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The Nuremberg Trials: A Postmodern Justification of Natural Law

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To understand the magnitude of the Nuremberg Trials it is necessary to provide a brief background of the Holocaust and crimes that took place. By 1933, when Hitler gained power, Jews were encouraged to leave Germany and by 1938 many of the larger Jewish communities were no more. The Jews who had chosen to stay were ridiculed and abused – only to become targets for Nazi propaganda. The declaration of war in 1939 resulted in the annexation of Poland whereupon Polish Jews were forced to live in ghettos with little access to food and other necessities. Those who were fit enough to survive the meager conditions were forced to work in labor camps. Nearly 30,000 Jews had perished in 1941 from street massacres and work camps, while another 20,000 died from starvation in the ghettos (Chippendale 35).

A new policy was enacted in June of 1941 with the invasion of Russia to destroy entire communities of Jews. An elite military unit known as the Waffen SS created special groups of soldiers, *Einsatzgruppen*, or “special killing forces” whose job was to “eliminate as many Jews as possible in the hundreds of small towns and villages throughout the conquered territories on the Eastern Front” (Chippendale 35). Their plan of attack was to line up and shoot as many Jews as they could, but this soon proved to be inefficient. Second to Hitler in the Nazi hierarchy was Hermann Göring, who commissioned the SS to “submit [...] promptly an overall plan showing the preliminary organizational, substantive and financial measures for the execution of the intended final solution of the Jewish question” (Chippendale 37). In 1942, a new system of transporting Jews in trucks and pumping poisonous gas into the trucks proved more efficient. Of those who were not gassed in trucks, many suffered the same fateful end via the gas chamber upon arriving at various concentration camps. Those who were fit to work

were not killed immediately but sentenced to work grueling jobs under horrific conditions. By the end of World War II more than one third of the worldwide Jewish population, nearly six million men, women, and children, had been murdered by the Nazis.

“The enormity of the crimes committed by the Germans in their attempt to render Europe *Judenfrei* (cleansed of Jews) is beyond the ability or the willingness of ethical people to accept” (Rice 10). Consequently, the results of the Holocaust left victims desperate for justice. The Nazis, under Hitler’s rule, had committed mass killings and torturous experiments, had enslaved and forced labor upon individuals, ultimately leaving Europe in a state of complete disarray. Representatives of the United States, Great Britain, France, and the Soviet Union decided to bring to trial the most notable Nazi war criminals. The charges ranged from conspiracy to crimes against peace, to war crimes, and perhaps most well known – crimes against humanity. The trial began on November 20, 1945, and lasted ten months. On the second day of the trial, Justice Robert H. Jackson of the United States opened for the prosecution saying, “[...] 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 has ever paid to Reason” (Chippendale 42). Throughout the trial, evidence was never hard to pinpoint and the revealed crimes against humanity as noted were the “murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated” (Peress 107). Furthermore, it was maintained that crimes against humanity “fell within the province of international law if they were committed in preparation for or in connection with international war such as aggressive war and War Crimes. This restriction was so as to not infringe in the domestic affairs of a sovereign state merely on the grounds that it was offending against humanitarian principles”

(Calvocoressi 57-8).

The defense's claim was to emphasize that they were only following orders and should therefore not be charged with the associated crimes. More specifically, three claims were laid out for the defense: "1. Hitler and others were to blame for everything. 2. The men on trial had no knowledge of the crimes that were committed. 3. The laws by which they were being tried were *ex post facto*, or established after the fact. (In other words, the Germans had broken no laws because the laws did not exist until after their actions came to light.)" (Chippendale 45). Yet based upon the court's ultimate decision, the defense was unable to win their case. Thus it was decided that there exists a moral obligation to reject orders that constitute a crime against humanity (Chippendale 62). Additionally, it was deemed "neither manly nor true" that one person, Hitler, was responsible for the acts committed. Thousands of men laid witness who had access to Hitler and often had the ability to control the information on which he based his policy and orders. While many Nazis escaped trial, ten of the defendants were sentenced to hanging, seven were given prison sentences, and three were acquitted. Prosecutor Whitney R. Harris said of the trials, "For the first time in history, the judicial process was brought to bear against those who had offended the conscience of humanity by committing the acts of military aggression and related crimes." "[...] Crimes against humanity and initiating and waging of aggressive war are now judicial concepts" (Chippendale 46). The Nuremberg Trials represented the first time that crimes against humanity were established in positive international law. Since the Nuremberg trials aimed at attaining justice for crimes against humanity, I will show that they were justified in their hearings. Because there is a higher order of law that all nations should adhere to, the trials were legitimate secondary to a defiance of natural law.

It is necessary to provide an outline for the basis of natural law as divine law in addition to international law before correlating the application of the Nuremberg Trials. While it need not always be the case, natural law is often grounded in religious beliefs. It is the law of the universe, the overarching backdrop to every action made in the

cosmos, and the standard against which all national laws are judged. The universality of natural law provides the basis for something that is "right" or "wrong" regardless of country or legal system. There exist three types of law: *jus naturale*, *jus gentium*, and *jus civile*. *Jus naturale*, as has been explained, is the natural law – existing by nature to all animals. *Jus gentium* is the law applied to strangers, and *jus civile* is the law applied to citizens of a particular place. It is necessary to declare a distinction between *jus gentium* and *jus civile* because not all laws apply to citizens everywhere in the same fashion. Because of this, laws must be enacted to keep the peace between strangers and citizens. Natural law ultimately applies to all men. *Jus naturale* is something God himself cannot change once it has been established. For philosophers who don't feel comfortable with founding legal theory in God, they may contest that reason is an innate faculty like our physical senses. In other words, the foundation for *jus naturale* could reside in a sense of reason existing within humans instead of through God. Theists would argue that natural law is promulgated in our consciences by God, while atheists would argue that we identify natural law through reason.

To demonstrate an understanding of natural law practice, let us examine the traditions and theory of St. Thomas Aquinas. Allow us to assume that Aquinas is correct in his notion that God grants within us a conscience with which we are to promulgate the law. Aquinas holds that a law is an ordering of reason. This makes sense within his framework because reason comes from God, who established the divine or natural law. Therefore, we are to align ourselves according to the divine law by using our God-given conscience to order God's law into applicable rules for our lives. Laws must be for the common good because they are for the entire community. Reason would not have us make a law that only benefited certain groups just as God did not make the world only hospitable to certain humans, animals, plants, etc. The "end" of a law is to bring a "good" to the community in its entirety whether it be peace, order, etc. The law must be made public by the caretakers. This follows from Aquinas's proclamation that God, the caretaker of the universe, promulgated his law to humans through conscience. Without such

announcement, a law cannot be a law, for its purpose is to bring good to a community. How can it bring good if it is not known? Aquinas would say that it could not. (Bubacz)

An abhorrent of divine-natural law theory is Grotius, who founded a law superior to all nations – thus establishing a communal standard outside of a religious belief. Grotius defined natural law as stemming from reason, which cannot be changed by God himself, rather than from divine order. The overarching principles of Grotius’s ideas present themselves in the order of international relations. His ideas aim to bring nations together, uniting everyone with the same responsibilities for behavior. Even if one is hesitant to associate God as the deliverer of natural law, s/he can still see the Nuremberg Trials as just in that natural law was disobeyed. (Bubacz)

Those who would tend to reject the justification of the Nuremberg Trials would likely ground their reasoning in a rejection of natural law. Why might one reject natural law theory? One of the central difficulties with natural law is that it surrounds the question “who is the law giver?” This of course would have to be God, the only being that supersedes all else. A problem automatically arises if one does not feel comfortable rooting a legal theory in God. Another problem of natural law is “how” (assuming its existence) it is to be identified. If there is no God, seeking an answer to this question becomes very difficult.

One philosopher who does not believe in God is Thomas Hobbes. Hobbes’s theory is rooted in long-term self-preservation. He would argue that the Nazis were aiming to preserve themselves; they were the sovereigns, the power. Because they have no concept of “wrong” or “humanitarian laws,” Hobbes would argue that there is no point to a trial. A trial is senseless because there is no law, no “right,” no “wrong.” If the sovereign ultimately wants the Nazi war criminals dead, then the sovereign should kill them. If the sovereign wants to have a trial, a trial can be enacted for appealing purposes, but there is no basis for this. A Hobbesian would argue that the Nazis didn’t violate any laws in the first place because no laws exist other than the laws dictated by the sovereign who is incapable of committing any crime. Because the Nazis lost their

role as sovereign by losing the war, a new sovereign is introduced who then provides the standard for a new set of “laws” (Kemerling 1).

Utilitarians like John Stuart Mill and Jeremy Bentham are also opponents to natural law theory. These philosophers assume a consequentialist viewpoint, which places stress on the importance of weighing the consequences of actions based on the utility of those actions, utility here is related to some conception of what makes those actions useful and/or valuable to undertake. Essentially nothing is intrinsically right or wrong (right or wrong simply because of the intentions behind the act); rightness and wrongness must be based on the sum effect of actions. Also, the foundation of morality, therefore, is utility: actions are right that tend to promote happiness (pleasure and absence of pain), wrong if they tend toward the opposite (unhappiness – pain and the privation of pleasure). Pleasure and freedom of pain are the only things desirable as ends; they are intrinsically good. In regards to the assessment of overall well-being, Bentham argues that utilitarianism deals with quantitative assessment of pain and pleasure. We need to employ a “hedonistic calculus” when making ethical assessments of well-being. Mill, on the other hand notes that there exists qualitative differences of which we ought to take account when making ethical assessments of well-being. To say that Mill and Bentham would be in support of the crimes committed in the Holocaust is unfair; however, the creed they are suggesting we follow would justify the actions of the Nazis. (Bubacz)

All of these opponents, Hobbes, Mill, and Bentham, are relativists. They believe in ends, which ultimately define their morality and which lead to immorality because there is nothing intrinsically good or evil; it begs the question, how does this meet my personal end? If no act is good in and of itself, if it is only good as an instrument to a means, then the act has no intrinsic value. This way of thought leads to relativism because it is impossible to predict the future or accurately define the good for another person or oneself; human beings are not omniscient. This leads to a picking and choosing of potential outcomes one wishes to examine. A morally valid act for one person has the ability to become a morally

invalid act for another person, yet both cannot be correct. Because there is no standard by which to judge these acts, the examination and the moral validity or invalidity becomes relative. The problem with moral relativism is that relativists can't accuse others of wrongdoing, just as they can't complain about evil. They can't demand justice and fairness and they cannot promote the obligation of tolerance (Relativism para. 5).

In response to these rejections, it seems odd that positivists (those most likely to object to natural law) do in fact object to overriding moral principles. Generally speaking, positivists claim to found their morality in scientific observations of human behavior. Morality is just a convention – we say things are right and wrong based upon the ends. It seems strange that they would fail to notice that all of nature is governed by superseding laws that place restrictions on all activity in the universe. Why should human behavior be any different?

Despite the existence of alternative theories to natural law, as presented by Hobbes, Mill, and Bentham, such theories do not override the elements presented in natural law theory. As natural law pertains to the Nuremberg Trials, its theory commits an international basis of moral law. Natural law is objective in that it provides a standard to work with – the ends don't justify the means. No one is asked to predict the future, read minds, or do anything humanly incapable to determine the moral status of an action. Acts are based on principle, not utility. The Nazis defied these principles, and were thus punished for the crimes they wrongfully committed. Reasons for the existence of punishment are vast – to change people, to express society's dissatisfaction of particular behavior, to set aside wrongdoing individuals from others, etc. The punishment fared by the Nazis was likely a result of all of the above reasons; it was necessary to hold the trials in order to solidify a sense of nationalism and unity. The trials also functioned to display a public, outward sense of discordance by the governments of sundry nations.

The trials were able to give rise to many changes in regards to international law. Crimes against humanity have since been deemed a part of *jus cogens* – “the highest standing in international legal norms [...] [constituting] a non-derogable rule of international law” (Peress

108). This association requires committers of such acts to be subject to universal jurisdiction, in that each state may exercise jurisdiction regardless of where the crime was committed. It is interesting to note that everyone is held to the same expectation – no sovereign is allowed to escape these parameters. Peress writes, “[...] no one is immune from prosecution for such crimes, even a head of state” (108). The definition of a crime against humanity has since been updated since the time of the trials to include forms of torture that have more recently plagued humanity, such as rape and forced pregnancy. New legislation has since been created to identify differences between crimes against humanity, and genocide. Crimes against humanity “do not require an intent to ‘destroy in whole or in part,’ [...] but only target a given group and carry out a policy of ‘widespread or systematic’ violations” (Peress 108). Crimes against humanity are also distinguishable in that they may be committed in times of war or times of peace.

To recapitulate my thesis (as an argument for the justification of the Nuremberg trials in response to actions that defied natural law) the necessary groundwork and interpretations both outlining and opposing the stance have been made. My interpretation of natural law answers the deficiencies found in the other theories presented. Natural law provides condemnation for acts that were lawfully committed. To say that the Nazis' acts were justified because there weren't any prohibitive laws in Germany is not only unacceptable but screams of immorality: an immorality that led to the massacre of nearly an entire population. Such moral justification is deplorable. I must on these principles reject any relative claim to morality. The Nuremberg Trials clearly depict the error in accepting positivist claims about morality and they provide clear foresight into the sanctioned acts of such governments. Unfortunately, it took a grievous, extreme situation like the Holocaust to demonstrate the flawed nature of positivist claims. Their claims naturally lead to a slippery slope situation where the concepts of the right and wrong are continually put at variance with selfish motives. Those motives find justification within the premise of utility. I hope that this occurrence never repeats itself in history; however, our false idea of tolerance leads

to the illusion of distance between ourselves and other human beings. This distance leads to extreme immorality and we as humans have to ask ourselves – is this the type of world in which we want to live? I will choose to accept as my creed beliefs that value life in and of itself.

Are human beings not capable of empathy? When I see the photos of Holocaust victims in pages upon pages of these books I cannot help but feel that there has to be something more than the pursuit of our ends. To ignore this is to strip ourselves of being human. This intuition tells me that there is some commonality amongst human beings. I feel a person's pain when I see these photos and to deny those feelings would be to distance myself from morality. I find it hard to believe that someone could examine these photographs of walking, living, breathing skeletons, of babies piled in heaps and women and children waiting in line for the gas chambers and not be moved to tears. This is how we know that something binds us together as human beings. There is a reason why I feel for these people; an indefinable relationship exists. While the events of the Holocaust occurred long before my lifetime, I still suffer when I see depictions of the horrific event. In his final assessment of the trials, Henry Stimson writes in his essay "Nuremberg: Landmark in Law,"

We must never forget that under modern conditions of life, science and technology, all war has become greatly brutalized, and that no one who joins in it, even in self-defense can escape becoming also in a measure brutalized. [...] A standard has been raised to which Americans, at least, must repair, for it is only as this standard is accepted, supported and enforced that we can move onward to a world of law and peace (Marrus 244-5).

The more I research and come to learn, the less I distance myself from the events that took place. This is beyond convention. I feel that these actions were wrong in and of themselves without regard to their ends, which implies that there is more to morality than strict utility. There are absolute connections that bind us to each other, and with those connections come law(s) that can't be violated.

Bibliography

- Bubacz, Bruce. Lecture. University of Missouri-Kansas City, Kansas City, MO. March 2009.
- Calvocoressi, Peter. *Nuremberg, the Facts, the Law and the Consequences*. New York: The Macmillan Company, 1948.
- Chippendale, Neil. *Crimes Against Humanity*. Ed. Austin Sarat. Philadelphia: Chelsea House, 2001.
- Goldensohn, Leon. *The Nuremberg Interviews: An American Psychiatrist's Conversations with the Defendants and Witnesses*. Ed. Robert Gellately. New York: Random House, 2004.
- Kemerling, Garth. "Utilitarianism." 21 Feb. 2002. *Philosophy Pages*. 17 Nov. 2008 <<http://www.philosophypages.com/hy/5q.htm>>.
- Marrus, Michael R. *The Nuremberg War Crimes Trial 1945-46: A Documentary History*. New York: Bedford Books, 1997.
- Peress, Gilles. *Crimes of War: What the Public Should Know*. Eds. Roy Gutman, David Rieff and Kenneth Anderson. New York: W.W. Norton & Co., 1999.
- "Relativism's Fatal Flaws". *What is Moral Relativism? Stand to Reason*. 17 Nov. 2008 <<http://www.scribd.com/doc/966666/what-is-moral-relativism>>.
- Rice, Earle. *Nazi War Criminals*. San Diego: Lucent Books, 1998.
- Tusa, Ann, and John Tusa. *The Nuremberg Trial*. New York: Cooper Square, 1983.