The Tokyo trial as part of an Allied occupation regime was even more of an American show due to the role of MacArthur as promulgating authority of the trial's charter and lone adjudicator of the appeal. Tokyo trial critics have also always been offended by the particularly stark hypocrisy of indicting defeated Japanese leaders for crimes against humanity in the wake of the U.S use of atomic weapons against Hiroshima and Nagasaki and the firebombing of Tokyo, although again, only slightly less stark versions of these "clean hands" issues were also present at Nuremberg.[51]

A more clear-eyed view of Tokyo might instead highlight how very close it was to Nuremberg. Yet if anything, the Nuremberg legacy has become increasingly burnished over time, although of course this re-evaluation process has not been a linear upswing, particularly in Germany.[52]

---

the trial. The typescript version is 1,235 pages; a 701–page typeset version was published by Sanyal & Co. in India under the title *International Military Tribunal for the Far East: Dissentient Judgment,* in 1953.

50. Totani spells out the consequences of Keenan's alcoholism, penchant for publicity, and lack of careful preparation, as does Tokyo assistant prosecutor Kurt Steiner, more obliquely, in his forthcoming memoir *The Tokyo Trial and the Progressive Development of International Law,* ed. Elizabeth Borgwardt (Stanford University Press, forthcoming, 2009).

51. Pal's dissent itemized procedural concerns but centered around Allied commissions of crimes against humanity; the published version was illustrated with photographs of atomic destruction. See also Timothy P. Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (Lexington: University Press of Kentucky, 2001); Borgwardt, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial"; Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (1971; Ann Arbor: University of Michigan Press, 2001); Richard Falk, "Forty Years after the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law," American Society for International Law, *Proceedings* of the 80th Annual Meeting, 1986, 65.

52. Shklar, *Legalism,* 145, 160–62, 168; on German critiques of Nuremberg, see Christoph Burchard, "The Nuremberg Trial and Its Impact on Germany," *Journal of International*

What could be the basis for arguing that Tokyo's problems were so much bigger, besides a kind of intuitive revulsion? One way to approach the Nuremberg versus Tokyo conundrum would be to say that spelling out the contrasts merely serves to tug the Nuremberg project further away from its own rather fragile claims to legitimacy. Another approach would be to say that the list of Tokyo concerns—expressed in both contemporaneous commentary and in later assessments—itself suggests some criteria for legitimacy. If we continue to have different verdicts on the value of these two flagship trials, we may be able to give form and substance to this intuition: the power of small differences, and ultimately, of institutional design, of cultural context, of intentions, of the caliber of individual contributions.[53]

Nuremberg seems somehow to make it over that legitimacy line, where the line embodies the notion that it was better to hold the trial than not to hold it. But there seems to be a continuing consensus that the Tokyo trial is on the wrong side of this line. The larger point may be that the legitimacy "stock" of a particular process may rise and fall over time, however, as it is continually reframed by the unfolding of subsequent events. Nuremberg's ascending legitimacy may be linked to a later-developing historical consciousness regarding the Holocaust and genocide, or to a bracketing of the trial as the last major act of the war's "multilateralist moment," where the Allies were still struggling to solve or at least address systemic postwar problems in tandem. As noted, Nuremberg was both forward looking and backward looking: looking ahead to a world where the "Nuremberg Principles" could be codified and looking back to a moment of Allied harmony, albeit brought about by exigent external circumstances.

Tokyo's falling legitimacy quotient, by contrast, may be linked to its "pulled punches" regarding the decision not to try the emperor being recast as the opening act of a more intense phase of the Cold War in Asia. The Tokyo process was if anything *too* forward looking, privileging stability over justice. The unilateralist military tribunals of the G. W. Bush administration have engendered similar sets of suspicions, in large part because a wider context of respect for the rule of law in the so-called "war on terror" has been weakened or absent in the administration as a whole, which has consistently privileged expediency and secrecy over justice.

Criminal Justice 4.4 (October 2006): 800–29; Albin Eser, "Das Internationale Militärtribunal von Nürnberg aus deutscher Perspektive," conference paper, "Judging Nuremberg: The Laws, the Rallies, the Trials," July 17, 2005, Nuremberg; Wilbourn E. Benton and Georg Grimm, eds., *Nuremberg: German Views of the War Trials* (Dallas: Southern Methodist University Press, 1955).

53. On a role for intuition in shaping political sensibilities, see Lynn Hunt, *Inventing Human Rights: A History* (New York: W. W. Norton & Co., 2007), 27.

Yet Yuma Totani's manuscript has encouraged me to rethink that dismissive verdict and to conclude that perhaps Tokyo may nevertheless make it just over the line. For example, evidence presented at the Tokyo trial is being used to rebut twenty-first-century denials by the government of Japan of an official role for its army in setting up and administering a system of sex slavery in its zones of occupation during World War II. The fact that key documents proving this army role were admitted as part of the official record of the Tokyo trial "would make it harder for the Japanese government to deny them," according to the team of Japanese researchers challenging these assertions by the government of Japan.[54] At a minimum, having created an enduring record, the Tokyo trial is serving as a resource for current and future debates.

Conclusion

The three editorial cartoons discussed earlier in this article, on the Allied role in punishing and rehabilitating Germany, reflect a chronological shift in attitudes, away from a punitive and all-encompassing wartime mindset and toward a more contained and Cold-War-friendly framing of what "denazification" might actually mean in practice. At the same time, these images also reflect what the historian of ideas Isaiah Berlin called the "Rooseveltite" orientation, of a less-than-coherent pluralism as the appropriate response to the incommensurability of different value systems. That is to say, we can see how *all three* of the purposes suggested by the political cartoons were expressed in the design of the Nuremberg trial: (1) the defendants were in some ways stand-ins for various sectors of German society as well as being on trial as individuals; (2) the trial itself was meant to be an exercise in didactic legality, and so a forum for education as well as retribution; and (3) the small number of perpetrators indicted meant that it was also widely interpreted as symbolically letting ordinary Germans off the hook on some level. A "New Deal" process could do all three, if not well, at least passably.

FDR himself embodied this kind of pluralistic vision, insofar as such a quality could be reflected in a single personality. In Berlin's words: "So passionate a faith in the future, so untroubled a confidence in one's power to mould it, when it is allied to a capacity for realistic appraisal of its true contours, implies an exceptionally sensitive awareness, conscious or half-

54. The article continued: "The Japanese government formally accepted the [Tokyo] tribunal's rulings as part of the 1951 peace treaty that it signed with Allied powers . . . ." Martin Fackler and Choe Sang-Hun, "Japanese Researchers Rebut Premier's Denials on Sex Slavery," *New York Times* (April 18, 2007), A3.

conscious, of the tendencies of one's milieu, of the desires, hopes, fears, loves, hatreds of the human beings who compose it, of what are impersonally described as social and individual trends." Berlin continued, "Roosevelt had this sensibility developed to the point of genius."[55] This plural sensibility is what is meant by referring to Nuremberg as a New Deal institution, not just that particular New Dealers were its designers.

The plural nature of this vision also meant that Nuremberg could be both backward looking and forward looking, even as it suffered from "ambiguities, inconsistencies, and incoherencies," in Anson Rabinbach's words.[56] It quietly filled in with norms about fairness and proportionality what it lacked in pre-existing positive law. As an institution it was also embedded in a nascent UN system that implicitly promised that this was just the beginning; these standards would apply to everybody and would be thickening still further over time. Such drastically disappointed expectations have themselves proved to be something of an engine of historical change in the post–Cold War era.

Yet reconnecting with the legacies of Nuremberg in the post–Cold War era does not mean recreating Nuremberg. In a recent public address, Chief International Criminal Court Prosecutor Luis Moreno-Ocampo pointed to a kind of "cultural thickening" of the design of prosecutions under the auspices of the ICC—the way these prosecutions have a dedicated role for the victims, for example, in line with civil law and African law traditions, rather than clinging exclusively to Anglo-American designs—as well as to the way the threat of an ICC prosecution could play a salutary role in internal diplomatic negotiations in conflicts that are still unfolding. Moreno-Ocampo explained how the ICC's design—articulated in its founding Rome treaty as "complementarity"—is "more than a treaty; it is also a monitoring system and a global justice system based in national states."[57]

What this article calls the thickening of human rights norms may be the key task for international institutions going forward, but it has a strong domestic dimension as well. Democratic theorist Seyla Benhabib calls these

55. Isaiah Berlin, "Winston Churchill in 1940," reprinted in Berlin, *The Proper Study of Mankind: An Anthology of Essays,* ed. Henry Hardy and Roger Hausheer (1949; New York: Farrar, Strauss & Giroux, 2000), 615.

56. Anson Rabinbach, "The Challenge of the Unprecedented—Raphael Lemkin and the Concept of Genocide," *Jahrbuch des Simon-Dubnow Instituts* 4 (2005): 397–42, at 408. (Rabinbach was writing about the narrower legal concept of genocide, not the wider workings of the trial. His argument about problems posed by the newness of such abstractions also applies to the forum that first tried to implement them, however.)

57. Moreno-Ocampo also appealed to his audience of law students, saying that "to keep the legitimacy of the institution, I need scholars to explain it." Luis Moreno-Ocampo, "The International Criminal Court and Human Rights in the 21st century," Address at Stanford Law School, January 30, 2006.

processes "jurisgenerative politics," where the transparency of democratic states allows citizens to become increasingly convinced of the independent validity of rule-of-law-related norms.[58] This is a dynamic process through which human rights-related principles are progressively incorporated into the positive law of democratic states, such as the way the criteria related to medical experimentation stemming from one of the subsequent Nuremberg trials (the "Doctors' Trial") became codified internationally and then adopted nationally as the Nuremberg Code.[59] Benhabib sees this domestic incorporation process as a more promising avenue than requiring a future world government for converting norms into rules.

A more thoroughgoing study of the longer-term legacies of Nuremberg will also help to broaden our field of vision, from more elite political and legal responses to a more wide-ranging "democratization of the past" through the creation of historical consciousness.[60] Historians willing to engage in a transdisciplinary dialogue with legal scholars might potentially make a huge contribution to the study of multiple dimensions in the field of human rights—politics, ideas, institutions, and culture—in order to enrich an ongoing conversation about where legitimacy really comes from in a chaotic political situation such as the end of World War II.

58. Seyla Benhabib, *Another Cosmopolitanism: The Berkeley Tanner Lectures* (New York: Oxford University Press, 2006), 4.

59. *United States of America v. Karl Brandt, et al.,* Trials of War Criminals before the Nuremberg Military Tribunals, Nov. 21, 1946–Aug. 20, 1947 (Washington, 1974); the principles of the Nuremberg Code, relating to informed consent and absence of coercion, are codified at Title 45 of the Code of Federal Regulations, Public Welfare, Subtitle A, Department of Health and Human Services, Part 46, Protection of Human Subjects. In the United States, the Nuremberg Code has also been incorporated into the laws of individual states and the codes of various universities and professional associations.

60. On the "democratization" of the past, see, for example, Sriram, "Transitional Justice Comes of Age," 510; John E. Bodnar, "Public Sentiments and the American Remembrance of World War II," in *Public Culture: Diversity, Democracy, and Community in the United States,* ed. Marguerite Shafer (Philadelphia: University of Pennsylvania Press). See also Wulf Kansteiner, *In Pursuit of German Memory: History, Television, and Politics after Auschwitz* (Ohio: Ohio University Press, 2006), and Peter Seixas, *Theorizing Historical Consciousness* (Toronto: Toronto University Press, 2004).