THE AMERICAN CENTURY THEATER PRESENTS

JUDGMENT AT NUREMBERG

WRITTEN BY: ABBY MANN

AUDIENCE GUIDE

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Theater you can afford to see—
plays you can't afford to miss!

About The American Century Theater

The American Century Theater was founded in 1994. We are a professional company dedicated to presenting great, important, but overlooked American plays of the twentieth century . . . what Henry Luce called "the American Century."

The company's mission is one of rediscovery, enlightenment, and perspective, not nostalgia or preservation. Americans must not lose the extraordinary vision and wisdom of past playwrights, nor can we afford to surrender our moorings to our shared cultural heritage.

Our mission is also driven by a conviction that communities need theater, and theater needs audiences. To those ends, this company is committed to producing plays that challenge and move all Americans, of all ages, origins and points of view. In particular, we strive to create theatrical experiences that entire families can watch, enjoy, and discuss long afterward.

These audience guides are part of our effort to enhance the appreciation of these works, so rich in history, content, and grist for debate.

The American Century Theater is a 501(c)(3) professional nonprofit theater company dedicated to producing significant 20th Century American plays and musicals at risk of being forgotten.

This program is supported in part by Arlington County through the Arlington Commission for the Arts and Arlington Cultural Affairs, a division of Arlington Economic Development; the Virginia Commission for the Arts; the National Endowment for the Arts; the Arlington Community Foundation; and many generous donors.

The American Century Theater thanks the Arlington Community Foundation for its generous grant permitting increased community outreach and education around our production of Judgment at Nuremberg, *including pre- and post-show discussions conducted by community leaders and this expanded* Audience Guide.

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A Commentary on the Justice Case

—Doug Linder

No one contends, of course, that German judges and prosecutors destroyed as many lives as did the SS, Gestapo, or other agencies of the Nazi machine. Their victims number in the thousands, not the millions. A judge who knowingly sentenced even one innocent Jew or Pole to death was, however, guilty in the eyes of the prosecutors and judges at the Justice Trial in Nuremberg. There would be no "only a couple of atrocities" defense.

Ingo Müller, in *Hitler's Justice: The Courts of the Third Reich*, provides a penetrating picture of the workings of the criminal justice system in Nazi Germany. Müller's analysis of the evidence suggests that most German judges—contrary to common opinion—were ultraconservative nationalists who were largely sympathetic to Nazi goals. The "Nazification" of German law occurred with the willing and enthusiastic help of judges rather than over their principled objections.

Many judges appointed before the Nazi rise to power—because of the economic and social circles from which the judges were drawn—had views that were quite compatible with the Nazi party. A few Jewish judges sat on the bench when the Nazis assumed power—but only a very few. A 1933 law removed those few Jewish judges from office.

Only a handful of the non-Jewish judges demonstrated real courage in the face of Nazi persecution and violations of civil liberties. One who did was Lothar Kreyssig, a county court judge who issued injunctions against sending hospital patients to extermination camps. When ordered to withdraw his injunctions, Kreyssig refused. He also attempted to initiate a prosecution of Nazis for their role in the program. Kreyssig, under pressure, eventually resigned.

In the Justice trial, American prosecutors sought to demonstrate a pattern of judicial and prosecutorial support for Nazi programs of persecution, sterilization, extermination, and other gross violations of human rights. In order to prove an individual defendant guilty, prosecutors had to show that the defendant consciously furthered these human rights abuses.

The violations of human rights progressively worsened as the Nazis solidified power and began their wars of aggression. In 1938, laws were adopted that imposed different levels of punishment for the same crime—a tougher punishment for Jews, a lighter one for other Germans. By 1940, sterilization programs were underway. By 1942, the "Final Solution," the wholesale extermination of Jews and other persons deemed undesirable, was in full swing.

Two features of German law combined to facilitate the Nazi's evil schemes. The first was that German law, unlike the law of the United States and many other nations, lacked "higher law"

(constitutional or ethical standards) that might be resorted to by judges to avoid the harsh effects of discriminatory laws adopted by the Nazi regime. The second difficulty was that there was no separation of powers between the executive and judicial branches of government. Hitler declared, and the Reichstag agreed, the power "to intervene in any case." This was done, legally, through what was called "an extraordinary appeal for nullification of sentence." The nullification invariably resulted in a sentence the Nazis thought was too light being replaced by a more severe sentence, often death. If these features of German law weren't enough, the Nazis also assigned a member of the Security Service to each judge to funnel secret information about the judges back to Hitler and his henchmen.

The excerpt from the decision of the tribunal [pp 12–20 of this *Audience Guide*] includes the judgments for two of the Justice trial defendants, Franz Schlegelberger and Oswald Rothaug. In the movie *Judgment at Nuremberg*, Burt Lancaster played the role of a German judge (Ernst Janning) that was based loosely on the prosecution of Schlegelberger.

Schlegelberger is the more sympathetic of the two defendants. He served in the Ministry of Justice from 1931 to 1942. For the last seventeen months of his service, Schlegelberger was Director of the Ministry of Justice. He wrote several books on the law and was called, at the time of his retirement, "the last of the German jurists." Schlegelberger argued in his defense that he was bound to follow the orders of Hitler, the "Supreme Judge" of Germany, but that he did so only reluctantly. Schlegelberger pointed out that he did not join the Nazis until 1938, and then only because he was ordered to do so by Hitler. Schlegelberger claimed to have harbored no ill-will toward the Jews. His personal physician, in fact, was Jewish. In his defense, he also stressed that he resisted the proposal that sent "half Jews" to concentration camps. Schlegelberger suggested giving half Jews a choice between sterilization and evacuation. He also argued that he continued to serve as long as he did because "if I had resigned, a worse man would have taken by place." Indeed, once Schlegelberger did resign, brutality increased.

In its decision, the Justice trial tribunal considered what it called Schlegelberger's "hesitant injustices." The tribunal concluded that Schlegelberger "loathed the evil that he did" and that his real love was for the "life of the intellect, the work of the scholar." In the end, he resigned because "the cruelties of the system were too much for him." Despite its obvious sympathy with Schlegelberger's plight, the tribunal found him guilty. It pointed out that the decision of a man of his stature to remain in office lent credibilty to the Nazi regime. Moreover, Schlegelberger signed his name to orders that, in the tribunal's judgment, constituted crimes. One case described in the decision involved the prosecution in 1941 of a Jew (Luftgas) accused of "hoarding eggs." Schlegelberger gave Luftgas a two-and-a-half-year sentence, but then Hitler indicated that he wanted the convicted man executed. Although Schlegelberger may well have protested, he signed his name to the order that led to the execution of Luftgas. Another case cited by the tribunal concerned a remission-of-sentence order signed by Schlegelberger. Schlegelberger explained in his decision that the sentence imposed against a police officer who was convicted of beating a Jewish milking hand would have been bad for the morale of officers.

Although Schlegelberger received a life sentence in Nuremberg, he was released from prison in 1951 and received a generous monthly pension until his death.

The tribunal found "no mitigating circumstances" in the case of Oswald Rothaug. In its decision, the tribunal calls Rothaug "a sadistic and evil man." Rothaug, unlike Schlegelberger, had no reservations about enthusiastically supporting the Nazi pattern of human rights abuses. One case used by the tribunal to illustrate Rothaug's guilt involved a sixty-eight-year-old Leo Katzenberger, head of the Nuremberg Jewish community. Katzenberger stood accused of violating Article 2 of the Law for the Protection of German Blood. The law forbid sexual intercourse between Jews and other German nationals. Katzenberger was accused of having sexual intercouse with a nineteen-year-old German photographer, Seillor. Both Katzenberger and Seillor denied the charge. Katzenberger described the relationship between the two of them as "fatherly." The most incriminating evidence the prosecution produced was that Seillor was seen sitting on Katzenberger's lap. That, in Rothaug's view, was enough: "It is sufficient for me that the swine said that a German girl sat upon his lap!" Rothaug arranged to have Katzenberger's trial transferred to a special court. In the special court, high-ranking Nazi officials—in uniform—took the stand to express their opinions that Katzenberger was guilty. Rothaug's real trick, however, was getting Katzenberger's punishment increased from life in prison (the normal punishment for violations of Article 2) to death. This he did by a creative construction of a law that prescribed death for breaking certain laws "to take advantage of the war effort." Rothaug argued that death was the appropriate punishment for Katzenberger because he exploited the lights-out situation provided by air raid precautions to develop his "romance" with Seillor.

Most German judges over-identified with the Nazi regime. They came to see themselves as fighters on the internal battlefront, with the responsibility to punish "the enemy within."

Richard A. Posner, federal court of appeals judge and one of the most astute observers of the legal scene, noted that it is not only German judges that might over-identify with popular causes. In *The New Republic*, Posner wrote:

> *Perhaps in the fullness of time, the growing of marijuana plants, the "manipulation" of financial markets, the bribery of foreign government officials, the facilitating of the suicide by the terminally ill, and the violation of arcane regulations governing the financing of political campaigns will come to be no more appropriate objects of criminal punishment than "dishonoring the race." Perhaps not; but [the story of the German judges] can in any event help us to see that judges should not be eager enlisters in popular movements of the day, or allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions.*

The Playwright: Abby Mann (1927–2009)

—Jack Marshall

Abby Mann was born Abraham Goodman in Philadelphia on December 1, 1927, the son of a Russian-Jewish immigrant, and grew up in a blue-collar, factory neighborhood where he said he always felt like an outsider.

He dabbled at playwriting as a student at Temple University and New York University. While serving a three-year hitch in the Army, he began writing scripts for television and became one of the most successful pioneers of TV's Golden Age (along with Rod Serling, Reginald Rose, and Paddy Chayefsky), with his teleplays performed live on *Lux Video Theatre*, *Playhouse 90*, *Studio One*, and many others. During this period, he became obsessed with the postwar Nuremberg trials that sought punishment for the surviving leaders of the Nazi regime for their "crimes against humanity." He proposed a live dramatization of the lesser-publicized final segment of the trials, which held the Nazi judges to account for the racist laws they executed. He met with much resistance. "A lot of people didn't want it done," he commented in a 1994 interview. "People wanted to sweep the issue under the rug."

Indeed. As explained in the award-winning documentary *Imaginary Witness*, Hollywood was initially reluctant to directly condemn Nazi anti-Semitism, and it wasn't until years after the war ended that American filmmakers began offering a realistic, graphic depiction of Hitler's "final solution."

Few films made use of the horrible footage of the concentration camps filmed by Allied troops. Part of the reason was community guilt that Hollywood, and its largely Jewish management, had been uninvolved in the issue for so long, but the main motive, as it always is in Tinseltown, was money. Nobody thought the American public wanted to see the real horrors of Auschwitz and the rest, especially in the afterglow of the Allied victory.

Once Mann got *Judgment at Nuremberg* produced on TV, his objective was to make it into a film, and perhaps a Broadway play. First, however, he had to get the show on TV.
Mann had travelled to Germany and interviewed judges, witnesses, and victims of the Nazi "justice system." He was influenced by the McCarthy hearings and concluded that the true story of how Nazism corrupted the laws and destroyed freedom of speech, thought, and association would be a bracing reminder to Americans about what they risked in their harsh response to the threat of Communism. In an interview with the *New York Post* in 1961, Mann said he sought to examine how patriotism like that motivating the German judges can become an "evil thing" that "divides man from humanity." (He did not, apparently, see the ironic side of the trials, still controversial today: Did they not also punish political beliefs? Anything can be declared a "crime against humanity" by the victors.)

On April 15, 1959, *Judgment at Nuremberg* made it to *Playhouse 90*, in an acclaimed live broadcast starring Melvyn Douglas, Claude Rains, Paul Lukas, and, as the German defense attorney, a young newcomer named Maximilian Schell.

So well-received was the TV production that Mann was certain he could turn it into his first film screenplay and movie, but again, he met with resistance. It was only when Spencer Tracy read the script and recruited his friend (and habitual director of films with social and ethical messages) Stanley Kramer to produce and direct it that United Artists took a deep breath and accepted the project.

Thanks to the activism of Tracy, Mann's script was performed by a stellar cast of legends past, present, and future: Tracy, Marlene Dietrich, Judy Garland, Montgomery Clift, Richard Widmark, Burt Lancaster, William Shatner, and others. Most of all, the film had a luminous Schell, reprising his TV role as Rolfe. The movie *Judgment* received eleven Oscar nominations, including Best Picture, and acting nominations for Schell, Tracy, Garland, and Clift. But Schell and Mann (for his screenplay) were the only winners.

"I believe that a writer worth his salt at all has an obligation not only to entertain but to comment on the world in which he lives, not only to comment, but maybe have a shot at reshaping the world," Mann said when he accepted his Oscar. Later, he wrote that his greatest honor was the telegram he received from Tracy, reading, "All I can say is that if the lights go out now, I still win. Please do not forget that it was a great honor to say those words. Love, Spence."

Mann continued writing screenplays, usually with social issues at their core. *A Child Is Waiting* (starring Lancaster and Garland) explored the plight of mentally disabled children. He returned to the Nazis and their persecution of the Jews in *Ship of Fools*, another Academy Award–nominated film with an all-star cast including Oskar Werner, George Segal, Elizabeth Ashley, Vivien Leigh, Simone Signoret, José Ferrer, Michael Dunn, and Lee Marvin. And *Report to the Commissioner* (featuring Michael Moriarty) about police corruption. Mann's reputation for integrity was legendary. When Paramount wanted to cast his screenplay, *A Child Is Waiting*, with actors who had no disability, Mr. Mann objected. He emptied his bank account and bought back the script. United Artists put out the movie, cast as Mann demanded, in 1963.

Increasingly, Mann found the film studios' reluctance to explore controversial subjects frustrating, so he returned to television—where he found even more reluctance to delve into difficult subject matter. He had been warned: when *Judgment at Nuremberg* aired, a sponsor, American Gas, forced him to remove all references to "gas" from the script, although the word was rather relevant to the story of the Holocaust.

Mann had sufficient name recognition and influence to occasionally shake the TV moguls from their torpor. His scripts, often derived from real cases, frequently delivered powerful critiques of the criminal justice system, examining the denial of the rights of the accused. One of these made

Mann rich: *The Marcus-Nelson Murders* (1973) was based in part on a nonfiction book by Selwyn Raab about the brutal killings of two young, white, Manhattan women, Janice Wylie and Emily Hoffert. The black man who was accused of those killings and made a forced confession was later exonerated when the real killer was found. Mr. Mann's script focused on the prejudice faced by poor and minority suspects. He also hit the jackpot, because his script for *The Marcus-Nelson Murders* introduced a maverick New York police detective named Theo Kojak. The film, starring Telly Savalas, was spun off into the long-running TV series *Kojak*.

While cashing his checks and writing made-for-TV films starring Savalas, Mann also wrote and directed the Emmy-nominated miniseries *King*, a biography of Martin Luther King, Jr. Mann also wrote *Skag* (1980), which became a short-run series for Karl Malden; *Murderers Among Us: The Simon Wiesenthal Story*" (1989); *Teamster Boss: The Jackie Presser Story* (1992); *Sinatra* (1992); and *Indictment: The McMartin Trial* (1995), which won him another Emmy.

Still, he still burned to see *Judgment at Nuremberg* on Broadway and still met resistance there, as Broadway was well-immersed in the infantilization and theme-park trends that have largely removed challenging and serious fare from its stages. Then he was contacted by actor Tony Randall, who had launched the National Actors Theatre, a New York version of The American Century Theater, dedicated to producing the shows Broadway ought to be doing, but wasn't. It took more than forty years, but on March 26, 2001, *Judgment at Nuremberg,* with Schell playing the defendant Janning this time, finally made it to Broadway, where it received a limited run, excellent reviews, and, Mann believed, an even more positive response than the film had. The production was certainly well-timed: Bosnia's Slobodan Milosevic's trial for war crimes would convene in 2002.

After the Broadway run, Mann wrote a non-Kojak teleplay and some more Kojak films and broke out Telly's lollypops for a short-lived reboot of the series in 2005. That was it. For half a century, Abby Mann had written some of the highest quality television the small screen has ever generated and won a lot of awards.

His crowning achievement, however, was *Judgment at Nuremberg*, in all of its forms. There was never any doubt about that.

Andersonville's Legacy: The History of War Crimes Trials

The precedent for a nation or international court trying an individual in a court of law for war crimes was scant when the Nuremberg trials convened. In fact, it was one case, and an American

one: Confederate Captain Henry Wirz was the first person ever to be executed in the United States for war crimes, following his trial before a military tribunal in 1865. A native of Switzerland, Wirz was found guilty and executed in the fall of 1865 for crimes committed against the Union POWs in the Andersonville prison camp during the last years of the Civil War.

It is not a strong precedent, and in fact embodies perfectly the troubling double standards and hypocrisies that haunt all war crimes trials. Wirz was a weak man and not a kind one, but it is hard to see how he could have stopped the malnutrition and starvation at the Andersonville, Georgia, prison camp while food was so scarce for Confederate armies in the field. We now know that the conditions at the camp were pre-ordained when Lincoln and Grant decided to suspend prisoner exchanges late in the war. Wirz was not even the commanding officer but had the bad luck to survive his superior, who ordered him to adopt Draconian measures to maintain order in the camp.

It is also undeniable that the Union prison camp at Elmira, New York, featured treatment of Confederate prisoners that was little better—and by some reports, worse, though it is hard to see how that would even be possible—than what occurred under Wirz's watch at Andersonville.

Nonetheless, Wirz was convicted (and hung on what is now the site of the United States Supreme Court, and the trial set the precedent for and was cited in the trials following both World War I and World War II. The Andersonville trial, for better or worse, established that "I was simply following orders" is no longer acceptable as a defense when "crimes against humanity" are committed by soldiers. Who defines what such a crime is?

Why, the winners, of course.

Here is a synopsis of the unintended consequences of the U.S. Army trying to respond to public outrage over the horrible photographs of Andersonville survivors.

War Crime Trials since 1945

Today, international war crimes tribunals are courts of law established to try those accused of committing atrocities and crimes against humanity in wartime, including genocide, torture, and rape.

Since 1945, several tribunals have been held. Some, like the Yugoslavia tribunal, have proceeded under United Nations authority. Others, such as the Nuremberg trials of 1945, were held under the authority of the Allied forces after World War II.

The aim of a tribunal is to offer victims an opportunity to confront the accused and allow the accused an opportunity to explain his or her actions in front of victims, their families, and the media. The ultimate goals are to achieve justice, promote peace building, encourage reconciliation, and begin healing.

In 1998, the International Criminal Court (ICC) in The Hague was established as the first ever permanent, treaty-based international criminal court. It was created, through a treaty signed by 120 countries, to address war crimes and other international crimes.

The ICC is designed to complement existing national judicial systems, although it can also exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute such crimes. It also aims to eliminate the need for tribunals such as those established for Yugoslavia and Rwanda.

The United States, Israel, the People's Republic of China, Iraq, Qatar, Libya, and Yemen all opposed the treaty. Experts say it will be several more years before the court is able to try cases.

The Nuremberg Trials

The International Military Tribunal in Nuremberg was convened in November 1945 and lasted until August 1946. Twenty-four major war criminals and six criminal organizations were indicted for conspiracy to commit crimes against peace; planning, initiating, and waging wars of aggression; war crimes; and crimes against humanity. Those indicted included Adolf Hitler's cabinet, the leadership of the Nazi party, the SS police, the Gestapo, the SA, and the General Staff and High Command of the army. Verdicts were announced September 30 and October 1, 1946, resulting in three acquittals, twelve sentences to death by hanging, and seven sentences to life imprisonment or to lesser terms. The sentences of death were carried out on the morning of October 16, 1946.

The Tokyo War Crimes Trials

The Tokyo War Crimes Trials took place from May 3, 1946 to November 12, 1948. The International Military Tribunal for the Far East (IMTFE) in Tokyo presided over the court and all Japanese "Class A" war criminals were charged. The prosecution team comprised justices from eleven Allied nations: Australia, Canada, China, France, Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, and the United States.

The two-year trial resulted in many prison sentences. Other war criminals were tried in the respective victim countries, and more than 900 people ultimately faced execution.

International Criminal Tribunal for Yugoslavia

The Bosnian war in the early 1990s saw ethnic cleansing, genocide, and other crimes against humanity. In May 1993, the United Nations Security Council established the International Criminal Tribunal for Yugoslavia (ICTY) to try those responsible for violations of international humanitarian law in the territory of the former Yugoslavia since 1991. The Tribunal's stated goal is to bring justice to victims of the conflict and deter future leaders from committing similar atrocities. The ICTY has also begun to take on cases from the Kosovo crisis of the late 1990s.

The highest-profile figure indicted by the Tribunal was former Serbian president Slobodan Milosevic. Indicted in 1999, he was brought to The Hague to stand trial in 2001. Milosevic died of a heart attack in March 2006 while in custody. Only fifty hours of testimony remained in his case.

The ICTY is the United Nations' first special tribunal and widely credited with helping to redefine how justice is achieved in war crimes cases. It has also come under intense scrutiny. Critics charge that it is a political tool rather than an impartial judicial institution.

International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda was created in 1994 to prosecute those responsible for genocide and other serious crimes in Rwanda during the ethnic conflicts of 1994. The Tribunal is also prepared to try individual Rwandans who committed genocide and other crimes in neighboring states. As of June 2006, the ICTR had convicted twenty-five people. This is a United Nations tribunal, with an international panel of judges picked from a list submitted by the Security Council and then elected by the United Nations General Assembly.

The Special Court for Sierra Leone

In 2002, the government of Sierra Leone and the United Nations established the Special Court for Sierra Leone. Trials began in June 2004. The Court is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law during armed conflicts in Sierra Leone from 1996 to 2002.

As a "hybrid" or mixed court based in the country where the atrocities occurred, as opposed to being based in The Hague, the Special Court is said to represent a new type of justice system.

Currently, eleven people associated with all three of the country's former warring factions stand indicted by the Special Court. They are charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. Specifically, the charges include murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on United Nations peacekeepers and humanitarian workers, among others.

Some Ethical Issues to Ponder While Considering *Judgment at Nuremberg*

—Jack Marshall, President of ProEthics, Ltd.

The many ethical issues, as well and the moral and legal ones, raised by the Nuremberg trials have been the topic of continuing debate since before the trials were complete. It would be hopeless, as well as unfair to the significance of both the trials and the issues, to try to cover them here. However, ethics—the ongoing human inquiry into what is right and what is wrong—is at the heart of both the historical event itself and Abby Mann's drama. This brief overview is designed to begin discussion and research about some of the many ethical issues that surface in the play.

1. Should the trials have been held at all?

Many, before and after, believe they should not have been. The military especially found the idea of declaring an enemy criminal for acts during wartime offensive, threatening, and hypocritical. Mann raises the issue near the end of the play, when General Merrin challenges the prosecutor, Colonel Parker. "Why not put Truman on trial for dropping the bomb?" he asks. "Or," he might have asked, " . . . try Churchill for bombing Dresden?" Having ethical rules and limits for an inherently unethical, indeed, anti-ethical activity like warfare is almost certain to cross into hypocrisy when it is the winners judging the losers.

The sole legal precedent for the trials was the ethically dubious post–Civil War military trial of the Confederate commander in charge of the Andersonville prison camp, Henry Wirz. In Saul Levitt's fictionalized play about the trial, the defendant Wirz rails at his military prosecutors and judges, asking how they dared condemn him for following orders, when they would have probably followed the same orders in his place. Similarly, the judges who had to pass judgment on their German counterparts never were in the position of having to enforce a law they felt was unjust, knowing that to refuse might mean not just loss of position, but death.

In ethical terms, the Nuremberg trials raise an ethical conflict, where some ethics principles must yield to others. On one level, the trials were demonstrably unfair and violated basic principles of justice. I think they were motivated by some unethical goals, such as revenge, and the world's need for a cathartic show trial in the wake of a cataclysm. Still, the argument is strong that when something so horrific as the "Final Solution" occurs, throwing the world into a near collapse of basic morality and even humanity, something as extraordinary as the war itself was essential to make the clear statement that such treatment of human beings is intolerable, and demand accountability, even at the risk of creating standards that those sitting in judgment either cannot or will not be held to themselves.

2. Was the trial a "kangaroo court"?

This question was raised in a recent op-ed by *Washington Post* writer Michael Gerson, who equated it with Holocaust denial. Gerson knows his history, but I think that comparison is clearly wrong. To use the *Wikipedia* definition, "A kangaroo court is often held by a group or a community to give the appearance of a fair and just trial, even though the verdict has in reality already been decided before the trial has begun." I think that describes most war crime trials, and certainly the first and second parts of the Nuremberg trials, accurately. Can anyone honestly suggest that there was any way, any way at all, that the court would find the German high command and Hitler's henchmen did *not* engage in crimes against humanity? Did anyone doubt it, or question that the purpose of having the trials at all was to condemn these men before the world as being responsible for the deaths of millions?

"Kangaroo court" suggests something crooked, perhaps, so it is not the best way to describe the trials. "Show trials" is better, though that is pejorative, too. Again, I would say, as I teach, that no ethics rules or principles apply 100 percent of the time, and the Nuremberg trials, like the

unprecedented events and acts that produced them, were *sui generis*—ethically justified, but unconventional, and perhaps not fit precedent for future situations.

3. Did the trials violate the jurisprudential objections to *ex post facto* laws?

I think the answer to this is clearly yes. This problem was addressed for future war crimes trials by the creation of various international treaties and agreements codifying war crimes, but this was done after World War II. The judicial defendants at Nuremberg were not violating any known law by following the laws of the Third Reich, and the laws that they were being accused of violating in their own trial did not exist when their alleged violations occurred.

The court addresses this problem is its opinion, but not persuasively or well. It is the ultimate bootstrap argument, supported with rationalizations rather than legal principle. There are three (you can read that part of the opinion in this *Audience Guide).* One is that international law is by nature reactive and evolutionary and is exempt from the prohibition against *ex post facto* laws. But international laws involve voluntary submission to international authority to resolve disputes, not criminal prosecutions with lives in the balance. The second argument is pure rationalization, that the Nazi judges had no problem sentencing Germans and Jews using *ex post facto* laws, so they could hardly complain.

Wow. So the court's standard for fair and just trials was defined by the past conduct of the same judges being tried for unethical and unconscionable enforcement of the laws? It is embarrassing logic. Almost as embarrassing is the third argument that the accused judges had to realize that a day of reckoning would come, that what they were doing was monstrous and wrong. Suspecting that some authority might try to punish you for what you are doing is not the same as having a specific law you are willfully violating.

4. Was it unfair for the prosecution to have been permitted to show the death camp films in the courtroom?

Defense attorney Rolfe is quite correct: The films were inherently prejudicial. In a jury trial, such a film would never be permitted to be brought into evidence. Yet it was the very unimaginable, unprecedented cruelty and horror of the crimes at issue that was at the core of the trials themselves. Yes, they stirred emotions; yes, they were prejudicial; yes, they made acquittal all but impossible. Still, the bar for "crimes against humanity" is a high one, and only these films could make that case. As we have seen since, there are still those today who use the mind-numbing extent of the atrocities as the means to deny them. The films are a decisive rebuttal.

5. If Rolfe hates doing it so much, why does he attempt to prove that the Feldenstein case was correctly decided?

The legal ethics answer is that he is zealously representing his clients and doing what he feels he must, even though he personally found the case, and the judge on trial for presiding over it, revolting. Lawyers often have to defend positions and clients they find morally and ethically

indefensible, and it can require them to adopt repugnant tactics. That is ethical lawyering, not unethical.

My dramaturgical answer is "I can't imagine why." The case was infamous; it requires Rolfe to badger a sympathetic client; the case itself was a symbol of how unjust the Nazi laws and the courts were, and it was a local case. In the actual trials, the case was raised by the prosecutor as part of the evidence against one of the judges on trial. To me, it doesn't make sense as a legal strategy for the defense.

6. Rolfe's final desperate arguments are rationalizations.

His defense of Janning is that "it could have been worse." The defendant Janning took measures to mitigate some of the damage being done by the laws he was following. Nonetheless, they were unjust laws, and his actions showed that he knew it.

Janning felt that he could do more within the system than outside of it, but because he was within an evil system, he could not deny his role in perpetrating evil. Moreover, that characterization of Janning's motives places him in the best possible light. One could also argue, as the prosecution did, that Janning simply lacked the courage to do what other German judges did, to leave the bench so as not to give what was occurring the imprimatur of his participation in it.

Rolfe also makes the familiar argument—we hear a similar one all the time, regarding the punishment of steroid-users in baseball, for example—that it is unfair to focus all of the punishment on the judges, when the crimes of the Nazi regime had so many allies, enablers, and passive observers worldwide. The rationalization is that if you can't punish everyone who is guilty, it is unfair to punish any of the guilty. This is perverse, because it posits that the larger a wrong is and the more culpable parties there are, the less accountability there can be.

Excerpts from the Decision in U.S.A. v. Alstoetter et al (The Justice Cases)

War Crimes and Crimes against Humanity

We next approach the problem of the construction of C.C. Law 10, for whatever the scope of international common law may be, the power to enforce it in this case is defined and limited by the terms of the jurisdictional act.

The first penal provision of Control Council Law No. 10 with which we are concerned is as follows:

"Article II, l.—Each of the following acts is recognized as a crime: . . . (b) War crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs

of war, including but not limited to, murder, ill treatment or deportation to slave labor or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

The scope of inquiry as to war crimes is, of course, limited by the provisions, properly construed, of the Charter and C.C. Law 10. In this particular, the two enactments are in substantial harmony. Both indicate by inclusion and exclusion the intent that the term "war crime" shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals. It will be observed that Article VI of the Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and "ill treatment or deportation to slave labor, or for any other purpose, of civilian population of, or in, occupied territory". C.C. Law 10, supra, employs similar language. It reads:

". . . ill treatment or deportation to slave labor or for any other purpose of civilian population from occupied territory".

… Article VI of the Charter defines crimes against humanity, as follows:

". . . murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, 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."

C.C. Law 10 defines as criminal:

". . . Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other acts committed against any civilian population, or persecutions on political, racial or religious groups whether or not in violation of the domestic laws of the country where perpetrated."

…Again, persecutions on racial, religious, or political grounds are within our jurisdiction "whether or not in violation of the domestic laws of the country where perpetrated". We have already demonstrated that C.C. Law 10 is specifically directed to the punishment of German criminals. It is, therefore, clear that the intent of the statute on crimes against humanity is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit: Germany. The intent was to provide that compliance with German law should be no defense. Article III of C.C. Law 10 clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish…

… It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual.

It is significant that the enactment employs the words "against any civilian population" instead of "against any civilian individual". The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government…

The Ex Post Facto Principle

…Whatever view may be held as to the nature and source of our authority under C.C. Law 10 and under common international law, the ex post facto rule, properly understood, constitutes no legal nor moral barrier to prosecution in this case.

Under written constitutions the ex post facto rule condemns statutes which define as criminal, acts committed before the law was passed, but the ex post facto rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth . . . .

… As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C.C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the States at war with Germany.

The Law in Action

We pass now from the forgoing incomplete summary of Nazi legislation to a consideration of the law in action, and of the influence of the "Fuehrer principle" as it affected the officials of the Ministry of Justice, prosecutor, and judges. Two basic principles controlled conduct within the Ministry of Justice. The first concerned the absolute power of Hitler in person or by delegated authority to enact, enforce, and adjudicate law. The second concerned the incontestability of such law….

The conclusion to be drawn from the evidence, presented by the defendants themselves is clear: In German legal theory Hitler's law was a shield to those who acted under it, but before a Tribunal authorized to enforce international law, Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of nations….

The assumption by Hitler of supreme governmental power in all departments did not represent a new development based on the emergency of war. The declaration of the Reichstag was only an echo of Hitler's declaration of 13 July 1934. After the mass murders of that date (the Roehm purge) which were committed by Hitler's express orders, he said:

"Whenever someone reproaches me with not having used ordinary court for their sentencing, I can only say: 'In this hour I am responsible for the fate of the German nation and hence the supreme law lord of the German people'."

The conception of Hitler as the Supreme Judge was supported by the defendant Rothenberger. We quote:

"However, something entirely different has occurred; with the Fuehrer a man has risen within the German people who awakens the oldest, long forgotten times. Here is a man who in his position represents the ideal of the judge in its perfect sense, and the German people elected him for their judge—first of all, of course, as 'judge' over their fate in general, but also as 'supreme magistrate and judge'."

In the same document the defendant Rothenberger expounded the National Socialist theory of judicial independence. He said:

"In order to guarantee this, a direct liaison officer without any intermediate agency must be established between the Fuehrer and the German judge, that is, also in the form of a judge, the supreme judge in Germany, the 'Judge of the Fuehrer'. He is to convey to the German judge the will of the Fuehrer by authentic explanation of the laws and regulations. At the same time he must upon the request of the judge give binding information in current trials concerning fundamental political, economic, or legal problems which cannot be surveyed by the individual judge."

Thus it becomes clear that the Nazi theory of the judicial independence was based upon the supreme independence of the Fuehrer, which was to be channelized through the proposed liaison officer from Fuehrer to judge.

…The evidence demonstrates that Hitler and his top-ranking associates were by no means content with the issuance of general directives for the guidance of the judicial process. They tenaciously insisted upon the right to interfere in individual criminal sentences.

…The Ministry of Justice was acutely conscious of the interference by Hitler in the administration of criminal law. On 10 March 1941, Schlegelberger wrote to Reich Minister Lammers in part as follows:

"It has come to my knowledge that just recently a number of sentences passed have roused the strong disapproval of the Fuehrer. I do not know exactly which sentences are concerned, but I have ascertained for myself that now and then sentences are pronounced, which are quite untenable. In such cases I shall act with the utmost energy and decision. It is, however, of vital importance for justice and its standing in the Reich, that the head of the Ministry of Justice should know to which sentences the Fuehrer objects, ..."

On the same date Schlegelberger wrote to Hitler in part as follows:

"In the course of the verdicts pronounced daily there are still judgments which do not entirely comply with the necessary requirements. In such cases I will take the necessary steps . . . . Apart from this it is desirable to educate the judges more and more to a correct way of thinking, conscious of the national destiny. For this purpose it would be invaluable, if you, my Fuehrer, could let me know if a verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of this responsibility and are firmly resolved to discharge their duties accordingly. Heil, my Fuehrer!"

…Although Hilter's personal intervention in criminal cases was a matter of common occurrence, his chief control over the judiciary was exercised by the delegation of his power to the Reich Minister of Justice, who, on 20 August 1942, was expressly authorized "to deviate from any existing law".

…As an illustration of the type of guidance which was furnished by the Ministry of Justice to the German judiciary, we cite a few instances:

A letter to the judges of 1 October 1942 discusses a case decided in a district court on 24 November 1941. A special coffee ration had been distributed to the population of a certain town. A number of Jews applied for the coffee ration but did not receive it, being "excluded from the distribution per se". The food authorities imposed fines upon the Jews for making the unsuccessful application. In 500 cases the Jews appealed to the court and the judge informed the food authorities that the imposition of a fine could not be upheld for legal reasons, one of which was the statute of limitations. In deciding favorably to the Jews, the court wrote a lengthy opinion stating that the interpretation on the part of the food authorities was absolutely incompatible with the established facts. We quote, without comment, the discussion of the Reich Minister of Justice concerning the manner in which the case was decided:

"The ruling of the district court, in form and content matter, borders on embarrassing a German administrative authority to the advantage of Jewry. The judge should have asked himself the question: What is the reaction of the Jew to this 20-page long ruling, which certifies that he and the 500 other Jews are right and that he won over a German authority, and does not devote one word to the reaction of our own people to this insolent and arrogant conduct of the Jews. Even if the judge was convinced that the food office had arrived at a wrong judgment of the legal position, and if he could not make up his mind to wait with his decision until the question, if necessary, was clarified by the higher authorities, he should have chosen a form for his ruling

which under any circumstances avoided harming the prestige of the food office and thus putting the Jew expressly in the right toward it."

…

It will be recalled that on 26 April 1942 Hitler stated that he would remove from office "those judges who evidently do not understand the demand of the hour." The effect of this pronouncement upon such judges as still retained ideals of judicial independence can scarcely be over-estimated. The defendant Rothenberger stated that it was "absolutely crushing".

…The threat alone of the removal was sufficient to impair the independence of the judges, but the evidence discloses that measures were actually carried out for the removal or transfer of judges who proved unsatisfactory from the Party standpoint…

The final degradation of the judiciary is disclosed in a secret communication by Ministerial Director Letz of the Reich Ministry of Justice to Dr. Vollmer, also a Ministerial Director in the Department. Not only were the judges "guided" and at times coerced; they wore also spied upon. We quote:

"Moreover, I know from documents, which the Minister produces from time to time out of his private files, that the Security Service takes up special problems of the administration of justice with thoroughness and makes summarized situation reports about them. As far as I am informed, a member of the Security Service is attached to each judicial authority. This member is obliged to give information under the seal of secrecy. This procedure is secret and the person who gives the information is not named. In this way we get, so to say, anonymous reports. Reasons given for this procedure are of State political interest. As long as the direct interests of the State security are concerned, nothing can be said against it, especially in wartime."

In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office. If the evidence cited supra does not demonstrate the utter destruction of judicial independence and impartiality, then we "never writ nor no man ever" proved. The function of the Nazi courts was judicial only in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner.

In operation the Nazi system forced the judges into one of two categories. In the first we find the judges who still retained ideals of judicial independence and who administered justice with a measure of impartiality and moderation. Judgments which they rendered were act aside by the employment of the nullity plan and the extraordinary objection. The defendants they sentenced were frequently transferred to the Gestapo on completion of prison terms and were then shot or sent to concentration camps. The judges themselves were threatened and criticized and

sometimes removed from office. To this group the defendant Ouhorst belonged. In the other category were the judges who with fanatical zeal enforced the will of the Party with such severity that they experienced no difficulties and little interference from Party officials….

Racial Persecution

The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offense charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are: (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime….

We turn to the national pattern or plan for racial extermination.

Fundamentally, the program was one for the actual extermination of Jews and Poles, either by means of killing or by confinement in concentration camps, which merely made death slower and more painful. But lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich. We have already noted the decree by which Jews were excluded from the legal profession. Intermarriage between Jews and persons of German blood was prohibited. Sexual intercourse between Jews and German nationals was punished with extreme severity by the courts. By other decrees Jews were almost completely expelled from public service, from educational institutions, and from many business enterprises. Upon the death of a Jew his property was confiscated… Poles and Jews convicted of specific crimes were subjected to different types of punishment from that imposed upon Germans who had committed the same crimes. Their rights as defendants in court were severely circumscribed. Courts were empowered to impose death sentences on Poles and Jews even where such punishment was not prescribed by law, if the evidence showed "particularly objectionable motives". And, finally, the police were given carte

blanche to punish all "criminal" acts committed by Jews without any employment of the judicial process. From the great mass of evidence we can only cite a few illustrations of the character and operation of the program.

As a crowning example of fanatical imbecility, we cite the following document issued in April 1943, which was sent to the desk of the defendant Rothenberger for his attention and was initialed by him.

> "The Reich Minister of Justice
> "Information for the Fuehrer
> 1943 No.
>
> "After the birth of her child, a full-blooded Jewess sold her mother's milk to a pediatrician and concealed that she was a Jewess. With this milk babies of German blood were fed in a nursing home for children. The accused will be charged with deception. The buyers of the milk have suffered damage, for mother's milk from a Jewess cannot be regarded as food for German children. The impudent behavior of the accused is an insult as well. Relevant charges, however, have not been applied for so that the parents, who are unaware of the true facts, need not subsequently be worried…."
>
> …While the part played by the Ministry of Justice in the extermination of Poles and Jews was small compared to the mass extermination of millions by the SS and Gestapo in concentration camps, nevertheless the courts contributed greatly to the "final solution" of the problem. From a secret report from the office of the Reich Minister of Justice to the judges and prosecutors, including the defendant Lautz, it appears that 189 persons were sentenced under the law for the protection of German blood and honor in 1941, and 109 in 1942. In the year 1942, 61,836 persons were convicted under the law against Poles and Jews. This figure includes persons convicted in the incorporated Eastern territories, and also convictions for crimes committed in "other districts of the German Reich by Jews and Poles who on 1 September 1939 had their residence or permanent place of abode in territory of the former Polish State". These figures, of course, do not include any cases in which Jews were convicted of other crimes in which the law of 4 December 1943 was not involved.
>
> The defendants contend that they were unaware of the atrocities committed by the Gestapo and in concentration camps. This contention is subject to serious question. Dr. Behl testified that he considered it impossible that anyone, particularly in Berlin, should have been ignorant of the brutalities of the SS and the Gestapo. He said: "In Berlin it would have been hardly possible for anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice." He testified specifically that he could not imagine that any person in the Ministry of Justice or in the Party Chancellery or as a practicing attorney or a judge of a special (or) Peoples Court could be in ignorance of the facts of common knowledge

concerning the treatment of prisoners in concentration camps. It has been repeatedly urged by and in behalf of various defendants that they remained in the Ministry of Justice because they feared that if they should retire, control of the matters pertaining to the Ministry of Justice would be transferred to Himmler and the Gestapo. In short, they claim that they were withstanding the evil encroachments of Himmler upon the Justice Administration, and yet we are asked to believe that they were ignorant of the character of the forces which they say they were opposing…

A large proportion of all of the Jews in Germany were transported to the East. Millions of persons disappeared from Germany and the occupied territory without a trace. They were herded into concentration camps within and within [sic] Germany. Thousands of soldiers and members of the Gestapo and the SS must have been instrumental in the processes of deportation, torture, and extermination. The mere task of disposal of mountainous piles of corpses (evidence of which we have seen) became a serious problem and the subject of disagreement between the various organizations involved. The thousands of Germans who took part in the atrocities must have returned from time to time to their homes in the Reich. The atrocities were of a magnitude unprecedented in the history of the world. Are we to believe that no whisper reached the ears of the public or of those officials who were most concerned? Did the defendants think that the nationwide pogrom of November 1938, officially directed from Berlin, and Hitler's announcement to the Reichstag threatening the obliteration of the Jewish race in Europe were unrelated? …Therefore, they knew that Jews were to be punished by the police in Germany and in Bohemia and Moravia. They knew that the property of Jews was confiscated on death of the owner. They knew that the law against Poles and Jews had been extended to occupied territories and they knew that the Chief of the Security Police was the official authorized to determine whether or not Jewish property was subject to confiscation.… They listened to the radio. They received and sent directives. They heard and delivered lectures. This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands never.

The evidence conclusively establishes the adoption and application of systematic governmentally-organized and approved procedures amounting to atrocities and offenses of the kind made punishable by C.C. Law 10 and committed against "populations" and amounting to persecution on racial grounds. These procedures when carried out in occupied territory constituted war crimes and crimes against humanity. When enforced in the Alt Reich against German nationals they constituted crimes against humanity.

The Nuremberg Context from the Eyes of a Participant

—Henry T. King, Jr., prosecutor at the Nuremberg trials

"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."

— from Justice Jackson's Opening Statement before the International Military Tribunal

Address presented 17 November 1995 during "Nuremberg and the Rule of Law: A Fifty-Year Verdict," a conference co-sponsored by the Center for National Security Law, University of Virginia, The Center of Law, Ethics and National Security, Duke University School of Law, and The Center for Law and Military Operations, The Judge Advocate General's School, United States Army. The Conference was held in the Decker Auditorium, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, November 17–18, 1995.

How Did I Get There?

It is indeed a pleasure to be here. There is a certain joy in reliving this experience which was very important to me personally as well as to mankind as a whole. You can rest assured that everything that is said here is an eyewitness account based on my experience as a prosecutor—first, in the trial of the major Nazi war criminals where I worked on the case against the German General Staff and High Command, and then in the subsequent proceedings. This account also is based on my interviews with Herman Goering, Albert Speer, Fritz Sauckel, Wilhelm Keitel, and others in the Nazi hierarchy. In the past few years I have spoken at length with Speer's daughter, Hilde Schramm, and Hitler's secretary, Frau Traudl Junge.

To give you some background in this exercise, let me take you back to my young manhood days when my father was a public official and ran for elective office. In the community where we lived, Meriden, Connecticut, father ran for almost every office there was. Mostly he was elected, but not always. Each Sunday my family discussed the issues of the day around the dinner table. One Sunday night in 1935 my father asked the question: "How do you stop wars?" Neither I nor my sister nor my mother had the answer. My father, having raised the question, proceeded to give us the answer: "The people don't want wars. It's their leaders. To prevent wars you have to punish their leaders." That summer I had an appendectomy, and returned late to school, and therefore, I still was at our summer home in Branford, Connecticut, about noon one September Saturday when a news report came over the air from Nuremberg, Germany, transmitting Adolf Hitler's speech at the Nazi Party rally at Nuremberg. The speech totally commanded my attention. I did not understand the German, but as Hitler began to raise his voice, it was apparent that the audience and Hitler became one. I have never heard anything like that before or since.

I went through Yale Law School in two years instead of three. After graduation I began my career with the major New York law firm of Milbank, Tweed & Hope. It was a good experience and excellent training, but there seemed to be something lacking. My wife encouraged me to seek out a human experience that we could share together. I was not able to understand at just that moment what she meant, but I was soon to find out. Meanwhile, after two years at the large firm I decided to go with a smaller firm in an important capacity. From small fish, big puddle, I was going to be a big, big fish in a small puddle, and I wanted to share this victory with a very competitive classmate of mine from Yale Law School. So I invited him over to the house for dinner. My wife, Betty, cooked a delicious roast pork dinner, and I announced my surprise and waited for the applause. "Henry," my classmate said, "I hate to upstage you, but I am joining the United States Prosecution staff at Nuremberg." I did not go to bed that night; my wife wouldn't let me. I hit the trail for Washington, D.C., very early the following morning, and that afternoon, I landed on the steps of the Pentagon and was interviewed for a position at Nuremberg.

Emphatically supported by my wife, I left no stone unturned until I was en route to Nuremberg. But Nuremberg involved considerable risk taking. There were those who told me not to go because I would lose my place in line for success in the traditional practice of law. I disregarded these naysayers and stuck with my decision. This proved to be the best decision I made in my whole life, because I became an individual at Nuremberg, and it gave my life a sense of meaning and purpose.

What It Was Like When I Got There

On my arrival at Bremerhaven in March 1946, I saw a Germany which had been devastated by modern weaponry. The effects were so destructive that I resolved to do my part to never let it happen again. Civilization as I had known it had disappeared. People lived in cellars and in the ruins of bombed-out buildings. Food was in short supply.

Many of the people were in rags. We took a train on a bitterly cold rainy March night from Bremerhaven to Nuremberg. We arrived at the Nuremberg Bahnhof (railroad station) at 4:30 a.m. in a blinding rainstorm. We were billeted at the Grant Hotel right across from the Bahnhof. This was where Adolf Hitler and his top subordinates had stayed and played a few years before. We arrived on a Friday and started work in the courthouse the following day, walking to the courthouse through a devastation wrought by the Allied bombing. As we did, we were faced with a continual reminder of the meaning of our mission.

At Nuremberg, I worked on the closing phase of the General Staff and High Command case. We sought to convict them as a group, but the court found that they were not a cohesive group, although what they did had the ring of criminality. As a result, we took steps to try them individually.

I was given three cases: (1) against Walther von Brauchitsch, Commander in Chief of the German Army; (2) against Heinz Guderian, the father of modern tank warfare and the Chief of

Staff of the German Army; and (3) against former Field Marshall Erhard Milch, who actually led the German air armada in the Battle of Britain.

I prepared the cases against all three, but von Brauchitsch was handed over to the British for trial and sentenced to a long prison term. Guderian was to be transferred to the Polish for trial. But after we were committed to the transfer, we got into a fight with the Poles; Guderian got as far as Berlin, and was stopped there and never turned over to the Poles—and he was subsequently released. He later participated in a Neo-Nazi movement in north central Germany.

The Milch case which I prepared started in December 1946 and was decided in April 1947. Milch was tried for his participation in the Nazi slave labor program and for his role in the human experiments program. He was found guilty on the slave labor counts and sentenced on April 16, 1947, to life imprisonment in Rebdorf Prison outside of Munich, but in early 1951 his life sentence was reduced by John McCloy, High Commissioner for Germany, to fifteen years and he was released on parole after serving two-thirds of this sentence in mid-1955. As a matter of interest, Milch had appealed his sentence to the United States Supreme Court, but the Supreme Court refused in October 1947 to take jurisdiction, so his sentence remained intact until it was reduced.

I also worked on the Ministries case and the Justice case. [*NOTE:* This is the section on which the play focuses.]

One of the unique features of the Nuremberg proceedings was that much of the proof of guilt came from the Nazis' own files. The Germans were the greatest record keepers in history. For example, in preparing the slave labor phase of the case against Milch, we used the minutes of the Central Planning Board, of which he was a member. The Board governed Germany's war economy and was up to its eyeballs in the exploitation of slave labor. Documentation for the human experiments case was amply provided by the Luftwaffe files—because the experiments were conducted for Luftwaffe use at Dachau concentration camp. The problem in preparing these cases was proving the "chain of knowledge." It was very hard to establish that, for example, Milch, as de facto head of the Luftwaffe, knew what was going on in the way of human experiments at Dachau. As regards slave labor, we did have some very incriminating documents, because the slave labor problem was frequently discussed at meetings of the Central Planning Board of which Milch was an important member. We convicted Milch to a considerable extent with the voluminous minutes from the Nazis' own files.

What was the law which governed in the handling of these cases?

In the first case before the International Military Tribunal, it was the London Charter of August 8, 1945. In the subsequent proceedings, it was the Control Council Law Number 10. These two documents were basically similar with two exceptions which I shall mention.

Both defined crimes against peace as planning or waging of aggressive war. But Control Council Law Number 10 defined "crimes against peace" to include invasions as well as wars—thus providing a basis for charging the Austrian and Czechoslovak conquests as crimes against peace.

The second category of crimes was war crimes—violations of the laws and customs of war.

The third category of crimes was crimes against humanity—atrocities committed against civilian populations on racial, political, or religious grounds. The London Charter added the provision that "such crimes must be in execution of or in connection of any crime within the jurisdiction of the tribunal." Thus, these crimes under the London Charter could not stand on their own bottom. Control Council Law Number 10 removed this provision; therefore, we could take cognizance of atrocities perpetrated prior to the outbreak of the war.

Backup for the changes in the case of war crimes against humanity came from The Hague and Geneva Conventions of 1907 and 1928, respectively, and in the case of crimes against peace, from the Kellogg-Briand Peace Pact of 1928 which outlawed war as an instrument of national policy and various treaties that Germany had signed covering the peaceful resolution of disputes (i.e., the Locarno Treaties).

Under the London Charter and Control Council Law Number 10, superior orders was not a defense, although it could be considered in mitigation if the moral choice was not possible. The head of state of a country was not exempted from trial by virtue of his position. The court dismissed the ex post facto defense, which was directed at the novelty of the Nuremberg trial, on the ground that ex post facto is a principle of justice and not a limitation on sovereignty, and Albert Speer told me after he was released from prison that he felt that the Nuremberg trial was just, and that to allow the ex post fact defense with these defendants would create an injustice. The fact of the matter was in several cases they had legal opinions telling them what they were doing was wrong.

Witnesses—Who Were They? Some Examples

- Rudolph Hoess, Commandant of Auschwitz, testified that he was responsible for the killing of 2,500,000 persons at Auschwitz and that an additional 500,000 people died from disease at Auschwitz.
- Otto Ohlendorf, head of Einsatz Gruppe D, admitted directing the killing of 90,000 men, women, and children in Southern Russia. Ohlendorf was a lawyer.
- Friedrich von Paulus, who surrendered German armies at Stalingrad in February 1943, testified against his former military colleagues saying that they planned and initiated the aggressive war against the Soviet Union.

In the Milch case, Roland Ferrier and Paul le Friec, who were French slave laborers, described the horrendous conditions under which slave laborers lived and worked. They were unbelievable, and their testimony could have been multiplied by others by the thousands.

The foregoing were just a few—plus the defendants themselves.

Who Were the Defendants—and What Were They Like?

I talked with several of the defendants in the first case—Speer—Goering—Sauckel—Keitel. Speer impressed me deeply because he said, "I did it and I bear my share of responsibility." Milch refused to accept any responsibility. Goering still revered Hitler when I talked to him on September 28, 1946. Hess appeared to be "out of it," but in his closing statement said that he would support Hitler and Nazism again if the opportunity ever arose. Sauckel and Keitel were weak sisters—Sauckel was a whiner and Keitel an old toady to Hitler.

It may be of interest that four of the defendants were lawyers: Kaltenbrunner, the head of the Gestapo; Frank, a former head of the Bavarian Bar Association and Governor General of Poland; Frick, the Minister of Interior; and Seyss-Inquart, the Governor General of the Netherlands and former Nazi Chief in Austria. All four were found guilty and executed.

Who were the major defendants at Nuremberg? Well, it soon became apparent that there were two who were very, very important—super important. One was Herman Goering—because of his standing. He was the Reichs Marshall. A World War I hero, the successor to Baron von Richtofen, the Red Baron who had been head of the Richtofen squadron in World War I. Goering was a national hero, charismatic and sharp, razor sharp. Once he got off the dope and got rid of the painted toe nails and toga that he wore at times during the war, he was extremely acute, and the exchanges between Justice Robert Jackson, the Chief Prosecutor at Nuremberg, and Goering were intense and fascinating. Jackson had been a good appeals lawyer. His experience was not as a trial lawyer, and some felt that he had met his match in Goering. But these sharp exchanges should in no way diminish Jackson's greatness.

I last interviewed Goering on September 28, 1946. I had a detailed affidavit that I wanted him to sign, implicating his Deputy, Erhard Milch, in certain war crimes. I had tried to play him off his deputy by suggesting that Goering say some incriminating things about Milch. But he went through the affidavit like greased lightning, crossed out the punch lines and then said, "Here's your affidavit. I give it back to you now and also the paper clip—they think I might do something to myself with this paper clip." Well, he didn't need the paper clip because he killed himself just before his anticipated execution with a cyanide capsule which some think an American soldier named Tex Wheelis helped him to obtain.

The other super important defendant was Albert Speer who was closer to Adolf Hitler than anyone else. Hitler had everybody figured out in terms of their weaknesses and instinctively played one person against another. Hitler encouraged the rivalries: between Speer and Goering; between Bormann and Speer; Goebbels against Himmler; and Goebbels against Ribbentrop. Nobody ever felt secure. It became clear to me very soon after my arrival in Nuremberg that the window into Hitler's soul was Albert Speer, Hitler's closest personal associate. Together they devised architectural dreams to create a new and greater Berlin as a world capital. Hitler was a frustrated architect himself whose grandiose plans could now be realized through Speer's expertise. Speer was responsible for choreographing some of Hitler's charismatic performances at party rallies. Speer conceived of the cathedral of ice that involved searchlights playing against

the dark sky. During these rallies, the legions of Nazism paraded for three or four hours to Nazi marching songs, then the solitary figure of Adolf Hitler appeared at the outer end of the vast Nuremberg stadium and the spotlights tracked him as he walked up to the platform to begin his mesmerizing speeches to the Nazi audience. The panoply was Speer's creation.

The only person that I could see who really understood and influenced Hitler was Albert Speer, so I spent a lot of time with him, during which Speer told me that Hitler was a mesmerizer, depriving people of their will. I didn't need to be told that. Remember, I had heard Hitler on the radio back in 1935. Speer said Hitler took people's wills away from them and twisted them to his own purposes.

Speer also told me that he frequently took the 7 p.m. Wednesday night flight from Tempelhof to Hitler's retreat in the Obersalzberg. During the flight, Speer would rehearse his exchanges with Hitler. One example from the late stages of the war involved Bormann's plan to destroy all industrial installations in the occupied countries of Western Europe, including the Philips Glowlampwerks at Eindhoven in the Netherlands and the Renault works in Paris. Speer appealed to Hitler's ego by saying, "We're coming back, mein Fuhrer. You told us we would be. We are going to need those installations. You don't want to destroy them." So Hitler reversed his decision. Thus, Speer was a point of influence without parallel in Hitler's circle. Speer told me that Hitler had no friends, yet Hitler's secretary, Frau Traudl Junge, told me in December 1992 and November 1994 that Hitler regarded Speer as his friend. This was a special relationship unlike any other within Hitler's entourage.

What Was the Court Like?

Chief Justice Geoffrey Lawrence, who also was Chief Justice of the United Kingdom, had a sense of fairness in running the proceedings. He was even handed. He kept the Russian prosecutors under control. Albert Speer expressed to me tremendous respect for Lawrence as a judge.

The proceedings were simultaneously translated into French, English, German, and Russian. Wolf Frank was the chief translator from German to English. His translations were delicious—he had a great command of the English language. I used to go to the courtroom sometimes in the afternoon just to listen to him.

Where Was the Press?

The press was everywhere. They lived at Faber Schloss (castle). Every great newspaper person of the day was there. Radio coverage was very complete.

Who Were the Defense Counsel?

German lawyers were defense counsel. They were the leaders of the German Bar. Some, such as Friedrich Gergold, who represented Erhard Milch, were very good. He also defended Martin

Bormann in absentia in the first case. In Hitler's Germany, Gergold had defended Jehovah's Witnesses who had been persecuted. He was smart, hardworking—very able as was Hans Flachsner, Speer's counsel. The star defense counsel was Otto Kranzbühler who represented Grand Admiral Karl Donitz, the head of the Germany Navy. He procured an affidavit from United States Admiral Nimitz, which said that the United States had undertaken actions paralleling some of the allegedly criminal activities with which we were charging Donitz.

Overshadowing all of these individuals was Robert Jackson, who had the vision to create Nuremberg—he was the greatest appeals lawyer that the United States has ever produced. There would have been no Nuremberg without Robert Jackson. We on the staff worked on his closing statement and submitted drafts, but I later found that Jackson re-did it all himself. It was a masterpiece.

What Was the Social Context?

Tension was high at the courthouse all day. At night we danced and relaxed at the Grand Hotel to Koenig and his great orchestra—"Violetta" from *la Traviata* and "Wien, Wien, nur du allein" are pieces that I shall never forget because of their effect on me and the atmosphere which they created in my memory.

What Did It All Mean to Me?

I came home with a sense of mission to never let war on that scale happen again. I became an individual at Nuremberg. I knew who I was and what I stood for. I developed for myself a blueprint of the world as it should be, and putting this into effect has been my goal for the rest of my life.

It has always been my sincere conviction that lawyers because of their training can, and must, play a critical role in establishing a rule of law in the world. I believe that we lawyers have to do what we can to create a better world for future generations; we have been given a privilege by society to practice law, and in return we need to tithe a bit for society.

What we need to focus on is institution building. We need to develop new institutions to fill conspicuous gaps in our international context. For example, an international criminal court is long overdue, and we need to see that it becomes a fixture on the world scene. It is vital to put in place an international criminal court after which we can make improvements in it based on actual experience. As an alternative to endless debate over a totally comprehensive set of crimes, an international criminal court could be limited at the time of its establishment to jurisdiction over a restricted number of crimes on which there was general agreement. Then, as experience dictates, the court's jurisdiction could be expanded to other crimes. Or we could transform the current ad hoc war crimes Tribunal sitting at The Hague into a permanent Tribunal which would not be limited to jurisdiction over crimes in the former Yugoslavia and Rwanda.

We also must continue to wrestle with the problem of sovereignty. We need to face up to the fact that some limitations on sovereignty are necessary if we are to achieve a better and more secure

world. Pristine sovereignty is indeed an illusion in our current world, bound together as it is so tightly today by trade and communication. There is no talk of international wars today in Western Europe, the site of most of the wars in the nineteenth and twentieth centuries. This is because the European nations have under the European Community relinquished some sovereignty in order to maintain economic equilibrium and peace in their homelands.

And so we should learn from the lesson of today's Europe—that the price of peace is the transfer of some elements of national sovereignty to international institutions. These prerogatives can in turn provide the basis for international institutions to function. We cannot have it both ways. To achieve an enduring peace, we must give up sufficient sovereignty to enable international institutions to function and work on our behalf. As the largest and most important nation in the world, the United States must be willing to give international institutions sufficient power to work for us. Today, in the absence of a structure for an assured peace, we face—in a nutshell—international anarchy and endless future surprises such as the attack on Kuwait, the death and destruction, which is now a fact in the former Yugoslavia, and a replay in other countries of the atrocities in Rwanda.

So we are at the point of decision and the answer seems self-evident: Relinquish some national sovereignty for international goals.

Nuremberg was the start of an odyssey for me, and I am still seeking the golden fleece. Perhaps my life and experience are analogous to the world at large as we all seek to apply the lessons of Nuremberg. We are all still seeking to respond to, and we have not yet answered, my father's challenge that hot May summer night in 1935 when he asked the question, "How do we stop wars?"

We aren't there yet, but fifty years after Nuremberg, trials have started at The Hague to investigate war crimes in the former Yugoslavia. The Nuremberg principles are the basis for these trials. Let us work to assure that an international criminal court will become a fixture on the international landscape, in its present form or in a changed form as future experience dictates.

Nuremberg was a historical landmark in other respects as well. It marked the start of the international human rights movement because it was the first international adjudication of human rights. Its effect in this respect is felt throughout the world in the United Nations Genocide Convention, the United Nations Universal Bill of Rights, American Convention on Human Rights, and above all, the European Convention on Human Rights and Fundamental Freedoms.

Nuremberg principles governing the conduct of war are incorporated into all field manuals of the major powers, and the Nuremberg principles have been supplemented as needed by the 1949 Geneva Conventions Governing the Treatment of Prisoners of War and the Protection of Civilians in Wartime.

Nuremberg was the first postmortem analysis of a dictatorship. Through Nuremberg we learned the intimate details of the levers of power in a functioning dictatorship, and how to avoid a recurrence in the future.

Nuremberg held individuals responsible for violations of international law and, correspondingly, that individuals had international human rights not dependent on nation state recognition. This was a giant leap forward in the evolution of a civilized world.

I am an idealist—I make no bones about it. I believe we can have a better world where men and women of all nations and races can live in peace and security and with dignity. I believe that we have to fight for this new world, and I am willing to do my part. In truth, I have devoted my life to it.

As Edwin Dickinson, that great internationalist, said some years ago: "History teaches that without ideals there can be no progress, only change; you may never touch with your own hands the stars that guide you, but by following them, you will reach your destiny."

We have to keep our eyes on the stars. Let us all tithe a bit for future humanity in an endeavor to create a more secure world in which the rule of law prevails. This has been my life-long dream, and I have devoted most of my waking hours to it.

There is an old Andalusian song that is sung in flamenco taverns which runs as follows:

They say that a day
Has twenty-four hours.
If it had twenty-seven,
I would love you three hours more.

On a personal level, I would phrase it this way:

They say that a day
Has twenty-four hours.
If it had twenty-seven,
I would work for a more secure world
three hours more.

Transcribed by Charlene J. Peterson, 2004

The Nuremberg Courtroom

[From *The Holocaust Encyclopedia*, The Holocaust Museum Website, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007089. Article accessed May 20, 2014]

Why Nuremberg?

During the summer of 1945, SHAEF (Supreme Headquarters Allied Expeditionary Force) and its successor organization USFET (US Forces, European Theater) conducted a survey of possible locations for the International Military Tribunal (IMT). They concluded that Nuremberg should

be selected as the location. Despite the fact that more than three quarters of the city lay in rubble, Nuremberg contained the only undamaged facilities—the Palace of Justice—that were extensive enough to accommodate the trial.

After a tour of the city and the Palace of Justice, which contained twenty courtrooms and a prison capable of holding 1,200 prisoners, the American, British, French, and Russian delegations all recommended to their governments that Nuremberg be the site of the first IMT.

Major General I.T. Nikitchenko, the head of the Russian delegation who then served as the Russian judge during the IMT, agreed to this with the provision that Berlin was chosen as the seat of the tribunal. [Justice Robert H.] Jackson, head of the American delegation and Chief of Counsel for the United States during the IMT, agreed; however, he expected Berlin to be merely symbolic. On October 18, 1945, the tribunal's first official session took place in Berlin, where prosecutors delivered the indictments. The court then adjourned to Nuremberg.

Building the Courtroom While Building the Case

The primary focus of the Palace of Justice's reconstruction was that of the main courtroom, which was doubled in size to accommodate the needs of the trial. A wall was knocked down to double the size of the room and the ceiling was raised. A visitors gallery and a press gallery that held 250 members of the international press were also constructed. Also crucial was the installation of equipment, wiring, and cabling for the simultaneous translation system.

Translation in the Courtroom

The Nuremberg Trial was an early experiment in simultaneous translation. The Charter of the International Military Tribunal stated that the defendants had the right to a fair trial and that all proceedings be translated into a language that the defendants understood. Because of the trial's complexities, the subject matter, and the different languages spoken by the defense, prosecution, and the judges, it was decided to use a simultaneous translation system would work best.

IBM developed the translation system based upon the Filene-Finlay system and an earlier translation system they had developed and installed at the League of Nations in 1931. In this system, speeches were pre-translated and then read simultaneously in the various languages. This set-up, however, would not allow for the extemporaneous exchanges that generally occur during a trial. In Nuremberg, there were five channels in the translation system. The first channel contained the verbatim transmission of the speaker. The other channels were English, Russian, French, and German. Each participant in the trial had a set of headphones and could dial to whichever channel he/she preferred. There were six microphones placed in the courtroom, one for each judge, the witness stand, and the speaker's podium.

Three teams of interpreters worked under the direction of Colonel Leon Dostert and Commander Alfred Steer. Two teams would alternate shifts in the courtroom, while a third team sat in another room listening to the proceedings on standby. A fourth team of auxiliary translators was on hand for other languages such as Polish and Yiddish. Two other interpreters were on the bench behind the judges.

The trial could not proceed any faster than 60 words per minute—as fast as dictation speed, but this was four times as fast as consecutive translation, in which the speaker pauses frequently to allow translation to occur. A monitor operating a control switch in the interpreting section would flash a yellow light to notify the speaker if they were going too fast or a red light indicating that he should stop and repeat what he just said.

IBM provided the new technology free of charge for the trial, providing that the United States Government pay the cost of shipment and installation of the technology. Through the success of the system in Nuremberg, they were able to later sell the system to the United Nations.

The Real "Feldenstein Case"

The travesty of Nazi justice that becomes the focus of *Judgment at Nuremberg* is called the "Feldenstein Case" in the play, and its witness, and one of the case's victims, is called Maria Wallner. In fact, the case was a real one— known as the Katzenberger Case—and became symbolic of the sickness that had overcome German law during the Nazi regime.It was a particularly raw topic for the war crimes trials, because it was a local case, involving conduct that had occurred in the city of Nuremberg.

Leo Katzenberger, a successful businessman in the city who owned a wholesale shoe business and a number of stores throughout southern Germany, was a respected and influential figure in the Nuremberg Jewish community. Beginning in 1932, he rented an apartment and a small storefront in a building he owned to Irene Seiler, the daughter of a non-Jewish acquaintance.

In the spring of 1941, Katzenberger, who was seventy-six, and Seiler, who was thirty, were accused of having a sexual affair and arrested on charges of race defilement (Rassenschande). They both denied that there was any sexual element to their relationship and asserted that it was merely friendship more akin to father and daughter.

The judge who initially investigated the case was unable to confirm that sexual relations had occurred and delayed bringing the case to trial until March 1942. Following a sworn statement by Irene Seiler in which she also denied the charges, the case was brought before the Nuremberg

Special Court and presided over by the notorious Nazi judge Dr. Oswald Rothaug, later a defendant in the war crime trials. (In the play, his equivalent is "Emil Hahn.")

The trial was sensational, much promoted by the local press, and the court was crowded both days. It was nothing but a show trial, with the final verdict never in doubt. Rothaug, the judge, referred to Katzenberger several times as a "syphilitic Jew" and an "agent of world Jewry"—not what would be regarded as objective judicial behavior. The court convicted Katzenberger of race defilement and imposed the death penalty by applying not just the Law for the Protection of German Blood and German Honor, but also the Ordinance against Public Enemies (also called the Folk Pest Law) of 1939.

This law permitted the death penalty if the accused exploited wartime conditions to further his or her crime. The theory was that Katzenberger secretly visited Seiler "after dark," the darkness being enhanced by anti–air raid measures. From the Nuremberg war crime trial verdict against Rothaug:

The offense of racial pollution with which [Katzenberger] was charged comes under Article 2 of the Law for the Protection of German Blood and Honor. This section reads as follows:

> "Sexual intercourse (except in marriage) between Jews and German nationals of German or German related blood is forbidden."

The applicable sections of the Decree against Public Enemies reads as follows:

Section 2 "Crimes during Air Raids"

> "Whoever commits a crime or offense against the body, life, or property, taking advantage of air raid protection measures, is punishable by hard labor of up to fifteen (15) years or for life, and in particularly severe cases, punishable by death."

Section 4 "Exploitation of the State of War a Reason"

> "Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to fifteen (15) years or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable."

Leo Katzenberger was beheaded on June 2, 1942, at Stadelheim Prison in Munich. Irene Seiler was found guilty of perjury and sentenced to two years of hard labor.

Excerpts from the written decision of the court in the case are below. As can be seen, Katzenberger and Seiler were arrested, charged, and convicted on the basis of rumors, innuendo, and assumptions, rather than actual evidence. Their sworn statements were distorted by the court to incriminate them, and the verdict was written to meet a predetermined outcome of guilt. Of course, the law they were accused of violating was monstrous even had they been guilty.

The trial was a public exhibition designed to inflame anti-Semitic sentiments and to justify the persecution and extermination of Jews and other "enemies of the people." The verdict and opinion gives a particular vivid picture of the culture of Germany at the time.

Excerpts from the
Decision of the Nuremberg Special Court in the Katzenberger Race Defilement Case

Verdict:
In the Name of the German People

…Lehmann Israel Katzenberger for the offense of racial pollution as defined under Article 2, legally identical with an offense under Article 4 of the Decree against Public Enemies, is hereby sentenced to death and to loss of his civil rights for life according to Sections 32–34 of the Criminal (Penal) Code. Irene Seiler for the offense of committing perjury while a witness is hereby sentenced to two years of hard labor and to loss of her civil rights for the duration of that time.

The three months the defendant Seiler spent in arrest pending trial will be taken into consideration in her sentence. Costs will be charged to the defendants.

Findings:

1. The defendant Katzenberger is fully Jewish and a German national; he is a member of the Jewish religious community.

…The defendant himself has stated that he is certain that all four grandparents were members of the Jewish faith. He knew his grandmothers when they were alive, and both grandfathers were buried in Jewish cemeteries. Both his parents belonged to the Jewish religious community, as he does himself.

The court sees no reason to doubt the correctness of these statements, which are fully corroborated by the available extracts from exclusively Jewish registers. Should it be true that all four grandparents belonged to the Jewish faith, the grandparents would be regarded as fully Jewish . . . . The defendant therefore is fully Jewish in the sense of the Law for the Protection of German Blood and German Honor. His own admissions show that he himself shared that view.

2. Irene Seiler, née Scheffler, is a German citizen of German blood.

Her descent is proved by documents relating to all four grandparents. She herself, her parents, and all her grandparents belong to the Protestant Lutheran faith. This finding of the religious background is based on available birth and marriage certificates of the Scheffler family that were made part of the trial. As far as descent is concerned, therefore, there can be no doubt about Irene Seiler, née Scheffler, being of German blood.

The defendant Katzenberger was fully cognizant of the fact that Irene Seiler was of German blood and of German nationality.

3. The defendant Katzenberger is charged with having had continual extramarital sexual intercourse with Irene Seiler, née Scheffler, a German national of German blood.

He is said to have visited Seiler frequently in her apartment at 19 Spittlertorgraben up to March 1940, while Seiler visited him frequently, up to autumn 1938, in his offices in the rear of the building. Seiler, who is alleged to have gotten herself in a dependent position by accepting gifts of money from the defendant Katzenberger and by being allowed to delay in paying her rent, was sexually amenable to Katzenberger. Thus, their acquaintance is said to have become of a sexual nature, and, in particular, sexual intercourse occurred. They are both said to have exchanged kisses, sometimes in Seiler's flat and sometimes in Katzenberger's offices. Seiler is alleged to have often sat on Katzenberger's lap. On these occasions, Katzenberger, in order to achieve sexual satisfaction, is said to have caressed and patted Seiler on her thighs through her clothes, clinging closely to Seiler and resting his head on her bosom . . . .

The defendant Katzenberger is charged with having taken advantage of wartime conditions to commit this act of racial pollution. Lack of supervision was in his favor, especially as he is said to have visited Seiler during the blackout periods. Moreover, Seiler's husband had been called up, and consequently Katzenberger did not need to fear surprise appearances of her husbandthe defendant . . . . Irene Seiler is charged with having made deliberately untrue statements and affirmed under oath that this contact was without sexual motives and that she believed that to apply to Katzenberger as well. It is therefore alleged that Irene Seiler has become guilty of perjury . . . .

II.
The court has evaluated the excuses of defendant Katzenberger and the attempts of defendant Seiler to present her admissions as harmless as follows:

In 1932, when the defendant Seiler came to settle in Nuremberg, she was twenty-two years old, a fully grown and sexually mature young woman. According to her own statements, which are in this respect at least credible, she was not above engaging in sexual activities with her friends.

In Nuremberg, when she took over her sister's photography laboratory at 19 Spittlertorgraben, she entered the immediate sphere of the defendant Katzenberger. During their acquaintance, she gradually, over a period of almost ten years, became willing to exchange caresses and, according to the confessions of both defendants, situations arose that in no way could be regarded as the results of only fatherly affection. When she met Katzenberger in his offices in the rear building or in her flat, she often sat on his lap and, without a doubt, kissed his lips and cheeks. On these occasions Katzenberger, as he admitted himself, responded to these caresses by returning the kisses, putting his head on her bosom, and patting her thighs through her clothes.

Katzenberger's portrayal of the exchange of caresses—as the expression of fatherly feelings—and that of Seiler—as the tender caress to a child arising from the immediate situation—defy common sense. The subterfuge used by the defendant in this respect is, in the view of the court, simply a crude attempt to disguise his actions,

which have a strong sexual bias, as fatherly affection free of sexual lust. In view of the character of the two defendants and on the basis of the evidence submitted, the court is firmly convinced that sexual motives were the primary cause for the caresses exchanged by the two defendants.

Seiler was usually in financial difficulties. Katzenberger took the opportunity and availed himself of this fact to make her frequent gifts of money and repeatedly gave her sums from one to ten reichsmarks. In his capacity as administrator of the property on which Seiler lived and which was owned by the firm in which he was a partner, Katzenberger often allowed her long delays in paying her rental debts. He often gave Seiler cigarettes, flowers, and shoes.

The defendant Seiler admits that she was anxious to remain in Katzenberger's favor. They addressed each other in the second-person singular.

According to the facts established in the trial, the two defendants gave the impression to those in their immediate surroundings and, in particular, to the community of the house of 19 Spittlertorgraben that they were having an intimate love affair.

The witnesses Paul and Babette Kleylein, Johann Maesel, Johann Heilmann, and Georg Leibner frequently observed that Katzenberger and Seiler waved to each other when Seiler saw Katzenberger in his offices through one of the rear windows of her flat. The witnesses' attention was drawn particularly to the frequent visits paid by Seiler to Katzenberger's offices after business hours and on Sundays, as well as to the length of these visits. Everyone in the house eventually came to know that Seiler repeatedly asked Katzenberger for money, and they all became convinced that Katzenberger, as the Jewish creditor, sexually exploited the dire financial situation of the German-blooded woman Seiler. The witness Johann Heilmann, in a conversation with the witness Paul Kleylein, expressed his opinion of the matter to the effect that the Jew was getting a good return for the money he gave Seiler.

Nor did the two defendants themselves regard these mutual calls and exchanges of caresses as being merely casual happenings of daily life, beyond reproach. According to statements made by the witnesses Babette and Paul Kleylein, they observed Katzenberger showing definite signs of fright when he saw that they had discovered his visits to Seiler's flat as late as 1940. The witnesses also observed that during the later period Katzenberger sneaked into Seiler's flat rather than walking in openly.

In August 1940, defendant Seiler accepted [the accusation] when she addressed Oestreicher in the air raid shelter, in the presence of the other residents of the house, and he answered, You Jewish hussy, I'll get you good! Seiler did not do anything to defend herself against this reproach, and all she did was to tell Katzenberger of this incident shortly after it had happened. Seiler has been unable to give an even remotely credible explanation for why she showed this remarkable restraint in the face of so strong an expression of suspicion. Although she simply pointed out that her father, who is over seventy, had advised her not to take any steps against Oestreicher, this is not a plausible explanation for the restraint she showed.

According to the testimony of the witness, Assistant Inspector of the Criminal Police Hans Zeuschel, it is also untrue that both defendants portrayed the existence of their sexual situation as harmless from the start. The fact that Seiler admitted the caresses she bestowed on Katzenberger only after having been earnestly admonished, and the additional fact that Katzenberger, when interrogated by the police, confessed only when Seiler's statements were being shown to him, forces the conclusion that they both deemed it advisable to keep secret the actions for which they have been put on trial. This being so, the court is convinced that the two defendants made these statements with the opportunistic intention of minimizing and rendering harmless the situation that has been established by witnesses' testimony.

Seiler has also admitted that she did not tell her husband about the caresses exchanged with Katzenberger prior to her marriage—all she told him was that in the past Katzenberger had helped her a good deal. After getting married in July 1939 she gave Katzenberger a "friendly kiss" on the cheek in the presence of her husband on only one occasion; otherwise they avoided kissing each other when the husband was present.

In view of the behavior of the defendants toward each other, as repeatedly described, the court has become convinced that the relations between Seiler and Katzenberger, which extended over a period of ten years, were of a purely sexual nature. This is the only possible explanation of the intimacy of their acquaintance. As there were a large number of circumstances favoring seduction, there can be no doubt that the defendant Katzenberger maintained a continuous sexual intercourse relationship with Seiler. The court considers as untrue Katzenberger's statement to the contrary that Seiler did not interest him sexually; and further, the court considers the statements made by the defendant Seiler in support of Katzenberger's defense as incompatible with all practical experience. They were obviously made with the purpose of saving Katzenberger from his punishment.

The court is therefore convinced that Katzenberger, after the Nuremberg Laws had come into effect, had repeated sexual intercourse with Seiler up to March 1940. It is not possible to say on what days and how often this took place . . . .

III.
Thus, the defendant Katzenberger has been convicted of having had, as a Jew, extramarital sexual intercourse with a German citizen of German blood after the Law for the Protection of German Blood and German Honor came into force, which, according to Section 7 of the law, means after September 17, 1935. He acted on the basis of a comprehensive plan designed from the very beginning to include repeated violations of the law. He is therefore guilty of a continuous crime of racial pollution according to Articles 2 and 5, Paragraph 2, of the Law for the Protection of German Blood and German Honor of September 15, 1935.

A legal analysis of the established facts shows that in his polluting activities, the defendant Katzenberger, moreover, generally exploited the exceptional conditions arising from wartime circumstances. Men have largely vanished from towns and villages because they have been called up [for military service] or are doing other

work for the armed forces that prevents them from remaining at home and maintaining order. It was these general conditions and wartime changes that the defendant exploited. As he continued his visits to Seiler through the spring of 1940, the defendant took into account the complete lack of any kind of measures that might have revealed his activities. Even the induction of Seiler's husband into the armed forces and the thereby altered circumstances of the household only facilitated his nefarious activities.

Looked at from this point of view, Katzenberger's conduct is particularly contemptible. Together with his offense of racial pollution he is also guilty of an offense under Article 4 of the Decree against Public Enemies. It should be noted here that the national community is in need of increased legal protection from all crimes attempting to destroy or undermine its inner solidarity.

On several occasions since the outbreak of war, the defendant Katzenberger sneaked into Seiler's flat after dark. In these cases, the defendant acted by exploiting the measures taken for protection during air raids and by taking advantage of the blackouts. His chances were further improved by the absence of the bright street lighting that exists in the street along Spittlertorgraben in peacetime. In each case, he exploited this fact, being fully aware of its significance, and thus during his excursions he instinctively escaped observation by people in the street . . . .

The court holds the view that the defendant's actions were deliberately performed as part of a consistent plan and amount to a crime against the body according to Article 2 of the Decree against Public Enemies. The law of September 15, 1935, was promulgated to protect German blood and German honor. The Jew's racial pollution amounts to a grave attack on the purity of German blood, the object of the attack being the body of a German woman.

This was why the defendant Katzenberger had to be sentenced, both on a crime of racial pollution and on an offense under Articles 2 and 4 of the Decree against Public Enemies, the two charges being taken in conjunction according to Paragraph 73 of the Penal Code.

In the view of the court, the defendant Seiler realized that the contact that Katzenberger continuously had with her was of a sexual nature. The court has no doubt that Seiler actually had sexual intercourse with Katzenberger. Accordingly, the oath given by her as a witness was, to her knowledge and intention, a false one, and she became guilty of perjury under Paragraphs 154 and 153 of the Penal Code.

IV.
In passing sentence the court was guided by the following considerations:

The political form of life of the German people under National Socialism is based on the community. One fundamental factor of the life of the national community is the racial problem. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong.

. . . When by initiating legal proceedings against Katzenberger the German people were to be given satisfaction for the Jew's polluting activities, the defendant Seiler did not pay the slightest heed to the concerns of state authority or to those of the people and decided to protect the Jew.

Taking this overall situation into consideration, the court determined that the defendant deserved a sentence of four years of hard labor.

An extenuating circumstance was that the defendant, finding herself in an embarrassing situation, lied under oath, as she knew. Had she spoken the truth, she could have been prosecuted for [the harsher charge of] adultery and aiding and abetting Katzenberger's violation of the Nuremberg Laws. The court therefore reduced the sentence by half despite her guilt, and imposed two years of hard labor as the appropriate sentence. (Paragraph 157, Section 1, No. 1, of the Penal Code.)

On account of her lack of honor, she had to be deprived of her civil rights, too. This has been decided upon for a duration of two years, taking into consideration the time spent in arrest pending trial . . . .

[Material used in this article were obtained in part from the Holocaust Museum website at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007908 and http://www.ushmm.org/wlc/en/article.php?ModuleId=10007908#seealso]

Der Stürmer

Der Stürmer *("The Attacker") was a weekly tabloid format Nazi newspaper published by Julius Streicher, a prominent Nazi official, from 1923 to the end of World War II in 1945. It was a significant tool of the Nazi propaganda, and was vehemently anti-Semitic, and often displayed anti-Semitic caricatures and accusations of Blood libel against Jews, as well as sexually explicit, anti-Catholic, anti-communist, anti-capitalist propaganda.*

The paper originated at Nuremberg during Adolf Hitler's rise to power. Der Stürmer's circulation grew over time, with distribution to a large percentage of the German population as well as Argentina, Brazil, Canada, and the United States.

Between August 1941 and September 1944, Streicher authorized articles demanding the annihilation and extermination of the Jewish race. The newspaper's issues were entered into evidence during the Nuremberg trials.

Julius Streicher himself was convicted of crimes against humanity and executed.

The following is an excerpt from the Der Stürmer *of April 2, 1942, covering the verdict in the Katzenberger trial, the fictionalized version of which is central to* Judgment at Nuremberg.

Death to the Race Defiler!

A trial before the Nuernberg Special Court.

Race defiler Katzenberger

The Prosecutor reads the charge. The Jew Katzenberger had committed "race defilement" with the now 31-year-old business proprietress in Nuernberg Irene S., of German blood, from the year 1937 UNTIL THE YEAR 1940 (!) by exploiting this woman's financial difficulties. He did not even shrink back from exploiting the conditions caused by the war and the absence of the husband of S. who had been conscripted for his Talmudic activity for military service.

Irene S. is charged with attempting to withhold the deserved punishment from the Jew by committing perjury in the pre-trial interrogation. [How Katzenberger defends himself–page 8, column 1—How will Katzenberger try to deceive the Court and get away from the avenging justice?]

The Jew Katzenberger made a quite special tactic his own. Allegedly he has not engaged in a "race-defiling" but a "fatherly" relationship with Irene S. Only out of "pure fatherly" sentiment has he thrown her cigarettes through the window and given her shoes in whole quantities. *[Photo caption: Before the verdict: After the presentation of evidence has been concluded, the Prosecutor rises. With sharp words he characterizes the defendant as a criminal, who did not even shrink back from exploiting war conditions for his shameless activities.]*

As a race defiler and public parasite in the sense of the law, Katzenberger had forfeited his life. Therefore the death sentence should be pronounced against him. The other defendant, Irene S., should be sentenced to two years' penal servitude and to the loss of her civic rights for two years. In his final words the Jew Katzenberger finally tries at least to save what can be saved. Once more he tries to play the "benefactor" in order to appeal to the pity of the judges. With an impudence which only a Jew can possess, he characterizes all that has been presented against him, as "backstairs gossip" and finally even went so far as to claim Frederick the Great as his principal witness, but the president does not permit a Jewish race defiler to soil the figure of the great Prussian King.

The court then adjourned for deliberation.

When the court re-enters the court-room to announce the verdict, one can already see from the serious faces of the judges, that the fate of the Talmudic criminal has been sealed. As a race defiler and public parasite Katzenberger is sentenced to death. The co-defendant Irene S. gets two years penal servitude and loss of her civic rights for two years for perjury. Head of the District Court R. finds certain words in the findings of the verdict, which prove to what extent the German judges are impressed by the tremendous significance of the racial laws. The President brands the depravity of the defendant and stamps him as an evil public parasite.

"Racial defilement is worse than murder! Whole generations until the most distant future will be affected by it!" Head of the District Court in his speech also refers to the guilt of the Jewry in this war. "If today German soldiers are bleeding to death, then the guilt falls upon that race, which from the very beginning strived for Germany's ruin and still hopes today that the German people would not emerge from this struggle. In the case of Katzenberger, the court had had to pronounce the death sentence."

The physical destruction of the perpetrator was the only possible atonement. With the findings of the verdict the sentence of the Special Court has become effective . . . .

Once Upon a War

—Joan Kelley

[Editor's Note: The American Century Theater has been asked by local journalists why it is producing Judgment at Nuremberg*. The obvious answer is that it is an excellent play that has been neglected by other theater companies in the area—that is our mission, after all—but with this particular play, the choice, which was initially mine until ratified by the TACT board, was based on quite a bit more.*

The discussions and debates over current events, especially those involving foreign affairs and the conflicts or threats to peace in Syria, the Ukraine, Israel, Iraq, Libya, Egypt, South Korea, North Korea, Iran, Pakistan, and elsewhere, frequently lack historical context. The ignorance of a majority of the public, most of whom were not alive during the Second World War, regarding the events, details, and realities of that period is palpable, frightening, and an impediment not only to comprehension of the present day's challenges, but of life in general. The name and image of Adolf Hitler, in particular, is used as a cheap tool of fear-mongering and name-calling without, in most cases, any specific point other than shock value. The shock is there, but the substance is fading rapidly.

Judgment at Nuremberg *was a TV script, a movie, and finally a play because its author, Abby Mann, became determined, fifty years before the story made it to the Broadway stage, to make sure that the substance of the Holocaust, and what befell German society, its culture, and the world's, was never forgotten. As is told elsewhere in this* Audience Guide*, he encountered, to his constant alarm and disappointment, a strong desire in the American culture to forget, to (in the deplorable parlance of today) "move on," to let the past stay in the past and look to the future. Mann understood, as too many of our younger citizens today do not, that ignoring the past risks forfeiting the wisdom we extracted from it, and having to learn harsh lessons all over again.*

To understand the context of Judgment at Nuremberg *requires understanding what the world had just experienced, from its leaders to its soldiers, their families, and civilian noncombatants. My father, a decorated army veteran (his memoirs, coincidentally, were also titled* Once Upon a War*), and my mother recently passed away, but while they lived they made certain that my sister and I were raised with the context, attitudes, and experiences of the war years vividly recalled*

and taught. That was a gift, but I realize that most of our audience members, certainly the youngest ones, did not have that direct connection to World War II.

When she heard that TACT was doing this show, Joan Kelley, a County staff member, TACT fan, actress, artist, scholar, and friend, was moved to submit her remembrance of growing up during the war. Though it does not directly relate to the story of the Nuremberg war trials, her account provides an important point of perspective in understanding them. TACT and the production of Judgment at Nuremberg *are grateful for the memories. They are precious to all of us, and we need them. —Jack Marshall]*

Those of us admitting to "a certain age" remember a kaleidoscope of moments.

The Second World War affected our lives in small specific ways and in large general ways; a bruised cloud hovered over every American home. I was five when the Japanese bombed Pearl Harbor and nine when the Germans surrendered prior to the horrific bombing of Hiroshima and Nagasaki.

Nothing was explained to me, but I knew I was part of something frightful. What was clear was that there were rules to be followed and efforts to be made. We crushed tin cans and took them to a recycling center "for the war effort." We spent the stamps in our food ration books carefully. We grew vegetables—easier for us than for many because we lived on a farm. (I reasoned that we won the war because I grew parsley in my Victory Garden.) Our hired man, Mr. Hickey, drank coffee, which he slurped from his saucer, bringing dinner table conversation to a halt. He also ate bread. Period. This was good because we could use his ration book for sugar, etc., in addition to ours.

One day I entered the kitchen to find my mother kneading something lard-looking in a plastic bag. An orange pill was crushed in the process and smooshed throughout the lard. This orange lard was supposed to pass for butter. I was shocked and felt betrayed that I'd been eating this messy mix for months and no one had told me it was phony butter.

Much was scarce. Gas, nylon stockings—nylon, we were told, was used for parachutes. Women covered their legs with a brown liquid (often streaky) and completed the ruse by running a line via black pencil up the backs of their legs. We "made do".

The slight deprivations just reinforced our patriotism. Every morning on the bus we sang, "Comin' in on a wing and a prayer," and an entire medley of red-white-and-blue songs. In school, our names were read over the loudspeaker when we had purchased enough stamps to buy a U.S. Savings Bond. Our air raid drills would not have protected us from an angry rooster: either we lined the halls with our knees tucked under our chins and our heads resting on our knees or we hid under our desks. Fortunately, no angry roosters attacked us, let alone a squadron of enemy planes.

When the air raid siren sounded an alarm at night, we quickly covered the windows with blankets so that German fighter pilots could not see flecks of light—should they make their way

undetected from Berlin, Germany, to Erie, Pennsylvania. Little boys memorized the shapes of German and American planes and were experts at identifying each. My brother Robert perfected jumping off the kitchen table shouting, "Achtung! Himmel! Schnell!" as he fell to the floor, the victim of American sharp shooters. ("Attention! Heaven! Hurry!" were the only German words we knew.)

Although our entire farm community was German—Hosbach, Kocher, Berger, Rusterholtz, Steinmiller—I never heard a word of Deutsch. We had been assimilated for generations. But of course our names identified us as German. One day an older girl shook me violently and pushed me off the school bus, shouting, "Your mother sings like Hitler!" My mother was indeed a singer; insofar as we know, Hitler was not.

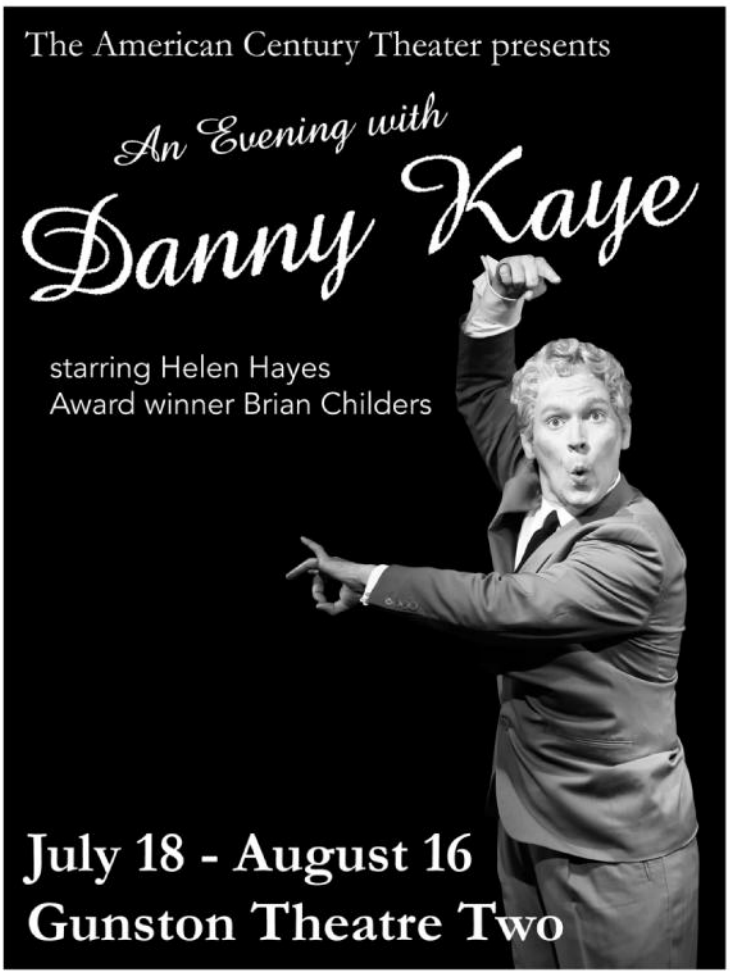
When I was old enough to understand the news, I sat on the floor by the large cathedral-window-shaped radio each evening and listened to Fulton Lewis, Jr., intone, "Good evening, ev'ry-bod-y." He told us what was happening where (I don't remember understanding any of it). The announcer told us how many cartons of cigarettes were being sent "to our boys overseas." At that time, no one knew that if the war didn't kill them, the cigarettes would.

The bright spot in the war was our P.T.A. tour. With four-year-old Robert dressed in a brown Army officer's uniform complete with hat, and our mother at the piano, I belted, in my best Ethel Merman voice, Irving Berlin's "This is the Army, Mr. Jones/No private rooms or telephones . . ." Robert stood at attention and saluted throughout my aria. We were a big hit.

The author and her brother

I knew the war was horrible but it didn't touch me personally. The atrocity of the war came to me in a single incident. One day I took a *Life* magazine to the barn and climbed onto a high beam over the hay. Inside *Life* was a photo of a soldier with a shattered arm so ruined it almost dragged on the ground. There was no television in the early 1940s. That photo said it all.

When the war was over, I marched up and down the road banging on a pot with a wooden spoon. America celebrated. But that *Life* photo stayed with me . . . .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