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ESSAY: THE ROMANCE OF NUREMBERG AND THE TEASE OF MORAL JUSTICE

*Thane Rosenbaum**

Moral justice is an illusion, a pipe dream of the pious, a fantasy of the just, nothing more than a mere myth for the rest of us. It is a mirage of civilized society, something we can envision but seldom receive, a lure that is painfully alluring but ultimately ungraspable.

If moral justice existed—just for the sake of argument, as an academic exercise and not to bring about madness through temptation—it would feature courtrooms where citizens actually receive a day in court, where voices are heard without disrespect and interruption, where truth is discovered without the tidal wave of distortions and preclusions that otherwise drown out any faithful recounting of what happened. Findings of fact would ring true. Final judgments would produce a real sense of closure. Legal relief would leave people feeling better. Appeals would seem unappealing, if not unseemly, precisely because the parties would end up reconciled rather than embittered. Adversaries would be given an opportunity to encounter one another as human beings, and possibly to hear words of contrition and regret, which might restore moral balance to once severed relationships.

The experience of seeking the truth and speaking truths—of granting people the voice to proclaim their grievances—would override all other conceptions of justice. The self-limiting, self-sabotaging goals of vindication, retribution, and revenge would cease to supply the legal system's only arsenal of relief.

Moral justice provides victims with an opportunity to have their stories told and the truth openly and publicly proclaimed and memorialized. Judgments should never be sealed or silenced. Justice is owed not only to the individual, but also to history, which receives the benefit of our experience, applying the lessons we have learned and avoiding the mistakes we have made. Moral justice takes into account spiritual harms rather than those that are merely physical, material, and quantifiable in nature. And moral justice requires that law—during

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special times of national crisis and soul-searching—must, on occasion, deviate from the strict application and adherence to legal rules. If it does not, the society that looks to that law for coherence will be forced to live with the consequences of an unbearable outcome.

Moral justice, ultimately, feels just and makes sense. Judges should continually ask themselves: Have we done what's right, and will this decision contribute to a general sense of faith and confidence that the legal system is a place of wisdom, fairness, and sound judgment?

The American legal system, sadly, neither asks these questions nor is guided by these aspirations. Justice in America is always defined narrowly and distilled into the slimmest of remedial options, the classic core values of off-the-rack resolution—legal, but not necessarily moral. Nothing could be more unimaginative and spiritually deflating. Those who have been the victims of breached promises or injured by fumbling professionals or damaged by charlatans and careless caretakers, ultimately, through settlement negotiations, receive nothing but monetary compensation for their losses. Those who find themselves as victims of crimes watch as government prosecutors, bargaining pleas with the dexterity of Las Vegas croupiers, ensure that the guilty are incarcerated—even at the expense of truth. Punishment and retribution is the endgame of legal justice. Restoration and repair, dignity and respect, is not. The vast, vast majority of cases are never publicly aired in a court of law.

Many things can be said about the Nuremberg Tribunals and their legacy as a force for human rights and an inspiration for international law. But what you do not hear much about is the way in which Nuremberg, perhaps inadvertently, represented the essential values and broad vision for moral justice. It is for this reason that Nuremberg, at least to my mind, was one of the great heroic and romantic moments of the twentieth century. It offered a glimpse as to what moral justice might look like, implemented in response to the world's greatest known atrocity, at a time when humanity had just failed so miserably.

Judgment at Nuremberg needed to be not only universal, but also moral. It had to go beyond what the law would ordinarily provide. It had to be as imaginative as it was meticulous. Given the enormity and uniqueness of the crime, a legal apparatus needed to be devised that was equal to the task, an international forum that would serve as a monument to the proper evaluation and judgment of mass murder.

Everyone by now knows that Nuremberg was not inevitable. Henry Morgenthau's vision for summary executions possessed its own moral appeal. Indeed, an eye-for-an-eye, revenge-based response to Nazi atrocities was not only arguably moral, but it is also offered an appealingly swift, efficient resolution to a moral problem. The Nazis had taken eleven million lives in roughly six years. Why should the

world spend any time, or waste any resources, dispensing justice for murderers who deserve nothing better than the immediacy of their own deaths? The judgment against the Jews of Europe was unequivocally merciless. Surely the Nazis and their accomplices shouldn't be given their day in court. In fact, they shouldn't even receive the time of day.

Most people would have accepted summary executions as a legally permissible and morally sustainable resolution to a gruesome episode in world history. But the spirit of Nuremberg prevailed instead. The exact opposite impulses, fueled by equally compelling moral imperatives, won the day. Nuremberg was slow and time consuming, inconvenient and resource-expending. It wasn't even local. The victors had to get on a plane and judge their enemies on the road, among the rubble of a bombed-out nation. And yet the moral argument that Nuremberg represented changed the way the world forever regarded justice and judgment, and gave rise to a new vision of moral responsibility among nations and the broadening of the range of that responsibility.

True moral judgment is never swift. It must be undertaken with great deliberation and thoughtfulness. It should never be decided lightly, or performed without anguish. Most of all, it must not be wasted. Moral judgment must be purposeful. It has to achieve more than simply a quick fix. It has to be meaningful for those who seek justice today, and those who will have to live with that justice, as well as those who will need to know what is meant by justice in the future.

Killing Nazis in their tracks, while arguably moral, fails to achieve so many other virtues, and fails to call attention to so many other values. The decision to choose Nuremberg over the self-help model of frontier justice, which many Americans appreciate and cherish in popular culture, whether in narratives inspired by *The Count of Monte Cristo*, or the vigilante, Rambo-styled retributions of *Death Wish* or *Die Hard*, was a choice that ultimately favored the slower-paced dramas of moral relief over the cheap thrills of a more conventional wild west ending.

Nuremberg forced the Germans to confront the full enormity and vast evil of their crimes. Summary executions would have squandered that opportunity—not just for the Germans, but for the world at large. Nuremberg placed the world on notice that there are legal and moral consequences to mass murder. Hit squads are efficient, but they are silent. With assassinations, the world does not get to witness the rogue's gallery of defendants, the voices of human testimony, and the marshalling of incontestable proof. Nuremberg, through newsreel footage, courtroom stenographers, and worldwide media coverage, gave the Germans, and the world, a daily reminder of the grotesque corruptions of humanity that were being undertaken in the name of the Third Reich.

Moreover, the fact that the trials took place in Nuremberg, rather

than in New York, London, Paris, or Moscow, located the trial at the scene of the crime, once more placing the burden on the German people to witness what was done under their watch. The same moral value was achieved decades later in South Africa, with the Truth and Reconciliation Commission. And the failure to replicate this principle happened more recently, in the tribunal that was convened in Tanzania in order to judge and punish the genocide of Tutsis in Rwanda. Many have observed that locating the trials in a different country, albeit one in the same continent, ultimately prevents Rwandans from experiencing the full emotional weight of national judgment and atonement. Nuremberg stands for the proposition that, morally, these tribunals work best when they are shoved in the face of the offending nation. The moral choice of venue compels citizens who smugly cling to the thin moral cloak of the “innocent” bystander to deal with the consequences of the trial wherever they go and wherever they look.

Nuremberg was a bloodletting of documentary evidence, meticulously introduced, chronicled, compiled, indexed, and recorded for posterity. The piles of proof served the immediate purpose as trial exhibits, but they also served as exhibits for history. Judgment matters, and memory matters, too. It matters to future generations who need to know what happened, and how it happened, and how the world responded in its aftermath—essentially, how did the world ultimately choose to judge the Nazis for their misdeeds? It wasn't merely enough to name a new crime: the crime against humanity. The more important question was: What set of remedies constituted judgment at Nuremberg, and what kind of justice was deemed appropriate in the aftermath of Auschwitz?

Such questions mattered not only to succeeding generations, but it mattered even more so to the survivors of the Holocaust and to the dead. What was done in their name, and in their memory, by the very nations who were once so consciously complacent and indifferent to the genocide of European Jewry? Establishing the guilt of the Nazis had to serve the judicial ends of verifiable proof and also had to stand the test of time. And as part of that proof, witnesses rounded out the storytelling, truth-seeking values that are the fabled lifeblood of trials. All of this was being done on an international stage and in front of an international audience. The narrative and truth-telling dimensions of Nuremberg provided the late-arriving moral antidotes to all the silence, suffering, and voicelessness that dominated the lives of those who had been selected to die in the Final Solution. Nuremberg is the forefather of all models of restorative justice and all efforts to promote reconciliation and healing in the law.

None of these virtues would have been achieved, however, had the Nazis swiftly succumbed to the hangman's noose. And yet, the moral

justifications for the hangman's noose were not lost on the prosecutors of Nuremberg. Henry Morgenthau may not have gotten his wish, but neither was he ignored. Most of the defendants received a fitting and final end. Nuremberg was a legal trial, but it was most definitely framed in moral terms. The idea that the Nazis might somehow escape judgment, slip through a loophole, duck under a technicality, was a morally repugnant concept. And therefore the Nuremberg prosecution team, led by Justice Robert Jackson, ensured that no such outcome would rob these proceedings of its moral and symbolic authority.

And in doing so, even without acknowledging it, they implicitly concluded, as a matter of moral justice, that atrocity is different. Genocide cannot be prosecuted like any ordinary crime. It is, so unmistakably, out of the ordinary—a crime of extraordinary proportion. And so, therefore, the context of the trial, and the moral stakes of its outcome, could not be held hostage to the imperfections of the constitutional process. A path to justice other than the purely legal must reveal itself. Indeed, in the face of atrocity, it is the moral path that ultimately influences the outcome.

If judged under a strict adherence to American constitutional principles, the Nazis would have been able to present serious and legitimate procedural defenses to the crimes attributed to them. In fact, they did. After all, from the perspective of international law, the crime of genocide did not exist at the time that the Nazis had perfected it, and in so doing, raising the bar to a new level of monstrosity. And the legal theory of criminal conspiracy, under which most Nazis were prosecuted, was only an Anglo-American concept. Germans had never before known this to be a crime. And yet, despite the fact that prosecuting defendants for a crime that did not exist at the time of its commission, and under a legal theory that did not exist under German law, clearly violates the *ex post facto* clause of the American Constitution, the Nuremberg prosecutors did not allow these constitutional infirmities to compromise their mission.

Moreover, given the immense bureaucratic size of Germany's killing apparatus, and the dispersion of so many murderous responsibilities, it was difficult, if not impossible, to present proof establishing the causal link between the acts of genocide and the specific actions of many of the Nuremberg defendants. As every American law student knows quite well, causation is the cornerstone of the legal system's authority to render judgment. Without establishing a proximate connection between the action and the harm—and the very existence of an action—there is no crime, and there is no culpability. But with the Germans, there was so much piecemeal, highly fragmented, bureaucratized delegation that took place within and between the killings. The necessary direct links, and the apparent *mens*

rea, was neither present nor obvious in so many critical cases.

To avoid this apparent constitutional deficiency, Nuremberg adopted the principle of organizational responsibility: mere membership in the Nazi party, absent other concrete evidence of individualized guilt, would nonetheless be sufficient to prosecute and judge. Associating with unsavory characters, joining their party and taking part in their ideological goose-stepping salutes, would be enough to establish guilt and complicity.

But doesn't this violate the First Amendment's freedom of association clause? Would the Constitution have allowed the same practice in prosecuting the Ku Klux Klan here in the United States? After a murder or lynching in Mississippi, could we have rounded up everyone in the Deep South with a white hood inconveniently and suspiciously stashed away in a closet, and held all Klan members organizationally responsible for all of the murders committed during Freedom Summer? The Red Scare, and the suspicion and prosecution of communist sympathizers during the 1950s, presented this exact set of legal problems. And most people, today at least, believe that the Constitution had been grossly misapplied and ignored during those volatile times of national soul-searching and paranoia.

Should it be that much different with Nazis? When it came to the Nazis, jurisdictional concerns, retroactive punishments, standard causation requirements, and freedom of association principles, were not going to impede moral justice and the development of international law. No one seemed to mind during Nuremberg that these constitutional principles were being upended, and that a strict adherence to constitutional safeguards seemingly did not make the trip to Germany. Given the enormity of the Nazis' crimes and the moral implications of acquitting them on procedural grounds, the Constitution, as a document, apparently was deemed not fit for travel and therefore was left behind. There was little ambivalence among the American prosecutors, including a sitting Supreme Court justice, about applying this new path to justice, one that looked legal but tilted in an entirely moral direction.

We have seen this blind-eye impulse before, even back home. The treatment of pedophiles in America, after they are released from prison and after having presumably served their debt to society, isn't exactly consistent with constitutional safeguards. They remain subject to civil commitment and stigmatized by statutes such as Megan's Law. Obviously something other than the Constitution is controlling here—perhaps a moral statement of the community that our children are not safe from these once convicted but now released defendants. And the same was true of Nazis, and is largely still true of Nazis, in the guise of concentration camp guards who illegally entered this country and gained citizenship. They simply were not going to receive the same

treatment under the law that we would ordinarily apply to ordinary criminals—such as embezzlers, rapists, and those who rob convenience stores.

Nuremberg clearly demonstrates that there are times when moral responsibility supersedes legal duty. The Nazis were special and their crimes were unique. In such circumstances, the law must recognize the difference, and display a certain awe and humility in doing what's morally just. An undeviating, legalistic obsession with the Constitution simply does not work. The American Constitution, with its presumptions of innocence, burdens of proof, governmental proscriptions, and general protections of liberty—in the context of genocide, and in the fresh light of Nuremberg's moral mandate—necessitated a new path to justice, one that was unapologetically and unequivocally moral. There would be punishment, and there would be judgment, but not at the expense of truth-seeking and story-telling, historical justice and cultural memory, and the impact of such a spectacle on the national consciousness of Germans and on audiences watching worldwide. These and other moral urgencies and imperatives would have been lost had Morgenthau's vision of summary executions been undertaken.

And the overall range of responsibility was broadened as well. Julius Streicher, a newspaper publisher, was convicted among the first tier of Nuremberg defendants for disseminating propaganda against the Jews. He was deemed just as complicit, murderous, and culpable in the crimes of the Nazis as anyone who wore a uniform and carried a gun. The lesson of how Streicher was treated in Nuremberg no doubt influenced the recent convictions in the Rwandan tribunals of defendants who owned a newspaper and controlled a radio station and who fomented cold-blooded violence without ever having to lift a machete.

Moreover, even the de-Nazification investigations of Wilhelm Furtwangler, the legendary conductor of the Berlin Philharmonic Orchestra, suggested that the moral vision of Nuremberg emanated various values and spiritual concerns beyond the merely retributive and prosecutorial. Although not a member of the Nazi party and someone who otherwise assisted some of his Jewish musicians in fleeing Germany, Furtwangler was nonetheless exposed to a protracted and humiliating investigation, the result of which ended in an acquittal but not without considerable damage to his legacy and reputation. Indeed, he never recovered from the proceeding, and his musical career was effectively over. Yet here was a man who was merely an artist, and not an ideologue. He was harmlessly apolitical. All he cared about was the preservation of German culture, even during a time of political madness.

But perhaps that's the point, at least the moral one. By continuing to orchestrate music during the rampaging murders of the Nazis, Furtwangler gave the Germans the spiritual resilience to go on, and the music to murder by. He allowed the murderers and bystanders to purify themselves each night with the sounds of lush German romanticism, while corrupting themselves during the day with fully evolved displays of German barbarism. Furtwangler merely lifted his baton, and yet he was deemed morally instrumental and complicit in the Holocaust, even if he was in no way the proximate cause. After Nuremberg, civilians, and even artists, were deemed to have responsibilities under international law.

The moral lessons of Nuremberg and its progeny are never-ending, even if the architects of those lessons, especially the Americans, failed to heed their own advice by not advancing the cause of moral justice at home, and in failing to support future international tribunals. So, instead, Nuremberg remains just a tease, a romantic glimpse of what can happen when moral values completely override the soulless, mechanical rigidity, and precedential obsessions, of cold, lifeless, black letter law.