INTRODUCTION

When I was twelve, the Oregon Bar Association held a special memorial session in the chambers of the U.S. District Court of Oregon to honor my recently deceased great-grandfather, Robert Maguire. I had never been to a funeral or a trial, and the stark wood-paneled chambers and the somber demeanor of the old men in their black robes filled me with equal parts fascination and fear. After gaveling the court into session, the judge announced "the presence in the courtroom of the following members of Mr. Maguire's family." I grew increasingly nervous as he ran down the list: "Mrs. Robert F. Maguire; Robert F. Maguire Jr."—I winced, waiting for my name—"Peter Maguire, a great-grandson; Robert F. Maguire III, grandson . . ." Just as my breath began to return, the door of the judge's chambers opened slowly and a young woman entered pushing a wheelchair, in which sat a very haunting old man.[1]

For a brief moment my young mind began to reel. Was this the corpse of my great-grandfather? My father, recognizing the ten-thousand-yard stare, reassured me that the man in the wheelchair was former Supreme Court Justice William O. Douglas, not my great-grandfather. He added

that the two men had agreed on very little, but that today was a day past differences were set aside. The only time I had ever met Robert Maguire was at my grandfather's house in Ventura, California. I was very young, but I remember his stately demeanor contrasting starkly with the southern Californian environs. One by one the children were taken to his knee and introduced with a solemn handshake. Though the judge was very old, his mind was razor sharp and he was very stylish in a three-piece, gray pinstripe suit.

At first glance, Robert Maguire appeared to be a typical conservative Republican. However, he was the son of two very atypical Americans. His mother, Kate or Kitty, was the daughter of L. H. Harlan, one of Ohio's leading intellectuals. She was described in her obituary as "a pioneer social worker in the United States." Robert's high school thesis, "John Mitchell and the Miners," reflected his upbringing: "The United States will see the greatest conflict of the world. Where capital is strongest there will be the fight, conservatism against progress. . . . Future generations will call upon John Mitchell as the man who gave the death blow to . . . industrial slavery. . . ." (Robert Maguire, "John Mitchell and the Miners" [circa 1903], Betty Maguire Frankus Papers, Portland, Oregon).

During high school Robert Maguire taught himself shorthand. In 1905 he received a civil service clerkship in Washington, D.C.; during the day he worked as a court reporter and at night he attended Georgetown University Law School. After receiving his L.L.B. in 1909, Maguire took a job with the U.S. Land Service and was sent to Oregon to work as a border marker. The slight twenty-one-year-old was issued a horse, a gun, and a badge and thrown headlong into the rough-and-tumble disputes of eastern Oregon. In 1910, Robert Maguire married Ruth Kimbell of Massachusetts and moved to Portland, Oregon, where he had just been named Assistant U.S. Attorney. For several years, Maguire honed his skills as a trial lawyer, and in 1915, he entered private practice with Edwin Littlefield. The majority of the firm's work involved representing large insurance companies.

Robert Maguire led two legal lives. Although he had become what today would be described a "corporate lawyer," he remained a public-spirited jurist. In 1917, he was appointed Standing Master in Chancery of the Federal Court of Oregon, a position he would hold for the next thirty-three years. Oregon Supreme Court Justice Randolph Kester stat-

ed, "It was the first appointment of its kind ever made in Oregon. . . . The object of appointing such a judicial official is to expedite the work of the federal courts" (interview by author, tape recording, Portland, Oregon, 19 March 1987). Throughout the 1920s, Robert Maguire worked on behalf of the infant Oregon Bar Association and was named the Oregon Bar Association's first president in 1929. His professional rise continued throughout the 1930s, and Maguire seemed destined for a seat on the Oregon Supreme Court. Clients such as Union Pacific allowed him to earn a large salary, while his post as Master in Chancery and bar association prominence gave his voice more resonance than a corporate lawyer could normally expect. When the clouds of war gathered over Europe in the late thirties, Maguire echoed the sentiments of his favorite statesman, Winston Churchill, arguing that Hitler's incursions needed to be met with force. When the war ended, he supported the idea of a European recovery program, but had no idea that he would actively participate in it.

As the memorial continued, Robert Maguire was described by his colleagues as "one of the finest if not the finest trial lawyer in the Pacific Northwest," a man of "rocklike integrity." What piqued my curiosity was a one-sentence biographical detail: "In 1948 he served as a Judge of the U.S. Military Tribunal for the War Crimes Trials in Nuremberg, Germany."[2] That was the first time I had heard of the Nuremberg trials.

After the ceremony, we were led through the crowd and into the judge's chambers. From there, we were taken to an even deeper recess, and steered to the foot of a wheelchair and introduced to former U.S. Supreme Court Justice William O. Douglas. He took my hand and did not release it immediately. When he looked into my eyes, I was reminded of that first encounter with Robert Maguire.

I proudly regaled my fifth-grade classmates with my great-grandfather's historical significance. But my pronouncements were met with the same dull response someone receives for bragging that their forefathers sailed aboard the *Mayflower*. A few years later, when my ninth-grade history class staged a trial of Napoleon Bonaparte, I jumped at the opportunity to play the French leader. It was with a great sense of purpose that I cynically argued that sovereign leaders are immune from prosecution.

My first serious attempt to obtain more information about the Nuremberg trials was in junior high school. Although there were books on the

subject, Robert Maguire could not be found in the group photos or the indexes. When I pressed my father and grandfather for details, they could only respond that "he was a judge at Nuremberg" and point to a faded black-and-white photograph on the wall of three black-robed men sitting in front of a large American flag.

Over the years my curiosity about the trials grew. It was not until college that I reluctantly told a political science professor about the family's claims. He informed me that after the international tribunal, there had been a subsequent series of American trials at Nuremberg. When I asked German history professor John Fout if he knew anything about the American trials, he took me to the library, where we found fifteen formidable-looking green books. We took them down and began to search.

Each volume had a picture of a three-man tribunal and their biographical information. As I scanned the tomes, my heart began to sink—we had checked nine of twelve cases and still no Robert Maguire. Then suddenly my professor said, "Yes, he does sort of look like you," and handed me one of the volumes. I looked down and there was Robert F. Maguire staring at me once again. It was the same picture that hung in my grandfather's hallway. His case was number 11, the *United States Government v. Ernst von Weizsaecker*, also known as the Ministries case.

My subsequent research efforts yielded an undergraduate thesis and raised many more questions than I could possibly answer. The most puzzling discovery was a 1953 U.S. High Commission Report on Germany. Buried deep in the report was a chart of charges, pleas, and sentences. The chart seemed suspiciously overcomplicated. However, there was one column that was straightforward. It was headed: "In custody as of February 30, 1952." When I looked at the Ministries case, I noticed that, despite a number of lengthy sentences, none of the defendants remained in prison after 1952. Even stranger was the number of death sentences that had been reduced to prison terms.

William Manchester's *Arms of Krupp* gave me a first, rather sensational account of the war criminal amnesty of the early 1950s. In an attempt to solve this and other mysteries, I contacted former Nuremberg chief counsel Telford Taylor. Our first meeting was in his Morningside Heights office in 1987; he was seventy-nine, I was twenty-two. When I produced the chart, Taylor put on his glasses and carefully studied it. He agreed that the sentences had been reduced way beyond the controversial McCloy decisions. However, he could offer no explanation why.[3]

Law and War is an attempt to transcend the simple oppositions of realism and idealism, positivism and natural law, liberalism and conservatism, might and right. During the 1990s, "war crimes" very much returned to center stage. If Nuremberg provides the legal and symbolic framework, its lessons remain unclear. In part, this is because what that name represents is really a series of contradictory trials that lead to no single, simple conclusion.

It is my contention that over the course of the twentieth century, the United States attempted to broaden the laws of war to include acts that had previously been considered beyond the realm of objective judgment. During the early twentieth century, American leaders argued that law would replace blind vengeance as a means of conflict resolution. The apogee of this movement came at Nuremberg in 1946. In order to provide a better context for America's radical post–World War II war crimes policy, it is necessary to see how the U.S. conception of international law differed from its European predecessor.

Generally speaking, after the Thirty Years War (1618–48), the era of the modern nation-state began.[4] European leaders viewed international politics as a never-ending and ever-changing struggle in which sovereignty and the national interest were the highest political ideals.[5] Americans tended to view war more like a contest in which total victory was the ultimate objective. The notion that enemies and their policies could be criminalized was not uniquely American; however, American lawyer-statesmen gave this idea its greatest impetus. After I examined the larger history of conflict resolution, it became obvious that the *U.S.-Dakota War Trials*, the trial of Captain Henry Wirz, the Dachau trials, and the Yamashita case were examples of traditional postwar political justice and that the Nuremberg trials were the anomaly. Under the traditional rules, the victor has no historical obligation to extend a wide latitude of civil rights to the vanquished. After reading Hans Delbrück, Michael Howard, Charles Royster, David Kaiser, John Keegan, and the more extreme views of J.F.C. Fuller, on the history of war and conflict resolution, I began to see the American Civil War and the two World Wars as exceptional events that had raised the stakes of international conflict. After reading German military political and legal theorists like Carl von Clausewitz, Heinrich von Treitschke, and Friedrich Meinecke on international politics, and Carl Schmitt on the concept of "neutrality," I began to realize how radical and threatening America's punitive occupation

policies, outlined in Joint Chiefs of Staff Directive 1067, must have appeared to post–World War II Germans.[6] Impressions, as my former professor Robert Jervis pointed out, are often more important than empirical facts, because they can be shaped to conform to the observers' preconceptions and expectations.

However, it was the foreign policy of my own country that made me question the sincerity of America's commitment to the new principles of international conduct that we had so aggressively advocated during the first half of the twentieth century. Although the second half of this book will focus very sharply on the Nuremberg trials, first I will take a step backward in order to examine America's unique historical relationships with law and war. The episodic histories in the first three chapters help to establish a much larger historical, legal, and political context from which the Nuremberg trials stand out as the legal, political, and historical revolution that they were intended to be. This three-dimensional, multidisciplinary approach is absolutely necessary if one is to enter the storm where war, law, and politics swirl and oscillate in a constant state of flux. As Otto Kirchheimer argued so eloquently, political justice is not illegitimate by its very nature; however, he warned that this is a high-risk arena where the line between "blasphemy and promise" is a very fine one.

America's political ideology posed unique problems for U.S. foreign policy. It became increasingly difficult to justify an expansive, essentially imperialistic foreign policy within the framework of an egalitarian political ideology. As America grew into a regional and later a global power, this simple hypocrisy evolved into a more profound duality. More than the obvious gap between words and deeds, from the beginning, there was a tension between America's much-vaunted ethical and legal principles and its practical policy interests as an emerging world power. In his book *American Slavery, American Freedom*, Edmund Morgan argues that the simultaneous rise of personal liberty and slavery on the North American continent was the great paradox of the first two centuries of American history.

What also became clear, long before the United States even gained independence, was that the "others," in this case the slave population and North America's native inhabitants, would pay the greatest price for American freedom. Whether it was the Algonquin and the Pequot in the northeast, the Sioux in the Dakotas, or the Chumash in California, U.S. expansion cost American Indians their civilization. Initially colo-

nial leaders deemed both slaves and Indians "barbarians" and "savages" and refused to grant them their natural rights. They would however, grant them financial credit; as much as the West was won with blood and iron, it was won with whiskey, dependence, and debt. However, from the point of view of early American leaders, these dualities were neither problematic nor paradoxical until well into the twentieth century. So what emerges quite naturally, even organically, are two sets of rules for war. When U.S. soldiers faced British and other European armies, they fought according to the customary European rules, with few exceptions. However, when American settlers and soldiers squared off against foes they deemed "savage" or "barbarian," they fought with the same lack of restraint as their adversaries. The "barbarian" distinction allowed early U.S. leaders to offer messianic justifications for everything from the forcible seizure of the American West to the brutal suppression of those unwilling to give in to the ever-increasing demands of a land-hungry American population. Although they did not hesitate to use force, early American leaders were careful to legalize their seizures in the form of treaty law. After reading Dee Brown's sad and moving account of the fall of traditional North American Indian civilization, *Bury My Heart at Wounded Knee*, I was shocked not so much by the flagrant use of force as by the U.S. government's inability to honor either its treaties or its word. Carol Chomsky's excellent article on the Minnesota Indian War of 1862 and the trials and executions that followed was extremely helpful. Sven Lindquist's provocative study of the role of colonial warfare in European history, *Exterminate All the Brutes,* was also extremely helpful.

In 1862, for a brief moment, the United States simultaneously fought Sioux Indians in Minnesota and Confederate armies in the South. Although the Confederacy would not be crushed until 1865, comparing the U.S. government's treatment of the two groups of vanquished foes is very telling and again points to the fact that America fought according to different sets of rules depending on its adversaries. However, this was consistent with the military practices of the European powers, who fought formal restrained wars against one another and operated with a freer hand in their colonial wars. After 1860, the Indian Wars entered a more brutal, final stage in which American Indians were settled onto reservations. Those who refused were deemed hostile and hunted down by specially trained cavalry units like the one led by Colonel Chivington

at Sand Creek in 1864. This policy successfully cleared the American frontier for settlement and reached a sad and inevitable apogee at Wounded Knee in 1890.

All of this was justified with a home-grown American doctrine of innate superiority that matured into the messianic political ideology of Manifest Destiny by the late nineteenth century. However, by 1898, American foreign policy was crossing into a new and uncharted territory. It was one thing to justify domestic atrocities on the ground of innate inferiority, but similar justifications would not work on the global stage. After the United States soundly defeated Spain in Cuba, the new imperial power faced one in a series of moments of truth—an either/or situation: either the United States would free Spain's former colonies in the Caribbean and the Philippines, or it would reimpose colonialism in its own name. When American leaders attempted to justify their absorption of the former Spanish colonies with the doctrine of Manifest Destiny, the argument was unconvincing both at home and abroad. American statesmen would require new and more sophisticated justifications in the coming years, and where ideology had failed them, law would serve them.

The American duality was embodied in Secretary of War Elihu Root, whose appointment in 1899 marked an important moment in the history of U.S. foreign policy. As Secretary of War he was an outspoken advocate of the new codes of international law like the Hague Agreements of 1899 and even an international court, but he had no qualms about using Manifest Destiny to justify a brutal colonial war in the Philippines. Richard Drinnon's *Facing West* was extremely helpful in outlining the similarities between America's conduct in the Indian Wars and the Philippine War. American President Theodore Roosevelt dismissed the Philippine calls for independence by claiming that granting it would be like granting independence to an "Apache chief."

However, much of the American public was unconvinced by their leaders' official explanations. In order to contain the public dissent and the outcry over American conduct in this brutal war, the Secretary of War ordered a number of war crimes trials for American officers like Major Littleton Waller and General Jacob Smith in Manila in 1902, after the war had been largely won. Although the court went through all the proper motions, the charges were hazy and in the end, the sentences were extremely light. Secretary of War Root used law as a strategic device in

order to quell a public relations problem that threatened to undermine American foreign policy. Elihu Root also employed what would become the favorite "device" of the strategic legalists—he used post-trial, nonjudicial means to further reduce already lenient sentences. In other words, once the public had been served its "justice," the sentences were quietly reduced behind the scenes. Root learned how to use the law to further his client's interests irrespective of facts and laws on Wall Street. In the case of the Philippines, everyone from his biographer and noted international lawyer Phillip Jessup to biographer Godfrey Hodgson to journalist Jacob Heilbrunn pointed to Root's use of his considerable legal skills to deny charges that were basically true. In fact, one of the major arguments of this book is that the American lawyers who came to shape and dominate twentieth-century U.S. foreign policy employed and interpreted international law in an extremely cynical manner. By "strategic legalism" I mean the use of laws or legal arguments to further larger policy objectives, irrespective of facts or laws, as Root pointed out: "It is not the function of law to enforce the rules of morality."

Throughout the early twentieth century, a long line of Wall Street–trained American lawyer-statesmen took the lead in pushing for radical new codes of international conduct that threatened by implication to undermine many of the traditional European rules of statecraft. The Europeans resisted these efforts, and no country more vehemently than Germany. Their representatives at the 1899 and 1907 Hague conferences made it clear that they wanted no part of the new international laws and courts. Above all, the Germans viewed war, not law, as the value-free means of dispute resolution. They rejected the "neutrality" of international law and any international court. To the leaders of the Second Reich, in the arena of international affairs there were only friends and enemies, and the only sacred international political principle was sovereignty. As a result of these views, American lawyer-statesmen like Elihu Root deemed Germany "the great disturber of world peace."

World War I was a very different kind of war, in both scale and aims. With the American entry in 1917, it was fully transformed into a crusade against German tyranny, or as Elihu Root described it, "A battle between Odin and Christ." The emergence of democracy and total war in the late nineteenth century began to erode Europe's customary rules of warfare. The popular support required for total war also included a vilification of the enemy, and by the twentieth century, amnesties for wartime atrocities

were being replaced by more punitive approaches. With the defeat of Germany came a window of opportunity for U.S. leaders to transform international relations along the lines advocated by American lawyer-statesmen like Elihu Root. Germany was not only labeled with war guilt but also fined with reparations. Most dramatic of all, by indicting the former Kaiser Wilhelm and attempting to put him on trial, the world powers crossed a threshold, challenging the sanctity of sovereignty.

The American duality was alive and well at the Paris Peace Conference and even in the fine print of the Treaty of Versailles. This time American President Woodrow Wilson and his Secretary of State Robert Lansing personified it. While President Wilson was attempting to overturn many of the traditional European rules of statecraft, Robert Lansing and colleague James Brown Scott stood unequivocally against the trial of the Kaiser, the punishment of the "Young Turks" for their genocide of over one million Armenians, and more generally, the expansion of international law. Like Elihu Root, both men were extremely successful Wall Street lawyers who argued that the prosecution of individuals for war crimes would imperil America's postwar strategic interests. In this case, Lansing was concerned that a breakdown of the old German social and political order could lead to a Bolshevik takeover. Another facet of the American duality was buried in a single, very significant amendment to the Treaty of Versailles. Although the League of Nations proposed outlawing colonialism and extending natural rights on a global basis, the United States was allowed to preserve its right to hemispheric intervention under the terms of the Monroe Doctrine.

The Leipzig trials, held in the German *Reichsgericht* in 1921, provide yet another example of a new form of twentieth-century political justice—strategic legalism. Unlike the General Jacob Smith case, where the U.S. government acted voluntarily, in the Leipzig trials the Germans were forced to prosecute their soldiers under the terms of the Versailles Treaty. But as in the Jacob Smith case, the Germans were no strangers to strategic legalism. They coupled stern and solemn judgments with very light sentences that also were subject to post-trial, nonjudicial modification. German authorities simply allowed convicts to "escape" after their trials.

The interwar period saw a flurry of American-inspired international legal efforts, the most radical of which was the Kellogg-Briand Pact of 1928. Elihu Root was near the end of his life by now and he had passed the torch to his apprentice, Henry Stimson. Not only had Stimson begun

his career in Elihu Root's Wall Street law firm, he was a forceful advocate of the revolutionary new treaties. After the Japanese seized Manchuria in 1931, Henry Stimson declared, in what would come to be known as the Stimson Doctrine, that the United States reserved the right of "non-recognition" for governments that did not come to power through what it considered to be "legitimate means."

The rise of National Socialism in Germany came at a time when European leaders were both war weary and unprepared to confront an aggressive regime willing to couple bad-faith diplomacy with military force. The Rhineland, Austria, and Czechoslovakia were taken over with minimum force, maximum bluff, and all the diplomatic trappings. Moreover, Hitler forced occupied nations like Czechoslovakia to accept the Munich Agreement or face destruction. In between more naked acts of aggression, as we shall see, Hitler's diplomats employed their own form of strategic legalism by providing careful, legal justifications for each takeover.

So by the late 1930s, Hitler had, for all intents and purposes, rendered the Treaty of Versailles null and void. Certainly one of the overlooked tragedies of World War II is the fate of Poland. Not only were Polish civilians of all religions killed, but Allied leaders failed to keep their word both during and after the war. The Poles suffered the horror of both Nazi and Soviet occupations. Once Hitler had obtained the goals he outlined in *Mein Kampf*, Poland became the site of Nazi Germany's unique contribution to the twentieth century—the death camp. However, unlike the residents of Indian reservations of the American West or the U.S. *reconcentrado* camps in the Philippines, the inmates of these camps were "less than slaves." If they could not be worked to death, they were killed with cold precision.

It would become very clear after the war that the Nazis fought according to different sets of rules, depending on their theater of operations. As Sven Lindqvist observes, "In the war against the western powers, the Germans observed the laws of war. Only 3.5 percent of English and American prisoners of war died in captivity, though 57 percent of Soviet prisoners of war died." In the East, the Third Reich waged a war of annihilation. The records left behind by the *Einsatzgruppen* and other sadistic execution squads like the *Dirlewanger* Regiment provide ample evidence that the Nazis spared few during Operation Barbarossa. However, on the Western Front, with a few famous exceptions, American

POWs were treated far better by the Germans than by the Japanese. Roughly 27 percent of the American POWs in Japanese captivity died, while only 3–5 percent died in German and Italian captivity. Japanese contempt for the weak, defeated, and defenseless led to carnivals of atrocity that lasted for weeks in Asian cities like Nanking and Manila, where tens of thousands of women were raped and hundreds of thousands of civilians slaughtered. Books by Iris Chang, Sheldon Harris, Yuki Tanaka, John Dower, and Hal Gold helped me to better understand the contempt that the Japanese military forces displayed toward the weak and the vanquished.

However, it was the Third Reich's systematic aggression and the killing of millions of European Jews that motivated American lawyer-statesmen like Murray Bernays and Henry Stimson to find a way to try German leaders. Because the Nazis had so carefully bureaucratized and legalized not just their invasions but even their killings, this posed new and insurmountable challenges for the traditional laws of war. Germany's Jews were German nationals; the atrocities committed against them, no matter how horrific, were outside the jurisdiction of the laws of war. Punishment for the defendants was absolutely dependent on legal innovation, or as many would later argue, *ex post facto* law. Once the defeat of the Third Reich was imminent, the advocates of a punitive peace were led by Henry Morgenthau. The U.S. State Department objected to this plan, favoring German rehabilitation (for similar reasons to those employed by Robert Lansing after World War I) to prevent the expansion of the Soviet sphere of influence. It was left to American lawyer-statesmen, led by Henry Stimson, to argue that German leaders should be tried under the interwar nonaggression treaties like the Kellogg-Briand Pact. The protrial faction was a fragile coalition of second- and third-generation lawyer-statesmen like Henry Stimson and John McCloy and liberal New Dealers like Telford Taylor and Robert Jackson.

Once the protrial faction emerged victorious from the internecine domestic battle in Washington in 1945, it had to convert very skeptical European allies to the idea that the trials would do more than render justice; they would also serve to "reeducate" the German people. While the American lawyer-statesmen were able to get the Allies to agree to charge German leaders under the radical new rules of statecraft that the United States had been pushing since at least 1907, ironically, they were unable to convert their scattered domestic critics on the right and the left. By 1945,

the U.S. State Department was already resurrecting Nazi intelligence infrastructure and operations in order to get a jump on the Soviet Union's efforts along similar lines.

However, this posed unique problems for U.S. foreign policy because military defeat was not the sole objective of the American war effort. U.S. leaders committed themselves to radical and wide-ranging social reform policy called "denazification." Although this was unlike anything Europeans had ever seen, it was all too familiar to Americans south of the Mason-Dixon Line, who had undergone a similarly resented postwar reconstruction after the Civil War. The German postwar reconstruction was founded upon the assumption that if only the Allies could somberly present evidence of Hitler's war guilt, Germans would recognize and acknowledge the criminality of their leadership. It turned out to be significantly more complicated than this.

While the Nuremberg trial is often referred to in the singular, there were actually three major trials, all different in scope and meaning. As American political scientist Quincy Wright pointed out in the 1950s, the Nuremberg trials provided a fresh setting for positivists and natural advocates to settle old scores. The leading American historian of the International Military Tribunal, Bradley F. Smith, concludes that although the trials were in many ways hypocritical, in the end their collective judgments were conservative and on the whole quite sound. Although British historians John and Ann Tusa take a harder view of Robert Jackson and the Americans, they too have a favorable view of the trials. German historians Werner Maser and Jörg Friedrich point out important flaws in the trials and most important, how the Soviet inclusion tainted the proceedings in the eyes of many Germans.

Nuremberg's International Military Tribunal (IMT), the first trial, continues to be the most popular model for contemporary international criminal courts and the central object of inquiry for almost all books on the subject. Between November 20, 1945 and September 30, 1946, a four-nation international court indicted twenty-two of Nazi Germany's highest ranking survivors under a radical indictment that included charges of aggression or crimes against peace, crimes against humanity, and conspiracy. The tribunal sentenced twelve men to death, seven to prison terms, and acquitted three. Initially the international court was planning to try more cases against German military and civilian leaders. Because of U.S.-Soviet tensions, however, President Truman was advised by the IMT's

Chief Prosecutor, Robert Jackson, not to participate in another international trial. Instead, the President asked OSS Colonel and IMT prosecutor Telford Taylor to create and staff American courts in Nuremberg to try the remaining high-level war criminals. Armed with an indictment modeled on the IMT's, American lawyers and judges tried one hundred eighty-five men in twelve cases at Nuremberg's Palace of Justice between 1947 and 1949. What initially interested me in these trials was the conspicuous absence of secondary sources about them. These were the more interesting trials because the courts were forced to address the same vexing questions as the IMT had, in far less certain cases, long after the passions of war had cooled. As the Cold War intensified, a new American duality emerged as political concerns began to eclipse moral and legal ones.

In trying to obtain even the most basic information about the American Nuremberg trials, I found a glaring historiographic omission—the absence of a single English-language study. With the exception of *Telford Taylor's Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, books like Joseph Borkin's *The Crime and Punishment of I. G. Farben*; Josiah Dubois's *The Devil's Chemists*; William Manchester's *The Arms of Krupp*; more recently, Ian Buruma's *The Wages of Guilt*; and Richard von Weizsäcker's *From Weimar to the Wall* examine specific cases, but none offers a comprehensive analysis of the subsequent proceedings and war criminals' changes of fate during the mid-1950s. In German there is more literature, Jörg Friedrich's *Das Gesetz Des Krieges* being by far the most comprehensive account of any single American Nuremberg trial.

The American Nuremberg trials resembled the IMT in a number of ways. In addition to punishing the guilty, the American courts intended to create an irrefutable record of Hitler's Third Reich. Defendants were not simply charged with violations of the customary rules of war, they were subject to the same unprecedented standards of international conduct as the defendants at the IMT. Military leaders, politicians, lawyers, doctors, businessmen, and bankers faced charges of aggression, conspiracy, and crimes against humanity. Each case produced a voluminous historical record composed of documentary evidence and testimony. The transcripts of the final American Nuremberg trial alone ran to 28,000 pages. The defendants included industrialist Alfried Krupp, diplomat Ernst von Weizsäcker, *Einsatzkommando* Otto Ohlendorf, Field Marshal Wilhelm von List, Judge Rudolf Oeschey, and many other high-ranking Third Reich officials. Originally Telford Taylor had hoped to try as many as three

hundred individuals. However, by 1949 it was clear that these punitive policies did not fit with the new American plan for West Germany.

Initially, I was interested in the final American trial at Nuremberg because my great-grandfather had been a judge. I quickly learned that *United States v. Ernst von Weizsaecker* was an extremely complicated case that brought charges against twenty-one high-ranking Nazis from all sectors of the Third Reich. The Ministries case could best be described as a Cold War IMT. Its roster of defendants included Ernst von Weizsäcker, SS General Walter Schellenberg, banker Emil Puhl, industrialist Wilhelm Keppler, Chief of the Reich Chancellery Hans Lammers, Reich Minister of Public Enlightenment Otto Dietrich, SS General Gottlob Berger, and fourteen others.

The American Nuremberg trials and especially the Ministries case would serve as yet another "moment of truth" that would test America's commitment to the trials themselves and their international legal legacy. The prosecution charged former State Secretary Ernst von Weizsäcker with the radical and recent crime of aggression (crimes against peace) for his role in the Nazi takeover of Czechoslovakia. His five-man defense team included his son Richard, who would later serve as the President of the Federal Republic of Germany and one of the most eloquent spokesmen of his generation. This was the only American court to convict under the controversial aggression charge. However, the decision was not unanimous: Judge Leon Powers blasted the majority decision in his dissenting opinion.

Few historians have attempted to consider the Nuremberg trials within the context of America's larger post–World War II war crimes policy. The first thing that becomes apparent is that the Nuremberg trials compare very favorably to the trial programs run by the various branches of the American military. The most glaring victor's justices came in the Yamashita case and the Malmedy trials. These proceedings occured immediately after the war when passions had not yet cooled; the cry for vengeance outweighed considerations of due process. This was postwar military justice, after all.

Aside from a single French trial in 1947 (Hermann Roechling), the only other court to employ a Nuremburg-like indictment was the International Military Tribunal Far East ("Tokyo Trial"). The eleven-man international tribunal arraigned twenty-eight of Japan's military and civilian leaders on May 3, 1946. Although Emperor Hirohito was not among the defendants,

they did include Hideki Tojo and a number of other military and political officials. After two and a half strife-filled years, the court sentenced seven men to death and seventeen to life in prison on November 4, 1948. Three of the eleven judges filed dissenting opinions. Justice Radhabinod Pal of India issued a scathing dissenting opinion that found all of the accused not guilty on every count of the indictment. Fueled by anti-imperialism, Pal wrote, "It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is illegitimate in warfare, then . . . this decision to use the atom bomb is the only near approach to the directives of . . . the Nazi leaders." In an effort to place the Nuremberg trials within the context of post–World War II war crimes adjudication, I have included summary analyses of the IMT, IMTFE (Tokyo Trial), and a few of the more significant military cases. The published secondary works of Bradley F. Smith, John and Ann Tusa, Robert Conot, Eugene Davidson, Drexel Sprecher, James Willis, Thomas Schwartz, Telford Taylor, Frank Lael, John Dower, James Weingartner, Frank Buscher, Phillip Piccigallo, James Bosch, Howard Levie, Michael Marrus, and John Pritchard were particularly helpful.

I then go on to examine the paroles of convicted war criminals in West Germany and Japan during the 1950s carried out by the U.S. Army (low level) and the State Department (high level). What interests me here is the clash between the geopolitical need for "reconciliation" with new and important allies and the traditional U.S. commitment to principles of law and human rights. Many West Germans, their leaders included, found the Nuremberg manner of punishment and parole confusing, unprecedented, and ultimately legally illegitimate. In the end, the United States and the Federal Republic found a face-saving way of resolving the war crimes question to West Germany's advantage. The ensuing story of how some of the worst war criminals of World War II were quietly paroled is worth telling. It is widely known that Rudolf Hess and the other IMT defendants were shown little mercy under quadripartite control in Berlin's Spandau Prison. How did the war criminals in the western prisons (Werl, Wittlich, and Landsberg) fare?

After I read Frank Buscher's groundbreaking study, *The American War Crimes Program in Germany*, and spent some time at the National Archives reading the State Department legal advisor's war crimes files, my eyes were opened to a far more complex picture that consisted of many levels of activity. In 1951, less than two years after the last Nuremberg sentence

was handed down, U.S. High Commissioner John McCloy ordered the first large-scale sentence reductions; he has provided a convenient scapegoat for historians ever since. Although McCloy's justifications for the sentence reductions were weak and often disingenuous, his actions were nowhere near as dramatic as the releases that came after 1953.

With the exception of Buscher's study, most of the accounts of war crimes clemency focus too heavily on John McCloy and his motives. What Buscher so powerfully demonstrates is that by 1953, American leaders viewed the war criminals as a political question they wanted to resolve as quickly and quietly as possible. For German views on the subject I relied on Jörg Friedrich, Norbert Frei, Anna and Richard Merrit, Thomas Schwartz, Jeffrey Herf, and Verene Botzenhart-Viehe.

My real education on the German side of these questions began in the summer of 1995, when I was hired as a historical advisor for a Chronos Films documentary entitled *Nuremberg: A Courtroom Drama* with German historian Jörg Friedrich under the direction of Spiegel Television's Michael Kloft. Not only did we watch all the American and Soviet footage of the trials, but Kloft interviewed everyone from Telford Taylor to Markus Wolf to Louise Jodl. I was able to interview Nuremberg's most successful defense attorney, Otto Kranzbühler, in the summer of 1996. After representing Admiral Doenitz, Alfried Krupp, and many other prominent defendants at Nuremberg, Kranzbühler advised Chancellor Adenauer on the war crimes question throughout the 1950s. He proudly described how he engineered both the early releases of Germany's most notorious war criminals and the official West German nonrecognition of the legal validity of the original sentences. Friedrich and I carefully examined the treaties restoring German sovereignty in the early 1950s and found the final and official German expression of illegitimacy in paragraphs 6.11 and 7 of the Paris Treaty on the Termination of the Status of Occupation of 1952. Buried in the paragraph regarding war criminals, just as Kranzbühler had told us, is a confusing caveat. In it the West German government, in a roundabout way, refused to accept the legal validity of not only the Nuremberg trials but all of the Allied war crimes trials.

I returned to the National Archives in College Park, Maryland in 1997 and, thanks to the help of archivist Martin McCaan, found the secret correspondence between the State Department legal advisors and the American members of the various war crimes parole boards. This new material demonstrates how American leaders caved in to official West

German pressure to release war criminals and as a result cast a shadow of doubt over the legal legitimacy of those trials in Germany. Many argue that however misguided the war crimes clemencies were, they did not detract from "the lessons of Nuremberg." I reject this view. In 1958, a parole board composed of Germans and Americans released the final four war criminals. Three of the four men had been members of the *Einsatzgruppen*, sentenced to death by an American tribunal at Nuremberg in 1948.

American clemency board member Spencer Phenix wrote State Department Assistant Legal Advisor John Raymond a telling memo on the eve of the decision: "I can answer all your questions and between us we can reach substantial agreement on what can and should be done to get this bothersome problem quietly out of the way where it will no longer complicate international relations." Because the question of war crimes clemency was usually linked to German rearmament, it created the impression that the United States was trading war criminals for German rearmament.

Did America fail to punish convicted German war criminals due to a lack of resolve? Or were there more serious internal problems with the Nuremberg approach to war crimes adjudication? It is my contention that a number of international political factors combined to force American and Allied authorities to abandon their controversial war crimes policy. In the United States, many scholars continue to point to the Allied war crimes trials, especially Nuremberg's IMT, as the centerpiece of a successful reeducation effort. The American flight from the radical and punitive policies of the occupation period coincided with the release and social reinstitution of prominent war criminals like Alfried Krupp and Ernst von Weizsäcker. This sent a powerful message to the West German body politic. The question was further confused when President Eisenhower asked West Germany to rearm under the EDC Treaty in the early 1950s. The abrupt and often contradictory shifts in American foreign policy reopened the question of Nuremberg's legitimacy in West Germany. Finally, we are left with two Nuremberg myths: the American myth of the redemptive trial and the German myth of the victor's justice.