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## CRIMES AGAINST HUMANITY NUREMBERG, 1946

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*We are honored to publish this keynote address delivered by Justice Breyer in a ceremony held at the Capital Rotunda, Washington, D.C., to mark Yom Hashoah, the Day of Remembrance, on April 16, 1996.*

The law of the United States sets aside today, Yom Hashoah, as a Day of Remembrance—of the Holocaust. On Yom Hashoah 1996, we recall that fifty years ago another member of the Court on which I sit, Justice Robert Jackson, joined representatives of other nations, as a prosecutor, at Nuremberg. That city, Jackson said, though chosen for the trial because of its comparatively well-functioning physical facilities, was then “in terrible shape, there being no telephone communications, the streets full of rubble, with some twenty thousand dead bodies reported to be still in it and the smell of death hovering over it, no public transportation of any kind, no shops, no commerce, no lights, the water system in bad shape.” The courthouse had been “damaged.” Its courtroom was “not large.” Over one door was “an hour glass.” Over another was “a large plaque of the Ten Commandments”—a sole survivor. In the dock twenty-one leaders of Hitler’s Thousand Year Reich faced prosecution.

Justice Jackson described the Nuremberg Trial as “the most important trial that could be imagined.” He described his own work there as the most important “experience of my life,” “infinitely more important than my work on the Supreme Court, or . . . anything that I did as Attorney General.” This afternoon, speaking to you as an

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American Jew, a judge, a member of the Supreme Court, I should like briefly to explain why I think that he was right.

First, as a lawyer, Robert Jackson understood the importance of collecting evidence. "Collecting evidence?" one might respond. What need to collect evidence in a city where, only twenty years before, the law itself, in the form of Nuremberg Decrees, had segregated Jews into Ghettos, placed them in forced labor, expelled them from their professions, expropriated their property, and forbade them all cultural life, press, theater, and schools? What need to collect evidence with the death camps that followed opened to a world, which finally might see? "Evidence!" one might then have exclaimed. "Just open your eyes and look around you!"

But the Torah tells us, There grew up a generation that "knew not Joseph." That is the danger. And Jackson was determined to compile a record that would not leave that, or any other future generation, with the slightest doubt. "We must establish incredible events by credible evidence," he said. And, he realized that, for this purpose, the prosecution's thirty-three live witnesses were of secondary importance. Rather, the prosecutors built what Jackson called "a drab case," which did not "appeal to the press" or the public, but it was an irrefutable case. It was built of documents of the defendants' "own making," the "authenticity of which" could not be, and was not "challenged." The prosecutors brought to Nuremberg one hundred thousand captured German documents; they examined millions of feet of captured moving picture film; they produced twenty-five thousand captured still photographs, "together with Hitler's personal photographer who took most of them." The prosecutors decided not to ask any defendant to testify against another defendant, lest anyone believe that one defendant's hope for leniency led him to exaggerate another's crimes. But they permitted each defendant to call witnesses, to testify in his own behalf, to make an additional statement *not* under oath, and to present documentary evidence. The very point was to say to these defendants: "What have you to say when faced with our case—a case that you, not we, have made, resting on your own words and confessed deeds? What is your response?" The answer, after more than ten months and seventeen thousand transcript pages, was, in respect to nineteen of the defendants, that there was no answer. There was no response. There was nothing to say. As a result, the evidence is there, in Jackson's words, "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." Future generations need only open their eyes and read.

Second, as a judge, Robert Jackson understood the value of precedent—what Cardozo called “the power of the beaten path.” He hoped to create a precedent that, he said, would make “explicit and unambiguous” what previously had been “implicit” in the law, “that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds . . . is an international crime . . . for the commission [of which] . . . individuals are responsible” and can be punished. He hoped to forge from the victorious nations’ several different legal systems a single workable system that, in this instance, would serve as the voice of human decency. He hoped to create a “model of forensic fairness” that even a defeated nation would perceive as fair.

Did he succeed? At the least, three-quarters of the German nation at the time said they found the trial “fair” and “just.” More importantly, there is cause for optimism about the larger objectives. Consider how concern for the protection of basic human liberties grew dramatically in the United States, in Europe, and then further abroad, in the half century after World War II. Consider the development of what is now a near consensus that legal institutions—written constitutions, bills of rights, fair procedures, an independent judiciary—should play a role, sometimes an important role, in the protection of human liberty. Consider that, today, a half century after Nuremberg (and history does not count fifty years as long), nations feel that they cannot simply ignore the most barbarous acts of other nations; nor, for that matter, as recent events show, can those who commit those acts ignore the ever more real possibility that they will be held accountable and brought to justice under law. We are drawn to follow a path once beaten.

Third, as a human being, Jackson believed that the Nuremberg trials represented a human effort to fulfill a basic human aspiration—“humanity’s aspiration to do justice.” He enunciated this effort in his opening statement to the Tribunal. He began: “The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.”

To understand the significance of this statement, it is important to understand what it is not. Nuremberg does not purport to be humanity’s answer to the cataclysmic events the opening statement goes on to describe. A visit to the Holocaust Museum (or, for some, to the

corridors of memory) makes clear that not even Jackson's fine sentences, eloquent though they are, can compensate for the events that provoked them. But, that is only because, against the background of what did occur, almost *any* human statement would ring hollow. A museum visit leads many, including myself, to react, not with words, but with silence. We think: There are no words. There is no compensating deed. There can be no vengeance. Nor is any happy ending possible. We emerge deeply depressed about the potential for evil that human beings possess.

It is at this point, perhaps, that Nuremberg can help, for it reminds us that the Holocaust story is not the whole story; it reminds us of those human aspirations that remain a cause for optimism. It reminds us that after barbarism came a call for reasoned justice.

To end the Holocaust story with a fair trial, an emblem of that justice, is to remind the listener of what Aeschylus wrote twenty-five hundred years ago, in his *Eumenides*—where Justice, overcoming the avenging furies, humanity's barbaric selves, promises Athens that her seat, the seat of Justice, "shall be a wall, a bulwark of salvation, wide as your land, as your imperial state; none mightier in the habitable world." It is to repeat the Book of Deuteronomy's injunction to the Jewish People: "Justice, justice shall you pursue."

And if I emphasize the role of Nuremberg in a story of the Holocaust, that is not simply because Justice Jackson himself hoped that the trial "would commend itself to posterity." Rather, it is because today our role—the role of almost all of us—in relation to the Holocaust is not simply to learn from it, but also to tell it and to retell it, to ourselves, to our children, and to future generations. Those who were lost said, "Remember us." To do that, to remember and to repeat the story, is to preserve the past, it is to learn from the past, it is to instruct and to warn the future. It is to help that future, by leading them to understand the very worst of which human nature is capable. But, it is also to tell that small part of the story that will also remind them of one human virtue—humanity's "aspiration to do justice." It is to help us say, with the Psalmist, "Justice and Law are the foundations of Your Throne."