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**CONSTRUCTIONS OF GUILT AND LOGICS OF PUNISHMENT: AMERICAN  
NARRATIVES OF GERMAN GUILT AFTER WORLD WAR II**

A Thesis in  
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by  
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## ABSTRACT

This thesis investigates how American war crime planners conceived of German guilt after World War II, and how it influenced their prescriptions for punishment. I examine three separate proposals for the punishment of German war criminals and the rhetorical, philosophical, and material ramifications of each. Using different aspects of narrative theory, I explore how each construction of guilt created a different propulsive logic for punishment. Recognizing that narratives have consequences both within and outside the story, I argue that each plan highlights a different conception of the relationship between guilt and punishment. The logics promoted by each plan have been carried into different aspects of transitional justice today and continue to demand that we examine how we construct guilt-and conceive of punishment in the wake of tragedy.

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## Introduction

### Narrating Guilt and Negotiating Punishment

In the wake of unspeakable tragedy, members of society privately and publically debate where to lay blame. Individuals and groups formulate accusations of blame, and demand that the perpetrators be punished. Nowhere is this more clear than in situations of transitional justice when institutional change is followed by demands for the redress of past transgressions. Members of society grapple with the past, a process which involves a rhetorical negotiation of transgression: what exactly happened, who did it happen to, and what made it wrong? Far from a foregone conclusion, the question of who is guilty of a specific transgression, why they are guilty, and what constitutes guilt is a matter of rhetorical significance. How these questions are negotiated creates the basis for a model of transitional justice.<sup>1</sup> Such negotiations, whether they are conducted by a few people, as in the case of trials or engaged in by a nation, as in the case of Truth and Reconciliation Commissions, are inherently rhetorical acts. They limit, persuade, propel and create action. The rationale of guilt and culpability propels arguments for punishment, just as considerations of the end goal of justice shapes and tempers it. The rhetorical process of these negotiations have material consequences for the fate of the accused. A rhetorical study of guilt and punishment within transitional justice models attempts to understand how guilt is construed and negotiated, and how it seeks to defend and prescribe punishment. This study seeks

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<sup>1</sup> By using the term “transitional justice,” I am referring to the academic study of how societies transition from periods of conflict or repressive rule to a different form of government or rule. The use of the term “model” refers to the different practices employed by society in order to address past grievances and enable future governance. Examples of these practices include judicial and non-judicial measures such as criminal prosecutions, truth commissions, reparations, official apologies, and institutional reforms. Transitional justice as a specific and separate field of inquiry has emerged within the last thirty years, though the practices it purports to examine have been in used in different forms for centuries. It is necessarily inter-disciplinary, reaching into Law, Political Science, Security Studies, Peace Studies, and Sociology, to name but a few disciplines. For more information on the study of transitional justice, see Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. (Washington D.C: United States Institute of Peace Press, 1995).

to understand the cultural, moral, philosophical and practical beliefs that shape projections of guilt and punishment. It analyzes the basis of transitional justice models, in the hope that it may clarify why particular models are used in specific situations and how they shape the future of the country utilizing them. Although this is a broad subject, each case study in which a country underwent a regime change after violent conflict presents a specific instance in which a transitional justice model was created and utilized.

My project takes up a case study with one such transitional justice model. I examine the Nuremberg Trial system by examining the negotiations of guilt and punishment of Nazi war criminals conducted by American officials between August 1944 and October 1945. The Nuremberg Trials were not created solely by American officials. Indeed, the final trial plan was reached after extensive negotiations involving the British, French and Soviet Union governments. Recognizing the limits of excluding international deliberations, this study deliberately focuses on the negotiations that were conducted by American officials because they were largely responsible for the formation of the final trial plan. Narrowing this case study to the American negotiations over the judicial redress of past atrocities highlights competing rationales about the *telos* of punishment.

### **Background and Overview**

Concerns over how to deal with the perpetrators of the Nazi holocaust started in the United States in 1942 and continued throughout the war. The Moscow Declaration of 1943 announced the intention of the Allies to punish Nazi guilt after the war. The specific mechanisms for that punishment, what has come to be known as the Nuremberg Trial system, was primarily developed from August 1944 to October 1945. This project examines the discussions held by top American officials and advisors during this time. Primarily, it examines how different officials

conceptualized the guilt of Germany and how those conceptualizations drove their reasoning about the acceptable mechanism for administering punishment. I analyze how conceptions of guilt exert rhetorical force in the push towards punishment. The officials charged with creating a program to deal with war crimes differed widely in their conceptions of who was guilty and what they were guilty of, and how to make the punishment fit the crime.

The three chapters are divided by three different concepts of guilt and punishment. These three categories also fall into a roughly chronological timeline, according to the author that they are ascribed to. I examine the Morgenthau Plan, the Bernays Plan, and the Final Agreement and Charter for the Nuremberg Trial. I have picked these three categories not simply because they represented three distinct periods in the evolution of the American war crimes plan, but because they also represented three distinct views of guilt and punishment. The Morgenthau Plan represented a collective view of guilt that promoted punishment for the sake of just desert and rehabilitation. The Bernays plan represented a view of guilt that was both collective and individual, in that it attempted to include collective guilt through the Anglo-American concept of conspiracy. Recognizing that a traditional trial would be limited to punishing individual guilt, the Bernays plan attempted to hold collective organizations such as the SS and Gestapo responsible for planning to commit crimes. It did so by attempting to deem entire organizations to be criminal, and membership in them a criminal act. Punishment functioned to hold accountable individual action, and in doing so, reinforced the rule of law. The Final Agreement and Charter for the Nuremberg Trial rooted individual German guilt in the waging of aggressive war, and elevated Crimes Against Peace as the supreme crime. In doing so, it drove a consequentialist logic of punishment that promoted deterrence and preventing future wars as the *telos* of punishment.

The three chapters are roughly organized around these texts because they most clearly represent the three concepts I am interested in exploring. They are the texts that most clearly impacted the trials, and they are the most stable textual stages for the competing concepts. My thesis attempts to survey the rhetorical landscape that surrounded these texts as each text was both a product of, and a catalyst for, negotiations of guilt and punishment. This rhetorical landscape features memos, transcripts of phone calls, transcripts of meetings, personal diaries, drafts of the text and letters that were authored by the American officials working on the United States' war crimes proposal. Because the American officials were under the intense gaze of a public audience, and perceived themselves to be subject to the future gaze of history, I have also attempted to include texts on the subject of German guilt that were salient in the public sphere during that time, newspaper editorials, a few books in the popular press, and articles by influential academics.

### **The Function of Narrative in the Construction of Guilt**

Throughout the three chapters of my thesis, I use the term narrative to describe the three different constructions of German guilt, and the way these constructions exerted a propulsive force through the set of inferences, beliefs, judgments, and contingencies that led to different conclusions about how German guilt should be punished.<sup>2</sup> Within communication studies, narrative as a paradigm versus a mode of discourse is a contested concept, with authors such as Fisher arguing that it encompasses an alternative way to understand human reasoning.<sup>3</sup> He is answered by authors such as Rowland who vie for a space for traditional understandings of reasoning, arguing that humans are not just storytellers, but theory builders as well. Rather than

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<sup>2</sup> As for the term narrative itself, I use it to describe a set of communication characteristics such as plot, character, marked beginning, middle, end, and rising action.

<sup>3</sup> Walter R. Fisher, *Human Communication as Narration* (Columbia, SC: University of South Carolina Press, 1987).

weighing in on whether narrative encompasses human communication, I look at a particular moment in time to see how three different narratives competed for the power to enact moral judgment. Through the analysis I provide in the next three chapters, I attempt to demonstrate how narrative is a condition for moral judgment: that in instances of competing interpretations of reality, narrative is a necessary precursor to the logics of moral judgment.<sup>4</sup> It provides a foundation for reasoning. Lewis argues for this understanding of the function of narrative, stating:

Narrative is a fundamental form of human understanding that directs perception, judgment, and knowledge. Narrative form shapes ontology by making meaningfulness a product of consistent relationships between situations, subjects, and events and by making truth a property that refers primarily to narratives and only secondarily to propositions; narrative form shapes morality by placing characters and events within a context where moral judgment is a necessary part of making sense of the action; and narrative form shapes epistemology by suggesting that all important events are open to common sense understanding.<sup>5</sup>

Both Rowland and Lewis seem to suggest that a key component of narrative is its internal consistency in creating a story that will be intelligible to the experience of its listeners. Lewis suggests that the power of narrative logic is its ability to “carr[y] a clear message to those whose experience leads them to accept the story as either true or as true-or-life and whose values lead them to accept the moral.”<sup>6</sup> However, for Lewis, and to some extent Rowland, the connections that the audiences make are between character and action, rather than “a rational logic that emphasizes the connections between problems and solutions.”<sup>7</sup> Lucaites and Condit have challenged this split as based on a poetic understanding of narrative in which poetic catharsis is

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<sup>4</sup> Hayden White’s concept of narrative as a metacode, “a human universal on the basis of which transcultural messages about the nature of a shared reality” is a helpful concept here. Hayden White, “The Value of Narrativity in the Representation of Reality,” *Critical Inquiry* 7, no.1. (1980): 6.

<sup>5</sup> William F. Lewis, “Telling America’s Story: Narrative Form and the Reagan Presidency,” *Quarterly Journal of Speech* 73, no.3 (1987): 288.

<sup>6</sup> Lewis, “Telling America’s Story,” 282.

<sup>7</sup> Lewis, “Telling America’s Story,” 282.

the end goal. They argue for evaluating some narratives as rhetorical, in which persuasion is the end goal. The relationship between character and action is thus subservient to “the demands of the relationship between the specific audiences to which it is addressed, the specific context in which it appears, and the specific gain toward which it strives.”<sup>8</sup> In my chapters, I argue that the relationship between character and action is key to the problems and solutions they purport to address. For example, in chapter one, I argue that Morgenthau believed that the national character of the Germans led to specific actions they took. The solution he proposed was based on his assessment of the relationship between character (the German people) and action (the corrupting influence of militarism) within the story. The problem of what to do with atrocities was actual, but it was framed through the construction of a story. The solution was predicated on that construction.

Many rhetorical theorists who study narrative grapple with how to evaluate it. Evaluating it for its narrative fidelity and probability as Fisher does provides some standard for understanding the relationship of narrative to reality, but does it provide the means for understanding the moral implications of narrative? Hayden White writes: “story forms not only permit us to judge the moral significance of human projects, they also provide the means by which to judge them, even while we pretend to be merely describing them.”<sup>9</sup> Other authors, such as Rowland, would disagree, arguing that narrative provides the grounds for moral judgment, but not an objective standard by which to judge. He writes, “If narrative fidelity and probability are to be useful tests of public argument, they must test not merely the story, but the story in relation

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<sup>8</sup> John Louis Lucaites and Celeste Michelle Condit, “Re-constructing Narrative Theory: A Functional Perspective,” *Journal of Communication* 35, no.4 (1985): 92.

<sup>9</sup> Hayden White, “The Narrativization of Real Events,” *Critical Inquiry* 7, no. 4 (1981): 797.

to the world.”<sup>10</sup> I agree with Rowland that narrative does not provide an independent mechanism for judgment, but I do not think this is a necessary harm. Narrative explains the way we got to where we are going. It is by recognizing this, that we can more critically examine the ethical implications of our stories. We can evaluate not simply our constructs, but the value ethic that emanates our logic.

Each of the chapters attempts to understand the construction of German guilt within the context of different narratives. All three documents feature fundamental elements of narrative, but different elements weigh more heavily than others in the construction of German guilt. For example, the mythic notion of German militarism featured heavily in Henry Morgenthau Jr.’s belief in collective German guilt, while the perceived gaze of the public audience was formidable in shaping the Bernays Plan. In analyzing the construction of guilt in each plan, I look to the logic of punishment that emanates from each one. I briefly consider the value ethic in each logic of punishment and how it can be evaluated as a component of transitional justice.

A final reason to examine the construction of guilt and the logics of punishment as a part of a narrative structure has to do with what Jeff Bass argues is a defining feature of rhetorical narration: “an ending consistent with the formal demands of the plot.”<sup>11</sup> Punishment, in a largely intuitive way, is viewed as necessary response to guilt. It bookends transgression. Daniel Philpott, a Professor of Political Science at the University of Notre Dame and Notre Dame’s “Kroc Institute for International Peace Studies” argues that punishment as a logical response to guilt is a core tenant of Western philosophy, criminology and penal practice, and while what

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<sup>10</sup> Robert C. Rowland, “Narrative: Mode of Discourse or Paradigm?” *Communication Monographs* 54, no. 3 (1987): 270.

<sup>11</sup> Jeff Bass, “The Appeal to Efficiency as Narrative Closure: Lyndon Johnson and the Dominican Crisis, 1965,” *Southern Speech Communication Journal* 50, no. 2, 105.

constitutes a just punishment is debated, the logic itself is largely intuitive. He quotes Dragica Levi, a man who lived through the atrocities in Sarajevo in the 1990s as saying, “With war criminals walking free—they must pay . . . If you lose your husband and the killer is walking free, you must have hate in your heart. If you did something you have to pay for it. It is normal.”<sup>12</sup> When viewed as a part of rhetorical narrative, the construction of guilt leads to the ending of the story: the punishment of the guilty. It provides a frame in which the beginning of the story implies the end.<sup>13</sup> While punishment is rarely the end of the story, either for the perpetrators or for the victims, it provides a temporary stability to a narrative, in which tragedy is given the illusion of a satisfactory ending. White argues that in providing not simply a chronology, but an ordered structure for events, an order illustrated well by the pairing of guilt and punishment, the real and the imaginary are reconciled in such a way as to give meaning to an event.<sup>14</sup> This is achieved, as Bass points out in quoting White, because in narrative “real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary.”<sup>15</sup> Punishment, in each narrative of German guilt, operates as a form of imaginary closure. Though I attempt to briefly explicate beyond this temporary stability in examining the implications of each view of punishment, I connect the concepts of guilt and punishment in order to examine how the construction of the beginning shapes the end.

### **Chapter 1: Guilt and Punishment in the Morgenthau Plan**

*“A list of the arch-criminals of this war whose obvious guilt has generally been recognized by the United Nations shall be drawn up as soon as possible and transmitted to the appropriate*

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<sup>12</sup> Dragica Levi as quoted in Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford: Oxford University Press, 2012), 214.

<sup>13</sup> I am paraphrasing Frank Kermode, as quoted in Bass, “The Appeal to Efficiency,” 117.

<sup>14</sup> White, “The Value of Narrativity,” 9.

<sup>15</sup> White as quoted in Bass, “The Appeal to Efficiency,” 118.

*military authorities. . . . When such identification has been made the person identified shall be put to death forthwith by firing squads made up of soldiers of the United Nations.”<sup>16</sup>*

*-Henry Morgenthau Jr., 1944*

The first chapter examines the rhetoric of collective guilt, summary executions and deindustrialization as seen in the plan put forth by Secretary of the Treasury Henry Morgenthau Jr. in August, 1944. Throughout 1943-44, Morgenthau became increasingly concerned about the fate of Jewish people at the hands of the Nazis. Morgenthau was convinced that the Allies were at risk of being too lenient with post-war Germany, and that the only solution to the barbarity and degradation of Nazism was a total de-Nazification of Germany. In Morgenthau’s reasoning, Nazism had so deeply affected the fabric of German life that all citizens were sullied by its coercive influence. That was the only way he could conceptualize what he saw as the complicity of the German people in allowing the extermination of German nationals and in the brutality exhibited by the Nazis in occupied territories. He believed the only way to expunge Nazism from German society was a complete deindustrialization of Germany and a summary execution of major war criminals. Other war criminals would be sentenced to forced labor by military tribunals, forcing them to help rebuild war-savaged Europe. His indictment of the proposed war criminals included a sweeping list of all people affiliated with a variety of Nazi groups and proposed that no one who had been a member of the Nazi party, a military officer, or a “sympathizer,” could hold public office, engage in the legal or journalism profession or in a managerial capacity in banking, manufacturing or trade.<sup>17</sup>

Morgenthau’s plan was initially supported by Roosevelt and was briefly endorsed by both Roosevelt and Churchill at a meeting in Quebec in September, 1944. But when the plan was

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<sup>16</sup> Henry Morgenthau Jr. to Franklin D. Roosevelt, Memorandum: “Appendix B: Punishment of Certain War Crimes and Treatment of Special Groups,” September 5, 1944, in *The American Road to Nuremberg: The Documentary Record 1944-1945*, ed. Bradley Smith (Stanford: Hoover Institution Press, 1982), 28.

<sup>17</sup> Morgenthau, “Appendix B,” in Smith, *The American Road to Nuremberg*, 29.

leaked to the press, it produced a variety of backlash. Most devastating to the American cause was the fact that it was used by Joseph Goebbels as a way to call for a fight to the death, and led to reprisals against American prisoners of war. In light of such severe reactions, Roosevelt was forced to distance himself from the proposal and it was never fully implemented.

Despite the fact that the Morgenthau plan was not fully implemented, Morgenthau's vision of guilt and punishment struck a resonant chord in the American public. It was a powerful vision for FDR, who only backed away from it after the political ramifications of it being made public proved too damaging. It was reflected in the public sphere, in newspaper articles, academic journals, and American wartime propaganda. The picture of collective German guilt that Morgenthau constructed was also directly reflected in Joint Chief Service Directive 1067, the Directive that governed the American Occupied Zone in Germany after the War for two years before the Marshall Plan. Morgenthau was one of the individuals responsible for the creation of JCS 1067, and while his plan for summary executions was not implemented, other components of the plan had a dramatic effect on post-war Europe.

In this chapter, I argue that Morgenthau drew on a mythic conception of the German collectivity in order to create a narrative that deemed all Germans guilty of both the war and wartime atrocities. Because he constructed German guilt as a collective moral failure, he believed that punishment needed to be a moral corrective: that it was given because it was deserved and because in being deserved, it had the ability to rehabilitate the moral character of Germany. Contrary to readings of Morgenthau's plan as shallow, vengeful, and merely punitive, I draw upon the work of Karl Jaspers and Daniel Philpott to suggest that Morgenthau's plan had a retributive, yet moral core to its rationale.

## **Chapter 2: Guilt and Punishment in the Bernays Plan**

*“The method of dealing with these and other criminals requires careful thought and a well-defined procedure. Such procedure must embody, in my judgement, at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses to his defense. . . . The very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity. Furthermore, it will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its reoccurrence.”<sup>18</sup>*

*-Henry Stimson, 1944*

The second chapter examines the plan proposed by Lieutenant Colonel Murray Bernays. Bernays belonged to a section of the War Department entitled “Special Projects Branch.” As a Colonel and Judge Advocate General, he had a strong belief in the necessity to create a legal, rather than political solution for the punishment of war criminals. While sharing Morgenthau’s belief that certain Nazi groups were responsible for the perpetration of wartime atrocities, Bernays rejected the idea that Germany as a country and collection of citizens should be punished for the actions of Germany leaders. Championing the legal punishment of individual guilt, Bernays created the plan that later served as a framework for the Nuremberg Trial plan.

For Bernays, the Nazi crimes against their own nationals could not be punished under current international law. The United States had to use innovation and legal ingenuity to punish them for atrocities committed before the war and against their own nationals. Whatever the mechanism for punishment, it had to punish individual offenders while “arousing the German people to a sense of their guilt, and to a realization of their responsibility for the crimes committed by their government.”<sup>19</sup> Bernays continued in his memo on the Trial of Nazi War Criminals, “If these objectives are not achieved, Germany will simply have lost another war. The German people will not know the barbarians they have supported, nor will they have any

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<sup>18</sup> Henry Stimson to the President, “Memorandum on Deindustrialization of Germany,” September 9, 1944, *The American Road to Nuremberg*, 30.

<sup>19</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 36.

understanding of the criminal character of their conduct or the world's judgment upon it."<sup>20</sup> For Bernays, guilt was both individual and collective. Determined to use the legal system, the narrative he constructed differentiated between legal and moral culpability and punished the former. In doing so, it elevated individual guilt, while diminishing the role of moral culpability. In his chapter, I examine the role of audience in influencing the authors of the Bernays plan to choose a legal mechanism for punishment. I argue that the desire to use the legal system to implement political will reflected a desire of the authors to create an objective and impartial mechanism to judge guilt. This resulted in a rationale of punishment that made strengthening the role of law and enforcing accountability to a shared morality the end goal of punishment.

The Bernays plan, though originally authored by Murray Bernays, went through many modifications. I closely detail how different audiences, both actual and perceived, imposed modifications on the document. I specifically stabilize it at four moments in its evolution, to highlight emerging concepts of guilt, and competing claims of what and who authorized punishment. By following it from its inception to its final articulation in the "Three Secretaries Memo," I hope to demonstrate the unique role of audience in shaping narratives and authorizing the moral judgments that arise from narratives.

### **Chapter 3: Guilt and Punishment in the Final Agreement and Charter for the Nuremberg**

#### **Trial**

*"No principle of justice is so fundamental in most men's minds as the rule that punishment will be inflicted by judicial action. . . . This principle is applied in greater or less degree by all nations, and historically its recognition is the first step in the approach to the democratic standard of liberty under law."*<sup>21</sup>

-Colonel R.A. Cutter, 1945

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<sup>20</sup> Murray Bernays, Department of War Inter-department memorandum: "Trial of European War Criminals," 15 September 1944, *The American Road to Nuremberg*, 36.

<sup>21</sup> Colonel R.A. Cutter, Memorandum, "Memorandum of proposals for the prosecution and punishment of certain war criminals and other offenders" April 25-30, 1945, *The American Road to Nuremberg*, 168.

The third chapter focuses on the Final Agreement and Charter for the Nuremberg Charter, which was signed in August, 1945 and agreed upon by all international parties. The trial plan was the product of intense negotiations that took place during May-July of 1945. Driven by U.S. Supreme Court Justice Robert Jackson, the American Trial Team were the main orchestrators and authors of what came to be known as the Final Agreement and Charter for the Nuremberg Trial. The Bernays plan formed a core foundation for the narrative constructed by the four negotiating teams. It created three categories with which to charge German war criminals: Crimes Against Peace, War Crimes, and Crimes Against Humanity. In this chapter, I argue that the American war crime planners, and later, the American Trial Team, constructed a narrative of German guilt that rooted it in a leader-centric criminal conspiracy to dominate the world. In constructing this narrative, atrocities were depicted as a systematic part of the plan to achieve world domination. In elevating the concept of criminal conspiracy, it not only diminished the nature of Nazi atrocities, but attempted to enshrine the status quo: elevating the interests of Western powers. By doing so, it drove a consequentialist logic of punishment: that the purpose of punishment was future deterrence of aggressive war and defense of the status quo.

### **Conclusion**

In examining the rhetorical construction of competing narratives of German guilt, I wrestle with one of the enduring questions posed in the wake of tragedy: what constitutes a just response? What value ethic emanates from our constructions of guilt, and can we use those to proscribe just punishment? In evaluating the logic of punishments that are driven by the construction of narratives of guilt, I attempt to examine their implications, both within the story and for future narratives. Particularly because the logics of punishment created during the Nuremberg Trial have subsequently been enshrined into international law, I argue that it is

imperative that we examine the ethical implications of the logics promoted by our narratives. In doing so, I strive not to condemn the past, but to ensure that our response to past tragedy shapes how we respond to and narrate future conflict.

## Chapter 1: Collective Guilt and Punishment in the Morgenthau Plan

In this chapter, I examine the discussions that occurred during August and September of 1944 concerning the fate of German war criminals. Specifically, I examine the plan proposed by Secretary of Treasury Henry Morgenthau Jr. to punish German war criminals, and thus restructure German society. While I focus on Appendix B, the section of his plan that dealt specifically with the punishment of major German war criminals, I use his larger plan (which included the deindustrialization and reeducation of Germany) to analyze how Morgenthau constructed a vision of German guilt, and how it drove his rationales for punishment. I argue that Morgenthau's plan fostered an interpretation of collective German guilt so sweeping that it suggested the need for a wholesale reconstruction of German society. I argue that Morgenthau's construction of collective German guilt as a collective moral failing, impregnated his logic of punishment as having a core moral purpose. I specifically challenge readings of Morgenthau's plan as reactionary, retributive or vengeful by comparing Morgenthau's construction of German guilt to philosopher Karl Jasper's construction. I do so in order to demonstrate that even if Morgenthau's plan would not have had a desirable outcome, contrary to other plans, it nevertheless attempted to seriously grapple with the nature of collective guilt, and the *telos* of punishment in addressing past guilt.

The issue of German guilt was widely debated during and after World War II. I draw on several of the more public debates conducted by intellectuals about collective guilt, and particularly the Morgenthau plan, to provide context for the plan, and to illustrate the way in which constructions of guilt after conflict dramatically affect the *polis*. The discussions held in the zeitgeist of public opinion are reflected both in the policies proposed, and in the policies that are chosen. The construction of guilt is a process of public narration, a frame in which to

understand the wrongs committed by the accused. This frame, in turn, provides a context for the set of inferences and beliefs that provide a propulsive force for a given logic of punishment. Examining the construction of a narrative of collective guilt in the Morgenthau plan reveals the way it created a foundation for a logic of punishment as deserved and rehabilitative. For Morgenthau, punishment's purpose was to address past wrongs and rehabilitate the German people.

Morgenthau's plan rooted his construction of German guilt in a particular myth about the German past.<sup>22</sup> For him, the legacy of Prussian militarism provided an origin story that had propelled German aggression, and of which Nazism was merely the latest flourishing. Rooting his narrative in this myth propelled his logic of punishment. For Morgenthau, this legacy of militarism demanded a rehabilitation of the German national character. Punishment, then, had a core moral purpose: it was given because it was both deserved, and because it had the power to rehabilitate. Morgenthau's construction of a narrative of guilt, rather than merely creating a space for moral judgment, attempted to persuade his audience of the rightness of a particular moral judgment about punishment. Though Morgenthau attempted to depict his construction of German guilt as a dialectical narration, or narration that "aspire[s] to the status of fact,"<sup>23</sup> it resulted in a rhetorical narration, or "a story that serves as an interpretive lens through which the audience is asked to view and understand the verisimilitude of the propositions and proof before it."<sup>24</sup> His belief about the necessity of a particular kind of punishment demonstrates what Jeff

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<sup>22</sup> In using the term myth, I am utilizing William Lewis's definition, that it is: "any anonymously composed story telling of origins and destinies: the explanations a society offers its young of why the world is and why we do as we do, its pedagogic images of the nature and destiny of man." William F. Lewis, "Telling America's Story: Narrative Form and the Reagan Presidency," *Quarterly Journal of Speech* 73, no. 3 (1987): 282.

<sup>23</sup> John Louis Lucaites and Celeste Michelle Condit, "Re-constructing Narrative Theory: A Functional Perspective," *Journal of Communication* 35, no.4 (1985): 93.

<sup>24</sup> Lucaites and Condit, "Re-constructing Narrative Theory," 94.

Bass has called a defining feature of rhetorical narration: “an ending consistent with the formal demands of the plot.”<sup>25</sup>

In the following pages, I trace the evolution of the Morgenthau plan, both the nuts and bolts of its creation into proposed policy, and the contours of the larger public debate being held at that time about the issue of collective guilt. I examine Appendix B and how it constructed a collective German guilt, and created a logic of punishment that focused on desert and rehabilitation. I conclude with an examination of the implications for this rhetorical narrative, and argue for its importance for future transitional justice proposals. While largely forgotten in the shadow of the Nuremberg Trial, Morgenthau’s plan is of vital importance, both in understanding the particular historical moment, and in understanding guilt and punishment as rhetorical creations with incredible material effect. To fail to treat Morgenthau’s plan seriously is to miss two of the enduring moral questions posed by World War II: what do we lose when we conceive of guilt as a purely individual endeavor, and does punishment have a moral relationship to guilt?

### **America Moves towards a Plan**

The problem of what to do with a vanquished Germany surfaced almost immediately upon America’s entry into World War II. First framed as a series of warnings to the Axis governments following reports of atrocities, discussions over how to rebuild war torn Europe, and what to do with Germany, began in earnest among White House officials during the latter half of 1944 and 1945. Culminating in a post-war plan that included the occupation of Germany, the plan for the Nuremberg trials, and the economic rehabilitation of Germany through the Marshall Plan, the debates leading up to the implementation of these measures proved

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<sup>25</sup> Jeff Bass, “The Appeal to Efficiency as Narrative Closure: Lyndon Johnson and the Dominican Crisis, 1965,” *Southern Speech Communication Journal* 50, no. 2 (1985): 105.

contentious and deeply divisive. Embedded within different proposals and plans were fundamental disagreements among top American officials over how to categorize the atrocities that had been committed, the relationship between guilt, punishment, and justice, and how to achieve a just peace after the conflict.<sup>26</sup>

President Franklin Roosevelt issued a series of directives dealing with the fate of war criminals starting in the summer of 1942. On August 21, 1942, he issued a press statement in which he warned that “the time will come when they shall have to stand in courts of law in the very countries which they now are oppressing and answer for their acts.”<sup>27</sup> At this point in the war, the punishment of war criminals was thought of as a matter for domestic courts. These early statements demonstrated a lack of knowledge and concern about how the German government had persecuted their own domestic population, as well as the lack of foreknowledge about the extent of economic, political, and societal damage that would be inflicted upon other European countries over the next three years.

A little over a month later, in response to reports of a massacre of French civilians, Roosevelt issued a statement affirming that “the successful close of the war shall include provision for the surrender to the United Nations of war criminals.”<sup>28</sup> As the war progressed, the need for international cooperation concerning the question of how to prosecute war criminals became more and more pronounced. The United Nations was a nascent concept at the time of

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<sup>26</sup> American officials struggled to categorize the atrocities committed by the Germans because many of them were committed against their own domestic population. It did not fit into the category of “War Crimes” as defined by international law. At this point, there was no mechanism in international law to account for this type of brutality, or precedent for holding leaders accountable for crimes committed against their own population.

<sup>27</sup> W.H. Lawrence, “President Warns Atrocities of Axis Will Be Avenged.” *The New York Times*, August 22, 1942. Accessed October 20, 2014.

<sup>28</sup> Bertram Hulen, “Roosevelt Says US Will Join In Investigation of Atrocities.” *The New York Times*, October 8, 1942. Accessed October 20, 2014.

this statement, barely more than a promise between nations to cooperate in the post war era over the prosecution of war criminals. It was not officially established until October, 1945.

A major development in the international plans to prosecute war criminals and deal with German leaders post-war occurred a year later, in October of 1943. Eleven countries, including the United States, Great Britain, the Soviet Union, and several governments in exile, convened in Moscow to discuss plans for post-war Europe. At the end of the conference, they released several documents, one of which was the “Moscow Declaration on Wartime Atrocities.” In this jointly released statement, the Allied countries proposed two solutions to the punishment of German war criminals. After the war, those individuals who had committed crimes that could be tied to a specific geographic location would be sent back to the newly liberated country to face charges there. Those who committed crimes that could not be pinpointed to a specific location would be “punished by joint decision of the government of the Allies.”<sup>29</sup>

In the intervening months between October 1943 and March 1944, several events occurred. First, leaked reports of Nazi atrocities against the Jewish population started to surface in American newspapers. Though reports of atrocities against Jewish people had circulated as early as 1937, they were greeted largely by skepticism and indifference. As it became clear that those reports had not been exaggerated, the Roosevelt administration created the War Refugee Board (WRB) in the winter of 1944 to investigate the problem further. The Board was also to deal with the problem of Jewish refugees who had flocked to northern Africa or Europe and were now awaiting entry to the United States. As the scope of the problem became apparent, the Roosevelt administration, which previously had denied entry to Jewish refugees, reversed its position on this controversial issue.

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<sup>29</sup> Senate Committee on Foreign Relations, *A Decade of American Foreign Policy: Basic Documents, 1941-49*, “The Moscow Declaration,” (Washington, D.C.: The Government Printing Office, 1950).

On March 24, 1944, Roosevelt issued the starkest warning of the war thus far. Crafted by the WRB (led by presidential advisor John Pehle), the “March 24 Statement by the President Regarding the Atrocities of War” surveyed the scope and nature of the crimes committed by the Axis powers.<sup>30</sup> Though taking a broad view, it focused particularly on the crimes committed by the German military and government against the Jewish people. It proposed that the United Nations oversee punishment of the Germans in a way that fit the severity of the crime. It also warned that anyone complicit in crimes against the Jewish people would be considered “equally guilty with the executioner,” which opened up the possibility of trying civilians as accomplices. Targeted towards lower ranking Nazi officials, the warning represented an attempt to prevent the extermination of the Jewish people or the execution of allied prisoners of war as allied armies advanced. Offering potential leniency to those who aided the Jews or prisoners of war, it seemed designed to foment dissent within the ranks of the German government and/or military.

The March 24 Presidential Statement was unique in that it was the only statement issued by the United States directly concerning the atrocities against the Jewish people. It also began to develop a more specific plan for post-war treatment of Nazi war criminals. First, by indicating that the United Nations would be the principal actor, it demonstrated the increasing awareness of the Allied governments of the nature of the German crimes, unbounded by location, and therefore, difficult to try in domestic courts. Secondly, it indicated the growing awareness of the degree to which the German people and other civilian populations might have been complicit in the extermination of more than six million Jews.

During the summer of 1944, the logistics for how to deal with the problem of post-war Germany began to be hammered out in earnest by top American officials. The United Nations

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<sup>30</sup> “Statement by the President Regarding the Atrocities of War,” The White House. Press release, April 3, 1944, on the FDR Library website, [fdrlibrary.marist.org](http://fdrlibrary.marist.org), accessed January 27, 2016.

war board was established and began to write its recommendations in the fall of 1944.

Roosevelt's cabinet was also engaged in different aspects of post-war planning and began to formulate its own plans for dealing with post-war Germany. A surprising player in this debate emerged in the form of Henry Morgenthau Jr.

As the Secretary of the Treasury, Henry Morgenthau Jr. had the responsibility of approving all spending for the war. He also was working on the projected expenses for rebuilding post-war Europe. By all accounts a robust, outspoken, and forceful man, Morgenthau was a prominent voice within the cabinet and a close, personal friend of Roosevelt. Morgenthau was also the only Jewish person in Roosevelt's inner circle of advisors. Over the years, Morgenthau had lobbied unsuccessfully for the United States to take a more active role in aiding Europe's Jews. Frustrated over the lack of action regarding post-war planning, Morgenthau took it upon himself to come up with a plan for post-war action. While the Treasury Department had no direct jurisdiction in foreign affairs, Treasury would need to approve all expenditures for post-war programs. Along with his close personal relationship with Roosevelt, this gave Morgenthau more influence over post-war planning than a Treasury secretary might otherwise have had. In the summer of 1944, Morgenthau traveled to Europe, ostensibly to survey the situation for himself and gauge the extent to which the United States would need to financially commit to post-war reconstruction. What he saw further entrenched his already deeply held belief that a tough peace needed to be imposed upon Germany. By the beginning of August, 1944, Morgenthau had tasked his department, including his chief advisor Harry White, to finish the Treasury proposal for the treatment of Germany post-war.

Morgenthau was not the only person within Roosevelt's cabinet to be seriously thinking about post-war reconstruction. Secretary of War Henry Stimson, who had vigorously advocated

the United States' involvement in the war, was working on a plan of his own, though he had little in writing at this point. A lawyer by training and a long-time presidential advisor, Stimson's vision for the rebuilding of Germany put him in direct conflict with Morgenthau. With his juridical background, Stimson wanted a trial of war criminals that would punish high ranking officials within the Nazi party, while showing mercy to the German people. His plan focused on rebuilding war-torn Europe economically. In the summer of 1944, however, Stimson had little more than concepts in writing, and he did not have the same close relationship with the President that Morgenthau did. Nevertheless, his challenge to Morgenthau's plan proved formidable.

Morgenthau's plan differed greatly from Stimson's vision. Morgenthau's over-arching philosophy held the German people collectively responsible for waging a war of aggression against the rest of the world. Nazism was not an anomaly, in Morgenthau's view. Rather, it was just the latest manifestation of the unbridled nationalistic militarism that had driven Germany's policies since the Prussian empire. In a draft of the plan Morgenthau took to a private conference between Roosevelt and Churchill and Quebec, this view was elaborated: "What the Nazi regime has done has been to systemically debauch the passive German nation . . . and shape it into an organized and dehumanized military machine. . . . *The dissolution of the Nazi party will not, therefore, by itself ensure the destruction of the militaristic spirit* instilled into the German people."<sup>31</sup> The only way to stop further aggression by the militaristic Germans was to destroy their capacity to wage war.

Morgenthau proposed a three-pronged plan for destroying Germany's capacity to wage war. First, he proposed destroying Germany's economic capacity for military aggression. This

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<sup>31</sup> R.E. McConnell to Henry Morgenthau Jr., "Memorandum on Economic Restructuring of Germany," September 19, 1944, *Morgenthau Diary (Germany) Prepared by the Subcommittee to investigate the Administration of the Internal Security Act*, (Washington, D.C: U.S. Government Printing Office, 1967), 599. Retrieved from: <http://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=615>.

required a complete deindustrialization of the German economy, a return to subsistence living for most of the German people, and a redistribution of Germany's industrial infrastructure across Europe to help other countries rebuild. Second, it meant the re-education of German people, particularly German youth, by a long term occupation that would include a complete overhaul of Germany's educational system. Lastly, it meant harsh punishments for any and all participants in war atrocities. Germany had waged another total war that had broken all previous rules for the conduct of war. For Morgenthau, this required a proportionate response—punishments that fit the crimes.

During the latter half of August, 1944, Morgenthau attempted to gather supporters for his plan outside of the Treasury Department. Separately, he approached Secretary of State, Cordell Hull, and later Harry Hopkins, one of Roosevelt's closest advisors. On August 23, 1944, he had lunch with Secretary of War Henry Stimson, along with Assistant Secretary of War John McCloy, and presented his views and plans on Germany.<sup>32</sup> Neither Stimson nor McCloy took Morgenthau as seriously as he took himself and his plan. They did not seem to grasp the full extent of Morgenthau's plan. Stimson even later wrote in his diary that the meeting had been a "very satisfactory talk," and that he had even agreed with Morgenthau's suggestions regarding upcoming talks with Prime Minister Churchill. At Morgenthau's suggestion, the President appointed a subcommittee of the cabinet, including Morgenthau, Stimson, and Hull, to help him prepare for the talks that were to be held in Quebec in just a few weeks.<sup>33</sup>

### **Lobbying for the Plan**

Despite having invited Hull and Stimson to advise the President on post-war treatment of German war criminals, Morgenthau fully intended for the President to adopt his plan. In an

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<sup>32</sup> Bradley F. Smith, *The Road to Nuremberg*. New York, NY: Basic Books, Inc., 1981, 24.

<sup>33</sup> Smith, *The Road to Nuremberg*, 24.

attempt to influence Roosevelt, Morgenthau brought Roosevelt a copy of the newly printed (yet not yet distributed) *Handbook of Military Government for Germany*, which contained guidelines for U.S. personnel participating in the occupation force. In the accompanying memo, delivered on August 25, 1944, he picked quotes that he knew would alarm the President, such as: “Your main and immediate task to accomplish your mission is to get things running, to pick up the pieces, to restore as quickly as possible the official functioning of the German civil government in the area for which you are responsible.”<sup>34</sup> He also gave Roosevelt the *Interim Directive on Occupation Procedures*, which likewise was designed to provide guidance to American military officials overseeing the transition to occupation during and after the war ended. Both were designed to provide the commander of the occupation forces, General Eisenhower, with latitude and flexibility during the transition. Morgenthau, however, thought the directives too soft on Germany.

Roosevelt was reportedly angered at this prospect, stating in a memo to Stimson the next day: “It gives me the impression that Germany is to be restored as much as The Netherlands or Belgium, and the people of Germany brought back as quickly as possible to their pre-war state. . . . The fact that they are a defeated nation, collectively and individually, must be so impressed upon them that they will hesitate to start a new war.”<sup>35</sup> He closed by urging the War Department to justify their own plans.<sup>36</sup> Position papers were accordingly drawn up by the State Department, the War Department, and Morgenthau’s Treasury Department, and on September 5, 1944, Morgenthau presented to Roosevelt in memo form a summary of his plan for the

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<sup>34</sup> *Handbook of Military Government for Germany*, as quoted in Arie Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, (Chapel Hill, NC: University of North Carolina Press, 1998), 81.

<sup>35</sup> Roosevelt to Stimson, as quoted in Kochavi, *Prelude to Nuremberg*, 82.

<sup>36</sup> Bradley F. Smith. *The American Road to Nuremberg: The Documentary Record 1944-1945*. Stanford, CA: Hoover Institution Press Stanford University, 1982, 8.

deindustrialization of Germany and the summary execution of German “Arch-criminals,” which he entitled, “Program to Prevent Germany from Starting World War III.”

The section of the memo that dealt with the treatment of German war crimes was entitled “Appendix B: Punishment of Certain War Crimes and the Treatment of Special Groups.” It laid out the overall vision behind Morgenthau’s plan. In the first section, Morgenthau detailed how he would deal with “Arch-Criminals” whose “obvious guilt has generally been recognized by the United Nations.”<sup>37</sup> This group of people would be identified by the military and immediately put to death by military firing squad. In the next section, Morgenthau identified “Certain Other War Criminals” whose guilt was less obvious but potentially just as serious. Morgenthau proposed a rubric for judging their crimes and proposed that they, if convicted, would also be sentenced to death. In the third section, Morgenthau listed groups of people who he believed should be detained on suspicion of guilt, and he went on to propose a number of other actions: registering all males to determine prior party affiliation; a compulsory labor program in which people guilty of belonging to criminal groups such as the Gestapo would be forced to rebuild Europe; the complete dissolution of all Nazi organizations; and prohibiting former members to hold public office, engage in certain trades, or belong to the managerial class. Finally, he proposed breaking up large wealthy estates and dividing the land among the “peasants.” He also proposed prohibiting any person who was a resident of Germany during the war from leaving, except with the permission of the Allied Military Government.<sup>38</sup>

Roosevelt was impressed by the memo. So much so, in fact, that he invited Morgenthau to come with him to Quebec, to meet with Churchill to discuss post-war plans. On September 9,

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<sup>37</sup> Henry Morgenthau Jr. to Franklin D. Roosevelt, Memorandum: “Appendix B: Punishment of Certain War Crimes and Treatment of Special Groups,” September 5, 1944, in *The American Road to Nuremberg: The Documentary Record 1944-1945*, ed. Bradley Smith (Stanford: Hoover Institution Press, 1982), 28.

<sup>38</sup> Morgenthau, “Appendix B,” in Smith, *The American Road to Nuremberg*, 29.

1944, Morgenthau and Roosevelt traveled to Quebec with an extended version of the plan. There, the Prime Minister and Roosevelt agreed to Morgenthau's economic plan and agreed to confer with Stalin on drawing up a list of "Arch-Criminals" to be executed. When Stimson heard that Roosevelt had agreed to Morgenthau's plan, he was deeply troubled and tried to make his own case heard. By late September, the divide between the two visions of the future had grown exponentially larger and harder to reconcile.

In late September, 1944, a string of leaks concerning the rift over post-war policy reached the public via the press. Morgenthau's plan was castigated in a series of editorials in the *Wall Street Journal*, *Washington Post*, and *New York Times*.<sup>39</sup> German Propaganda Minister Joseph Goebbels used the leaks to call for all German citizens to "fight to the death"; otherwise they would be subjugated, persecuted, and killed under the Allied Military Government. Roosevelt quickly distanced himself from the plan. Within this vacuum, Stimson and Assistant Secretary of War John McCloy stepped forward, ready to propose an alternative.

Thus, the Morgenthau plan was not implemented, and in fact an almost perfect foil of his plan was chosen instead. Nevertheless, Morgenthau's plan is worthy of study, for it speaks to larger issues surrounding the rhetoric of blame and justice in the wake of war. First, it provides a virtual snapshot of the collision between two fundamentally differing philosophies of how to respond to radical evil. Morgenthau's plan embodied a philosophy that had a particular resonance within its time. The full magnitude of the atrocities that were committed by the Germans was just barely being realized by the American public. It shocked the conscience of

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<sup>39</sup> For an example, see Alfred Flynn, "Post-War Germany: Treasury Plan Calls for Dismemberment, Ban on Most Heavy Industry," *The Wall Street Journal*, Sept 23, 1944, pg. 1. Also, Henry Morgenthau Jr., "Meeting Notes: September 27, 1944," *Morgenthau Diary (Germany) Prepared by the Subcommittee to Investigate the Administration of the Internal Security Act*, (Washington, D.C: U.S. Government Printing Office, 1967), 651-652. Retrieved from: <https://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=667>.

civilized society. People were looking to understand not simply how some individuals could commit crimes on that large of a scale, but how a whole country could be complicit in it. This anger and belief in the collective guilt of Germany had been echoed by FDR himself at the Casablanca Conference in April of 1943, when he called for the unconditional surrender of Germany and stated that it did not mean “the destruction of the German population but does mean the destruction of a philosophy in Germany . . . which is based on the conquest and subjugation of other peoples.”<sup>40</sup> Morgenthau’s plan captured this belief that the root cause of the war was a collective philosophy within Germany itself.

This belief was contentiously debated in the United States. An oft-quoted *New York Times* editorial that appeared on December 1, 1940 deplored the categorization of all Germans as collectively guilty, citing British diplomatic advisor Robert Vansittart as saying, “the German is often a moral creature, Germans never.”<sup>41</sup> The anonymous editorial took strong umbrage against the collectivizing of all Germans arguing:

It cannot be denied that the Germans have permitted themselves to be used by a gang of thugs, employing the twin weapons of terror and lies. There is no evidence that this success of thuggery is due to inheritable qualities in the German race. . . . What has to be restored is a sound and constructive German culture—which is real in a way that “race” is not.<sup>42</sup>

Similar books in the popular press attempted to make a distinction between the German people and the Nazi regime. In 1942, reporter Joseph C. Harsch depicted Hitler as a cunning opportunist who hijacked a vulnerable German public. In his estimation, economic devastation had softened German morality and made them easy dupes for Nazism.<sup>43</sup> Many of these writers categorized

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<sup>40</sup> Franklin Delano Roosevelt as quoted in Michael Balfour, "Another Look at 'Unconditional Surrender'" *International Affairs (Royal Institute of International Affairs 1944- 46)*, no. 4 (1970), 723.

<sup>41</sup> Robert Vansittart as quoted in “Indicting a Race,” *The New York Times*, December 1, 1940, pg. E6.

<sup>42</sup> Indicting a Race, *The New York Times*, December 1, 1940.

<sup>43</sup> Joseph C. Harsch, *Germany at War: Twenty Key Questions and Answers* (New York: Headline Books: Foreign Policy Association, Inc., 1942). In Harsch’s popular pamphlet, he argued that the German people had been duped by Hitler, and seduced by the promise of material gain after years of deprivation.

the collectivizing of German guilt as a sort of propaganda, left over from the First World War. While it can be difficult to pinpoint the exact statements that led these writers to argue so strenuously against the collectivizing of German guilt, several of them point to Gallup polls taken during the time that attempted to gauge the American public's attitude towards Germany. In 1942, only 6% of the American public considered the German people to be responsible for the war, with the majority attributing it to Nazi leadership, compared to 50% of people surveyed in Great Britain.<sup>44</sup> However, as the war progressed, many public figures, including George Gallup, the director of the American Institute for Public Opinion, became increasingly vocal about the nature of the German people, and the collective guilt that emanated from that character. In an interview with the *New York Times* in 1943, he argued that "unless some way is found to neutralize the militaristic psychology which has dominated Germany for more than a century, the United States will find itself embroiled in another world conflict twenty-five years hence."<sup>45</sup>

Similar reactions to the collectivizing of the German people's guilt were seen in the academic debates being had during and shortly after the war. In January of 1944, prominent German-American economist and political scientist Ferdinand Hermens published an article that explicitly differentiated the Nazi leaders from the German people, rejecting attempts to categorize the German people's guilt along racial or historical lines. He argued that even though the Germans had voted for National Socialism, it was a result of the economic conditions of the time stating: "The German voter reacted to the great depression in the same way as the voter did

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<sup>44</sup> George Gallup, "War Guilt Laid to Nazi Leaders: Most Voters Believe People are not our Chief Enemy, Gallup Poll Finds," Jun 13, 1942, *The New York Times*, pg. 8.

<sup>45</sup> "Confusion on War, Gallup Declares," *The New York Times*, Jan 6, 1943, pg. 33.

in all other countries; he emitted a mere “protest vote.” He voted against something, not for something.”<sup>46</sup>

An article published in May of 1948 by Hermens explicitly addressed the concept of collective guilt as espoused by the Morgenthau plan. He argued that the notion of collective guilt was barbaric and anti-Christian, denying the Christian notion of the individual soul as accountable to God. Collective guilt refused the idea that individuals should be held responsible<sup>47</sup> and that the German people were forced through social conditions, to acquiesce to a tyrannical dictatorship. He specifically called out the Morgenthau plan as creating conditions for future conflict. Given the public debate that was occurring over whether or not the Germans could be held collectively guilty for the war, an examination of Morgenthau’s plan can provide unique insight into the rhetorical construction of a narrative of collective guilt, and the way that narrative shapes beliefs about punishment.

### **Morgenthau’s Hierarchy of Guilt**

The goal of this section is to analyze Morgenthau’s vision of German guilt, the relationship he envisioned between guilt and punishment, and the end goal of punishment. A great deal of the current literature on Morgenthau’s plan portrays it as largely retributive and punitive—at times even vindictive. In *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Gary Bass portrays Morgenthau’s plan as enacting “swift and terrible” justice, out of “blazing anger.”<sup>48</sup> He takes pains to quote Morgenthau’s more bombastic statements about German guilt, such as, “Why the hell should I care what happens to their people?”<sup>49</sup> Historian

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<sup>46</sup> Ferdinand A. Hermens, “Public Opinion and the Peace: The ‘War Guilt’ of the German People,” *American Journal of Economics and Sociology* 3, no. 2 (1944), 210.

<sup>47</sup> Ferdinand A. Hermens, “Collective Guilt,” *Notre Dame Lawyer: Quarterly Law Review* 23, no. 4 (1948), 442.

<sup>48</sup> Morgenthau as quoted in Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 152.

<sup>49</sup> Morgenthau as quoted in Bass, *Stay the Hand of Vengeance*, 153.

Warren Kimball, while admitting positive aspects of the plan, depicts it as a “policy of revenge.”<sup>50</sup> Historian Bradley Smith<sup>51</sup> is perhaps the most sympathetic to Morgenthau, acknowledging that having taken notice of Nazi atrocities much earlier than most American officials, it was little wonder that Morgenthau was willing to “use almost any means to stop it from being projected into the post-war era.”<sup>52</sup> Still, even Smith at times portrays Morgenthau as merely vengeful in his planning, writing that Morgenthau “came up with increasingly bizarre ways to make Germans suffer.”<sup>53</sup> Stimson certainly interpreted Morgenthau’s provisions as shallow and punitive, writing in a memorandum to the President: “In spirit and in emphasis they are punitive, not, in my judgment, corrective or constructive.”<sup>54</sup>

While there is little doubt that Morgenthau felt a deep and abiding dislike for what he saw as the militarism and nationalism that had led to the rise of the Third Reich, I argue that his plan was not merely a blanket punishment of all Germans. That Morgenthau made vindictive and vengeful statements is self-evident. However, many commentators on Morgenthau have taken these statements as proof of the reactionary shallowness of Morgenthau’s thought, rather than examine the internal logic of Morgenthau’s rhetorical narrative. I argue that he provided a nuanced view of German guilt that differentiated between action and inaction, and attempted to match punishment with offense. Furthermore, whether or not his plan was perceived as vindictive by others, Morgenthau depicted it as a moral response to the problem of centuries of militaristic indoctrination. Rather than simply indulge in a speculation of motives, which

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<sup>50</sup> Warren F Kimball, *Swords or Ploughshares?: The Morgenthau plan for defeated Nazi Germany, 1943-1946*, (Philadelphia: Lippincott, 1976), 62.

<sup>51</sup> It is important to note that all references to Bradley Smith are referencing Bradley F. Smith, the celebrated historian, and not Bradley R. Smith, the Holocaust revisionist.

<sup>52</sup> Smith, *The Road to Nuremberg*, 40

<sup>53</sup> Smith, *The Road to Nuremberg*, 28.

<sup>54</sup> Stimson to Roosevelt, “Memorandum, September 15, 1944,” Morgenthau Diary, 622. Retrieved from: <https://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=638>.

everyone from Morgenthau's contemporaries to recent academics have done,<sup>55</sup> I attempt to understand the internal logic of the plan itself, focusing on his proposal for the treatment of German war criminals. Morgenthau's motives are important, but do not necessarily control the internal logic of his plan. To do justice to his thought, it should be read with an eye to both context and content. Morgenthau's narrative of guilt is of vital importance in understanding the way it propelled his logic of punishment, and in understanding what he viewed as the moral purpose of punishment.

Within Appendix B, Morgenthau outlined a hierarchy of German guilt. In the top level of the hierarchy were individuals whose guilt was pre-determined. Their "obvious guilt has been generally recognized by the United Nations."<sup>56</sup> They belonged to the class of "Arch-Criminal," and were, in Morgenthau's mind, the most guilty. They were to be apprehended, identified by an Allied military officer, and summarily executed by firing squad.<sup>57</sup>

In the second level, he listed "Certain other war criminals." These individuals had presumably participated in or caused the death of another individual in violations of the rules of war, in reprisal for another person's death, or on the basis of race, nationality, color, creed, or political conviction. They would be entitled to a trial by military commission. If found guilty, they would be put to death, unless there were extenuating circumstances. In this section, Morgenthau made it clear that being given an order to kill was not an extenuating circumstance.

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<sup>55</sup> Many authors have noted Stimson's frequent mentions of Morgenthau's Jewish heritage in his personal diaries, which some have attributed to anti-Semitism. Whether or not Stimson intended to invoke his heritage against him, he does attribute Morgenthau bias based on "Semitic grievances." Henry Stimson as quoted in *The Henry Lewis Stimson diaries in the Yale University Library, Vol. 48*, September 14, 1944, (New Haven: Manuscripts and Archives, Yale University Library, 1973), 74. <https://dds-crl-edu.ezaccess.libraries.psu.edu/item/81551>.

<sup>56</sup> Morgenthau, "Appendix B," in Smith, *The American Road to Nuremberg*, 28.

<sup>57</sup> It should be noted that in many ways, this was similar to the proposal that Churchill had advocated in the spring of 1944, with his war cabinet going so far as to draw up a list of names of "major war criminals."

Level three of Morgenthau's hierarchy of guilt included all people he presumed to be guilty. The document advised the detention of all members of the S.S; the Gestapo, "All high officials of the police, S.A. and other security organizations, All high Government and Nazi Party officials, [and] all leading public figures closely identified with Nazism." That Morgenthau presumed them to be guilty is obvious in the wording of the document. He advised that all members be detained "until the extent of the guilt of each individual is determined."<sup>58</sup> It was not a matter of if. It was a matter of the extent.

He also advised the registration of all German males over the age of 14. One of the stated goals of registration was to determine affiliation with the Nazi Party or like-minded organizations. In Morgenthau's mind, age, gender, and nationality became a basis for suspected guilt. For this particular level of guilt, Morgenthau proposed two punishments. For those who had committed crimes outlined earlier, they would be tried and put to death. Apart from the question of crimes committed, mere membership within a Nazi affiliated group constituted guilt for Morgenthau. Those who had been members of a Nazi affiliated organization would "constitute the basis for inclusion into compulsory labor battalion to serve outside Germany for reconstruction purposes."<sup>59</sup> All Nazi affiliated organizations would, of course, be disbanded.

The last level of Morgenthau's guilt hierarchy prescribed the guilt and proposed punishment for Nazi sympathizers. In this level, a broader depiction of guilt emerged. Included in Nazi sympathizers were, of course, former members of the Nazi party, but it also included people who had "by their words or deeds materially aided or abetted the Nazi program."<sup>60</sup> This definition was particularly expansive when one considers that support of the Nazi party within

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<sup>58</sup> Morgenthau, "Appendix B," in Smith, *The American Road to Nuremberg*, 28.

<sup>59</sup> Morgenthau, "Appendix B," in Smith, *The American Road to Nuremberg*, 29.

<sup>60</sup> Morgenthau, "Appendix B," in Smith, *The American Road to Nuremberg*, 29.

Germany was mandatory. By 1939, all German children over the age of ten were required to join the “Hitler Youth.”<sup>61</sup> Furthermore, after seizing power, Hitler declared non-Nazi political parties and organizations illegal. Quite literally, people were compelled to aid the Nazi party and the war machine under the law. Under Morgenthau’s expansive definition, most German citizens would be considered Nazi sympathizers, guilty of aiding the Nazi party through word or deed, action or inaction. The punishment of this level of guilt was unique in the way it envisioned a new public order. Any person who fit the criteria of a Nazi sympathizer would be “dismissed from public office, disenfranchised and disqualified to hold any public office or to engage in journalist, teaching, and legal professions, or, in any managerial capacity in banking, manufacturing or trades.”<sup>62</sup> In other words, virtually any person could be dismissed from participating in the new public sphere under this criteria by the Allied military or occupation government. It would allow them to redesign the upper middle class, political structure, and civic space of the newly designed Germany.

This vision was reinforced by the recommendation that all Junker estates be “broken up and divided among the peasants and the system of primogeniture and entail should be abolished.”<sup>63</sup> By way of explanation, the Junkers were the big industrialists and land owners in eastern Germany that formed the upper class and were in prominent places within the German bureaucracy. Eastern Germany was largely agrarian, and largely governed by the Junkers, a remnant of Prussian rule. Members of the Junker class were well-established within the military, and constituted a large percentage of the German officer position. The Junker estates were established in late 1200, and developed by instituting indentured servitude. While this system

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<sup>61</sup> United States Holocaust Memorial Museum. “Shaping the Youth: Indoctrinating Youth.” Holocaust Encyclopedia. <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007820>. Accessed on 10/28/15.

<sup>62</sup> Morgenthau, “Appendix B,” in Smith, *The American Road to Nuremberg*, 29.

<sup>63</sup> Morgenthau, “Appendix B,” in Smith, *The American Road to Nuremberg*, 29.

changed over 600 years, the system of indentured farming continued up until the Second World War. Though numerous agricultural crises, including a tariff crisis after WWI, threatened the economic power of the Junkers, their positions helped them to maintain power.<sup>64</sup>

Morgenthau's prescription to break up the estates of the Junker elite and to give the land to the peasants thus served several functions. First, it served to destroy the economic power behind a powerful group of ruling elite. Second, it served to re-distribute agricultural land in such a way as to make the consolidation of land for the purpose of trade impossible. By doing this, it sought to impoverish the Junker ruling elite and keep eastern Germany at a subsistence level of farming. This land distribution is a provocative demonstration of Morgenthau's vision of German guilt. By suggesting the redistribution of Junker land, he communicated a belief in their implicit guilt. The source of their guilt was not simply that they helped the Nazis rise to power, but that their legacy of aristocracy, privilege, and militarism was responsible for the ideology that made total war possible. This was a view shared by other prominent writers during this time.

In an opinion piece published in the *Virginia Quarterly Review* in 1943, future Yale President and historian A. Whitney Griswold wrote an article about the future of Germany once the war was over. Specifically, he focused upon the role the Junkers had played in shaping Prussian and German society and how that would remain post war unless an intervention was staged. He argued that the agricultural system of eastern Germany, and Junker elite had "shackled the German people to a feudal past."<sup>65</sup> For Griswold, as for Morgenthau, this group of individuals were a permanent ideological and structural barrier to post-war peace. Griswold eloquently summarized his argument, stating: "Until its power is broken and it has been converted to the ways of the present century, the four freedoms will be smuggled into Germany

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<sup>64</sup> A. Whitney Griswold, "The Junkers: Hostage to the Past," *Virginia Quarterly Review* 19, no. 3 (1943).

<sup>65</sup> Griswold, "The Junkers: Hostage to the Past," 363.

with difficulty and that unhappy nation will continue to renounce the world as the Junkers' ancestors, the Teutonic Knights, did before them."<sup>66</sup> By breaking their economic and structural power, Morgenthau sought to punish them, but also to cast a vision for German society free of their influence. They would be punished because they deserved it for their legacy of militarism. But the experience of deserved punishment had the power to be rehabilitative for the individual and German society. It had the power to make German society anew.

In this section of Appendix B, Morgenthau insisted that the Junker estates should be redistributed to the peasants. This hints at the economic restructuring that Morgenthau outlined in his larger "Program to Prevent Germany from Starting World War III." In that section of the plan, Morgenthau advocated for the complete deindustrialization of Germany and for the majority of Germany to be relegated to subsistence farming. Many of Morgenthau's critics viewed this part of the plan as not only economically unwise, but a deliberate and punitive punishment of all Germans, instead of simply the Nazis. However, this does not necessarily represent Morgenthau's reasoning. By most accounts, Morgenthau believed that farming would actually help Germans break free from the traditions of militarism. Discussing his plans at a conference in August of 1944, Morgenthau compared his plan to the Rural Resettlement and Farm Security Administration programs during the New Deal Era and stated that he wanted it to operate similarly to the social structure in Denmark: "where the people, through small-scale farming, were in intimate association with the land and were peace-loving and without aggressive designs upon others."<sup>67</sup>

The idea that farming and re-education would break the bonds of German militarism was a theme that Morgenthau would repeat even after his plan had been rejected. The redemption of

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<sup>66</sup> Griswold, "The Junkers: Hostage to the Past," 363-364.

<sup>67</sup> Morgenthau as quoted in Kimball, *Swords or Ploughshares?*, 26.

the German people could be found in deserved punishment, administered by returning Germany to its agrarian roots. In 1945, he published a book entitled *Germany is Our Problem*. In it, he outlined his complete plan and the rationale behind it. He argued that strains of militarism and fanaticism had flourished for generations in German philosophy, infecting the essential good character of the average, German citizen. He argued:

The German people had to be cultivated intensively for nearly two hundred years before they could produce those finest Nazi flowers—the gas chambers of Maidanek and the massacre of Lidice. It would be a highly reckless gamble to act on the wishful thought that the blood of nearly six years of war has not only fertilized this soil but changed its character. For the traditional German will to war goes back as far as our own traditional will to freedom.<sup>68</sup>

Morgenthau went on to describe the German character as “capable,” and “virile.”<sup>69</sup> It was, in fact, redeemable. This aspect of his internal logic points to the moral purpose of punishment that Morgenthau attempted to convey. For him, the only way to change the character of the Germans was to fundamentally alter their philosophical tradition and indoctrination. It also drove the logic for why Morgenthau viewed the Junkers as especially guilty. They were the ruling class that had indoctrinated the “good” Germans, allowing for the rise of Nazism. It was fitting that they should lose their land as punishment. The Junkers would be punished because they deserved to be punished. The German people would be punished because it would allow for their rehabilitation.

In the final punishment proscribed by Morgenthau for this last category of guilt, no one was allowed to emigrate from Germany without the express permission of the Allied Military Government. If someone attempted to and was caught, he or she could be subject to death. People who were being stripped of their land and office were thereby prohibited from seeking better fortune elsewhere. But it was also an attempt to ensure that guilty parties were not given

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<sup>68</sup> Henry Morgenthau Jr., *Germany is Our Problem*, (New York: Harper and Brothers, 1945), 104.

<sup>69</sup> Henry Morgenthau Jr., *Germany is Our Problem*, 144.

the chance to flee, and that they were given the punishment they deserved. Morgenthau was determined that no guilty party, which for him included most Germans, was able to escape the punishment meted out to them by the Allied Military Government.

There is an internal logic and consistency to prescriptions for punishment in Morgenthau's plan. From the swift military justice, to the land re-distribution, to the radical restructuring of the public sphere, Morgenthau's plan strove to enact an extensive social change throughout Germany. He sought to change what he saw as the essential nature of the German people and republic. Historian Warren Kimball argues that Morgenthau sought to counter what he saw as an essential characteristic of the German people: their militarism and aggressive nationalism.<sup>70</sup> From this standpoint, Morgenthau's plan was less of an attempt to punish guilt in the service of larger justice, than a pragmatic, if not radical, attempt to enact social change in the service of a long term peace that would come from Germany's disarmament and reconstruction.

Though it often came off as ruthless, Morgenthau's plan embraced the idea that at least a few generations of Germans were so hopelessly indoctrinated that the slate needed to be wiped clean before Germany could be free of fanaticism. He even contemplated putting the S.S. and Gestapo in the concentration camps they had built along with their families. In a conversation with economic advisor Harry White, in August of 1944, Morgenthau stated: "When it gets down to it, it may be a question of taking this whole S.S. group, because you can't keep the concentration camps forever and deporting them somewhere. . . . Just take them bodily. And I wouldn't be afraid to make the suggestion just as ruthless as it is necessary to accomplish the act . . . Let somebody else water it down."<sup>71</sup>

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<sup>70</sup> Kimball, *Swords or Ploughshares?*, 3.

<sup>71</sup> Henry Morgenthau Jr. to D.W. Bell, "Telephone Transcript: August 28, 1944," *Morgenthau Diary*, 448. Retrieved from: <https://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=460>.

The language of moral rehabilitation through punishment, while present in Morgenthau's plan, should not overshadow the language of just desert: that Morgenthau's deep anger towards the German people drove a belief that they deserved to suffer. For Morgenthau, deserved suffering through punishment created the conditions for rehabilitation. His belief that the German people needed to experience the depth of the suffering they had caused was not without rationale, particularly as he felt that the United States was completely out of touch with the extent of the atrocities that had been committed by the German people (both through their actions, and through their inaction). He became increasingly frustrated over what he saw as the inaction of the United States, particularly the State Department. On January 13, 1944, Morgenthau released a memo to Roosevelt and the department heads, expressing his ire over their inaction. Beginning in a polemic style, he stated:

One of the greatest crimes in history, the slaughter of the Jewish people in Europe, is continuing unabated. This Government has for a long time maintained that its policy is to work out programs to save those Jews and other persecuted minorities of Europe who could be saved. You are probably not as familiar as I with the utter failure of certain officials in our State Department, who are charged with actually carrying out this policy, to take any effective action to prevent the extermination of the Jews in German-controlled Europe.<sup>72</sup>

Morgenthau continued to detail lack of effort to save Jewish people fleeing Europe, a deliberate attempt on the part of the State Department to repress information about Hitler's extermination camps, and the numerous attempts of outside groups to get the United States to act. For him, the United States was guilty of inaction. He concluded his statement by writing, "The matter of rescuing the Jews from extermination is a trust too great to remain in the hands of men who are indifferent, callous, and perhaps even hostile. The task is filled with difficulties. Only a fervent

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<sup>72</sup> Henry Morgenthau, John Pehle, Josiah DuBois, "Report to the Secretary on the Acquiescence of this Government in the Murder of the Jews: Issued January 13, 1943," (Washington, D.C: U.S. Government Printing Office, 1943).

will to accomplish, backed by persistent and untiring effort can succeed where time is so precious.”<sup>73</sup>

This statement was merely a small window into the anguish and frustration that Morgenthau was experiencing over the United States’ inaction over the genocidal intent against the Jewish people. He sincerely felt that it was his responsibility to advocate for a harsh punishment of the Germans, and was alarmed at the idea that Germany would be allowed to rebuild. In a conversation with Secretary of State Hull in August of 1944, he was reported as saying, “I appreciate the fact that this isn’t my responsibility, but I am doing this as an American citizen, and I am going to continue to do so, and I am going to stick my nose into it until I know it is all right.”<sup>74</sup>

On September 4, 1944, Morgenthau recounted a conversation to Harry White that he had had with Secretary of War Henry Stimson, and Secretary of State Cordell Hull. According to Morgenthau, Stimson had accused him of “fighting brutality with brutality.” However, Hull had seemed to be on what Morgenthau referred to as “his side” and reportedly stated: “This Nazism is down in the German people a thousand miles deep and you have just got to uproot it, and you can’t do it be just shooting a few people.”<sup>75</sup> Morgenthau also reported Hull as agreeing with him that even if the deindustrialization of Germany hurt the United States’ economy, it was worth “sacrificing a little of our trade in order to make the Germans suffer.”<sup>76</sup> Dismissing Stimson’s

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<sup>73</sup> Henry Morgenthau Jr., John Pehle, Josiah DuBois, "Report to the Secretary on the Acquiescence of this Government in the Murder of the Jews: Issued January 13, 1943," (Washington, D.C: U.S. Government Printing Office, 1943).

<sup>74</sup> Henry Morgenthau Jr., “Diary Entry, August 18, 1944,” *Morgenthau Diary*, 416. Retrieved from: <https://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=428>.

<sup>75</sup> Henry Morgenthau Jr. to D.W. Bell, White, Gaston, Klotz, “Group Meeting: September 5, 1944,” *Morgenthau Diaries*, 526. <https://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=540>.

<sup>76</sup> Henry Morgenthau Jr. to D.W. Bell, White, Gaston, Klotz, “Group Meeting: September 5, 1944,” *Morgenthau Diaries*, 526. <https://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=540>.

desire for a legal trial, Morgenthau framed Hull's response as: "Hull doesn't want to wait; He wants to shoot them all at dawn."<sup>77</sup>

This emphasis on the suffering of the Germans does create a link to the sort of justice that Morgenthau viewed his plan as bringing. Simply shooting the people who were guilty was insufficient. Also important is his emphasis on German troops being held in the concentration camps that they created, along with their children. Morgenthau clearly wanted the Germans to feel the consequences for the *specific* suffering they had inflicted on others and for the war they had perpetuated. This is significant in light of the fact that many of his colleagues' plans, to include Stimson's and the final plan put into place to try German war criminals, focused on the German's guilt in starting a world war, rather than their guilt in killing over six million Jewish people. Much of Morgenthau's plan mimicked the devastation that the Germans had wreaked upon the Jews. From forced registration, mandatory re-education, stripping them of their property, forced labor, and housing them in concentration camps, Morgenthau's plan followed retributory means of justice that were specific to the harm rendered to the Jewish people.

Political Philosopher Daniel Philpott points out that while the logic of desert in punishment is often taken to be self-evident, a retributive logic of punishment can also be based on punishment acting as a balancing of scales. He writes, "virtually all versions of balance retributivism hold that the hardship of punishment balances out either the gain that the perpetrator has won or the harm that he has inflicted: evil for evil, harm for harm."<sup>78</sup> The restructuring imagined by Morgenthau bears traces of this logic of punishment as well.

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<sup>77</sup> Henry Morgenthau Jr. to D.W. Bell, White, Gaston, Klotz, "Group Meeting: September 5, 1944," *Morgenthau Diaries*, 526. <https://babel.hathitrust.org/cgi/pt?id=uiug.30112000495181;view=1up;seq=540>.

<sup>78</sup> Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford: Oxford University Press, 2012), 217.

Punishment would serve to right the wrong of the past, leading to a balancing of the scales of justice.

The definition of guilt that emerges from Morgenthau's document is also interesting in that intent does not determine moral responsibility, rather action (or inaction) does. Because it does not use a legal system, it also fails to distinguish between moral responsibility and legal responsibility. The significance of this is not merely theoretical. In much of American law, intent is used to create hierarchies for legal culpability. For example, a person who hits and kills another person while driving could face charges of manslaughter, negligent homicide, homicide, or have charges dropped based on determinations of intent. The lack of intent as a determinate of moral culpability in Morgenthau's plan is significant in that it saw no relationship between intention and punishment. The lack of intent as a standard for moral culpability is what has led, in my opinion, to the perception that Morgenthau's plan was vindictive against the German people. Because it punished people based on their action or inaction, rather than their intentions, it has led to the belief that Morgenthau's intent was to hold all Germans equally blameworthy. Whether or not he believed this personally, the internal logic of his blame does not sustain this interpretation.

Another interesting aspect of Morgenthau's definition of guilt is the relationship between moral culpability and authority. For Morgenthau, the Allied powers had the authority to judge moral culpability, and, based on that analysis, to determine punishment. The direct connection between moral culpability and punishment reflects Morgenthau's understanding of the German problem as political, rather than legal, a view that was initially shared by Roosevelt and Churchill as well.<sup>79</sup> Instead of treating the German leaders as criminals who had broken specific

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<sup>79</sup> In a joint telegram issued by Churchill and Roosevelt after the Quebec Conference, they argued that a legal process of trial, conviction, and punishment was inappropriate for "arch-criminals" such as Hitler, Himmler, and

laws, they were to be treated as violating the moral code of the world community, and therefore subject to punishment by the victors in the new world order.

The distinction between moral culpability (as Morgenthau saw it) and legal culpability, which the Nuremberg Trials would attempt to establish, is important. While there is some connection in American law between moral culpability and legal culpability, it is not necessarily a direct connection. A person can commit a moral offense against another person without necessarily committing a crime. Morgenthau's plan fails to make this distinction. One of the potentially significant consequences of equating moral culpability with punishment, rather than legal culpability with punishment, is that it vests the authority for determining what is moral with whoever has the power to enact judgment, rather than with a (supposedly) consistent, and pre-determined set of rules. But is the creation of law by those in power, less of an act of moral judgment? A central claim of Morgenthau's opponents, including the authors of the Nuremberg Trial plan, was that the creation of law by the Allied victors was an impartial act. It was different than the arbitrary exercise of power that they saw in Morgenthau's plan. In the following section, I detail Karl Jaspers's view of authority in relationship to the question of guilt. While he vested the authority for determining individual guilt in the individual, rather than an outside entity, he acknowledged what Morgenthau's contemporaries often refused to do: that moral guilt bred political guilt. And for that, the victors had every right to attribute moral culpability.

### **A Moral Failing Requires a Moral Punishment: Jaspers and Morgenthau**

In late 1945, German philosopher Karl Jaspers gave a series of lectures at Heidelberg University on the subject of German guilt, culminating in one of the most poignant essays during

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Goering. They stated: "Apart from the formidable difficulties of constituting the Court, formulating the charge, and assembling the evidence, the question of their fate is a political, and not a judicial one." Churchill and Roosevelt, as quoted in Arie H. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, (Chapel Hill, NC: University of North Carolina Press, 1998), 88.

the time on the collective nature of German guilt. Responding to what he perceived as a public conception of collective German guilt, Jaspers attempted to reject an un-nuanced categorization of all Germans as guilty by creating four distinct categories of guilt. The argument that Jaspers makes against viewing all Germans as equally guilty, that “there is no such thing as a national character extending to every single member of a nation,” is an argument that was levied against Morgenthau’s plan and philosophy of German guilt. Yet Jaspers’s essay actually provides a better philosophical framework in which to understand Morgenthau’s construction of German guilt, and provides explanatory force for Morgenthau’s conception of punishment as having a core, moral purpose. For Jaspers, the differentiation of guilt can aid both the victors, in understanding how to assign punishment, but also the vanquished, in understanding their own guilt and how to atone for it. The explicit connection he makes between differentiated guilt and the punishment they require is a particularly helpful lens in which to view the implicit connections that Morgenthau makes.

In Jaspers’s essay, he divides guilt into four different categories: Criminal, Political, Moral, and Metaphysical. Criminal guilt is created when an individual breaks a pre-established law. The jurisdiction for the law, or the people that are able to decide on matters of guilt, is the body that has created it. Political guilt is the guilt shared by members of a community for the actions of their government. As Jaspers states: “Everybody is co-responsible for the way he is governed.”<sup>80</sup> The jurisdiction for political guilt is the victors. Moral guilt is individual, and is determined by the action or inaction of the individual. It is everything from an individual’s attempt to live in disguise, which Jaspers argues that the majority of Germans had to do in order to survive, to passively allowing the suffering of others. As he states, “passivity knows itself

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<sup>80</sup> Karl Jaspers “The Question of German Guilt,” trans. E. B. Ashton in Guénaél Mettraux, ed. *Perspectives on the Nuremberg Trials* (Oxford: Oxford University Press, 2008), 673.

morally guilty of every failure, every neglect to act whenever possible, to shield the imperiled, to relieve wrong, to countervail.”<sup>81</sup> Jurisdiction is the conscience of the individual. It cannot be assigned by an outside party. It must be understood and accepted by the individual. Jasper depicts metaphysical guilt as relational guilt. He views human beings as having intrinsic duty to each other. Metaphysical guilt is the individual guilt an individual accrues by virtue of having failed to sacrifice one’s own life to save others<sup>2</sup>. Jurisdiction rests with God. It grows out of one’s relationship to God and others.

Morgenthau’s construction of collective German guilt eliminates the category of criminal guilt, and roots German guilt as both political and moral. Though Jaspers argues that only an individual can determine moral guilt, Morgenthau identifies the authority for moral guilt as relational. It can be assigned by others. While Jaspers argues against viewing the German people as a moral collective, he states that “the destruction of any decent, truthful German polity must have its roots also in modes of conduct of the majority of the German population. A people answers for its polity.”<sup>82</sup> This is political guilt, and describes Morgenthau’s view of German guilt well. The Germans, whether or not they were personally implicated in atrocities, were complicit in the creation of the Third Reich. For Morgenthau, this makes them morally guilty. For Jaspers, this makes them not necessarily morally guilty, but politically liable. The political liability of the Germans means that they must bow to the jurisdiction of the victors. He writes, “All must cooperate in making amends to be brought into legal form. All must jointly suffer the effects of the acts of the victors, of their decisions, of their disunity.”<sup>83</sup> The German collective must suffer the Allied consequences, and have their society restructured to create new legal norms, though

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<sup>81</sup> Jaspers, “The Question of German Guilt,” 689.

<sup>82</sup> Jaspers, “The Question of German Guilt,” 686.

<sup>83</sup> Jaspers, “The Question of German Guilt,” 691.

given his category of criminal guilt, only a few individuals would be criminally punished by the courts. For Morgenthau, the ability for an outside force to determine moral guilt meant that the authority to push for moral reform of a society lay with the victor, not simply with the individual. Individual moral guilt created political guilt. They are therefore one and the same.

And the divide between collective moral and political guilt, which Jaspers has defended throughout the essay, gives him pause at the end; “Something has been lost in the process—something which in collective guilt is always audible in spite of everything.”<sup>84</sup> Despite his attempts to remove the moral from political guilt, Jaspers is forced to admit that “there can be no radical separation of moral and political guilt.”<sup>85</sup> He writes:

We do not drop the distinction, but we have to narrow it by saying that the conduct which made us liable rests on a sum of political conditions whose nature is moral, as it were, because they help to determine individual morality. The individual cannot wholly detach himself from these conditions, for—consciously or unconsciously—he lives as a link in their chain and cannot escape from their influence even if he was in opposition. There is a sort of collective moral guilt in a people’s way of life which I share as an individual, and from which grow political realities. For political conditions are inseparable from a people’s way of life.<sup>86</sup>

For Jaspers, “the atmosphere of submission is a sort of collective guilt.”<sup>87</sup>

This is the construction of guilt that Morgenthau describes, though without the narrowing and nuancing that Jaspers gives. For Morgenthau, this narrative of collective guilt proscribes the necessary punishment: because the German collective failure is political stemming from the moral, the corrective must start with the moral to effect the political. Punishment must rehabilitate the core moral character of the German people: it must correct the average German’s willingness to submit to militarism. It must not simply deter future action, but punish past submission. If punishment could awaken Germans to their guilt, it could change their future

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<sup>84</sup> Jaspers, “The Question of German Guilt,” 692.

<sup>85</sup> Jaspers, “The Question of German Guilt,” 693.

<sup>86</sup> Jaspers, “The Question of German Guilt,” 693.

<sup>87</sup> Jaspers, “The Question of German Guilt,” 694.

character. It is this understanding of the purpose of punishment within a construct of collective German guilt that provides explanatory force for Morgenthau's plan to allow every single German to experience the economic consequences of German militarism, coupled with an imposed system of governance and re-education. Under a narrative which understood moral guilt as the root of political guilt, a punishment that did not address the moral failings of the collective would fail in its purpose. For punishment to mean anything in relationship to guilt, it had to be given because it was deserved, and had the power to address previous moral failings. It had to affect every individual in order to change the collective.

### **Conclusion: The Legacy of the Morgenthau Plan**

The series of press leaks and Roosevelt's subsequent disavowal of Morgenthau's plan, caused his influence in decided post-war war crimes policy to wane. Still, parts of his larger plan for Allied occupation were used. While almost all of the suggestions in Appendix B fell out of favor, and summary execution of war criminals was completely disowned, parts of Morgenthau's plan for the economic restructuring of Europe was adopted. His criticisms of the *Handbook of Military Government for Germany* were given consideration and eventually morphed into the Joint Chief of Staff Directive 1067. JCS 1067, which would govern the Allied occupation zone from the end of the war to its repeal in June 1947, prohibited the economic development of Germany. It restricted the development of German industry such as oil, rubber, and steel, and led to further impoverishment of the Germany economy. It was rescinded in 1947 due to the fear that continued deprivation would make the German people susceptible to Communism, and shifted the focus of occupation from re-education to re-orientation.<sup>88</sup> The directive that replaced it (JCS 1779) formed the basis for the Marshall Plan.

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<sup>88</sup>David Bloxham, "The Genocidal Past in Western Germany and the Experience of Occupation, 1945-6," *European History Quarterly* 34, no. 3 (2004): 309.

The concept of collective German guilt bled inconsistently into other areas of the American military occupation of Germany as well. The Office of Military Government of the United States (OMGUS) took over the task of denazification of the German public. One of its tasks was to convince the Germans of their collective guilt. A pocket guide, given to American soldiers shortly after the invasion stated: “These people are not our allies or our friends. They are bound by military terms. However friendly and repentant, however sick of the Nazi Party, the Germans have sinned against the laws of humanity and cannot come back into the civilized fold by merely sticking out their hands and saying— ‘I’m sorry.’”<sup>89</sup> In another striking example, propaganda posters widely distributed in the American Occupation Zone screamed “Diese Schandtaten: Eure Schuld!” or “These atrocities: Your fault!” alongside photographs from Buchenwald and Dachau.<sup>90</sup> Historian David Bloxham writes that while JCS 1067 was never fully implemented and was inconsistently applied, and indeed later abandoned, by the Allies, vestiges of the thread of collective guilt charge “occupied Germans even after it had been discharged by the Allies. Nothing could change the fact that Germany had been forced to surrender unconditionally, with the implication that there was no group which the Allies considered untainted.”<sup>91</sup> The Morgenthau Plan, though not the originator of the concept of collective German guilt, created a place for it within official American policy. Even when summary executions fell out of vogue, the construct of guilt did not.

While he continued to advocate for summary execution after September 1944, Morgenthau’s plan to deal with German war criminals was gradually supplanted by the voices of

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<sup>89</sup> United States Army Service Forces, Information and Education Division, *Pocket Guide to Germany*, as quoted in Grant Madsen, “Becoming a State-in-the-World: Lessons Learned from the American Occupation of Germany,” *Studies in American Political Development* 26, no.4 (2012): 167.

<sup>90</sup> Propaganda Poster, “Diese Schandtaten: Eure Schuld! [These Shameful Deeds: Your Fault!],” [ca. 1945], Catalogue Number: Art.IWM PST 8350, Imperial War Museums, <http://www.iwm.org.uk/collections/item/object/29110>.

<sup>91</sup> Bloxham, “The Genocidal Past in Western Germany and the Experience of Occupation, 1945-6,” 310.

McCloy, Stimson, and War Department official Murray Bernays. It would be easy to treat Morgenthau's plan as a brief road-stop, a punitive lashing out against the German people on the road to a more just or equitable plan. This would be a mistake, however. Morgenthau's plan was more than simply a foil to the plan that eventually won out. It was an earnest attempt by Morgenthau to grapple with the radical evil of genocide. As one of the only voices within Roosevelt's cabinet to specifically champion the Jewish cause, Morgenthau attempted to craft a response that was fitting to the situation: the waging of an aggressive war by Germany and the attempted annihilation of the Jewish race.

The significance of Morgenthau's focus on Nazi atrocities against the Jewish people should not be ignored. As the legacy of the Nuremberg trial was debated over the years, a growing number of voices argued that it had punished the leaders of the Nazi party for waging an aggressive war, but it had not sufficient dealt with the genocidal campaign against the Jewish people. In fact, the official agreement and charter of the Nuremberg trials, which outlined the charges against the defendants as well as the procedure that would be followed by all parties, lacks specific references to the war of genocide against the Jewish people, calling it instead a "Crime against Humanity." This has raised significant concerns over how the Trial failed to force leaders to contend with the root causes of their crimes. It also allowed the German people to avoid confronting responsibility for their own moral complicity, focusing instead on legal culpability. It has also been characterized as a show trial, pretending impartiality and hiding behind a legal framework, but pre-determining the guilt of those who it had accused.<sup>92</sup>

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<sup>92</sup> A fascinating debate was held both during and after the implementation of the Nuremberg Trial plan over how to hold German officials responsible for crimes committed against their own population, since they had not broken any international laws. The final Nuremberg Trial plan ended up creating two new categories of crimes, Crimes Against Peace, and Crimes Against Humanity. Both of these categories were heavily criticized as imposing *ex post facto* law, or holding someone legally responsible for something that wasn't illegal at the time the act was committed. In fact, some legal experts in the U.S actually advocated for a plan like Morgenthau's over the Nuremberg Trials. US Chief Justice Harlan Stone was quoted in 1945 as saying: "It would not disturb me greatly...if that power were

It can, and has been argued, that Morgenthau's plan would have brought economic destruction upon Europe and bred permanent resentment among the German people. But his specific intent to deal with the roots of German nationalism, and the collective nature of German guilt, stand in contrast to the Final Agreement and Charter for the Nuremberg Trials. By examining the construction of collective guilt, as well as the logic of punishment present in the Morgenthau plan, scholars can not only reach a better understanding of the unique position that Morgenthau advocated, but also more deeply question future logics of punishment within transitional justice structures.

If narrative provides a place for moral judgment, then Morgenthau's plan should prompt us to examine the metric we use to measure an ethic of punishment. Philpott argues that one of the core insights offered by retributivism is that "punishment is justified because it is deserved, apart from its consequences." As a part of a moral property, a retributive punishment is given because it is deserved by the guilty and needed by the victim, in order to restore the guilty to the community. Although one of the consequences of punishment may be rehabilitation, its first principle is desert. When the principle of punishment as desert and rehabilitation is justified as a component of transitional justice, it can be a part of the process of restoring a community after violence.

But as the narrative paradigm illustrates, no principle can be entirely abstracted from its story, and still provide a space in which to exercise moral judgment. The metric used to judge the narrative is itself, in need of the narrative, if it is to function as a way to determine just ends, or

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openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the constitutional safeguards to those charged with crimes...[Chief Prosecutor] Jackson is away conducting his high-grade lynching party in Nuremberg, I don't mind what he does to the Nazis, but I hate to see the pretense that he is running an court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas." Stone as quoted in Cheryl Saunders and Katherine Le Roy, eds., *The Rule of Law*, (Sydney, Australia: The Federation Press, 2003), 104.

what Rowland refers to as “the good life.”<sup>93</sup> As Alasdair MacIntyre argues in the first chapter of *Whose Justice, Which Rationality?*, any appeal to an idealized and disembodied principle of rationality “ignores the inescapably historically and socially context-bound character which any substantive set of principles of rationality, whether theoretical or practical, is bound to have.”<sup>94</sup> While the search for a stable rationality to judge our stories continues, the stories we create provide powerful spaces in which to examine and contest interpretations of reality, and the logics we derive from them.

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<sup>93</sup> Robert C. Rowland, “Narrative: Mode of Discourse or Paradigm?” *Communication Monographs* 54, no. 3 (1987): 271.

<sup>94</sup> Alasdair MacIntyre, *Whose Justice? Which Rationality?* (South Bend, IN: University of Notre Dame Press, 1988), 4.

## **Chapter 2: Enshrining Political Doctrine into Law: The Construction of German Guilt in the Bernays Plan**

If Henry Morgenthau Jr.'s plan to punish German war criminals represented one perspective prevalent in America during the spring and summer of 1944, an almost perfect foil was pushed to the fore of the discussion in September of 1944. Championed by Secretary of War Henry Stimson, this opposing stance rejected Morgenthau's assumptions about the nature of German guilt and the use of a political mechanism for punishment. Instead, it advocated using legal proceedings to try the leaders of Germany for specific war crimes, rather than punishing all Germans in correspondence to their level of guilt.

This opposing philosophy is best represented in a series of documents that came to be known as the "Bernays Plan," named after one of its authors, War Department official Lieutenant Murrays Bernays. Starting off as an inter-department memo, it went through many revisions before being finalized in January of 1944. Though I trace its history as a rhetorical artifact, I stabilize it at four moments in time in order to examine the way it develops the concept of individualistic German guilt. Specifically, I focus on its articulation in a September 15, 1944 memo, its re-articulation in a November 11, 1944 memo, a January 8, 1945 proposal, and its final matriculation on January 23, 1945. In describing its evolution, I seek to demonstrate the way audience, political contingency and personal belief shaped its conception of German guilt within a narrative of guilt and punishment.

Rhetorical scholars who research narrative agree that one of the primary purposes of narrative is to interpret reality for a specific audience. A narrative's persuasiveness and cohesion is bound by its fidelity to the values and beliefs of its audience. Lewis points out that one of the defining features of a persuasive narrative is its ability to "both express and assume a knowledge

that is shared by the community.”<sup>95</sup> But what happens when the knowledge and values of particular audiences conflict? How can an author craft a persuasive narrative when the core beliefs of multiple intended audiences are in conflict?

The creation of the Bernays Plan perfectly illustrates the ways in which American war crime planners attempted to reconcile the conflicting values of several different audiences into a cohesive narrative about German guilt. Recognizing the near impossibility of meeting the expectations of past victims of Nazi atrocities, the current Allied public, the German people, a community of legal experts, and the future audience of history, the Bernays Plan crafted a narrative of individual, criminal German guilt that utilized the legal system to administer punishment. It created a narrative in which rogue criminals seized control of a morally weak and largely complacent German public and conspired to dominate the world through criminal means. From this construction of German guilt, the authors of the Bernays Plan reasoned that criminal actions take place when public morality is weak, and the rule of law is not strong. Therefore, punishment of Nazi criminals must serve the purpose of strengthening the rule of law and international morality. Otherwise, the world would judge the victors as not having answered the transgression of Nazism appropriately.

The concept of appropriateness is paradoxical in that it is intimately tied both with audience, and with our desire to find an impartial rationale that will justify our story, independent of audience. Fisher argues that the standards of narrative fidelity and probability supplant traditional standards of rationality in the evaluation of the logics of a narrative.<sup>96</sup> Other scholars, such as Rowland, are less sanguine that these standards escape the same values that

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<sup>95</sup> William F. Lewis, “Telling America’s Story: Narrative Form and the Reagan Presidency,” *Quarterly Journal of Speech* 73, no. 3 (1987): 292.

<sup>96</sup> Walter R. Fisher, *Human Communication as Narration* (Columbia, SC: University of South Carolina Press, 1987).

construct traditional tests for public reasoning.<sup>97</sup> The desire to escape the story, and to position moral judgment as separate from the creation of the story, is a powerful reflection of audience values. For the authors of the Bernays Plan, individual German guilt demanded a judgment that was impervious to the contingencies of the political whim. For them, the metric that was outside the story could be found in the law. The law could impartially regulate public morality.

But by what authority could this regulation be justified? I argue that the Bernays Plan reflected a larger fight over the vestment of authority in law. In this conflict, positivist theories of authority clashed with natural law and pragmatism. In a positivist account of authority, the state is the sole holder of authority and “is under no obligation except those which it has accepted by valid agreement or clear acquiescence in a general custom; that such obligations are to be narrowly construed under the assumption that consent to qualifications of sovereignty cannot be assumed; and that consequently concrete obligations cannot be implied even from formal consent to general principles.”<sup>98</sup> In this view, the lack of prior laws deeming the actions of Nazi leaders illegal made Nazi action, though perhaps morally deplorable, not legally liable. In natural law and a pragmatist account, law is subservient to a higher moral order, either a revealed order (in natural law) or human need (pragmatism). This doctrine “breaks through the technicalities and statutory limitations imposed by legal positivists.”<sup>99</sup> As Judith Shklar summarizes: “If the core of natural theory law is the proposition that law and morals intersect, positivism lives to deny that proposition.”<sup>100</sup>

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<sup>97</sup> Robert C. Rowland, “Narrative: Mode of Discourse or Paradigm?” *Communication Monographs* 54, no. 3 (1987): 270.

<sup>98</sup> William J. Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials* (Chapel Hill: The University of North Carolina Press, 1970), 42.

<sup>99</sup> Bosch, *Judgment on Nuremberg*, 54.

<sup>100</sup> Judith Shklar, *Legalism: Law, Morals, and Political Trials*, 2<sup>nd</sup> ed, (Cambridge: Harvard University Press, 1986), 30.

The fact that the Bernays Plan ultimately vested legal authority in the rationale of pragmatism and natural law reflects their belief that their audience would not permit the Nazis to escape legal punishment. However, their decision to create a law that could punish future crime reflected a belief that the fundamental role of punishment had to be a strengthening of the rule of law, and holding the Nazis accountable to public morality. In this way, though the authors of the Bernays Plan attempted to rise above the story and create an independent metric for moral judgment, they found themselves constrained by audience, political contingency, and their own beliefs.

In this chapter, I argue that Stimson's vision, as articulated through "The Bernays Plan," differentiated between moral guilt and legal culpability. Unlike the Morgenthau plan, which equated collective moral guilt with collective political culpability, the Bernays Plan sought to portray (and punish) individual guilt. This emphasis on individual guilt was the product of using a legal mechanism for punishment. It also reflected the desire of the writers of the Bernays Plan to use the legal system for punishment, for the sake of reconciling the perceived expectations of multiple audiences. In the first part of the chapter, I focus on the history of the document itself, demonstrating the personalities, political contingencies, and legal exigencies that drove its formation and its modifications as a rhetorical narrative. In the second half of the paper, I examine the logics that drove the authors' advocacy of the legal system, and the way it contributed to the construction of an individualistic account of German guilt. I argue that the authors attempted to fit political doctrine into a legal framework by rhetorically framing the doctrine as "legal innovation." I argue that this framing was a result of their desire to please a public audience, an audience of law-makers, and the personal moralities and exigency of policy

makers. I note how the use of legal rhetoric allowed the authors to enshrine private morality into law by helping them to appear anonymous, fair, and constrained by legal precedent.

### **Conspiring to Construct a Conspiracy, September 15, 1944**

Stimson was dismayed by Roosevelt's decision to include Morgenthau in the talks at Quebec. He was convinced that the implementation of Morgenthau's plan would lead to the destruction of the European economy, the permanent resentment of the German people, and the future judgment of history that the Allied forces had enacted a victor's justice. He believed Morgenthau to be driven by "Semitic grievances" and believed himself to have a less clouded view of what needed to be accomplished. On September 9, 1944 he attempted to articulate to the president why the United States needed to support the punishment of war criminals through a legal mechanism, arguing: "the very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity. Furthermore, it will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its reoccurrence."<sup>101</sup> Even at this early stage in its development, the perceived gaze of future audience framed the way Stimson conceived of punishment. Still, he did not have a formal proposal that he could present to Roosevelt. Jolted by Morgenthau's proposal into action, Stimson used the early days of September to formulate a counter-proposal that could encapsulate his ideas for post-war justice.

Lieutenant Colonel Murray Bernays was an Army Reservist and lawyer, assigned temporarily to the War Department in their Special Projects Branch. He was specifically tasked with working on legal plans for the punishment of German soldiers who had committed

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<sup>101</sup> Henry Stimson to Franklin D. Roosevelt, "Memorandum, 9 September 1944," in *The American Road to Nuremberg: The Documentary Record 1944-1945*, ed. Bradley Smith (Stanford: Hoover Institution Press, 1982), 30-31.

traditional war crimes against Allied American soldiers. On September 15, the Personal Branch approved and circulated a memo that Bernays had written concerning the prosecution and punishment of Nazi war criminals. In late September, it was evaluated by Assistant Secretary of War John McCloy, and by late October, was presented to Stimson. Though not formally endorsing it, Stimson was enthusiastic and sent the original memo, along with his own notes on it, to Secretary of State, Cordell Hull.

Like Stimson, Bernays was committed to the idea of trial by jury. However, the logistics of a trial were challenging. First, Bernays recognized that for many of the crimes committed by the Nazis, there was no specific location in which to attach them to, therefore no clear jurisdiction for them to be tried within a national court. Secondly, he realized that even if countries were to hold domestic trials, there would be no way to standardize the kind of legal proceedings that would be used from country to country. He also knew that many of the countries would not have the infrastructure after the war to try a large number of individuals. In his September 15, 1944 memo, he summed up the remainder of his concerns, writing, “Undoubtedly, the Nazis have been counting on the magnitude and ingenuity of their offenses, the number of the offenders, the law’s complexities, and delay and war weariness as major defenses against effective prosecution. Trial on an individual basis, and by old modes and procedures, will go far to realize the Nazi hopes in that respect.”<sup>102</sup>

Bernays envisioned a plan that would create a new international legal basis for trying German criminals, and also serve to demonstrate to the world (and the German citizens) the massive atrocities committed by the German people. His plan indirectly addressed the

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<sup>102</sup> When describing the September 15, 1944 memorandum, I will use the text of Bernays’s Inter-department memorandum entitled “Trial of European War Criminals” dated September 15, 1944 published in *The American Road to Nuremberg: The Documentary Record 1944-1945*. This came to be known colloquially as “The Bernays Plan.” *The American Road to Nuremberg*, 33.

Morgenthau plan and its basic premise. In a section of the memo entitled “Deficiencies of Certain Suggested Solutions,” Bernays attempted to persuade his audience of War Department officials with a variety of methods.

To the idea that “Arch Criminals” be summarily executed without a trial, he gave four responses. The first was a pragmatic response, aimed as a policy criticism. He argued that Morgenthau’s plan would not solve the problem of how to deal with thousands of other individuals who had committed lesser (but still egregious) crimes.<sup>103</sup> He then leveled an argument, appealing to the communal value of fairness and principles, stating that it would “do violence” to the principles espoused by the nascent United Nations and act as its own justification for Nazi action. Third was another pragmatic argument, using a strong fear appeal that stated that it would “help the Nazis elevate Hitler to martyrdom.” Lastly, in another appeal to the communal value of justice and the fear of appearing unjust, he wrote that “the suggested procedure would taint an essential act of justice with false color vindictiveness.”<sup>104</sup>

The Morgenthau Plan haunted the rest of the section as well. Implicit in the criticism was the idea that the Morgenthau Plan punished *action* instead of *intent*. In referencing an instance of Nazi atrocities during the war, Bernays wrote, “The ultimate offense, for example, in the case of Lidice,<sup>105</sup> is not alone the obliteration of the village, but even more, the assertion of the right to

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<sup>103</sup> Smith argues that separate from the reasons Bernays listed as opposing summary execution, was the belief that different audiences would not accept it. He writes, “One of the main reasons Bernays totally rejected Morgenthau’s idea of summary execution; a few quiet liquidations would not satisfy anyone.” Bradley F. Smith, *Reaching Judgment at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (New York: Basic Books, Inc., 1977), 27.

<sup>104</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 35.

<sup>105</sup> Lidice was a small Czech village that had been ravaged by the Nazi regime in response to allegations that it had sheltered the men that assassinated SS officer Reinhard Heydrich. Every man and a number of women, were summarily executed by firing squad. The women and many of the children were sent to the concentration camps. The majority of the children were gassed. The rest of the children were sent to Germany to be raised as German. The Holocaust Education and Archive Research Team, “The Massacre of Lidice,” H.E.A.R.T, 2013, <http://www.holocaustresearchproject.org/nazioccupation/lidice.html>.

do it.”<sup>106</sup> For Bernays, the intent was just as troubling as the action. Guilt was not dependent on action, but rather “voluntary membership in organizations devised solely to commit such acts.”<sup>107</sup>

The final two sections of the September 15, 1944 memo depicted the “Basic Objectives” and “Proposed Solution.” In Bernays’s plan, three main objectives guided the solution. First was the objective that the international community should unite in issuing the judgment that a state may not commit atrocities in pursuit of national interests. This objective is significant in understanding the philosophy that emanated from the proposed purpose of punishment. Punishment, for Bernays, needed to re-establish a public, international morality through law. Second, the document argued that a legal trial would allow the world see the “realities and menace of racism and totalitarianism,” once again reinforcing a cohesive, shared global morality. Lastly, Bernays sought to demonstrate to the German people the “barbarism” of their leaders and bring to them a sense of guilt for having supported their actions. It is interesting to note that while Bernays suggests that the German people share a moral responsibility for having supported the Nazi regime, he does not suggest a legal culpability, nor does he suggest a specific punishment for them.

In the last section of the memo, entitled “Proposed Solution,” Bernays laid out his vision for punishment. An international court would be established to try Nazi Government officials, as well as Party officials and State agencies officials, to include the SA, SS, and Gestapo. The international court would try individuals thought to be most representative of those respective institutions. In finding the individuals guilty, the criminal nature of the organizations would be

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<sup>106</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 35.

<sup>107</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 35.

shown as well. The organizational guilt, would in turn, implicate every member of the organization. With guilt a foregone conclusion, every member of the above mentioned organizations would be “subject to arrest, trial and punishment in the national courts of the several United Nations . . . and the individual would be punished in the discretion of the court.”<sup>108</sup> Organizational guilt would also establish a conspiracy to commit crimes. Therefore, every action from the time of the group’s inception would be punishable. This is significant because under international law at that time, there was no jurisdiction to try crimes committed before a formal declaration of war, or to try crimes that had been perpetrated against the domestic population of a country. Conspiracy, an Anglo-American judicial concept, was introduced into the international realm as a mechanism by which to hold individuals responsible for all of the atrocities committed.

### **Backlash against the September 15, 1944 Memo**

Objections were almost immediately raised to the Bernays plan as real and imagined audiences worked to impose constraints upon the narrative. In the months that followed the initial memo, the authors of the document sought to satisfy both the perceived demands of a “public” audience, and the actual demands of individuals within the White House. The first concern raised by officials was the concept of conspiracy. Though used in Anglo-American law, conspiracy as a concept was not used in European or Soviet law. To introduce it into the international realm meant, potentially, trying individuals for crimes that were not crimes when committed. Other officials raised concern over the clarity of the conspiracy charge. It was unclear under the original plan, whether the criminal conspiracy was the atrocities committed against minority groups, or whether it was a conspiracy to wage aggressive war.

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<sup>108</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 35.

Other concerns related to the Bernays plan but also to the larger problem of legal trials. One major concern was whether or not Germans could be tried for crimes committed against domestic populations. This problem was heightened in September of 1944, as Hitler was even then enacting his plan to liquidate Hungary's Jewish population. International law, up until that point, did not criminalize acts committed against domestic populations. This view had largely been upheld by America and Britain during the early war years. Even with the establishment of the United Nations War Crimes Commission in October of 1942, the commission was instructed to define war crimes as to exclude any act committed against a domestic or Axis civilian. Bernays's plan sought to address this by depicting the waging of aggressive war as contingent upon the persecution of minority groups through the empowerment of criminal groups such as the SS and the Gestapo.

One aspect of Bernays's plan made Stimson initially uneasy, though he eventually embraced it wholeheartedly. Stimson worried that trying Nazi leaders for acts that were not considered to be criminal by domestic law at the time they were committed created a dangerous precedent for interference into the sovereign affairs of other nations. In his September 9, 1944 memo to the president, Stimson alluded to the possibility of setting a precedent that would allow foreign courts to try "those who were guilty of, or condoned, lynching in our own country."<sup>109</sup> Whether or not this was a sincere fear of Stimson's, it encapsulated well the fear that the imposition of *ex post facto* law would create an unhealthy precedent in international law. In these specific arguments, the larger tension between positivism and natural law/pragmatism is seen. Did the authority for holding individuals accountable for crimes spring from a sovereign state's

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<sup>109</sup> Henry Stimson to Franklin D. Roosevelt, "Memorandum, 9 September 1944," in *The American Road to Nuremberg*, 31.

prior acquiescence to a body of law? Or could an uncodified, though shared, public morality, either revealed or discovered, be a sufficient authorizer for deeming something criminal?

Another larger concern over the issue of trials was whether or not an individual could be tried for a crime that was committed before a formal declaration of war. The prevailing legal theory was against trying individuals for a crime committed before a war. Bernays's plan, recognizing that some of the outrages against minority groups occurred before the war, sought to address this by portraying each act committed before the war as a part of the planning to commit the crime of aggressive war. In this way, it was a part of the criminal enterprise.<sup>110</sup>

In spite of concerns, even Stimson came to see that the Bernays plan was the best option for holding the Nazis accountable for war in a way that would withstand the pressure of history.<sup>111</sup> In a memo to Hull on October 27, 1944, urging him to consider Bernays's proposal, he wrote, "Punishment is essential, not as retribution, but as an expression of civilization's condemnation of the Nazi philosophy and aggression which have relentlessly plunged the world into war. That condemnation must be achieved in a fair manner which will meet the judgment of history."<sup>112</sup> In this, Stimson's logic of punishment reflects his concern about how future audiences would perceive their efforts: punishment's purpose was not simply to address past wrongs, though history would judge them if they did not. No, punishment must reinforce a

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<sup>110</sup> Several authors have commented on Bernays's focus on punishing pre-war atrocities instead of the larger, more egregious atrocities, such as the liquidation of Hungarian Jews happening as the document was written. Bradley Smith argues that one explanation for this comes from the legacy of World War I atrocity propaganda, combined with eye-witness accounts of Jews who emigrated before 1939. He writes, "Ingrained doubts about atrocity stories, an inability to grasp the reality of the holocaust, and the seeming futility of any effort to stop it, all played a part in this failure to comprehend reports of Auschwitz and other camps. It should be noted that one explanation of Bernays's strange focus is that Washington was alive with both Jewish and non-Jewish refugees from prewar Europe who served as executive officials and advisers to the U.S. Government. Quite naturally, they tended to direct official attention toward prewar Nazi actions, the circumstances of which they knew all too well." Smith, *Reaching Judgment at Nuremberg*, 26-7.

<sup>111</sup> Many authors have argued that Stimson's history as a trial lawyer, in which he'd made his reputation in a well-known antitrust conspiracy case, predisposed Stimson to the concept of conspiracy. For more, see Smith, *Reaching Judgment at Nuremberg*, 31.

<sup>112</sup> Henry Stimson to Cordell Hull, "Memorandum, 27 October 1944," *The American Road to Nuremberg*, 39-40.

shared, public morality that condemned Nazi ideology. It had to act as a mechanism to buttress the rule of law in its attempt to hold individuals accountable for transgressing shared morality. Accordingly, the War Department agreed on November 9, 1944 to endorse the Bernays plan in principle.

### **Clarifying the Conspiracy: the November 11, 1944 Memo**

McCloy and Bernays took the September 15, 1944 memo and expanded it, releasing a November 11, 1944 War Department draft memorandum intended for the President. In it, they detailed the barriers in trying Nazi war criminals, to include the logistical challenges, as well as the lack of legal precedent to try criminals for crimes committed against civilians. The proposal argued that the crimes committed by the Nazis “does not consist of scattered individual outrages such as may occur in any war, but represents the results of a purposeful and systemic pattern created by them to the end of achieving world domination.”<sup>113</sup> It argued that by applying the concept of conspiracy, the Nazis could be held accountable for this systemic plan. This narrative of a single origin for Nazi guilt was provocative for it provided explanatory force for how atrocities on such a large scale could be committed by a supposedly civilized nation, while solving the practical constraints of policy makers. The memo argued that the conspiracy charge could be proven in a single trial and that that ruling could be used in national courts to try members of the criminal organizations. This would allow for the United States to publically condemn and punish prominent Nazis, while limiting their long-term involvement in a messy trial system.<sup>114</sup> Finally, in a move separate from the September 15, 1944 memo, it recommended

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<sup>113</sup> Henry Stimson Cordell Hull, and James Forrestal to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of European War Criminals,” 11 November 1944, *The American Road to Nuremberg*, 42.

<sup>114</sup> Fear of becoming embroiled in a costly, long-term, “European” problem, proved to be a consistent theme among White House officials. Smith writes that, “Despite the wartime crusading enthusiasm in Washington, a permanent presence on the European continent was the last thing desired by Roosevelt and his top officials. To many of them, the most appealing aspect of Morgenthau’s proposal was this it was a policy of “smash and run.” The U.S. Government wanted to establish a righteous world, but only if it could be done quickly.” Smith, *Reaching Judgment*

the creation of a treaty court that could consist of military, civilian, or both representatives. It was signed by the Secretaries of State, War and Navy.

Despite its new form, the Bernays Plan continued to encounter sharp criticism, both from within the War Department and externally. Internally, the Judge Advocate General Cramer was concerned about the ability to use the verdict from the conspiracy trial to try criminals in subsequent national courts. State Department Legal Advisor Judge Green Hackworth pointed out that the charge of conspiracy was vague, and seemed to go in two directions: first to suggest that the Germans were guilty of a conspiracy to perpetrate atrocities, second, that the Germans were guilty of attempting to achieve world domination. Army deputy fiscal director Brigadier General Kenneth Royall argued that the German leaders could not be prosecuted for pre-war atrocities, nor for persecuting civilians, and suggested the use of a limited, military trial.

Compounding the difficulty of advancing the War Department memo was a request in mid-November by the United Nations War Crimes Commission to expand their fact finding mission and try Nazi leaders for the crime of aggressive war. While on face, this seemed to complement the War Department's proposal, it was deeply problematic for a number of reasons. The United States and Britain had a vested interest in curtailing the authority of the UNWCC. The Soviet Union had declined to join the UNWCC, leaving the United States and Britain to confine the UNWCC's mission to investigating traditional war crimes against allied soldiers and allied civilians. Almost from its inception in 1942, the commission, in particular the American Ambassador to the UNWCC Herbert Pell sought to expand the authority of its mission. Confronted by the enormity of German crimes against civilians, the lack of clarity over

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*at Nuremberg*, 26. Kochavi also argues that the disaster of the Leipzig trials caused both London and Washington to fear making too broad of a commitment to post-war justice. See Arie Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: The University of North Carolina, 1998), 170. See also Bosch, *Judgment on Nuremberg*, 5-7.

international definitions of war crimes, and the lack of direction from allied powers on the direction of post-war prosecutions, the UNWCC pushed ineffectually to get the two powers to confront a wider scope of German guilt. This latest push, coming in the midst of an already heated debate over how to handle the Germans post-war, put the War Department in an uncomfortable position. They did not want to draw further attention to the United States' position, they did not want to cede more authority to the UNWCC and they did not want to directly announce that they would expand the scope of prosecutions, fearing reprisals against allied soldiers and civilians. In light of these problems, Stimson sent a note to Pell, via Hull, advising the UNWCC not to pursue the issue of aggressive war at this time.

In many ways, the disagreement between Herbert Pell and the War Department perfectly illustrates the fight over what constituted authority for judging a just narrative. For Pell, a non-lawyer, any proposal that did not hold the Nazis accountable for crimes against civilians would fail to meet the fundamental burden of a just ending to atrocities. It would not be just to the past victims of the Nazis or meet the demands of the public. In a letter to his British counter-part Cecil Hurst he wrote: "We are either statesmen preparing new laws for new conditions, or solicitors' clerks torturing precedents and twisting rules to make them fit cases which unquestionably were not in the minds of the judges who originally enunciated them."<sup>115</sup> The legal audience represented by the War Department viewed law, not policy, as the only authority capable of meeting the demands of a just distribution of punishment. For them, a system of punishment that did not respect the pre-existing law would fail to meet the standard of impartiality expected by the public.

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<sup>115</sup> Pell to Hurst, as quoted in Kochavi, "Discord within the Roosevelt Administration over a Policy toward War Criminals," *Diplomatic History* 19, no. 4 (1995), 637. For more on the legacy of Herbert Pell, see Kochavi, *Prelude to Nuremberg*, 27-171.

The sharp criticism that met the Bernays memo in early December of 1944 may have been the end of it if not for an event that occurred several weeks later. On December 17, 1944, a unit of S.S. officers killed eighty-four American prisoners of war near Malmédy, Belgium. What came to be known as the “Malmédy Massacre” roused the American public to outrage, and elevated the question of how to deal with war criminals. The massacre had been carried out by the S.S. The S.S. was a paramilitary organization. While a division of the SS was used within the German military, it was considered by the Allies to be a part of Germany’s domestic policing infrastructure. Its origins as a volunteer organization, and their diffuse usage throughout the Nazi domestic, military, and intelligence apparatuses caused the Allies to classify them as a non-military actor. A non-military actor had no jurisdiction to kill Allied soldiers, let alone violate the conventions of war by killing prisoners of war. The Malmédy Massacre was a turning point for the criminal conspiracy plan because it provided evidence, in the war crime planners’ minds, that non-military organizations (including domestic organizations) within Germany were being used in a concerted effort to achieve world domination. These organizations were engaged in a criminal conspiracy to perpetrate atrocities by illegal means. The Malmédy Massacre prompted the White House to announce its war crimes policy. Ever responsive to public opinion, Roosevelt sent a memo to the Secretary of State, asking about the status of the War Crimes Commission, and indicated that he was interested in pursuing the charge of aggressive war, perhaps even through the concept of conspiracy.<sup>116</sup>

That Roosevelt was willing to give indication of his opinion after months of tight-lipped silence was perhaps due to two newly appointed Presidential advisors on the issue of war crimes. Harry Hopkins had just stepped down and was replaced by Ambassador Joseph E. Davies and

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<sup>116</sup> Franklin D. Roosevelt to Cordell Hull, “Memorandum, 3 January 1945,” *The American Road to Nuremberg*, 92.

Judge Samuel Rosenman. While Davies had many reservations against the Bernays Plan, Rosenman was an enthusiastic supporter and had urged Roosevelt to support it. After meeting with Rosenman and the JAG office on January 3, Bernays and Major Brown attempted to revise the draft to note the JAG's opposition to the prosecution of crimes of aggressive war and to temper the language of conspiracy. However, in an interdepartmental meeting that was held on January 11, 1945 to discuss the draft, the conspiracy/criminal organization approach was so supported that Bernays felt justified in rewriting the draft to enthusiastically support the unlimited prosecution of the crime of aggression, as well as supporting the use of a treaty court. The January 13, 1945 memo reflected the boldest support of the spirit of the Bernays plan yet.

On January 18, 1945, a final meeting was assembled to discuss the official war crimes policy of the White House, and the latest draft of the Bernays Plan. Judge Rosenman had been careful to select people who he felt would support the Bernays Plan, maneuvering to exclude people such as Henry Morgenthau Jr. from attending. During the meeting, he led the assembled group through the latest draft of the Bernays Plan and then invited comment and counter-proposals. The JAG, under General Weirs, presented a plan that would limit prosecution to traditional war crimes, and whether or not the Nazis had launched an aggressive war without warning or declaration. There would be no prosecution of atrocities that had been committed before the declaration of war, or had been committed against German nationals. The trials would be conducted by a military tribunal. Ambassador Davies countered by suggesting that Roosevelt issue a statement announcing that the Nazi leaders would be punished, but leave the actual details of the policy to the Big Three's foreign ministers.

#### **The Final Draft: January 22, 1944**

Enough people rallied to the Bernays Plan that the result of the meeting was a slightly altered version of the original plan that left in tack the basic strategy of the conspiracy/criminal organization scheme. It was assembled on January 22, 1945 into a memorandum for the President concerning the “Trial and Punishment of Nazi War Criminals.” One significant change incorporated Wechsler’s suggestion that individuals be tried for “joint participation in a criminal enterprise” rather than conspiracy. The significance of this is that it focused the locus of the crime upon the participation and execution of criminal activities rather than the planning or conspiring to commit crimes. This draft of the plan did not advocate a treaty court; rather, it advocated an international military tribunal that would be convened by agreement of Britain, the United States and the Soviet Union.

The Final Draft was comprised of nine separate sections. In the first section, entitled “The Moscow Declaration,” the authors traced the authority and inception of the prosecution of war crimes to the 1943 Declaration by the “Big Three” to punish the atrocities committed by the Germans by trying them in national courts, and trying them “by a joint decision of the Government of the Allies,” if their crimes could not be tied to a particular geographic location. This was a logical point in time for them to start their genealogy as it was the first joint declaration by the “Big Three” concerning war crimes. It is also interesting that they chose to invest this moment with particular notice, as it was a “Declaration of Intent” rather than a treaty or joint policy. By starting their narrative genealogy there, the authors sought to elevate the Moscow Declaration to the level of a legal document, and portray their own plan as the natural progression of such a legal decision, as having a cohesive and logical progression through plot development.

The second section, entitled “The United Nations War Crimes Commission,” is an oddly placed appendage. In it, the authors detail the mission of the commission as “the collection of lists of criminals referred to, the recording of the available supporting proof, and the making of recommendations as to the tribunals to try and the procedure for trying such criminals.”<sup>117</sup> They noted specifically that “The Commission has no investigative or prosecuting authority to try offenders of any kind.”<sup>118</sup> This curious section can only be explained by understanding the tension between the UNWCC and the American officials in the State and War Departments and by viewing it as a power struggle between a morally outraged, and politically rather than legally-minded Herbert Pell, and more conservative forces in the White House. The American officials did not want the UNWCC to be able to expand the scope of their mission, both because they wanted to limit American commitment to try individuals after the war, and because the Soviet Union had declined to be a part of the UNWCC. Whatever war crimes policy was endorsed, they wanted agreement between the “Big Three.”

In the third section, entitled “Scope and Dimensions of the War Crimes Program,” the authors detailed both the “Crimes to be Punished,” and the “Criminals to be Punished.” In this section, they made the case that war crimes were not “individual outrages.” Rather, they contended that atrocities were a part of a systematic, criminal plan, originating in 1933, to enact “total war.” The criminals were both the Nazi leaders, but also the leaders of the numerous criminal organizations that helped to carry out these crimes. This section introduced, in many ways, the central thesis and strategy of the plan: to try and convict not just the Nazi leaders, but Nazi organizations for systemic, wide-spread atrocities. It also marked a significant moment in

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<sup>117</sup> Murray Bernays and John M. Weir to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of Nazi War Criminals, 22 January 1945,” *The American Road to Nuremberg*, 118.

<sup>118</sup> Murray Bernays and John M. Weir to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of Nazi War Criminals, 22 January 1945,” *The American Road to Nuremberg*, 118.

the development of international legal theory. It recognized the way in which the Nazis had blurred the distinction between the military as an enactor of foreign policy, and the policy as an enactor of domestic policy. It recognized that the Nazis did not treat the military as a separate class or profession, bound by a code of conduct particular to its creed. Rather, they empowered non-military actors to engage in war. By using the language of criminality to describe these acts, the authors of the Bernays plan sought to re-inforce the distinction between military and police, and condemn atrocities committed by both.

In section four entitled “Difficulties of an Effective War Crimes Program,” the authors reiterated the logistical challenges of trying such a large number of crimes and collecting so much evidence. They also detailed some of the more serious legal difficulties, including the fact that many atrocities were committed pre-war, and were not technically violations of international law. This section served to depict the exigence for the section five, the “Recommended Program.” It framed the difficulties presented as uniquely solvable through the recommendations of the Bernays plan. It also attempted to elevate the need for the plan above the secondary and tertiary concerns of legality and pragmatics by stating that the need to implement the plan was in “the interests of postwar security and a necessary rehabilitation of German peoples, as well as the demands of justice.”<sup>119</sup>

If justice demanded a swift response, then the authors of the document were intent on delivering it in Section Five, “Recommended Program.” In a brief rebuttal and allusion to the Morgenthau Plan, the authors argued that non-judicial methods “would be violative of the most fundamental principles of justice, common to all of the United Nations.”<sup>120</sup> In contrast, the

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<sup>119</sup> Murray Bernays and John M. Weir to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of Nazi War Criminals, 22 January 1945,” *The American Road to Nuremberg*, 119.

<sup>120</sup> Murray Bernays and John M. Weir to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of Nazi War Criminals, 22 January 1945,” *The American Road to Nuremberg*, 119.

judicial method would “receive the respect of history,” ensure “the maximum public support in our own times,” and “make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.”<sup>121</sup> The lure of public support of immediate and future audiences framed the past claim that it fit the demands of justice. The authors implied that the judicial method was the most just method, and most uniquely suited to bear the weight of public judgment. This particular framing is a revealing moment, not simply into the rhetorical strategy of the Bernays plan, but into the way that the authors attempted to equate public morality with the use of the legal system.

The rest of Section Five detailed the plan to prosecute the Nazi regime and criminal organizations for committing atrocities stemming from 1933, in an attempt to wage an illegal war of aggression. Rather than prosecute them for a conspiracy to commit atrocities and wage war, they would be charged for their participation in “the formulation and execution of a criminal plan.” The change from conspiracy to formulation and execution was slight but significant. While the findings from the International Military Tribunal (IMT) would establish the criminal nature of the organizations represented and could therefore be used in occupation and national courts to establish the guilt of individual members of the organization, that guilt would not necessarily correspond to a particular punishment. In these secondary trials, “Proof would also be taken of the nature and extent of the individual’s participation. The punishment of each defendant would be made appropriate to the facts of his particular case.”<sup>122</sup>

Section six, “Nature and Composition of Tribunals” and Section seven, “Preparation of Case,” deal with the logistics of setting up the trial. The Tribunal would be set up by Executive

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<sup>121</sup> Murray Bernays and John M. Weir to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of Nazi War Criminals, 22 January 1945,” *The American Road to Nuremberg*, 119.

<sup>122</sup> Murray Bernays and John M. Weir to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of Nazi War Criminals, 22 January 1945,” *The American Road to Nuremberg*, 121.

Agreement by the heads of the United Nations, or possibly the Supreme Authority “Control Council for Germany.” It would consist of members of the Big Three, France, and three other representatives of interested nations. The success of the trials would be dependent upon careful evidence collection and technical expertise. It suggested that the UNWCC was not up for the job and should be disbanded, having completed its mission. Final recommendations included setting up a full time executive council to prepare the trial, with representation from the Big Three and France.

Section eight and nine detail the War Department’s assessment of the “Soviet Attitude” and the “British Attitude,” respectively. The authors frame both countries as being in favor of international military tribunals and willing to bring use “applicable criminal law” to punish Nazi leaders, including in cases where the person was “accused of having committed war crimes against the nationals of several of the United Nations.”<sup>123</sup> In reality, the Soviet and British attitudes towards war crimes prosecutions, particularly the prosecution of Nazi leaders for atrocities committed against Axis civilians was much more complicated. Similar to the United States, there was not a single “Soviet” or “British” stance at this point in time. Britain’s Foreign Office, in particular the foreign secretary Anthony Eden, was hesitant to commit to trying Nazi leaders for crimes against their domestic populations and Axis nationals. Eden opposed the creation of an IMT, preferring each Allied country to only pursue cases that involved crimes against their personal or had been committed on their territory.<sup>124</sup>

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<sup>123</sup> Murray Bernays and John M. Weir to Franklin D. Roosevelt, memorandum entitled “Trial and Punishment of Nazi War Criminals, 22 January 1945,” *The American Road to Nuremberg*, 122.

<sup>124</sup> For a fuller discussion of Britain’s attitude toward war crimes, see Arieh Kochavi, *Prelude to the Nuremberg Trials*, or Arieh Kochavi, “Allied war crimes policy: The Issue of crimes against Jewish nationals of Axis countries.” *Justice* 44 (2007): 24-28.

The Soviet attitude was harder to ascertain. They had already tried several accused German war criminals in Soviet courts, an act that had caused considerable consternation among the allies. On several occasions, Stalin had distinctly rejected a purely judicial solution, calling for the summary execution of at least 50,000 German people. For the January 22, 1945 document to depict the Soviets as in favor of a trial before a special international tribunal, the authors had to cherry-pick the words of Vyacheslav Molotov, the Minister of Foreign Affairs in endorsing trying Nazi war criminals in front of an IMT. By portraying a single point of view for both the Soviet and British governments, the Bernays plan sought to unify a narrative in which all three “civilized” nations had unified around a shared, moral plan.

Attached to this memorandum for the President was one other memorandum. It was an implementation document, which described in greater detail the way in which the verdicts of the first international trial could be used in subsequent trials within national courts. It advocated the creation of an executive group, comprised of military representatives from the Big Three plus France to prepare for the international tribunal and described how the expenses would be shared. At the bottom of the document were three spaces for the Secretaries of State, War, and Navy to sign. Together, the two documents came to be known as “The Three Secretaries Memorandum.”

On February 1, 1945, the Secretaries of State, War, and Navy officially declared “The Three Secretaries Memorandum” to be official American war crimes policy. The one problem for the three Secretaries was that Roosevelt had failed to sign off on it. Preparing for his trip to Yalta, Roosevelt promised to consider it, and promptly pushed it to the back of the agenda. The failure to seriously discuss post-war plans for German war criminals at Yalta is one of the more puzzling mysterious that emerged from the conference. Still, the White House acted as if the Bernays plan was official doctrine waiting for a word from Roosevelt to the contrary. On April

12, 1945, Roosevelt died, leaving a country in mourning and the question of how to deal with German war criminals unanswered. The arrival of Harry Truman as Commander in Chief would answer that question and propel the Bernays plan into post-war planning, forever altering the trajectory of post-war Europe and international law.

### **Enshrining Public Morality into Law**

*“International law is based on customary usage and treaties among the several States. These, however, are not the law but only its expression. Together, they disclose the principles of conduct which are from time to time accepted by the States as controlling their relations with one another, but the ultimate foundation of those principles consists of the public concepts of morality, and justice in the States concerned. More than any other law, therefore, international law grows and develops with the growth and development of the public conscience upon which it is founded.”*

*-January 4, 1944 Memorandum by Major Brown and Colonel Bernays<sup>125</sup>*

To create a law is to enshrine particular conceptions of morality into a practice, with material results. It involves a rhetorical negotiation of competing values, based upon three audiences: the public (present, past, and future), the legal community, and the creators of the law. In the evolution of the Bernays plan, we see how value judgments about German guilt are constructed through the lens of the evaluation of public attitude, political constraints, personal beliefs, and the desire to operate within the legal system. Within the rhetorical negotiations of how to punish German guilt, the desire to rise above the narrative by utilizing a supposedly impartial legal system reflects a larger desire of the authors to distance themselves from personal morality to operate under the “impersonal” and “just” lens of the legal system. However, the legal system is circular in that it is a reflection of the aforementioned. Thus, the rhetorical

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<sup>125</sup> Murray Bernays and D.W. Brown to War Department General Staff Personnel Division, “Memorandum, 4 January 1945,” *The American Road to Nuremberg*, 94.

construction of legal justification creates an imaginary impartiality by which responsibility and personal morality is spread out across a system of institutions rather than a system of individuals.

I argue that the Bernays plan constructs an individualistic view of German guilt, in which leaders committed atrocities for the sake of nationalistic ambition. The German people, though perhaps morally complicit, were led astray by their leaders, and therefore not legally accountable. This individualistic construction of guilt is a reflection of the desire of War Department Officials to use the judicial system to restore Germany, in accordance with their beliefs about audience acceptance. A judicial process necessarily tries individuals, even as it is a product of using a legal framework. However, the innovations purposed in Bernays's plan, in which the criminal character of organizations would also be on trial and potentially binding in future courts, reflects a condemnation of the larger philosophical and structural processes that allowed individuals to commit widespread atrocities.

Enshrining this construct of guilt within a judicial process was the product of a negotiation of rhetorical audience: the Bernays plan reflects the authors' awareness of the need to appease their public audience, both past, present and future, and their justifications as to why a judicial proceeding would most uniquely fit that need. In balancing legal innovation with an attempt to link it to past legal precedent, it reflects the desire of the authors' to meet the approval of the legal community. And in negotiating what atrocities should be considered a crime, the evolution of the Bernays plan reflects the audience of law-makers- the intensely personal morality and political contingency that undergirds the formation of laws.

The construction of guilt within the framework of a judicial system ultimately points to use of the law as a way to claim the institutionalizing of public morality. It distances the authors from the way private morality and political negotiations shape the values that are represented in

law. The use of the judicial system functioned to distance them from public judgment—both present and future. By using a legal framework in which to understand and punish German guilt, judgment about guilt could be spread out across a faceless institution, rendering it as an impartial consensus of public morality, rather than be perceived as the partial judgment of a few individuals in positions of political power. The philosophy of punishment that emanated from this decision was one in which punishment functioned to strengthen the rule of law by holding individuals accountable for violations of a shared morality. Stemming from natural law or pragmatist appeals to authority, it ultimately reified positivist concepts of law, by criminalizing offenses committed against domestic populations. The often painstaking negotiations made during the evolution of the Bernays plan from its inception to its endorsement as the American War Crimes policy on February 1, 1945, reflect the authors' attempts to make political decisions based on personal and political expediency fit within the framework of an "impartial" judicial system.

### **Constructing an Individual Account of German Guilt**

One of the cornerstones of the Bernays plan was that it held individuals responsible for committing atrocities. This was remarkable in a number of ways. While international law already had provisions for trying individuals for war crimes, the Bernays plan expanded this concept to suggest that non-military individuals could be held criminally liable for committing war crimes. Furthermore, it established that no one was immune from prosecution for war crimes, including heads of state.<sup>126</sup> It proposed holding individuals responsible for waging aggressive war,

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<sup>126</sup> For more information on how the Nuremberg Trials strengthened the ability to try individuals for war crimes, see Michael J. Bazylar's "The Holocaust, Nuremberg and the Birth of Modern International Law," in David Bankier and Dan Michman (eds.), *Holocaust and Justice: Representation and Historiography of the Holocaust in Post-War Trials*, (Jerusalem, Yad Vashem and New York, Berghahn Books, 2010).

targeting heads of organizations, the very individuals who would have likely escaped responsibility in past prosecutions. Finally, by punishing individuals for planning to commit crimes, it created a new precedent within international law that criminalized intent, allowing for future law to have an active role in preventing crimes, rather than simply a reactive role in punishing it.

Embedded within the Bernays plan was a founding myth about what had allowed Nazism to exist and thrive in Germany. In the first iteration of the Bernays plan, Bernays wrote that one of the purposes of the trial should be to demonstrate to the German people the guilt of their leaders. This demarcation between the German leaders and German citizens suggests that Bernays believed the German people to be somehow hood-winked or misled in supporting bad leadership. Unlike the Morgenthau plan, which portrayed Nazism as an inevitable flowering of German character, the Bernays plan portrayed the Nazis as evil leaders who had duped an ignorant and passive population.

This characterization of German guilt as individualistic lends itself to the logic of using a judicial mechanism for punishment, but also could be the result of a desire by the authors to use a judicial mechanism for punishment. In the original September 15, 1944 Memo, Bernays made a telling distinction between legal and moral guilt, stating that the German people should be “arous[ed]...to a sense of their guilt, and to a realization of their responsibility for the crimes committed by their government.”<sup>127</sup> He depicted them as somehow morally responsible for the crimes committed by their government. Whether their guilt stemmed from their complicity or their ignorance is not directly addressed by Bernays, though it seems to be the later as he depicts

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<sup>127</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 35.

the Germans as ignorant of “the barbarians they have supported.”<sup>128</sup> Furthermore, though ignorance may be a moral failing, it was not, as envisioned by Bernays, a legally culpable offense.

The distinction between the moral guilt of the German people and the moral/legal guilt of their leaders may be reflective of an ideology that saw Nazism as the product of leaders rather than a nation. However, it could also reflect the authors’ desire to use the judicial system—a system ill-suited for punishing collective guilt. Stimson, in particular, was determined to use a judicial mechanism for punishment.<sup>129</sup> He believed that the judgment of history would condemn them if punished German guilt through summary executions or economic reprisals. He also believed that the current audience, both Allied and Axis, would not tolerate punishment outside of judicial means. In response to the Morgenthau plan, he wrote to him that such measures “do not prevent war, they tend to breed war.”<sup>130</sup> Bernays also showed a preoccupation with the reaction of an Allied audience, writing in his original memo that Allied audiences comprised of Jewish groups and like-minded individuals, already believed that the crimes committed by the Nazis should be categorized as war crimes. He argued that these groups did not simply want the Nazis punished but that “recognition should be given to the criminal character of the specific acts and policies of which they complain.”<sup>131</sup> To not recognize this, and to fail to punish the Nazis for

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<sup>128</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 36.

<sup>129</sup> Authors have also commented on Stimson’s past support for the criminalization of aggression, arguing that Stimson saw the Bernays Plan as a chance to put into law, what he had proposed to do politically in 1932, by suggesting that the United States refuse to recognize Japanese land conquests. For more, see Smith, *Reaching Judgment at Nuremberg*, 32 and Bosch, *Judgment on Nuremberg*, 8.

<sup>130</sup> Henry Stimson to Franklin D. Roosevelt, “Memorandum, 9 September 1944,” in *The American Road to Nuremberg*, 30.

<sup>131</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 34.

them would “leave millions of persons frustrated and disillusioned.”<sup>132</sup> To punish the Nazis without a full judicial process, even a streamlined judicial process, would fail to meet the recognition that this this audience demanded, risking that the punishment of the individuals would not achieve its “true moral and juristic significance.”<sup>133</sup>

Bernays was not wrong in his assessment of at least part of his audience. For a number of years, Jewish groups had been attempting to advocate for the punishment of Nazi war criminals. As the full extent of the Nazi atrocities came to be known, and even more so, came to be accepted by the Roosevelt administration, the voices of Jewish leaders gained a more receptive audience. In late August, the American Jewish Conference submitted a Statement on War Criminals to the State Department. In it, they advocated for the punishment of Nazi war criminals for specific crimes carried out against Jewish individuals, as well as “acts designed to bring about the ultimate annihilation of Jewish communities.”<sup>134</sup> They advocated for this to take place within national and international courts. Failure to do so, they warned, would “destro[y] the legal and moral foundations upon which our civilization rests.”<sup>135</sup> While the American Jewish Conference may have just been attempting to align their own stated wishes with the stated intentions of the Allied powers as released in the Moscow Declaration, Bernays interpreted it to suggest that anything other than judicial means would not satisfy his audience.

The result of these unique pressures was to construct an individualistic account of guilt that criminalized not simply the actions taken by the German leaders, but their desire to do so.

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<sup>132</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 34.

<sup>133</sup> Murray Bernays, Department of War Inter-department memorandum: “Trial of European War Criminals,” 15 September 1944, *The American Road to Nuremberg*, 35.

<sup>134</sup> American Jewish Conference to Cordell Hull, memorandum: “Statement on War Criminals Submitted by the American Jewish Conference to the Secretary of State,” *The American Road to Nuremberg*, 19.

<sup>135</sup> American Jewish Conference to Cordell Hull, memorandum: “Statement on War Criminals Submitted by the American Jewish Conference to the Secretary of State,” *The American Road to Nuremberg*, 18.

While the creation of a conspiracy narrative may have been suggested because it would allow the Allied forces to try the German leaders for a wider net of crimes that had been committed, the consequence was that it proposed punishment for attempts to actualize ideology, even if that attempt was membership in an organization. Because law creates precedent for the future and does not simply address past grievances, criminalizing intent would create a precedent in international law that would allow individuals to be punished before they committed a crime.

### **Political Will as Legal Innovation: Appeasing the Audience of Lawmakers**

Many authors have noted the way in which actors within courts, particularly judges, attempt to depict themselves as anonymous within the confines of an impartial judicial system. Clarke Rountree, in his book *Judging the Supreme Court*, notes the way in which judges “characterize themselves as interpreters rather than creators of the law, that they imply that they are chained to judicial logic rather than free to craft arguments from a rich well of rhetorical resources, that they pretend to be above normal human biases, and that they insist that what they assert about the law *is* the law.”<sup>136</sup> Rountree points out that the purpose for this rhetorical maneuvering is to maintain credibility. Rather than being constrained by law, judges are actually “constrained to meet the rhetorical demands of a political system and a political body that judge them against the idealized standards of their judicial mythology.”<sup>137</sup> An important part of this judicial mythology is the appearance of fairness and objectivity. Judith Shklar has argued that the appearance of neutrality is contingent upon the public’s consensus. Without consensus about a

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<sup>136</sup> Clarke Rountree, *Judging the Supreme Court*, (Lansing: Michigan State University Press, 2007), 3.

<sup>137</sup> Rountree, *Judging the Supreme Court*, 4.

judge's action, "the appearance of neutrality evaporates."<sup>138</sup> But this consensus is based upon an understanding of the law as operating outside of the social and political history that created it.

I argue that while Bernays and his fellow authors were not positioning themselves as judges, they were in essence operating under the same demands of judicial mythology. In order to maintain the appearance of fairness, which was key to their ability to develop a standard outside of the narrative, they had to appear constrained by the law, and in fact, disappear altogether from its pages. To buy in to this mythology though, would be to ignore the way in which individual personalities asserted their will and preferences, using their political power to construct a law that would best serve their needs. It would, in the words of Shklar, "fail to recognize that they too have made a choice among political values."<sup>139</sup>

The authors of the Bernays plan took great pains to depict the plan as a continuance of past precedent, and as a part of a larger legal history. The law and the international framework for imposing the law did not exist; yet they couched their rhetoric in such a way as to depict an act of political will as "legal innovations" within an agreed upon international framework. In doing so, they sought to distance themselves from the appearance of imposing a "Victor's Justice" upon a defeated Germany. The impartial veneer of the legal system is contingent upon the appearance of continuity and conformity between each new ruling. It is only by appearing consistent that the hand of the author of each law can disappear, leaving a seemingly unruffled and continuous stream between past precedent and future rulings. Furthermore, depicting laws as stable and unchanging is a lynchpin in the appearance of fairness. To charge someone with a crime is to charge that the existence of a moral offense (and possible punishment) was agreed upon before the act was

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<sup>138</sup> Shklar, *Legalism*, 12-13.

<sup>139</sup> Shklar, *Legalism*, 8.

committed, and the perpetrator transgressed that moral offense. The authors of the Bernays plan sought to portray the concept of a criminal/conspiracy as a continuous, stable extension of previous law, rather than the imposition of *ex post facto* law. This was done to appease the audience of lawmakers, and the future judgment of history, despite being a clear imposition of political will.

The Bernays plan sought to depict itself as a part of a larger legal history by connecting it to the Moscow Declaration of 1943. The January 22, 1945 Memo grounded the rationale for war crimes policy in the existence of the Moscow Declaration, stating in the first section of the memo that the Moscow Declaration “took note of the atrocities perpetrated by the Germans and laid down the policy” that those individuals would be punished in national courts or by the joint declaration of the United Nations. By connecting American war crimes policy to the Moscow Declaration, the Bernays plan created an origin story for the legal policy it would advocate, and grounded it within an established trajectory of former policies. In fact, the Moscow Declaration was not a legal policy at all. Though jointly signed by the Big Three and eleven other nations, as a Declaration it did not have any particular legal status within international law. It was not a treaty, or an executive agreement, and it did not specify any binding action for the signatories beyond the intention to punish war criminals. However, by grounding the legal proposals made by the Bernays plan in the Moscow Declaration, it simultaneously elevated the Declaration to the level of law, and created a precedent for the Bernays plan to lay claim to. It functioned as a precedent, so that the authors of the Bernays plan could claim that the principles they were espousing, i.e. punishing Nazi leaders for atrocities against civilians, was a part of the record before the end of the war.

The authors of the Bernays plan also took great pains to depict any alteration from existing precedent as a “legal innovation” rather than a completely new, or extra-judicial, action. To innovate is to make changes in something already established. In the negotiations that took place

between the original September 15, 1944 memo, and the final January 22, 1945 memo, we see the efforts of a community of legal minds to make political necessity fit the confines of legalese, through the use of rhetorical devices such as analogy. For example, in the November 22, 1944 memorandum from JAG Major General Myron Cramer to Assistant Secretary of War John McCloy, Cramer attempted to map out how the logistics of the Bernays plan would affect the ability to use the rulings against the criminal conduct of organizations as binding in national courts, a process that had no precedent in current legal practice. He acknowledged the political exigence of the Bernays plan, stating: “Certainly we can not afford, by any act or omission of ours, to lend support to the view that crime can be made to pay if its undertaken with a wide enough scope.”<sup>140</sup> Thus acknowledged, he attempted to fit the political necessity into the current legal context, though acknowledging that the process Bernays was suggesting “goes beyond anything now known to our criminal law.”<sup>141</sup> Still, seeing “nothing in it repugnant to natural justice,” Cramer advised Bernays on how to mold the legal system to fit the political necessity.<sup>142</sup> He did so by analogizing the new process to an established process within American law, that of the American class action suit, whereby multiple people are bound by a single ruling.

Even in the moment, those critical of the plan recognized that the Bernays plan sought to transform political will into legal precedent. An internal memo prepared in the JAG office shortly before December 18, 1944 explicitly acknowledged the impossibility of pleasing both a public audience and the legal audience. In a very technical memo, it acknowledged that failing to try war criminals for atrocities would “be met with outraged protests by suffering peoples who are not

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<sup>140</sup> Myron Cramer to John McCloy, memorandum: “Trial of European War Criminals (Comments on the Bernays Plan)”, 22 November 1944, *The American Road to Nuremberg*, 60.

<sup>141</sup> Myron Cramer to John McCloy, memorandum: “Trial of European War Criminals (Comments on the Bernays Plan)”, 22 November 1944, *The American Road to Nuremberg*, 60.

<sup>142</sup> Myron Cramer to John McCloy, memorandum: “Trial of European War Criminals (Comments on the Bernays Plan)”, 22 November 1944, *The American Road to Nuremberg*, 60.

concerned with the legal aspects of what to them has been plain mass murder.”<sup>143</sup> However, they contended that under international law, aggressive war was not illegal and “use of illegal means to conduct a war [was] wholly irrelevant and [had] no effect upon the legality of the war itself.”<sup>144</sup> Furthermore, they argued that “to say that the pre-war persecution of minority groups in Germany was a part of a conspiracy to dominate the world by illegal methods of warfare, besides being irrelevant, is historically inaccurate . . . There unquestionably was a Nazi conspiracy in the decade prior to the war, but it was a *domestic* conspiracy.”<sup>145</sup> In another crushing blow, they argued that even if there was a conspiracy to dominate the world through the commission of atrocities *after* the war had begun, it was currently legal under international law. Summarizing the thrust of their argument and the impossibility of fulfilling the political need with a legal solution, they wrote: “It is believed that the prestige of the United States would be damaged if it sought to justify *in law* its desire to punish German leaders by reliance upon a *political* doctrine of this kind.”<sup>146</sup>

One of the responses that highlight the Bernays plan’s attempt to couch their plan within existing precedent was issued by the Treasury Department. While the Treasury Department had not accepted the inevitability that the Bernays plan would become the de facto American war crimes policy, they did attempt to modify it in such a way as to increase the scope of those prosecuted for war crimes. In a memorandum that responded to the newly redrafted Bernays plan, the Treasury Department attempted to argue that the plan was too concerned with preserving the technicalities of legal precedent and was insufficient to respond to political and moral need. It

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<sup>143</sup> Judge Advocate General’s office to the War Department, memorandum: “Is the Preparation and Launching of the Present War a War Crime?”, 18 December 1944, *The American Road to Nuremberg*, 82.

<sup>144</sup> Judge Advocate General’s office to the War Department, memorandum: “Is the Preparation and Launching of the Present War a War Crime?”, 18 December 1944, *The American Road to Nuremberg*, 83.

<sup>145</sup> Judge Advocate General’s office to the War Department, memorandum: “Is the Preparation and Launching of the Present War a War Crime?”, 18 December 1944, *The American Road to Nuremberg*, 83.

<sup>146</sup> Judge Advocate General’s office to the War Department, memorandum: “Is the Preparation and Launching of the Present War a War Crime?”, 18 December 1944, *The American Road to Nuremberg*, 84.

argued against a formal extradition process, which would only result in “endless frustrating delays and disagreements.”<sup>147</sup> It acknowledged that a trial process may have merit for appeasing the public audience of history, “demonstrat[ing] to the world that we as civilized nations are able to bring justice by regular legal methods,” but argued for severely restrictive rules, such as limiting the time given to the accused to speak on their own behalf, and eliminating pleas such as insanity, superior orders, or immunity.<sup>148</sup> In short, the Treasury advocated for the use of a trial for political and rhetorical purposes, and objected to any modifications that the Bernays plan would implement, that would limit the ability to prosecute whomever the Allies deemed guilty.

The need to conform to previous precedent was not felt by the Treasury because they were not writing for a community of law-makers. They were writing for the public. They argued that “the respect which the people of the world will have for international law is in direct proportion to its ability to meet their needs.”<sup>149</sup> If the trial did not adequately punish war criminals, it would disillusion the public, which in turn would weaken the rule of law, leading to future wars. It would be a mistake, they summarized, “to attempt to apply past practices and procedur[e]s out of the relatively puny wars of history to the present gigantic struggle for survival.”<sup>150</sup> Instead, the “rule of reason” should govern the “handling of novel situations” in international law. Framed as a dilemma between the need to adhere to past precedent and the need to achieve the goals for which the war was fought, the Treasury demanded that the United States act “with boldness, courage, and determination to advance the science of international law by making the necessary decision in

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<sup>147</sup> Department of the Treasury to the War Department, memorandum: “The War Department Memorandum Concerning the Punishment of War Criminals,” *The American Road to Nuremberg*, 127.

<sup>148</sup> Department of the Treasury to the War Department, memorandum: “The War Department Memorandum Concerning the Punishment of War Criminals,” *The American Road to Nuremberg*, 128.

<sup>149</sup> Department of the Treasury to the War Department, memorandum: “The War Department Memorandum Concerning the Punishment of War Criminals,” *The American Road to Nuremberg*, 128

<sup>150</sup> Department of the Treasury to the War Department, memorandum: “The War Department Memorandum Concerning the Punishment of War Criminals,” *The American Road to Nuremberg*, 129.

a manner consistent with the ethical, moral, and humane principles recognized by civilized men.”<sup>151</sup>

Rountree argues that courts use the reframing of past precedent in order to frame interpretations of judicial motives. Though only explicitly reframed as such in the December 18, 1944 JAG memo, each objection and modification of the Bernays plan demonstrates a resounding pre-occupation with the perception (and reception) of motives. Stimson objected to Morgenthau’s plan because it would be perceived by the world and future audiences as motivated by a desire for revenge. Herbert Pell’s impassioned plea for greater lee-way in information gathering and prosecution was rejected because of how it would be perceived by the Soviets, the fear that it would expand the scope of the investigation too much, and because the United States perceived Great Britain as being hostile to expansive post-war prosecutions. Framing political policy in terms of past precedent allowed the United States to deliberately constrain the Allied role in post-war prosecutions while still satisfying the political needs of their constituencies. It allowed them to portray themselves as both bound by past law, and therefore helpless to prosecute all instances of atrocities, but simultaneously empowered (and in fact, instructed) by past precedent to prosecute specific cases.

This duality enabled the authors to elevate the law in such a way as to supplant the authors of the law. By highlighting the law, the authors were able to maintain the veneer of legal impartiality, and place the onus of responsibility upon the constraints of past law. This strategy obscures the role of personal responsibility, and indeed, morality, in the creation of law. It also exposes it as a part of the process of constructing a narrative, rather than an impartial standard in

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<sup>151</sup> Department of the Treasury to the War Department, memorandum: “The War Department Memorandum Concerning the Punishment of War Criminals,” *The American Road to Nuremberg*, 129.

which to judge the narrative. Rather than an impartial, dispassionate act, interpreting the law became a highly charged, political action, contingent upon the morality of the people empowered to make those interpretations. While the legacy of the Bernays plan has often been the elevation of human rights within international law, the results should not obscure the rhetorical nature of its construction, nor the natural law/pragmatic value judgments that were enshrined into positivist law.

### **Conclusion: Implications of the Bernays Plan**

What were the ramifications for attempting to enshrine into law a political doctrine that created an individualistic, leader-centric account of German guilt? As Shklar observes, accusing a party of acting politically under the guise of law is not that remarkable. But what does matter “is again the intellectual consequences of this denial, and the attendant belief that law is not only separate from political life but that it is a mode of social action superior to mere politics.”<sup>152</sup> Materially, the Bernays plan went on to create a virtual blue-print for the creation of the Nuremberg Trials. It set an international precedent for the prosecution of leaders, the punishment of crimes against domestic populations, and attempted to criminalize the waging of aggressive wars. Michael Bazylar writes that “modern international law had its birth—and all of international law its rebirth—in the aftermath of the Holocaust.”<sup>153</sup> Its moment of conception was the Bernays plan.

One of the consequences of the Bernays plan’s decision to attempt to create an international morality that could be enforced through law, has been a virtual explosion of subsequent judicial punishment in the international arena. Daniel Philpott calls this trend the imposition of the “liberal

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<sup>152</sup> Shklar, *Legalism*, 8.

<sup>153</sup> Michael Bazylar, “The Holocaust, Nuremberg and the Birth of Modern International Law,” in David Bankier and Dan Michman eds., *Holocaust and Justice*, (Jerusalem and New York: Yad Vashem and Berghahn Books, 2010), 46.

peace,” in which the decision to try German war criminals has been reiterated throughout conflicts in Argentina, Chile, Timor-Leste, and Sierra Leone, among other nations and regions. He argues that while judicial punishment for political injustice has been relatively rare throughout history, they became the dominant form of political punishment after 1945.<sup>154</sup> One of the implications of this move towards punishment has been to refocus the discussion about the relationship between guilt and punishment. Philpott writes that arguments about judicial punishment “focus not on the intrinsic value of determining guilt and punishing criminals but on the consequences of punishment.”<sup>155</sup> The focus on punishment as serving a future function, rather than righting past wrongs is especially evident in the Bernays Plan. In rooting the narrative of German guilt in a story in which a weakening of public morality allowed for a gang of thugs to attempt to dominate the world, the trajectory of the plot steered towards a particular moral conclusion: that the ending of the story would only satisfy audiences if it strengthened public morality, and in doing so, prevented it from happening again. In this way, the punishment served to strengthen the rule of law through a new form of public accountability.

The Bernays Plan divorced the philosophy of punishment from past guilt. It justified punishment based upon its future purpose in strengthening accountability and the rule of law. This was a direct result of the moral space created by the narrative in the Bernays Plan. However, because it was enshrined into positivist law, it has become a consistent logic of punishment in international trials. Our examination of the Bernays Plan, particularly the way it sought to provide a rationale for judgment apart from its narrative, provides the opportunity to examine whether this logic of punishment can or should be applied to new contexts. Do international trials actually

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<sup>154</sup> Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford: Oxford University Press, 2012), 209.

<sup>155</sup> Philpott, *Just and Unjust Peace*, 213.

strengthen the rule of law and increase accountability? And should that be the end goal of punishment?

This examination of the Bernays Plan also should lead us to examine the way in which rhetorical narratives are used to shape political decisions into legal standing, and the way private morality, exigency, and perceptions of audience influence the creation of laws. Critical legal studies have done much to expose the way in which politics and the law are influenced by each other and benefit the people within positions of political power. A rhetorical analysis of moments such as this exposes the way policy-makers use rhetoric to disguise their own presence, thus preserving the myth of judicial anonymity and fairness. That this disguise is perceived as necessary for the maintenance of audience acceptance is perhaps the most revealing one. It speaks to the faith societies have in a shared morality, even at a moment in time when the illusion of a shared morality had been shattered.

Even the best intentioned laws are a product of individual judgments of morality. The question of whether the version of guilt and consequent punishment constructed by the Bernays plan constituted the most just response to the Holocaust thus requires a moral evaluation. There is no doubt that the January 22, 1945 memo advocated a much more restrictive picture of individual guilt, limiting the scope of people who would be prosecuted for their role in the conspiracy. It is also true that the focus on holding leaders and participants responsible for perpetuating the Holocaust placed action as a requirement for legally culpable guilt, rather than inaction. The problem was, for a conspiracy as vast as Bernays had attempted to portray to exist, it was dependent not simply on leaders acting, but for them to be able to act without opposition. For the Bernays plan to work as a part of an impartial judicial mythology, it had to separate the question

of what moral culpability demanded in favor of prosecuting what legal culpability could be demonstrated.

The Bernays plan created a rhetorical split between moral guilt and legal culpability while projecting a particular morality into the public sphere. This examination of the Bernays plan should lead to examine that morality, and ask whether it is an appropriate foundation for international law. Whether it truly represents a shared public morality, we are bound by it. Therefore, we should ask if it is a sufficient definition of guilt, and whether it is adequate to respond to the exigencies of genocides in Rwanda, Yugoslavia, Sudan, and the Democratic Republic of Congo, or whether we, like the Treasury Department urged in late January of 1945, need to acknowledge the limits of using the Bernays plan as a precedent.

### Chapter 3: Narrative Unity and Crimes against Peace

One of the defining elements of narrative is the quest for cohesion and unity of a plot. In Aristotle's poetics he mused that the unity of a plot depended upon the interdependence of each action. He wrote that "the different parts of the action must be so related to each other that if any part is changed or taken away the whole will be altered and disturbed."<sup>156</sup> The production of that kind of dependence requires that the author of the narrative provide a way for the audience to understand relationships between each part of the action. The construction of that meaning must provide a framework for understanding the narration according to a given audience's pre-existing system of understanding.

The creation of the Final Agreement and Charter for the Nuremberg Trial provides a unique glimpse into the formation of a unified plot. Political constraints, the authors' personal beliefs, and the perceived pressure of a public audience formed the system of understanding used by the authors to interpret how each action related to the next. These relationships are what provide cohesion to the narrative. In the Final Agreement and Charter for the Nuremberg Agreement, the American war crime planners rooted the source of German guilt in the waging of aggressive war. They argued that the Germans wanted to dominate the world. The desire to dominate the world thus operated as a central point of unity: every German infraction was given meaning and relationship to other German infractions by interpreting it through this lens.

A system of meaning that gives cohesion to a narrative determines what is included in a narrative. It also determines what it left out of a narrative; what is deemed to be irrelevant to the story. If world domination was the end goal of German aggression, then the American war crime

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<sup>156</sup> Aristotle, *The Poetics of Aristotle*, trans. Preston H. Epps (Chapel Hill: University of North Carolina Press, 1942), 18.

planners reasoned that it was the driving force behind all German infractions. Under these narrative constraints, crimes committed against civilian populations, concentration camps, and the attempted annihilation of the Jewish people, were interpreted by the American war crime planners as directly related to each other: they all supported Germany's goal of world domination. The result of this was the elevation of the charge of Crimes Against Peace in the Final Agreement and Charter for the Nuremberg Trial, over the charges of Crimes Against Humanity and War Crimes, because the latter two would never have happened if the former had not been pursued.

The material effects of this interpretation have been diverse and long-reaching. First, the quest for narrative unity around the German conspiracy to wage aggressive war shaped Allied Trial strategy. Everything from evidence gathering, to indictments, to sentencing was shaped by this rhetorical frame. Secondly, it shaped how the public understood Nazi atrocities, obscuring inquiry into the eclectic range of events and attitudes that had allowed the Holocaust to occur, often at the expense of victims of Nazi atrocities. Third, it enshrined the status quo into international law; by criminalizing Crimes Against Peace, the Allied war crime planners made initiating an armed struggle a crime, thereby entrenching status quo geographic borders. Lastly, by elevating Crimes Against Peace, as the worst of all crimes, the Allied war crime planners promoted a logic of punishment that was predicated upon its ability to deter future Crimes Against Peace. I argue that this logic of punishment, which I refer to as "consequentialist" logic, has endured past its application at Nuremberg and continues to be used to justify the creation and application of international criminal law.

### **Solidifying American War Crimes Policy, April-May, 1945**

The death of President Roosevelt on April 12, 1945 marked an important date in the progression of American war crimes policy. While the Three Secretaries Memo had functioned as default policy since February 1, 1945, it had received the official endorsement from Roosevelt before his death. The Yalta Conference, which American officials had expected to yield definitive decisions concerning war crimes, was remarkable for its lack of deliberation on the subject. At the time of Roosevelt's death, Rosenman, Weir and Cutter were in London, engaged in a diplomatic mission to convince the British to accept the basic tenants of the American criminal/conspiracy plan. They were hamstrung in many ways. The fact that Roosevelt had not officially accepted the plan had caused the State Department to classify the actual Three Secretaries memo, forcing the three emissaries to rely on describing it in general principle. They were there to test the water, rather than officially bargain, making any changes or concessions made in the course of negotiations subject to approval. At that time, the British cabinet had thoroughly steeled themselves against the idea of a trial and was pushing for summary execution.

The events of April 12, 1945 changed the political equation by ushering into power Harry S. Truman. Truman differed from Roosevelt in many ways. Historians have noted the way in which his decisive decision-making style stood in sharp contrast to Roosevelt.<sup>157</sup> Eager to ensure continuity in the office, and led by Rosenman to believe that the Three Secretaries Memo had more support from the British than it did. Truman agreed to endorse it and gave permission for the war crime trial planning team to move forward with Allied negotiations.<sup>158</sup>

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<sup>157</sup> For a lengthier discussion of Truman's impact on war crimes policy in comparison to Roosevelt, see Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, Inc., 1981), 193-195 and Michael R. Beschloss, *The Conquerors: Roosevelt, Truman and the Destruction of Hitler's Germany, 1941-1945* (New York: Simon and Schuster, 2002).

<sup>158</sup> Smith has noted the way Truman saw the trials as a way to teach the German's how to behave in a civilized world. He writes: "President Truman himself, in a letter to General Dangeline Booth of the Salvation Army, agreed that strong, and perhaps unprecedented measures were necessary to deal with war criminals. Due to their "barbaric practices," Truman asserted, "we have a stern duty to teach the German people the hard lesson that they must change their ways before they can be received back into the family of peaceful civilized nations.'" Truman to General

The British cabinet's support of summary executions posed a problem for American officials. Despite attempts to come to a compromise that might involve arraignment instead of a military trial, the amateur negotiating teams on both sides were unable to come up with a solution that would be acceptable to both Allies. The Americans had committed themselves philosophically and politically to the idea of a trial and perceived themselves to be unable to trespass against that idea. In advance of the now historic United Nations San Francisco Conference, held from April-June 1945, American officials attempted to shore up potential objections to the conspiracy/criminal trial program.

The philosophical justifications that the Americans had for committing themselves to a trial were made manifest in a document prepared by Assistant Secretary of War John McCloy. On April 20, 1945, McCloy issued a four-page paper outlining the rationale and pre-emptive defense of the criminal/conspiracy trial plan. McCloy's overall argument was predicated upon a narrative of humanity's progress from barbarism to civilization. Picking examples from history of tyrants using unsavory punishment practices, he juxtaposed these Anglo-American judicial practices, and indirectly elevated the American criminal/conspiracy trial plan as the next step in civilization's march towards progress. A failure to punish through this method would be a "descent to the methods of the Axis itself"<sup>159</sup> and therefore a step back in progress. He argued that any punishment was justified not by its ability to seek revenge or retribution, but by its ability to act as a future deterrent and improve the standards of international conduct.

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Booth, May 25, 1945, Official File, File 325, Box 1007, Papers of Harry S. Truman, Harry S. Truman Library, Independence, Missouri. as cited in Bradley Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, Inc., 1977): 47.

<sup>159</sup> John McCloy, Memorandum "The Punishment of Those Guilty of War Crimes and Atrocities is for Criminal Violation of International Law: April 20, 1945", *The American Road to Nuremberg*, 158.

McCloy also appealed to the implicit morality of the method. Appealing to the audience of “freedom-loving peoples” he argued that a failure to uphold that moral burden would “sacrifice a part of something very precious.”<sup>160</sup> While McCloy did not explicitly explain why a trial would fulfill that moral burden, or what that moral burden actually was, he seemed to believe that it would be self-evident for his audience. The charged language of sacrifice and freedom masked the lack of explanation for how morality and the judicial method were linked. As for many of the American officials working on the criminal/conspiracy trial plan, the morality of the judicial method as opposed to others was taken as a given, and did not require much explanation. They conceived of their public audience as having a shared morality that would not abide by an immoral method of punishment.

It is clear that another audience weighed heavily on McCloy’s mind. As with Stimson, McCloy justified the plan on the basis of “the judgment of history,”<sup>161</sup> arguing that future interpretations of Allied actions would determine whether or not peace would be preserved in the future. The majority of McCloy’s arguments for a trial has very little relationship to the actual crimes committed by the Nazis, or the appropriateness of punishment based upon their guilt. Their rhetorical thrust was predicated on how the trial would be received by future audiences. He was not without rationale for this focus on the future. It is clear that the past weighed heavily on his mind; in justifying his plan based off of the future judge of history he wrote: “One has only to remember the confusing propaganda interpretations of the Versailles Treaty to realize what might be the disastrous results of action dictated by politics and not by fundamental principles of

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<sup>160</sup> John McCloy, Memorandum “The Punishment of Those Guilty of War Crimes and Atrocities is for Criminal Violation of International Law: April 20, 1945”, *The American Road to Nuremberg*, 159.

<sup>161</sup> John McCloy, Memorandum “The Punishment of Those Guilty of War Crimes and Atrocities is for Criminal Violation of International Law: April 20, 1945”, *The American Road to Nuremberg*, 160.

law and justice.”<sup>162</sup> The failure of the Leipzig Trials, and the forced acceptance of Germany for its guilt both factored into how the American officials perceived the past efficacy of post-conflict reconciliation measures. For McCloy, at least one of the purposes of punishment was the maintenance of future peace, and the deterrence of future aggression. Future audiences would view the punishment as appropriate if its effect was to keep the peace.

Bradley Smith has argued that the McCloy memo factored heavily into the negotiations that were to take place in San Francisco, and shaped the draft document that was used to guide the London Conference negotiations. It offers a valuable insight into the underlying rationales that guided American officials in their pursuit of the criminal/conspiracy trial plan, and ultimately, the philosophical framework that the Final Agreement and Charter for the Nuremberg Trial was built upon. Confident of the rightness of their cause, McCloy put into words the American war crime planners’ belief in the fundamental morality of a trial system over summary execution, even if that morality was based largely on a public perception of the judicial system as more moral than a political solution.

The increased appeals to moral rhetoric, and indeed the American officials’ feelings of upholding a righteous cause as evidenced by McCloy’s memo, and in many of the documents during this time. On April 11, 1945, American soldiers liberated Buchenwald. They would later liberate Dora-Mittelbau, Flossenbürg, Dachau and Mauthausen. As the Eastern and Western fronts closed around the crumbling German army, the full extent of the Third Reich’s atrocities became impossible to ignore. American soldiers, followed closely by American reporters, confirmed the reports which the public and White House officials had assumed to be exaggerated: that far from exaggerating the extent of devastation, the reports had failed to

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<sup>162</sup> John McCloy, Memorandum “The Punishment of Those Guilty of War Crimes and Atrocities is for Criminal Violation of International Law: April 20, 1945”, *The American Road to Nuremberg*, 160.

capture the full extent of it. Edward R. Murrow, an American broadcast journalist who had reported extensively on the war, visited Buchenwald about three days after liberation. On April 16, 1945 he released a radio report, trying to describe the scene of devastation at Buchenwald. Towards the end of his description, he stated: “I pray you to believe what I have said about Buchenwald. I have reported what I saw and heard, but only part of it. For most of it, I have no words.”<sup>163</sup> As the extent of devastation became known, so did the moral framing of the Allied war crime planners.<sup>164</sup> But these atrocities had to be reconciled into the political and rhetorical framework that the American war crime planners had created in order to frame German guilt. As their knowledge of Nazi atrocities grew, the American war crime planners used it as evidence of Germany’s attempt to subdue civilian populations for the purpose of aggressive war.<sup>165</sup>

Another factor that might explain the burgeoning of moral sentiment was the end of the war itself. The memory of the ill-fated leak of the Morgenthau plan had caused the American war crime planners to fear retribution against Allied prisoners of war. This had created a significant political constraint, as the war crime planners feared not simply the American publics’ reaction to an overly punitive post-war reconstruction plan, but also the German

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<sup>163</sup> Edward Murrow, “Report from Buchenwald: April 15, 1945,” radio broadcast, CBS London, transcript, Tufts University: The Life and Work of Edward Murrow: an archive exhibit, Medford, MA. <http://dca.lib.tufts.edu/features/murrow/exhibit/cbseurope2.html>

<sup>164</sup> For more analysis on the effect of the end of the war on the rhetoric of the war crime planners, see Smith, *The Road to Nuremberg*, 200-206. He argues that with the end of the war and discovery of atrocities: “The emotional floodgates were then allowed to open and all the pent-up frustration and anger tore through the bureaucratic defenses. Here was living proof of German wickedness and a transcendent demonstration of the justice of the Allied cause.” (204)

<sup>165</sup> Scholars have noted how the American experience of concentration camps framed their subsequent interpretation of the racial nature of Nazi crimes. Bloxham argues that the Allies’ liberation of Buchenwald and Dachau shaped their interpretation of the function and purpose of other camps. He writes: “Buchenwald and Dachau held paramount places in the American consciousness. In contrast to Belsen, which was discovered by the British, the majority (approximately four-fifths) of prisoners in Buchenwald and Dachau were not Jewish, but were instead political prisoners from Germany and other European countries.” Bloxham argues that the American experience of these camps factored into their relative down-playing of Jewish suffering, as well as the American conflation of concentration camps with death camps. Bloxham, “The Genocidal Past in Western Germany and the Experience of Occupation, 1945-6,” *European History Quarterly* 34, no. 3 (2004): 313.

response. With the end of the war came the removal of that restraint. Finally, the war crime planners could openly plan without fear that it would be used against them by German propagandists.

Prior to the San Francisco Conference, another factor came to pass that would have a large impact on the future trajectory and rhetorical framing of the Nuremberg Trial Plan. In late April, President Truman quietly approached Supreme Court Justice Robert H. Jackson to see if he would be interested in heading the American Prosecutorial Trial team. The team would be charged with crafting the American case against Nazi war criminals, but also would take part in the international trial planning effort. Jackson accepted and started to recruit members, first enlisting none other than Colonel Murray Bernays. While Jackson attempted to cool the rhetoric used in the proceedings, arguing for a less impassioned rhetoric that would lead to more discerning action, he firmly supported the rationale behind the criminal/conspiracy trial plan.<sup>166</sup> The force of Jackson's personality, beliefs, and sharp judicial mind imposed itself upon the documents dating from the time of his appointment through the creation of the Nuremberg Trial plan and the prosecution of German war criminals (Jackson was the appointed head prosecutor). He proved to be a formidable ally for the American war crime planners, and his leadership and vision at the London Conference would prove to be decisive in the creation of a trial plan.

With Truman's endorsement, the American war crime planners went through several rounds of revision, fine-tuning a draft to be presented to the British, Soviet, and French representatives. The diplomatic effort was led by Judge Samuel Rosenman, whom Roosevelt had

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<sup>166</sup> In commenting upon the April 28, 1945 redraft of Colonel Cutter's Memorandum on the "Punishment of War Criminals," Jackson wrote: "I think its future credit will be greatly aided if it is a colder toned instrument. What the world is looking for now is not more fiery words which, after all, are pretty much exhausted but evidence of sure footed and discriminating action." Jackson to Cutter, "Memorandum RE Document Entitled, 'Punishment of War Criminals.' Dated 28 April, 1945." May 1, 1945, *The American Road to Nuremberg*, 180.

appointed earlier in January, and who had been a fierce advocate for the criminal/conspiracy trial plan. The majority of the drafts were produced by Colonel Cutter, an early adapter of the conspiracy/criminal trial plan, who had been involved in the diplomatic efforts to secure British approval in March and April. Cutter was tasked with drafting both the memorandum that would explain the American policy and the executive agreement, which would serve as the basis for negotiations at between the Allied governments at San Francisco, much like the earlier “Implementation Instructions” draft that accompanied the “Three Secretaries” memo.

A first draft of the Memorandum for the Punishment of German War Criminals rehearsed much of the ground covered in the “Three Secretaries” memo and John McCloy’s paper. Much of the latter half, defending a judicial method versus a summary execution and pre-empting arguments about the difficulty of the judicial method, was taken verbatim from McCloy’s paper. That Colonel Cutter was worried about the British team accepting the draft was clear. The draft left open the possibility of a separate trial for the heads of Nazi Germany, while subsequent trials would implement the criminal/conspiracy trial scheme, implicating Nazi organizations to be used in secondary courts. The Bernays Plan’s narrative of a single “premediated criminal plan”<sup>167</sup> that encompassed every Nazi atrocity and linked them to the goal of aggressive war was evident throughout the document. One notable aspect of this draft was an inclusion in the section against summary executions: “Principal emphasis, doubtless, will be placed in the trial upon those potent violations of the customs of war which most shock the Allies (e.g., murder of prisoners of war, abuse of populations in occupied territories, deportation of Allied peoples for use as slave labor, etc.)”<sup>168</sup> This is significant in that it reveals the degree to which the American war crime planners’

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<sup>167</sup> Colonel Cutter, Memorandum, “Memorandum on the Punishment of German War Criminals,” April 28, 1945, *The American Road to Nuremberg*, 163.

<sup>168</sup> Colonel Cutter, Memorandum, “Memorandum on the Punishment of German War Criminals,” April 28, 1945, *The American Road to Nuremberg*, 171.

perception of their Allied audience shaped their understanding and construction of German guilt. For them, the root source of German guilt was the manner in which the war had been conducted, and the fact that Germany had waged a war against their neighbors. Atrocities committed by the Germans were depicted as extreme war crimes. After one round of relatively minor revisions, the Memorandum was allowed to sail forward to San Francisco.

The Executive Draft Agreement was a different story. The initial draft by Colonel Cutter was redrafted at least four times before it made it to San Francisco. It reflected the perceived constraints of what the Cutter thought would be approved by the British. A whole section was dedicated to the Arraignment of top Nazi war criminals, reflecting earlier negotiations in which the British had indicated that they would prefer an arraignment followed by a summary execution. In Cutter's version, an arraignment would be followed by an abbreviated version to a trial, though he avoided that exact language. In another nod to earlier negotiations with the British, a wide range of charges could be brought against individuals, from the persecutions of minority groups to "the encouragement of internal disorders in countries bordering upon Germany."<sup>169</sup> The language was much more passionate than other documents as well, citing "the treacherous invasion by force," and "the ruthless program of mass extermination."<sup>170</sup> Mass extermination was once again portrayed as inseparable from the primary source of German guilt: aggressive war. Cutter's struggle to reconcile the American demand for a trial with what he thought would pass British muster was reflected in the loosely constructed document. A subsequent memo from Jackson reflected several of these concerns, noting that the charges were too specific and had to be thought of more broadly. It was here too, that Jackson expressed

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<sup>169</sup> Colonel Cutter, Memorandum, "Punishment of War Criminals, Redraft," April 28, 1945, *The American Road to Nuremberg*, 174.

<sup>170</sup> Colonel Cutter, Memorandum, "Punishment of War Criminals, Redraft," April 28, 1945, *The American Road to Nuremberg*, 174.

concern about the heightened language, noting the fear that it might be received in the future as “setting up a court organized to convict.”<sup>171</sup>

The final Executive Draft that was brought to San Francisco stripped away the language of arraignment, as well as the plethora of charges, pairing it down to: violation of the customs and rules of warfare, invasion by force or threat of force of other countries in violation of international law or treaties, initiation of war in violation of international law or treaties, launching a war of aggression, and recourse to war as an instrument of national policy or for the solution of international controversies. It also allowed for the right to charge defendants for other crimes such as atrocities or, “crimes committed in violation of the domestic law of any Axis Power or satellite or of any of the United Nations.”<sup>172</sup> These changes are significant in that they reflect a turning away from Bernays’s focus on pre-war atrocities to a definitive highlighting of Germany’s “crime” of aggressive war. While that was always a part of the criminal/conspiracy trial plan, the new Executive Draft thrust it into prominence and made it a cornerstone of international negotiations. Historian Bradley Smith notes that in doing so, it adopted the language of the 1928 Kellogg Briand pact, condemning the “recourse to war as an instrument of national policy.”<sup>173</sup> This allowed for a convenient, if perhaps distorted, grounding of the German crime of aggression in the earlier treaty. Also significant was the new language allowing defendants to be tried under Axis or Allied domestic law. This provision increased the number of statutes and laws under which German war criminals could be conflicted. This would have ensured a much more extensive trial program than the British had wanted.<sup>174</sup>

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<sup>171</sup> Jackson to Cutter, Memorandum, “Memorandum RE Document Entitled, ‘Punishment of War Criminals,’” April 28, 1945,” *The American Road to Nuremberg*, 180.

<sup>172</sup> Cutter and Jackson, Memorandum, “Draft Executive Agreement,” May 2, 1945, *The American Road to Nuremberg*, 189.

<sup>173</sup> Smith, *The Road to Nuremberg*, 215.

<sup>174</sup> Smith writes that the inclusion of this clause, allowing the defendants to be charged under Axis and Allied laws, “suggests a rising feeling in Washington that with the Third Reich in its death throes—VE Day was less than a week

Political scientist and international relations scholar Gary Bass has argued that the American war crime planners' focus on conspiracy to commit aggressive war was a result of not having lived under Nazi occupation. They had not felt first-hand the effects of Nazi atrocities against civilian populations. The greatest crimes committed against Americans were the deaths of American soldiers and the disruption of peace. Therefore, their perception of Nazi guilt focused on those violations. He points out that early in the war, the British were more inclined to focus on the suffering endured by their Allies in occupied Europe, but as the German bombing of Britain grew to be more intense, as reports of mistreatment of British Prisoners of War emerged, and as unrestricted submarine warfare claimed the lives of British civilians, the British focused on their own suffering, which "translated directly into war crimes policy."<sup>175</sup> This perception was later echoed by men such as Stimson who, in reflecting on the success of the Nuremberg Trial, wrote: "The crime of the Nazis, against *us*, lay in this very fact: that their making of aggressive war made peace here impossible."<sup>176</sup>

On May 3, 1945, the delegates arrived in San Francisco and met later that day with representatives from the four Allied countries. The British had hoped to confound the American's insistence on a trial by placing the onus of a working plan on them. To their surprise, the American's opened the meeting not just by declaring the American intention to try German war criminals under the criminal/conspiracy trial plan, but by distributing copies of the

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away—some of the legal niceties could be sacrificed, if necessary, to guarantee conviction of the Nazi leaders." Smith, *The Road to Nuremberg*, 214.

<sup>175</sup> Gary Bass, *Stay the Hand of Vengeance* (Princeton: Princeton University Press, 2000), 192. Bass cites as evidence several memos written by Churchill. To demonstrate his earlier inclination to focus on the crime of Nazi atrocities, Bass cites a memo Churchill wrote to the War Cabinet advocating for local prosecutions of Nazi war criminals stating that those who "have been outraged and subjugated...have every right to be the judges of the treatment administered to those who have so horribly mistreated them." Cabinet Papers 66/65. Churchill war criminals memorandum, 9 November 1943 (College Park, MD: National Archives) W.P. (43) 496.

<sup>176</sup>Henry Stimson, "The Nuremberg Trial: Landmark in Law," in Guénaél Mettraux, ed. *Perspectives on the Nuremberg Trials*, 621.

memorandum and Executive Draft Agreement.<sup>177</sup> Despite their initial opposition, the British agreed to a judicial method and allowed the negotiations to proceed. The four allies also agreed to formulate legal teams to undergo the collection of evidence and the preparation of cases. Throughout the next week, the diplomatic team, along with legal specialists, attempted to negotiate and revise the plan. Unfortunately, neither the Soviet nor the French teams had been given the power to finalize negotiations, and so revisions made by the teams were tentative. The revisions suggested in San Francisco were not extensive, though the Soviets brought up the question of what to do if multiple Allied countries wanted to try the same person for domestic crimes, and what to do if there was a lack of agreement amongst the Tribunal judges about the guilt and punishment of a defendant.

The delegates left San Francisco without a firm plan, though everyone had endorsed in principle the concept of a trial. After some diplomatic arm-bending and a series of high-profile visits from American diplomats, the British announced their official endorsement of the American proposal. On May 30, 1945, they also announced a summit to be held in London on June 25, 1945 to discuss a final agreement. Unbeknownst to the rest of the Allies, the American team took the suggestions and final draft from the San Francisco Conference and started to work on a new draft to present at the upcoming London Conference.

A couple notable themes emerged in subsequent American drafts of the Executive Agreement. In a May 16, 1945 draft, atrocities against civilians in violation of domestic laws of Axis countries on racial or religious grounds was added to the list of charges of criminality. While it did not make it a violation of international law, it did give atrocities against civilians a

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<sup>177</sup> For more information on this meeting and the British attitude towards a trial plan, see Smith, *The Road to Nuremberg*, 218-223.

more prominent place.<sup>178</sup> Subsequent notes on the draft show the authors wrestling with the wording, attempting to broaden the charges, while still charging the defendants under pre-existing domestic laws. Absent from this point onward was any mention of trying defendants under Allied laws. In a May 19 draft of the Executive Agreement, a concept was put into words that would ease the burden of finding domestic laws under which to try defendants, and change the trajectory of international law.

In the section labeled, “Declaration of Legal Principles,” the May 19 draft stated that: “International Law’ shall be taken to include treaties between nations and the principles of the law of nations as they result from the usages establish among civilized peoples from the laws of humanity, and the dictates of public conscience.”<sup>179</sup> Codified into words was the philosophy that had so troubled critics of the Bernays plan. Under this definition, international law was not merely pre-existing legal or political documents; it was an unspoken, shared public morality. The Third Reich had violated the conscience of this shared public, and so had broken the implicit contract which governed the international polis. As argued in chapter two, the Bernays plan stemmed from a natural law, or pragmatist framework, in which international law was an extension of a shared, self-evident morality. Enshrining it into law, of course, would create a positivist basis for international legal decisions in the future, but at the moment, the May 19 draft revealed the philosophical roots of the Final Agreement and Charter: the belief that the Nazis had violated a shared morality in waging an aggressive war.

### **Negotiating at the London Conference, June-August, 1945**

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<sup>178</sup> American Trial Planners, Memorandum, “Executive Agreement Draft No. 2,” May 19, 1945, *The American Road to Nuremberg*, 195.

<sup>179</sup> American Trial Planners, “Executive Agreement Drafts 3 and 4,” May 19, 1945, *The American Road to Nuremberg*, 206.

It was this draft that traveled with the delegates to London, headed by Robert H. Jackson. As the delegates arrived in London on June 20, 1945, representatives from Britain, the Soviet Union, France and the United States met to informally talk before the formal negotiations began on June 26, 1945. The United States surprised the other delegates by presenting a newly revised American Executive Draft agreement. Due to logistical issues, the French and Soviet delegations had not received a copy. Areas of disagreement began to make themselves known almost immediately. Not only was there a clash between issues of Continental and Anglo-Saxon law, revolving around indictment procedures, the role of the judge, the burden of proof for guilt, and rights of the defendant, but there was also confusion over the concept of criminal conspiracy and the ability of the Tribunal to try organizations as criminal. This latter issue, brought up repeatedly by the Soviet's (as represented by General Nikitenko), originated from the fact that the Control Council of Germany had already ruled that Nazi organizations such as the SS and Gestapo were illegal and disbanded them. Why should a Tribunal have to prove it? And if it were proved innocent, would not it follow that they would be allowed to resume activities?

Jackson met all of these objections by directing the delegates back to what he called "the heart of our proposal,"<sup>180</sup> the criminal conspiracy trial plan, which would reach to "the heart of [the] offenses."<sup>181</sup> This, of course, referred to Germany's waging of an illegal war. Despite protestations that any trial would not be interested in "trying the remote causes for this war," Jackson was crafting a unique narrative in which Germany's top leaders had led a systematic effort to achieve world domination by means of aggressive war.<sup>182</sup> Every casualty, every atrocity,

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<sup>180</sup> Robert H. Jackson to Executive Council, "Minutes of Conference Session of July 2, 1945," *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials (ICMT)*, (Washington D.C.: Government Printing Office, 1949), 129.

<sup>181</sup> Jackson to Executive Council, "Summary Record of Two Informal Gatherings of British and American Delegations June 21 and 24, 1945," Jackson, *ICMT*, 82.

<sup>182</sup> Bradley Smith argues that the Soviet Union and British delegations accepted this to various degrees and with varying motives. For the British, he argues, the conspiracy criminal trial plan was "the best way of limiting the

and every discrimination had been a planned and reasoned effort to achieve this end. They were, in fact, attributing cause to the war: a gang of criminals, intent on world domination, had hoodwinked a nation into committing unspeakable atrocities in the service of its cause.

This narrative is especially evident in the planning memorandum distributed by Jackson at the start of the conference. In the section entitled “Outlines of Proof,” Jackson described the types of proof that would be sought by the prosecutors to demonstrate “proof of the criminal plan or enterprise.”<sup>183</sup> It would gather proof aimed at the internal measures taken by defendants to, among other things: “Divid[e] the German citizenry on a racial basis and discriminat[e] against those whom defendants adjudged not to be of German blood,” for the purpose of “preparing Germany organizationally, materially, psychologically and otherwise to launch and conduct illegal wars of aggression and to wage such wars by unlawful means.”<sup>184</sup> That this narrative was being solidified in the collection of evidence was particularly significant. The implication was that evidence that supported this narrative would be included. Evidence that was irrelevant to this narrative would not be included. Every time Jackson answered objections to the criminal conspiracy plan, he was solidifying the narrative of a conspiracy to wage aggressive war.

A common strategy used by Jackson to promote the criminal conspiracy plan was an appeal to the willingness of the public to accept (or not accept) the findings of the Tribunal, thus determining its future acceptance in history. For example, in a meeting over Tribunal procedures he argued, “We introduce . . . the common plan or enterprise aimed at aggression against or domination over other nations and calculated to involve the unlawful means of violation of

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number of defendants and the quantity of necessary evidence.” Eager to keep the number of defendants low, and therefore prolonged British involvement in the trials at a minimum, the British delegation, led by Maxwell Fyfe was willing to support the American plan. Smith, *Reaching Judgment at Nuremberg*, 49.

<sup>183</sup> Jackson, “Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945,” Jackson, *ICMT*, 66.

<sup>184</sup> Jackson, “Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945,” Jackson, *ICMT*, 66-67.

international law. We think that it is important that that should be made clear in the declaration of legal principles because we think it is the gist of the offense which is believed by most of the people in the world.”<sup>185</sup> While the idea that the German offenses against the world were a part of a criminal conspiracy may have come as a surprise to many individuals, Jackson was able to effectively frame his appeals in terms of public reaction as a way to persuade his audience to agree to the American plan. In this way, the rationale of punishment as consequentialist is again seen.

But several thorny issues persisted in plaguing the deliberations and Justice Jackson became impatient as the negotiations dragged into July and early August. One of those issues was Jackson’s apparent mistrust of the Soviet Union. Repeated Soviet objections to prosecuting criminal organizations, as well as their failure to grasp the mechanics of the conspiracy concept frustrated him. He was also dismayed by the lack of Soviet concern for due process, and worried that defendants would be stripped of rights, thus depriving the trial from future legitimacy.<sup>186</sup> The Soviet request to include a provision in the Agreement that would allow for the unmitigated extradition of any prisoner held by an Allied force at the request of another made him worried that the Soviets would start requesting people based on political reasons. Jackson also felt strongly that the trials should be held in Nuremberg, as it was one of the only cities with an adequate facility to hold the prisoners, and was adamantly opposed to the Soviet’s desire to hold it in Berlin. At various points in the months of July and early August, he advocated all four Allies holding separate trials and entering into a secret agreement with the other two to issue an ultimatum to the Soviets.

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<sup>185</sup> Jackson to Executive Committee, “Minutes of Conference Session of June 29, 1945,” Jackson, *ICMT*, 99.

<sup>186</sup> For more on the relationship between the Soviet and American delegations, see Smith, *Reaching Judgment at Nuremberg*, 54-57.

Concurrent to the conference in London, the Allied heads of state were meeting in Potsdam to decide upon a number of end-of-war measures. During this time, the Stalin pushed Truman and Churchill to release the names of war criminals who would be tried. While the other Allied heads did not want to negotiate without the IMT team, they were willing to place a deadline on the London negotiations, stating that the Allies would make public a list of defendant names on September 15. This seemed to have a stimulating effect on the London negotiations in early August, particularly on Soviet willingness to compromise on issues upon which they had previously dragged their feet. On August 2, 1945, the Soviet's agreed to the latest American redrafting of the plan. The plan included the American focus on a "common plan and conspiracy." Signed on August 8, 1945, the Final Agreement and Charter of the Nuremberg Trials represented a monumental effort by all the delegates to come to an agreement, and would change the shape of the world in the years to come.

#### **The Final Agreement and Charter for the Nuremberg Trial, August, 1945**

The Final Agreement and Charter for the Nuremberg Trial was actually two separate documents. The first document, the Agreement, outlined the reasons, authorization, and agreed upon articles for pursuing a war crimes trial. It listed the names of each representative of the Allied governments and was signed by them. The second document, the Executive Charter, was comprised of seven different sections: a governing Constitution, an explanation of jurisdiction and general principles, an outline of the steps needed to create committees to investigate and prosecute major war criminals, an outline of steps to ensure a fair trial for defendants, an explanation of what power the Tribunal would have and how the court would proceed, an explanation of how judgment and sentencing would be reached, and an agreement on how

expenses would be distributed amongst the allies. The majority of this section will focus on section two: Jurisdiction and General Principles, with a brief overview of other sections.

The Agreement followed many of the themes already present in previous documents. It rooted its existence and authorization in the Allied issuing of the Moscow Declaration, and agreed that the four allied powers would work together to ensure that the “abominable deeds” committed by German officers and members of the Nazi party would be “judged and punished according to the laws of . . . liberated countries,” and by “the joint decision of the Government of the Allies.”<sup>187</sup> In seven succinct articles, the four Allied powers (referring to themselves as “the Signatories”) agreed to establish an International Military Tribunal (IMT) to: try those whose crime had no geographic location, create and abide by a charter for that trial, relinquish the criminals in their custody that were called upon to stand trial, to return war criminals to the countries where crimes had been committed to stand trial where appropriate, allow other United Nations to sign on to the Agreement, and allow for the termination of the agreement after one year, should any of the Signatories want to terminate it. It also agreed that the final rulings of the Tribunal would not contradict or override the jurisdiction of national or occupation courts.

The wording of the Agreement was unremarkable, except for its sterility and lack of moral posturing. Gone was McCloy’s impassioned appeal to the judgment of history. In its place was a document that agreed to investigate and indict some of the most heinous crimes in history, and the strongest condemnation issued was a characterization of Nazi atrocities as “abominable deeds.” It reflected Jackson’s early injunction to be mindful of the power of the document to function as a future legal document, not simply as a condemnation of past crimes, once again

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<sup>187</sup> The Executive Council, “The Final Agreement and Charter for the Nuremberg Trial,” Smith, *The American Road to Nuremberg*, 212.

focusing on the consequence of punishment as the end goal of the trial.<sup>188</sup> Rather than convince others of the necessity to consider the judgement of history, it enacted, through legal language, the gaze of future audiences, censoring passion in favor of supposedly less subjective language.

The charter continued this sterile language. The first section, the “Constitution of the International Military Tribunal,” depicted the make-up of the judges. Each nation would appoint a judge and an alternate, to be used in cases of illness. A President would also be appointed by these judges as a tie-breaker, in case there was a lack of consensus over sentencing. Section three of the charter outlined the process by which the signatories would select prosecutors to investigate and try the case, and identify the duties of the prosecutors. While the Americans had already picked Jackson, it was not a given that any of the other members of the Executive Committee would be their country’s prosecutor as well. The Executive Committee agreed to divide the burden of presenting the full case before the judges. The Americans were given the task of presenting the case of conspiracy. It was never a separate charge, but occupied a prominent place in the logic of all three charges.

Section four outlined the procedures that would be put in place to ensure a fair trial for defendants. A defendant would have the right to see the full charges against him prior to the trial in the form of an indictment as well as an explanation for the charges. The trial would be conducted or translated into a language that he understood. He would have the right to council or to conduct his own defense, and to present evidence, testimony, and cross-examination on his own behalf. The formation of this section was relatively simple. The Soviets had expressed the concern that defendants would use this provision as an opportunity to spew propaganda, which

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<sup>188</sup> In a memorandum to Colonel Cutter, Jackson urged him to remember that the document would “become one of the basic documents in international law. Viewed from the credit it will receive in the future, I think it is too impassioned.” Jackson to Cutter, May 1, 1945, “Memorandum RE Document Entitled, ‘Punishment of War Criminals.’ April 28, 1945,” *The American Road to Nuremberg*, 180.

the Americans had agreed with, but felt that the safeguard it would provide was important enough to overcome any potential for misuse.

Section five outlined the powers that would be adopted by the Tribunal and the conduct of the trial. It had been a relatively uncontested section of the Charter, with the main conflict over what rules should be adopted regarding evidence. The final document reflected a loosened rule of evidence, with the Tribunal “not bound by technical rules of evidence.” All parties had worried that restrictive rules of evidence would allow defendants to escape punishment by contesting the evidence on technical, rather than moral or legal grounds.

Section six outlined the process for sentencing and judgment, which gave the Tribunal the right to convict and sentence each Defendant as they saw fit, and allowed for the Control Council of Germany to lessen or modify the charges if needed. It also allowed for fresh charges to be brought by the Control Council for Germany if separate, fresh evidence was uncovered. The document concluded anti-climactically with a short section on expenses in which the Signatories agreed to pay for the trials out of the funds allocated for the Control Council for Germany.

The heart of the document was found in section two: Jurisdiction and General Principles. In the second section, the document laid out the charges that would be brought against the chosen defendants. It broadened the authority to try people, from the Nazi party and German Army, to people acting in the interest of the European Axis powers.<sup>189</sup> It also reflected the agreement to hold each defendant personally liable, whether they had acted as individuals or as members of an organization.

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<sup>189</sup> This wording had prompted concern among the British delegation that the Americans would use this to try pre-World War II economic leaders, potentially implicating British business ventures, and embarrass the British government.

The numerous charges discussed by the Allied representatives during the London trial had been coalesced into three separate indictments: Crimes Against Peace, War Crimes, and Crimes Against Humanity. Of all of these charges, the least innovative was War Crimes. It covered traditional war crimes that had been deemed violations of international law before World War II, such as murder, ill-treatment and forced slave labor of civilian populations under occupation, mistreatment of POWs, destruction of private property and “wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>190</sup> This wording reflected not simply the prior conventions of warfare, but an uneasy, implicitly made political decision to deem Axis criminals guilty of war crimes while exempting Allied soldiers and politicians. Indeed, the subsequent trial and indictment of Admiral Karl Donitz, Commander in Chief of the German Navy, highlighted the inherent tension between the wording of the second charge and the decision to only prosecute Axis criminals. Donitz had been indicted under all three charges, particularly for enforcing unrestricted submarine warfare and sinking neutral vessels, but only indicted on the first two, and was given a reduced ten-year sentence by the tribunal. He was found guilty of the charge of unrestricted submarine warfare, thus violating traditional rules of wartime engagement.<sup>191</sup> Still, this crime was not assessed in his overall punishment, because of similar actions of Allied commanders. Admiral Chester Nimitz, the U.S. naval wartime commander, had recommended unrestricted submarine warfare in the Pacific, and the British had ordered several civilian crafts to be sunk.<sup>192</sup>

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<sup>190</sup> The Executive Council, “The Final Agreement and Charter for the Nuremberg Trial,” August 8, 1945, *The American Road to Nuremberg*, 215.

<sup>191</sup> Donitz was charged with breaking the Second London Naval Treaty of 1936. See Bosch, *Judgment on Nuremberg*, 181.

<sup>192</sup> David Luban, “Legacies of Nuremberg,” in Guénaël Mettraux, ed. *Perspectives on the Nuremberg Trials*, 660.

The third charge of Crimes Against Humanity also reflected this political decision to not try Allied soldiers or politicians at Nuremberg. The Katyn Massacre, in which over 40,000 Polish soldiers and civilians had been killed, had been carried out by the Soviet Union in April and May of 1940. Despite Soviet attempts to blame it on the Nazis, the evidence of Soviet perpetration was obvious, even to the other Allied forces, who turned a deliberate blind eye. This particular crime, which would fit under both the category of war crimes and the new category of Crimes Against Humanity, was never prosecuted by the Allies. Crimes Against Humanity made it illegal to commit inhumane acts against civilians, both before and during the war.<sup>193</sup> It also made it illegal to persecute civilians “on political, racial or religious grounds,” but only if that persecution was “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”<sup>194</sup> In order for persecution along these lines to be deemed illegal, it had to be proven that it was in the service of the larger Nazi plan to commit aggressive war, or commit war crimes. Professor of Law and Philosophy David Luban has noted that the wording of this charge demonstrates its subservience to the larger crime, in the Allies mind, of waging aggressive war. He argues: “The result is that persecutions on political, racial, or religious grounds are not Crimes Against Humanity unless the perpetrator has also launched an aggressive war or committed war crimes. Persecutions do not, that is, cost a state its sovereignty until it has already forfeited it on other grounds.”<sup>195</sup>

This charge transformed the notion of state sovereignty from absolute to contingent upon its treatment of its population, and thus incorporated the American desire to try Nazi war

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<sup>193</sup> These crimes were only illegal if it could be demonstrated that they were committed in conjunction with “participat[ion] in the formulation or execution of a common plan or conspiracy.” The Executive Council, “The Final Agreement and Charter for the Nuremberg Trial,” August 8, 1945, *The American Road to Nuremberg*, 215.

<sup>194</sup> The Executive Council, “The Final Agreement and Charter for the Nuremberg Trial,” August 8, 1945, *The American Road to Nuremberg*, 215.

<sup>195</sup> David Luban, “Legacies of Nuremberg,” in Guénaël Mettraux, ed. *Perspectives on the Nuremberg Trials*, 645.

criminals for crimes committed before the official declaration of war. It also demonstrated the force of political opinion, in that it shifted from trying defendants who had committed atrocities against Allied civilian populations to any civilian population. It also abandoned legal reasoning that would have tied the crime to laws of the countries where the crimes were committed. It reflected the belief, expressed so perfectly by Henry Stimson in his subsequent defense of the Nuremberg Trial, that international law was not solely comprised of past precedent. It was the encapsulation of the moral opinion of the world: “International law is not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world.”<sup>196</sup>

This belief was again seen in the wording of the first charge: Crimes Against Peace. Abandoning attempts to fit it into a pre-existing legal framework, it charged that a crime against peace constituted: “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” war crimes or Crimes Against Humanity.<sup>197</sup> Previous drafts had attempted to incorporate the language of the Kellogg-Briand treaty of 1928, which had condemned aggressive war. The new charge against the European Axis Criminals went beyond the violation of international treaties to condemn the common plan or conspiracy to commit War

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<sup>196</sup> Stimson argued vehemently against the idea that this was an example of *ex post facto* law. Citing the analogy of “the first murder,” he wrote: “Now this is a new judicial process, but it is not *ex post facto* law. It is the enforcement of a moral judgment which dates back a generation. It is a growth in the application of law that any student of our common law should recognize as natural and proper, for it is in just this manner that the common law grew up. There was, somewhere in our distant past, a first case of murder, a first case where the tribe replaced the victim’s family as judge of the offender. The tribe had learned that the deliberate and malicious killing of any human being was, and must be treated as, an offense against the whole community. The analogy is exact. All case law grows by new decisions, and where those new decisions match the conscience of the community, they are law as truly as the law of murder. They do not become *ex post facto* law merely because until the first decision and punishment comes, a man’s only warning that he offends is in the general sense and feeling of his fellow man.” (621-622) Henry Stimson, “The Nuremberg Trial: Landmark in Law,” in Guénaél Mettraux, ed. *Perspectives on the Nuremberg Trials*, 619.

<sup>197</sup> The Executive Council, “The Final Agreement and Charter for the Nuremberg Trial,” August 8, 1945, *The American Road to Nuremberg*, 215.

Crimes and Crimes Against Humanity. The wording caused confusion for the judges on the bench and subsequent scholars have noted how the bi-directional nature of the conspiracy charge made it less effective for the prosecution. Even here in the final document, the defendants could be accused both of conspiring to commit war crimes and Crimes Against Humanity, and of committing War Crimes and Crimes Against Humanity as a part of a conspiracy to commit Crimes Against Peace!

The latter half of section two noted that “Leaders, organizers, instigators, and accomplices” who had conspired to commit any of the charges would be held responsible for the actions of their subordinates. This was a radical departure from previous law, but an important premise of the Bernays Plan that had been carried into the final document. It explicitly denied protection to Heads of State.<sup>198</sup> It also explicitly denied that the defense of acting on superior orders could be used to extricate a defendant from being found guilty of one of the charges, though it could be considered as mitigating evidence in sentencing. Articles nine, ten and eleven of section two primarily outlined the procedure for trying organizations for criminal character. This would allow subsequent national or occupation courts to summon and try any individual for

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<sup>198</sup> Historian William Bosch argues that finding the Nazi Heads of State criminally responsible for the actions of World War II was a legacy of the ways in which the Versailles Treaty attempted to find the Kaiser morally and politically responsible for WWI. He argues that the Allied war time population during WWI wanted to try the Kaiser for starting the war, and wanted to indict enemy leaders for war crimes. However, the judicial committee for the US’s participation at Versailles (The Committee on Breaches of Laws of War) advised against prosecuting the Kaiser. “The reason for the committee’s inaction was that their judicial experts had decided ‘that the accused could not be brought before any legal tribunal, since they were only guilty of moral responsibility.’” (5) The attempt to separate the moral from the legal collapses during the American war crime planners discussion, particularly in documents such as the McCloy plan. Bosch notes, “The Versailles court was to try the Kaiser, exclusively on political and moral charges. At Nuremberg the indictment maintained that, over and above any ethical considerations, the acts committed by the Nazi chieftains were criminal in the strict judicial sense; that is, they were actions which broke the law and were punishable.” While the sterile legalese of the Final Agreement and Charter is scrubbed of moral rationalizations, the textual residue of documents reveal the way moral responsibility was couched in the language of criminality. United States Department of State, *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference, 1919*, 13 vols. 4:332 as cited in Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials*, 5-6.

their membership in the criminal organization.<sup>199</sup> Articles twelve and thirteen allowed for individuals to be tried in absentia and authorized the Tribunal to create the rules necessary for the trial, provided they were consistent with the rest of the charter.

### **Consequences of a Conspiracy to Commit Crimes Against Peace**

The legacy of the criminal conspiracy plan is evident in the Final Agreement and Charter for the Nuremberg Trials. The conspiracy was not a separate charge itself, but it was treated by the American prosecutorial team as a separate charge.<sup>200</sup> They took on the task of preparing the criminal conspiracy case for the trials. For the American team, the criminal conspiracy charge enabled them to try the Germans for Crimes Against Peace, and Crimes Against Humanity. Furthermore, it held a particular kind of explanatory power for them. It allowed them to depict the world as generally in agreement about the stability of moral norms. The Nazis were criminals in an otherwise civilized world. By using the rhetorical lens of criminal conspiracy, they were able to argue that a rogue group of German gangsters had hijacked a vulnerable nation for the purpose of German world dominance.<sup>201</sup> The fundamental crime committed by these German

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<sup>199</sup> Smith notes the way in which the wording caused subsequent problems for the judges at Nuremberg: “‘The Charter did not explain how close the association had to be between the defendant and the particular organization, nor did it specify whether the acts in question had to have been performed in his official capacity.’” Smith, *Reaching Judgment at Nuremberg*, 61.

<sup>200</sup> Smith argues that the conspiracy charge was watered down in the Final Agreement, but that the American war crime planners still attempted to weave it in, in connection with other charges: “The conspiracy charge was watered down in London such that it was not a separate charge, but rather used in connection with other charges. For example, “unless the Court held that a conspiracy had existed, nothing that the German Government had done, persecution, torture, or whatever, was a Crime Against Humanity if it took place before September 1, 1939. Only a finding that a conspiracy had existed before that date could establish a basis for ruling that Crimes Against Humanity had been committed in Austria, Czechoslovakia, or Germany itself.” Smith, *Reaching Judgment at Nuremberg*, 60.

<sup>201</sup> Luban argues that the language of conspiracy was a product of the way the American war crime planners understood German guilt. “The shock value and moral message of utilizing a conspiracy charge at Nuremberg lay in the analogy it presented: it ‘demystified’ and depoliticized World War II by suggesting that the Nazis were simply gangsters who had seized control of the German state in furtherance of their plan to launch a war.” (665) “But surely all this is a caricature of history! The Nazis did not *just* seize power, as in a coup d’etat; their rise was the product of complicated, even profound, forces—as Arendt more accurately assesses it, ‘The subterranean stream of Western history ha[d] finally come to the surface.’” David Luban, “Legacies of Nuremberg,” in Guénaël Mettraux, ed. *Perspectives on the Nuremberg Trials*, 665.

gangsters was thus the crime of German ambitions to world dominance: they were guilty of Crimes Against Peace. Every other crime had been committed in a planned conspiracy to commit this particular crime. Historian Mark J. Osiel quotes Jackson during the Trial as stating, “the Jews . . . were used as exemplars of Nazi discipline; and their persecution eliminated an obstacle to aggressive war.” Jackson depicted Crimes Against Humanity, particularly the attempted annihilation of the Jewish people, as a measure taken by the Nazis to achieve their goal of world dominance. Osiel further argues that this reasoning “is question-begging—how can such annihilation be understood as a ‘measure in preparation for war’?—and historically suspect . . . Yet, the very vulnerability of Jackson’s argument highlights his attempts to translate Nazi crimes into an idiom familiar to the law, and to enlist the evidence of such atrocities into an argument about renegade militarism.”<sup>202</sup>

This demonstrates what Hayden White depicts as one of the consequences of our modern conflation of “real” events with narrative. We only accept events as real when they display the coherence of narrative.<sup>203</sup> The attempted annihilation of an entire people group within “civilized” Europe was incomprehensible to the war crime planners. Their pre-existing beliefs and values struggled to make sense of the wanton destruction of Nazism. The American Trial Team reconciled the narrative by depicting these acts as a sort of heightened war crime. It was committed in the service of military ambition. Germany had transgressed the international moral conscience, but in an understandable way. They had sought domination of territory through expansion, something familiar to all of the Allied countries.

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<sup>202</sup> Jackson, XIX *International Military Tribunal* 470-41 (1946) as quoted in Mark J. Osiel, “Legacies of Nuremberg,” in Guénaél Mettraux, ed. *Perspectives on the Nuremberg Trials*, 718-19.

<sup>203</sup> Hayden White, “The Value of Narrativity,” *Critical Inquiry* 7, no.1. (1980): 10.

Other scholars have also noted how the charge of conspiracy shaped not just the trial, but our subsequent understanding of the Holocaust. Historian Bradley Smith has argued:

By making aggressive-war conspiracy the transcendent theme of Nazism, Jackson and his aides found a convenient legal heading under which to collect the various accusations they wished to make against Hitler and his associates. But they also set off on a course that historically was highly suspect. The historical research of the past thirty-five years has established ever more decisively that Nazism was not a single uniform force, but a complex, confused, and essentially eclectic phenomenon in which the pursuit of raw power, as was as racism, expansion, and other elements, played important roles. When Jackson and his aides tried to turn aggressive-war conspiracy into Nazism's heart and soul, the inevitable result was that some of the most prominent and atrocious actions of the Third Reich, such as the mass extermination of Europe's Jews and Gypsies, were made to appear less important in their own right; and the causal forces which had produced them were twisted and distorted.<sup>204</sup>

Both Smith and Osiel view the criminal conspiracy charge as a legal tactic: a convenient way to turn a political desire into an international legal reality. It may be viewed as a part of the American legal team's desire to please multiple audiences, including a legal audience. It should also be viewed as a sincere expression of the American legal team's conception of German guilt. It was based upon treating the individual as a unit: capable of distinguishing between a stable right and wrong. It depicted the moral guilt, and therefore legal culpability, of followers as tempered by the fact that they were under the snare of a powerful, criminal state. Still, individuals were morally responsible for their participation, and therefore could be held legally culpable, even for membership in a criminal organization.

But framing German guilt as a criminal conspiracy was only half of it. The purpose of the conspiracy was to dominate the world. One of the implications for the framing of Crimes Against Peace as the superior crime was ironically to reinforce state sovereignty, with the state only giving up sovereignty when they trespassed on another sovereign state. To criminalize aggression meant that the status quo geographic borders of the state were seen as the default

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<sup>204</sup> Smith, *The Road to Nuremberg*, 234.

norm, ignoring the way the status quo favored the homogeneous linguistic and cultural communities of Western Europe. Luban writes compellingly of the implications of such a geographic understanding of the state for countries in the developing world, noting that at Nuremberg, “The European nation-states (and the United States) exercised economic and often political control over much of Asia, Africa, and Latin America.”<sup>205</sup> He quotes Jackson as stating in his opening remarks at the trial, “Our position is that whatever grievances a nation may have, however objectionable it finds the *status quo*, aggressive warfare is an illegal means for settling those grievances or altering those conditions.”<sup>206</sup> This view stabilized the status quo in a way that largely favored the Western Allies. If one of the provisions of rhetorical narration is to frame truth for a specific audience at the expense of another, then the audience of Allied decision makers favored themselves above the developing countries or contending ethnic or tribal groups not favored by the status quo. Indeed, this opinion was captured by Justice Radha-Binod Pal, in his famous dissenting opinion in the Tokyo war crimes trial:

Dominated nations of the *status quo* cannot be made to submit to eternal domination only in the name of peace. The part of humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic ascetic outlook of life, and may think of peace in terms of political status quo. But every part of humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only the menace of totalitarianism but also the ACTUAL PLAGUE of imperialism.<sup>207</sup>

This is not to suggest that the Allied war crime planners maliciously or intentionally framed their narration in such a way as to exclude other audiences, but that the result of their attempts to reconcile German actions with their pre-existing beliefs resulted in the elevation of Crimes Against Peace and that this elevation championed the status quo.

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<sup>205</sup> David Luban, “Legacies of Nuremberg,” in Guénaél Mettraux, ed. *Perspectives on the Nuremberg Trials*, 643.

<sup>206</sup> Luban in Mettraux, ed. *Perspectives on the Nuremberg Trials*, 643.

<sup>207</sup> Radha Binod Pal, *International Military Tribunal for the Far East: Dissident Judgment of Justice R. B. Pal, M.A., LL.D.* (Calcutta: Sanyal, 1953), pp.114-115, as recorded in Luban in Mettraux, 643.

The Final Agreement and Charter for the Nuremberg Trials' failure to define aggression within the charge of Crimes Against Peace was one of the elements that made the elevation of the status quo inevitable within that rhetorical frame. Scholars have noted that the failure to define aggression is one of the elements that weakened its legacy in the aftermath of World War II and made it easy for countries like the United States to ignore it during the invasion of Vietnam.<sup>208</sup> To Jackson's continued credit, he believed that all nations should be accountable in the future for Crimes Against Peace. His opening speech at Nuremberg stated: "And let me make clear that while this law is being applied for the first time against German aggressors, it must condemn aggression by any other nations, including those that have been presented today at the Tribunal, provided it is to serve a useful purpose."<sup>209</sup>

### **Punishment as Deterrence**

By its very nature, accusations of guilt lead toward a logic of punishment. Occasionally, the rhetorical construction of guilt lends itself towards a *particular* logic of punishment. By logic of punishment, I mean that it reveals and promotes particular justifications as to who, how, and why certain individuals should be punished. One of the ways that rhetorical constructions of guilt lead to a particular logic of punishment is through its relationship to audience. As I have argued earlier in this chapter and in the previous chapter, the American war crime planners were particularly cognizant of both the current world audience and the future audience of history. They perceived themselves to be under enormous scrutiny. This heightened gaze shaped the way they thought about the crimes committed by the Germans. The Germans had just waged a second

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<sup>208</sup> For more on the legacy of aggression in international law post-World War II, see A.I. Poltorak, "The Nuremberg Trials and the Question of Responsibility for Aggression," in Guénaél Mettraux, ed. *Perspectives on the Nuremberg Trials*, 445.

<sup>209</sup> Robert Jackson, "Second Day, Wednesday, 11/21/1945, Part 04", in *Trial of the Major War Criminals before the International Military Tribunal: Volume II* (Nuremberg: IMT, 1947), 98-102.

world war in twenty years, devastating much of Europe and indeed, the world. Past efforts had failed to keep German militarism under control after World War I. Under this scrutiny, they reasoned that it was not enough for the Germans to answer this particular crime, the punishment had to serve the purpose of deterring future crime. In this instance, the narrative of German guilt as rooted in world domination led to a consequentialist justification for punishment; Germans should be punished for waging aggressive war because it would deter future aggressive wars. A consequentialist logic of punishment has its roots in utilitarian justifications for punishment. A punishment is warranted if it will serve the larger purpose of deterring a crime from being committed again. Under consequentialist justifications for punishment, a murder should face capital punishment not just because they deserve it, or they need to be held accountable, but because it will deter other would be murderers from committing the same crime.

The rhetoric that elevated Crimes Against Peace as the source of German guilt propelled a logic of consequentialism. This is seen most clearly in McCloy's memo, which in many ways, should be read as the philosophical framework of the Final Agreement and Charter of the Nuremberg Trials. For example, in McCloy's memo, the Germans were guilty of breaching the international march towards progress and peace, by waging an aggressive war. To keep this from happening again, the punishment of German war crimes had to act as a deterrent. It had to be public, well-documented, and legally-binding. It had to create a future mechanism for the international community to intervene. Under the header "Punishment of War Criminals Is Designed as a Deterrent and to Raise International Standards of Conduct" McCloy wrote, "The satisfaction of instincts of revenge and retribution for the sake of retribution are obviously no sound basis of punishment. If punishment is to lead progress, it must be carried out in a manner which world opinion will regard as progressive and consistent with the fundamental morality of

the Allied cause.”<sup>210</sup> In this way, McCloy tied the Allied cause (to stop Germany’s war of aggression), with the gaze of a world audience that demanded not simply punishment, but a kind of punishment that could only be delivered by the American criminal/conspiracy trial plan. The consequence of this was to consequentialize punishment, and divorce its function from desert.

The practical consequences for this mobilization of consequentialist logics of punishment are apparent in its later adoption in international law. The International Criminal Court, which was built on the structures of the Nuremberg Trial System, explicitly drew upon this consequentialist logic in its founding document, The Rome Statute. In its preamble, it argues that the court’s aim is to “put an end to impunity for perpetrators of these crimes and thus to contribute to the prevention of crimes.”<sup>211</sup> But of course, if the end goal of punishment is merely deterrence, it forces the question: does it work? Some scholars espouse the efficacy of international trials, but others are less sanguine. Some have argued that in some cases, it can actually hamstring the peace process, as perpetrators are unlikely to cease hostilities if they know they will have to face a trial afterwards. Others have argued that there is little empirical evidence to suggest that international trials serve as a deterrent across borders.

Outside of the practical consequences of a consequentialist justification for punishment, there are also potential moral and philosophical implications. Political philosopher Daniel Philpott argues that consequentialist logics of punishment struggle “to answer deeper questions about its theory of punishment. If the effects of punishment are all that matters, why not give extra punishment to a famous person who is popularly thought to be guilty—or even punish one

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<sup>210</sup> John McCloy, Memorandum “The Punishment of Those Guilty of War Crimes and Atrocities is for Criminal Violation of International Law: April 20, 1945”, *The American Road to Nuremberg*, 158.

<sup>211</sup> Preamble to the Rome Statute of the International Criminal Court, as quoted in Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (New York: Oxford University Press, 2012), 213.

who is innocent—in order to achieve a deterrent effect?”<sup>212</sup> Hannah Arendt implicitly critiqued the Nuremberg logic of punishment as deterrence because it lacked moral boundaries for defining the purpose of punishment. It exploded the limits of proportionality: there was no upper limit for punishment within a consequentialist logic, but there was also no lower limit. In a letter to her former teacher Karl Jaspers, she argued: “the Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough . . . This guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug.”<sup>213</sup> A logic of deterrence is devoid of the principle of proportionality in either direction. It is without a core justification for how punishment is connected to present guilt. Philpott argues that any sort of punishment must consider not simply the future potential for wrong-doing, but “the standing victory of the wrong-doer’s injustice.” For him and others, punishment has to have a restorative function within the localized context, seeking to rebuild, through the promotion of just punishment, right relationships between communities and states.<sup>214</sup>

### **Conclusion: Evaluating the Nuremberg Legacy**

The legacy of the Final Agreement and Charter for the Nuremberg Trial cannot be reduced to its construction of German guilt and logics of punishment, but it is imperative that those are considered in understanding it as a historical event, and evaluating it as a transitional justice structure. The narrative frame of aggressive war, as geared towards a specific audience of a present and future public, drove a consequentialist logic of punishment. Not only does an examination of the construction of German guilt within the Final Agreement and Charter for the

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<sup>212</sup> Philpott, *Just and Unjust Peace*, 215.

<sup>213</sup> Hannah Arendt to Karl Jaspers, “Letter to Karl Jaspers,” as quoted in Philpott, *Just and Unjust Peace*, 218.

<sup>214</sup> For more on Philpott’s theory of punishment, see *Just and Unjust Peace*, 219-250.

Nuremberg Agreement reveal the power of rhetorical agency, but it demonstrates the material consequences of any given frame.

Rooting German guilt in a criminal conspiracy to wage aggressive war not only shaped the convictions of the twenty-two men at the Nuremberg Trial, but the domestic trials that took place in Germany of 90,921 individuals accused on crimes under the three charges created by the Final Agreement and Charter for the Nuremberg Trial. It shaped who the courts could prosecute, and how their guilt would be measured and understood. Of the six organizations tried for guilt by the IMT, only four were found guilty. The Storm Troopers, who had committed brutal and terrorizing acts during the rise of the Third Reich, were largely gone by the end of the war. Donald Bloxham writes that because they had disappeared before the war, they “could have played no role in the conspiracy. Accordingly, by the logic of the court’s position on conspiracy, the organization could not be considered in relation to pre-war ‘crimes against humanity’.”<sup>215</sup> Bloxham also notes that the conspiracy charge made it much more difficult to hold German industrialists and economic leaders responsible for materially aiding the planning and waging of war, as they could not be considered to have aided in the conspiracy.<sup>216</sup> In the second round of IMT trials against German economic industrialists, all eleven industrialists were acquitted of Crimes Against Peace and conspiracy. Two and a half years after sentencing, ten out of the eleven had been released. The most visible and notorious of the German industrialists tried, Alfried Krupp, was able to resume control of his firm and by 1957, his picture ran on the cover

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<sup>215</sup> Donald Bloxham, “From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited,” *The Journal of the Historical Association: History* 98, no. 332 (2013): 575.

<sup>216</sup> Bloxham writes that the acquittal of Hjalmar Schacht, President of the Reichsbank...on grounds that despite his role in German rearmament he did not know of specific Nazi plans for aggression, weakened the economic art of the case on the aggressive war charge and set a demanding standard on that counter for later attempted convictions of industrialists and economic planners.” Bloxham, “From the International Military Tribunal to the Subsequent Nuremberg Proceedings,” 574

of *Time* magazine as “the richest man in Europe.”<sup>217</sup> While the Allied war crime planners’ perceived German guilt to be rooted in their perpetuation of aggressive war, or in Stimson’s words, their crime “against *us*,” this rhetorical frame distorted the varied and eclectic sources of the Nazi regimes’ monstrous atrocities. By attempting to create a coherent narrative that would appeal to the perceived values of their audience, it sanitized a less coherent and chaotic reality.

It also de-emphasized Jewish suffering. Bloxham argues that the Allied Trial strategy and subsequent occupation policy “helped to sculpt a skewed profile of the victims for posterity.”<sup>218</sup> Based on the future oriented logic that Jackson had espoused, the Allied Trial Team had decided to forgo much direct testimony in favor of documented evidence, reasoning: “documents make dull publicity . . . they [seem] . . . to make the sounder foundation for the case, particularly when the record is examined by the historian.”<sup>219</sup> The problem was, documents included by the Trial team were framed by the aggressive war narrative and were an incomplete picture of Nazi atrocities. Even in submitting evidence of Crimes Against Humanity, the American Trial Team focused on the conspiracy aspect of the narrative. “The 170-page document contained six pages on the persecution and murder of the Jews—approximately the same space that was devoted to the pillage of public and private property.”<sup>220</sup> Bloxham notes that many documents that exposed the most extreme Nazi atrocities in Belzec, Sobibor, and Treblinka had been destroyed. By

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<sup>217</sup> Elizabeth Borgwardt, “Bernath Lecture: Commerce and Complicity: Corporate Responsibility for Human Rights Abuses as a Legacy of Nuremberg,” *Diplomatic History* 34, no.4 (2010): 630-631.

<sup>218</sup> Bloxham, *The Genocidal Past in Western Germany*, 306.

<sup>219</sup> Bloxham, *The Genocidal Past in Western Germany*, 315.

<sup>220</sup> Bloxham, *The Genocidal Past in Western Germany*, 317.

eschewing testimony in favor of documentation that supported the aggressive war narrative,<sup>221</sup> the profile of Nazi victims was radically altered.<sup>222</sup>

The future-focused nature of the American Trial Teams' justification for punishment also formed the philosophical basis for international trials today. As noted earlier, subsequent treaties, such as the Rome Treaty, which founded the International Criminal Court, enshrined into law the consequentialist logic of punishment, even as it failed to successfully uphold the criminalization of Crimes Against Peace. The evidence of this logic in subsequent international law, while not necessarily wrong, should give us pause and ask that we rethink the function of punishment and its relationship to guilt. Should deterrence be pursued as a primary end of punishment, or merely a secondary benefit? In his conclusion to *Just and Unjust Peace*, Daniel Philpott argues that a failure to question what justice should look like, and how punishment figures into it, risks treating justice as a means to an end, rather than an end in and of itself. The consequentialist logic of punishment, derived from the rhetorical construction of German guilt as rooted in Crimes Against Peace, risked just that: punishing German leaders for the sake of future peace, rather than the crimes of the past.

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<sup>221</sup> Bloxham writes “the focus on conspiracy to conduct aggressive war meant that the presentation of atrocities was restricted to illustrative examples . . . As Jackson put it, the tribunal might otherwise ‘become lost in a “wilderness of single instances”’.” Jackson as quoted in Bloxham, *The Genocidal Past in Western Germany*, 316.

<sup>222</sup> Bloxham argues that Jackson's focus on the future judgment of history caused him to deliberately dismiss Jewish testimony. He writes: “Jackson's attitude towards the perceived lack of ‘objectivity’ of Jewish victims may be inferred from his subsequent explanation as to why he had not wanted any Jewish representation in the parts of the prosecution team dealing with crimes against Jews: he wanted, he said, ‘to get away from the racial aspects of the situation’; ‘we don't want to exaggerate racial tensions’; ‘the only thing to do was to avoid making {Nuremberg} a vengeance trial.” Jackson as quoted in Bloxham, *The Genocidal Past in Western Germany*, 316.

### **Conclusion: The Consequences of Our Stories**

Narratives have consequences. They create trajectories for moral reasoning that extend beyond the story itself. We learn from the stories we tell and we apply that reasoning to the future. In the aftermath of World War II, American officials attempted to make sense of previously unimaginable devastation by crafting specific narratives of guilt and punishment. In all three of the narratives discussed, American officials attempted to apply the moral reasoning garnered from these rhetorical constructions to the future: how could the punishment of German war criminals in 1945 be used to deter future devastation and atrocities? Whether the purpose of punishment was rehabilitative, accountability, or deterrence, all three narratives sought to apply the logic of punishment to the future.

Examining these narratives in the present creates new space for moral reasoning. As the material implications of the Nuremberg Trial have unfolded, it created longer narrative in which to ask and draw conclusions about three issues: whether the logics of punishment derived from constructions of German guilt created an accurate frame in which to understand past reality, whether those same logics of punishment have actually had the effects they were purported to have, and whether the relationship between punishment and guilt, as depicted by these narratives, has moral saliency for us today.

In this conclusion, I look at some of the material implications of the three narratives, both in the immediate aftermath of World War II, and as the ensuing logics of punishment have been taken up in other transitional justice contexts. Secondly, I look at the rhetorical and philosophical implications of the logics of punishment that originated at Nuremberg and have consequently been enshrined into international law. My argument is that the future oriented nature of the logics of punishment that governed Nuremberg have resulted in an underdeveloped penology within

international transitional justice modeling, or a lack of consistent theorizing about the relationship between guilt and punishment. The overriding application of Nuremberg principles to new situations of conflict have resulted in the diminishment of other forms of restorative justice practices.

### **Material Implications of German Guilt Narratives**

In this section, I look at the material implication of the three narratives of German war guilt. Narratives of individual and collective guilt had material ramifications immediately following World War II. The final decision to prosecute German war criminals as individuals has led to a proliferation of international criminal law, and repeated attempts to codify an international, shared morality that functions to create a system of accountability. Lastly, I argue that the rhetoric of deterrence as utilized in the Nuremberg trials, has led to the dramatic increase in the use of trials to prosecute war criminals, both internationally and domestically.

#### *Individual and Collective Guilt in American Occupied Germany*

In the immediate aftermath of World War II, the German public felt the material ramifications of both the narrative of collective moral guilt, and the narrative of individual criminal guilt. The Final Agreement and Charter for the Nuremberg Trial made it so that criminal rulings against organizations such as the Gestapo, Hitler Youth, and the Storm Troopers, could be used in domestic courts to try lesser criminals. In Germany, almost 90,000 individuals were tried under the categories established by Nuremberg, with around 80,000 acquitted. In countries such as Austria, 17,500 individuals were prosecuted though only 43 were sentenced to death, with 29 individuals eventually executed. However, many of the former Axis regimes resisted the narratives of individual guilt and heartily resented the accusation of collective guilt. Indeed, scholars have attributed the low number of acquittals in the immediate aftermath to resentment,

and even scholars at the time such as Karl Jaspers acknowledged the collective resentment that was generated against the trials and against Allied accusations of collective guilt.

In the American Occupation Zone, JCS 1067 implemented a wide range of devices to convince Germans of their collective guilt. Waves of re-education material, such as Occupation newsreels, films, and pamphlets, focused on what David Bloxham has dubbed a “polemic” emphasis on collective war guilt.<sup>223</sup> He argues that in the early days after World War II, “It was left to individuals to decipher for themselves the difference between ‘guilt,’ ‘responsibility,’ ‘liability’ and ‘shame’—terms which in the early Allied usage were almost interchangeable—and to choose between degrees of each.”<sup>224</sup> But whether this attempt to convince the Germans of their collective guilt, particularly in supporting the Nazis in the commission of atrocities, was effective is entirely another matter.

Numerous studies after the end of the war tried to ascertain how much the German people knew about Nazi atrocities, particularly concentration camps, and to what degree they felt moral responsibility or guilt for these actions. One study measured German reactions to an Allied film about the concentration camps. 56.3 per cent believed the film to be accurate, but 87.9 per cent felt no personal responsibility for the images.<sup>225</sup> In another study, an American psychological operations officer asked seventy Western German respondents, "Under what circumstances did the German people believe that atrocities were committed?" "Who is believed to have committed them?" "Who is to be held responsible, and how, in their opinion, can it be prevented from occurring again?"<sup>226</sup> He noted that among the seventy respondents, only three believed the German people to share a degree of guilt with the Nazi regime. All of the respondents placed the

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<sup>223</sup> Bloxham, “The Genocidal Past in Western Germany,” 310.

<sup>224</sup> Bloxham, “The Genocidal Past in Western Germany,” 311.

<sup>225</sup> Chamberlain as quoted in Bloxham, “The Genocidal Past in Western Germany,” 310-311.

<sup>226</sup> Morris Janowitz, “German Reactions to Atrocities,” *American Journal of Sociology* 52, no. 2 (1946): 143.

majority of guilt on the Nazi party and pled their own ignorance and helplessness in combatting the Nazis. One of the respondents was recorded as saying: “You Americans can hardly understand the conditions under which we were living. It was as if all of Germany were a concentration camp and we were occupied by a foreign power. We were unable to do anything to oppose them. What could one person do against that powerful organization?”<sup>227</sup>

As the Americans perceived a growing threat from Communism, they largely dropped their re-education efforts in Occupied Germany in favor of development. While domestic trials continued, they were met with growing German resentment, and subsequent lenient sentencing. Secondary trials reached the next tier of those in power who had served in the Third Reich. Bloxham notes that these trials “touched on issues that were a little closer to home for the majority of Germans who had served in some functional capacity during the war.”<sup>228</sup> He argues that Allied efforts to impose upon Germans a sense of their own guilt, combined with the harsh economic measures of JCS 1067, and the increasing intrusion of domestic trials, led to the perception within Germany that the IMT had not been fairly conducted.<sup>229</sup> As a result of this and growing Cold War tensions, the United States shifted tactics, allowing for increased German independence in arbitrating post-World War II justice.

Thus the legacy of collective versus individual guilt in post-war Germany, while leading to profuse material ramifications, does not have a single, stable, ending. Rather, it was something that was, and still is, rhetorically negotiated. It defies poetic or even rhetorical catharsis. Each subsequent generation of Germans has had to grapple with the issue, leading a 2014 article in

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<sup>227</sup> Janowitz, “German Reactions to Atrocities,” 144.

<sup>228</sup> David Bloxham, “From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited,” 568.

<sup>229</sup> Bloxham notes the growing opposition within Germany to trials during the late 1940’s by citing a HiCOG Survey of German Public Opinion. It demonstrated that only 38% of 2,000 Germans surveyed thought the IMT trial had been conducted fairly, compared to 78% of Germans who had regarded it as fair four years earlier. Bloxham, “From the International Military Tribunal to the Subsequent Nuremberg Proceedings,” 569.

*The Atlantic* on the issue of collective German guilt to ask quixotically, “What is the half-life for historical guilt?”<sup>230</sup> Lucaites and Condit note that the dangers of viewing narrative through a poetic or rhetorical lens is that endings are either viewed as safely cathartic or forcing actual plot resolution. In reality, “narrative does not constitute a unified or fixed set of options for either authors or audiences; like any pragmatic metacode, it offers a full range of options.”<sup>231</sup>

Narratives, while having material consequences, are renegotiated each time they are retold, and in doing so, offer up new spaces for moral judgment.

*Shoring up International Morality and Accountability through International Criminal Law*

A significant legacy of the use of the Nuremberg Trial system to try German war criminals has been the subsequent proliferation of international criminal law. As I argued in chapter two and three, Nuremberg created a precedent for the codification of shared morality within positivist law. This led to a veritable flowering of international criminal law, the effect of which has been to strengthen the liberal philosophy which undergirds individual rights and individual accountability. Tangible examples of the enshrinement of this philosophy have been the creation of the category of genocide, the subsequent elevation of Crimes Against Humanity in subsequent international law, the creation of multiple other treaty courts in which to hold individuals responsible for human rights violations, and the creation of an international criminal court.

I have argued in chapter three that the main focus of the American Trial Team at Nuremberg was the charge of conspiring to commit Crimes Against Peace. However, as revelations of German atrocities continued, focus shifted in international criminal law from

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<sup>230</sup> Emma Green, “Are Today's Germans Morally Responsible for the Holocaust?” *The Atlantic*, January 22, 2014, <http://www.theatlantic.com/international/archive/2014/01/are-todays-germans-morally-responsible-for-the-holocaust/283243/>.

<sup>231</sup> Lucaites and Condit, “Reconstructing Narrative Theory: A Functional Perspective,” 105.

prosecuting Crimes Against Peace, to Crimes Against Humanity.<sup>232</sup> This shift ushered in a burgeoning philosophy of “extraordinary crime.” Professor of Law Mark Drumbl uses this term to mark the a paradigmatic shift whereby Nazi crimes came to be understood as “extraordinary in their nature, and, thereby . . . not only . . . crimes against the victims in the camps or the helpless citizens in the invaded countries, but also as crimes in which everyone everywhere was a victim.”<sup>233</sup> The fact that these crimes made an individual perpetrator “an *enemy of all humankind*”<sup>234</sup> made the perpetrator accountable to all humankind. The creation of international criminal law codified what actions made an individual a universal enemy. In doing so, it solidified the rhetoric and logic of accountability and rule of law that pervaded the Bernays plan.

For example, the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide echoes the logic of prevention through accountability to an international morality: a set of stable norms. The preamble states:

HAVING CONSIDERED the declaration made by the General Assembly of the United Nations in its resolution 96 dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world; RECOGNIZING that at all periods of history genocide has inflicted great losses on humanity; and BEING CONVINCED that, in order to liberate mankind from such an odious scourge, international co-operation is required.<sup>235</sup>

This preamble elevates a singular “us”, a “civilized world” that is attacked and harmed when individuals commit the criminal act of genocide. Therefore, each nation must cooperate to hold perpetrators responsible under law.

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<sup>232</sup> Scholars have attributed this shift to multiple factors, one of them being the advent of the Cold War and the lack of willingness of the United States or the Soviet Union to be bound by the new international law of non-aggression.

<sup>233</sup> Mark Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge: Cambridge University Press, 2007), 3.

<sup>234</sup> Drumbl, *Atrocity, Punishment, and International Law*, 4.

<sup>235</sup> United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

Drumbl argues that defining the crime is only “one step in the enforcement process.”<sup>236</sup> International Criminal Law has grown and been operationalized through criminal tribunals. Since the Nuremberg Trial System, the United Nations has created the International Criminal Court, as well as two other International Criminal Tribunals in Yugoslavia and Rwanda. It has also been involved in the creation of the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Special Tribunal for Cambodia, and the Ad-Hoc Court for East Timor. In creating these tribunals, the United Nations has explicitly reinforced the idea that certain crimes violate an international morality, and require an international response.

#### *Deterrence through Law*

But does strengthening accountability through international criminal law actually lead to the deterrence of crime? One of the most significant claims that emerged from Nuremberg’s logic of punishment was that the purpose of punishing Nazi war criminals through the judicial system was to deter future individuals from committing crimes. This rationale has been taken up in subsequent international law, and trickled into domestic law as well, with states trying former regimes under new international norms. Leslie Vinjamuri argues that the rhetoric of deterrence was particularly used in the ICTY, citing the 1994 Annual Report from the Tribunal which argued “the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts.”<sup>237</sup> While the logic of deterrence continues to promote the use of criminal trials, and indeed has led to what Political Scientists Kathryn Sikkink and Hun Joon Kim have called “the justice cascade,” evidence of their effectiveness is highly contested.<sup>238</sup> In

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<sup>236</sup> Drumbl, *Atrocity, Punishment, and International Law*, 4.

<sup>237</sup> ICTY 1994 Annual Report as cited in Leslie Vinjamuri, “Deterrence, Democracy and the Pursuit of International Justice,” *Ethics & International Affairs* 24, no. 2 (2010): 192.

<sup>238</sup> Sikkink and Kim have compiled one of the most comprehensive data sets to date on the proliferation of judicial methods for accountability in transitional justice models. Sikkink and Kim have interpreted their data set in a way that would suggest that judicial methods of accountability have some effectiveness in deterring future human rights violations cross-borders, within regional clusters. They do recognize the inherent difficulty in assessing the impact

some instances, the gravest atrocities of a conflict occurred after an international tribunal was established.<sup>239</sup> Some scholars have argued that there is little evidence to suggest that tribunals have a cross-border effect as well. They have even argued that in some instances criminal tribunals can exacerbate peace talk attempts.<sup>240</sup>

The American war time planners crafted a narrative in which individual guilt drove rationalizations for judicial punishment. Because a tangible consequence of that narrative was the creation of law, it framed future narratives, and the logic of deterrence continues to be a driving force in the use of judicial mechanisms for transitional justice. One of our roles in examining past narratives is debating the value ethic that emanates from them. We do this by asking ourselves if their value proposition, in this case the logic of deterrence, has corresponded with our experience of the past and has likely efficacy for the future. In this instance, we are unable to universally apply a logic of deterrence to all situations of international justice.

### **Rhetorical and Philosophical Implications of German Guilt Narratives**

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of trials on deterrence and acknowledge scholarship that contradicts their results. Kathryn Sibbink and Hun Joon Kim, "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations," *The Annual Review of Law and Social Science* 9 (2013): 280. In a separate study with the same data set, Sibbink and Kim found similar results. They argued: "Consistent with the deterrence hypothesis, we find that transitional countries with human rights prosecutions are less repressive than countries without prosecutions. Our study also shows that countries with more cumulative prosecutions are less repressive than countries with fewer prosecutions. In addition, countries with more neighbors with prosecutions are less repressive, which may suggest that individuals learn from the experiences in other countries to create a deterrence impact across borders." Hun Joon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* 54, no. 4 (2010): 941.

<sup>239</sup> Drumbl points out that in the former Yugoslavia, the Srebrenica massacre, and the Kosovo ethnic cleansing occurred after the establishment of the ICTY. Drumbl, *Atrocity, Punishment, and International Law*, 169.

<sup>240</sup> In a study of thirty-two civil wars between 1989 and 2003, Political Scientists Jack Snyder and Leslie Vinjamuri concluded that there was little evidence to suggest that trials exert a deterrent effect. They state: "Evidence from recent cases casts doubt on the claims that international trials deter future atrocities, contribute to consolidating the rule of law or democracy, or pave the way for peace. Since 1989, two international criminal tribunals have convened: the ICTY (Yugoslavia) and the ICTR (Rwanda). In neither case did their trials deter subsequent atrocities or contribute to bringing peace in the region. Indeed, in the former case, the democratization and pacification of the Yugoslav successor states likely occurred despite the tensions provoked by the tribunal and not because of it. More generally, neither the Yugoslavia nor the Rwanda tribunals has had a demonstrable effect on reducing atrocities globally or on altering the calculations of combatants in conflicts in East Timor, Chechnya, Sierra Leone, or other war sites." Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2003): 20.

The logic of accountability to an international order and deterrence that emerged from the Nuremberg Trials focused the purpose of punishment on the future, rather than addressing past crime. This has left international legal theory on shaky penological ground. The lack of an explanation for how legal punishment serves to answer past guilt showed itself both at Nuremberg and in contemporary institutions. It has led to a lack of a systemic framework for determining the appropriateness of punishment in correspondence with guilt. Furthermore, the application of judicial punishment for the purpose of deterrence masks a conversation about the *telos* of punishment in addressing the wrongs of the past.

Drumbl argues that because explanations for judicial punishment at Nuremberg focused so much on future deterrence, it failed to explain punishment's relationship with past crime. Drumbl argues that this led to inconsistent sentencing, both at Nuremberg and in future international law. The logic of punishment as deterrence failed to provide judges with a framework in which to judge mitigating factors for past infractions. For example, at Nuremberg, judges struggled to figure out how to weigh factors that either aggravated or mitigated criminal liability. This shaky penology has continued in other areas of international criminal law as well.<sup>241</sup>

But the implications for this sort of future oriented rationale go beyond inconsistent sentencing. It also begs the moral question of how punishment should relate to guilt. Out of the three narratives presented by the American war crime planners, the Morgenthau plan was the only narrative that explicated a relationship between past guilt and punishment. In both of the other plans, punishment was somewhat alienated from guilt; its function was not necessarily the restoration of the individual, or even the current society, it was for future individuals and

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<sup>241</sup> Drumbl, *Atrocity, Punishment, and International Law*, 46-47.

societies. The question of whether punishment could serve a moral purpose in restoring relationships amongst the living was left unanswered in the narratives that created the Nuremberg Trial Plan.

Philpott argues that any ethic of punishment contains implications for action.<sup>242</sup> How societies explicate the relationship between punishment and guilt tangibly affect the way they move forward after conflict. It is not enough to believe that punishment should matter in the future, it has to matter in the now as well. Philpott argues for an ethic of political reconciliation, in which punishment is a component of restoration. He argues that “the central form of harm that a political injustice (or any crime) causes is the wound that I have called, ‘the standing victory of the wrong-doer’s injustice.’ Restorative punishment’s main purpose is to defeat this standing victory by communicating censure.”<sup>243</sup> Philpott’s view of punishment preserves the possibility of judicial punishment acting restoratively, alongside other forms of political and personal reconciliation, but argues that “it differs from consequentialism in preserving the idea of desert. Just as the perpetrator created the standing victory of his message of injustice through his act, so, too, does the defeat of this message occur through a censure of this same person for this very deed and only for this deed.”<sup>244</sup> While future deterrence and the promotion of the rule of law may be a secondary benefit of restorative punishment, they are secondary consequences, rather than primary purposes.

Narratives provide a space and a trajectory for moral reasoning, even if they fail to provide a standard in which to judge their own salience. But the ethic that emanates from them can spark a debate about the good, and in doing so, shape the way we view and apply those

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<sup>242</sup> Philpott, *Just and Unjust Peace*, 287.

<sup>243</sup> Philpott, *Just and Unjust Peace*, 219.

<sup>244</sup> Philpott, *Just and Unjust Peace*, 219.

narratives within our own context. The three narratives created to understand German war guilt and the obligation of the Allied world to respond to it are powerful moments in which to examine the potency of myth, audience, and fidelity to the story in crafting the stories we tell to ourselves. They are also invitations to enter into the logic of a moment, in which eminent and conscientious men attempted to craft a fitting response to radical evil. We gain a newfound appreciation for the way they negotiated seemingly crushing constraints by responding to this invitation to enter into their narrative logic. By critically examining the material and philosophical consequences of rhetorics of guilt and their logics of punishment within our own context, we become more aware of the way they craft and shape our own narratives.

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