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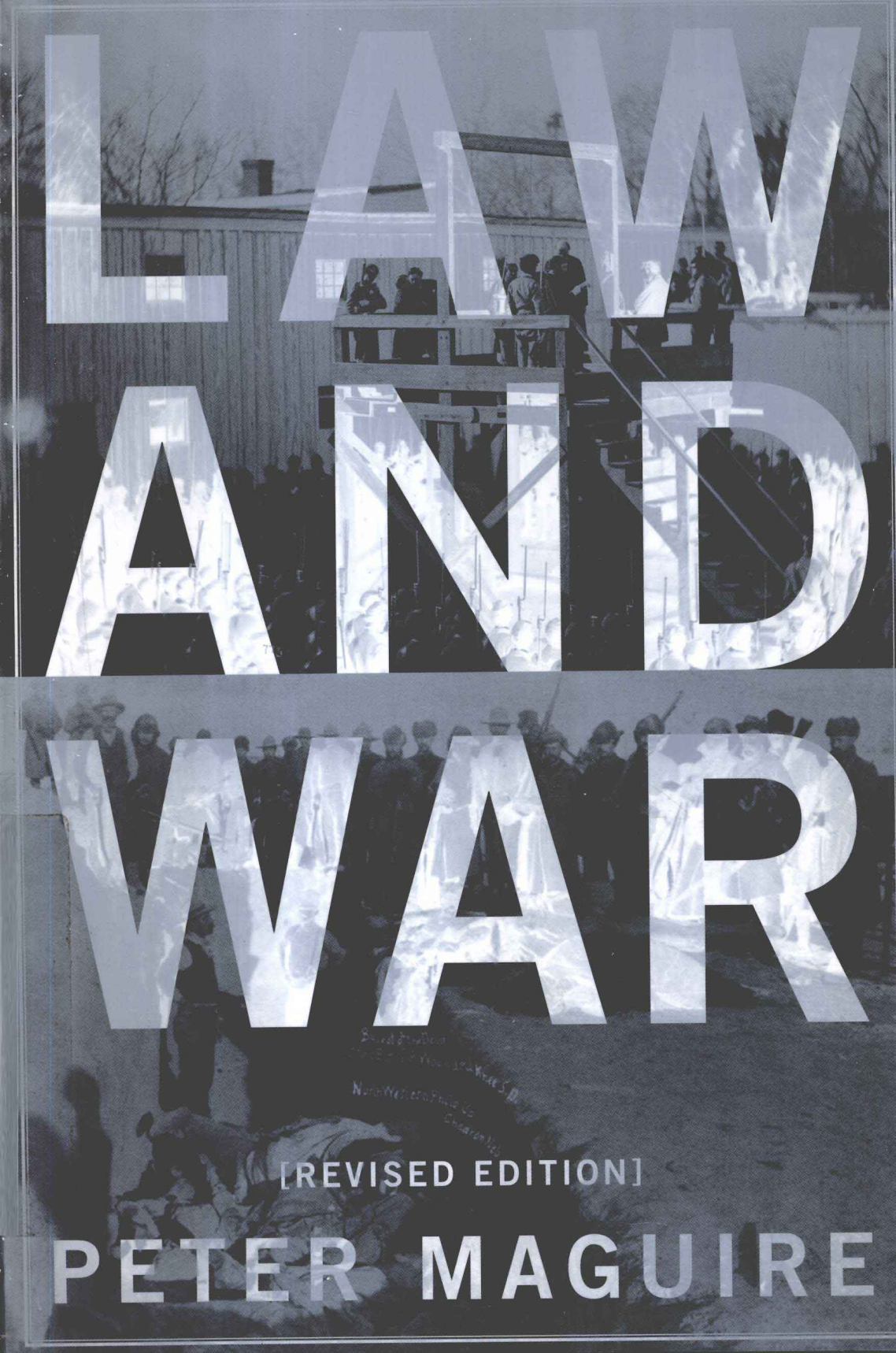
[REVISED EDITION]

PETER MAGUIRE



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INTERNATIONAL LAW & AMERICAN HISTORY

[REVISED EDITION]

PETER MAGUIRE

COLUMBIA UNIVERSITY PRESS *New York*

COLUMBIA UNIVERSITY PRESS
PUBLISHERS SINCE 1893
NEW YORK CHICHESTER, WEST SUSSEX

This is a revised edition of *Law and War: An American Story.*

Library of Congress Cataloging-in-Publication Data

Maguire, Peter (Peter H.)
Law and war : international law and American history / Peter Maguire. — Rev. ed.
p. cm.
"This is a revised edition of Law and War : an American Story."
Includes bibliographical references and index.
ISBN 978-0-231-14646-3 (cloth : alk. paper) — ISBN 978-0-231-14647-0 (pbk. : alk. paper) —
ISBN 978-0-231-51819-2 (electronic)
1. War crimes. 2. War (International law) 3. Nuremberg War Crime Trials, Nuremberg, Germany, 1946–1949. 4. United States—Foreign relations—20th century. I. Title.
K5301.M34 2010
341.6'9—dc22 2009018411

Columbia University Press books are printed on permanent and durable acid-free paper.

This book was printed on paper with recycled content.
Printed in the United States of America
C 10 9 8 7 6 5 4 3 2 1
P 10 9 8 7 6 5 4 3 2 1

References to Internet Web sites (URLs) were accurate at the time of writing. Neither the author nor Columbia University Press is responsible for URLs that may have expired or changed since the manuscript was prepared.

PREFACE

"Think of the new era that is being born. The world has learned its lesson at last, at last. The closing chapter to ten thousand years of madness and greed is being written here and now—in Nuremberg. Books will be written about it. Movies will be made about it. It's the most important turning point in history." I believed it.

"Walter," she said, "sometimes I think you are only eight years old."

"It is the only age to be," I said, "when a new era is being born." . . .

"Well," said Ruth, "when you eight-year-olds kill Evil here in Nuremberg, be sure to bury it at a crossroads and drive a stake through its heart—or you just might see it again at the next full mooooooooooooooooooooooooon."

KURT VONNEGUT, *Jailbird*

"'NUREMBERG' IS BOTH WHAT ACTUALLY HAPPENED AND WHAT people think happened," wrote Nuremberg prosecutor Telford Taylor, before adding a prophetic afterthought: "the second is more important than the first."[1] When *Law and War* was released in the spring of 2001, "the legacy of Nuremberg" was in the process of being selectively appropriated by activist journalists and human rights advocates to justify a new generation of diverse war crimes trials and an International Criminal Court empowered with "universal jurisdiction." It was thought that universal jurisdiction would compensate for the fundamental weakness of international law since the time of Grotius: enforcement. Pulitzer Prize–winning journalist Tina Rosenberg offered this application of the theory: "If the Spanish government had discovered Lt. William Calley vacationing in Barcelona and America had refused to put him on trial, Spain would have been within its legal rights to have held him and brought him to justice for the My Lai massacre in Vietnam."[2]

Many made extremely broad and unsubstantiated claims about the therapeutic benefits of war crimes trials—not only would they punish the guilty and exonerate the innocent, they would also provide "truth," "reconciliation," "healing," and "closure" because, these advocates claimed, that is what Nuremberg had done for the Germans. According to this most recent

myth of Nuremberg, the landmark trials did not simply determine legal innocence and guilt, they brought about a West German national catharsis during the 1950s.[3] Groundbreaking books by professional historians were largely ignored, while popular pedestrian works were treated as if they had broken new scholarly ground. Compared to the careful Nuremberg scholarship of the 1970s and 1980s, much of the 1990s scholarship was both naive and inadequate. One leading Nuremberg scholar characterized much of the 1990s literature as "Over argued, under researched, nit-picky but mistaken about Nuremberg and uncritical about the current tribunals, factually inaccurate, and worst of all, stubbornly uncurious."[4]

More troubling than the war crimes trial triumphalism was the fact that few of the assumptions stood up to analysis. Not only were important parts of the "legacy of Nuremberg" left out, criticism beyond the ritualistic complaints about ex post facto law and victor's justice was considered to be in bad taste in anything but far left and far right academic circles. As a result, analysis of the trials rarely went deeper than American prosecutor Robert Jackson's opening address.[5] While selective case studies were offered to buttress claims about the benefits of therapeutic legalism, conspicuously absent were references to the British, French, and American war crimes clemencies of the 1950s, not to mention the West German rejection of the legal validity of all the Allied postwar trials. This revised version of Law and War is intended to reemphasize and update my central thesis concerning America's opportunistic relationship to international law and to argue that it is the task of historians to distinguish carefully the actual legacies of Nuremberg and their true impact on realpolitik from what we would like these to have been.

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INTRODUCTION

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

For a brief moment my young mind began to reel. Was this the corpse of my great-grandfather? My father, recognizing the ten-thousand-yard stare, reassured me that the man in the wheelchair was former Supreme Court Justice William O. Douglas, not my great-grandfather. He added that the two men had agreed on very little, but today was a day when past differences were set aside. The only time I had ever met Robert Maguire was at my grandfather's house in Ventura, California. I was very young, but I

remember his stately demeanor contrasting starkly with the southern Californian environs. One by one the children were taken to his knee and introduced with a solemn handshake. Though the judge was very old, his mind was razor sharp and he was very stylish in a three-piece, gray pinstripe suit.

At first glance, Robert Maguire appeared to be a typical conservative Republican. However, he was the son of two very atypical Americans. His mother, Kate or Kitty, was the daughter of L. H. Harlan, one of Ohio's leading intellectuals. She was described in her obituary as "a pioneer social worker in the United States." Robert's high school thesis, "John Mitchell and the Miners," reflected his upbringing: "The United States will see the greatest conflict of the world. Where capital is strongest there will be the fight, conservatism against progress. . . . Future generations will call upon John Mitchell as the man who gave the death blow to . . . industrial slavery."[2]

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

Robert Maguire led two legal lives. Although he had become what today would be described as a corporate lawyer, he remained a public-spirited jurist. In 1917, he was appointed Standing Master in Chancery of the Federal Court of Oregon, a position he would hold for the next thirty-three years.[3] Throughout the 1920s, Maguire worked on behalf of the infant Oregon Bar Association; he was named its first president in 1929. His professional rise continued throughout the 1930s, and he seemed destined for a seat on the Oregon Supreme Court. Clients such as Union Pacific allowed him to earn a large salary, while his post as Master in Chancery and bar association prominence gave his voice more resonance than a corporate lawyer could normally expect. When the clouds of war gathered over Europe in the late '30s, Maguire echoed the sentiments of his favorite statesman, Winston Churchill, arguing that Hitler's incursions needed to be met with force.

When the war ended, he supported the idea of a European recovery program, but had no idea that he would actively participate in it.

As the memorial continued, Robert Maguire was described by his colleagues as "one of the finest if not the finest trial lawyer in the Pacific Northwest," a man of "rocklike integrity." What piqued my curiosity was a one-sentence biographical detail: "In 1948 he served as a Judge of the U.S. Military Tribunal for the War Crimes Trials in Nuremberg, Germany."[4] That was the first time I had heard of the Nuremberg trials. After the ceremony, we were led through the crowd and into the judge's chambers. From there, we were taken to an even deeper recess, steered to the foot of the wheelchair, and introduced to Justice Douglas. He took my hand and did not release it immediately. When he looked into my eyes, I was reminded of that first encounter with Robert Maguire.

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

My first serious attempt to obtain more information about the Nuremberg trials was in junior high school. Although there were books on the subject, Robert Maguire could not be found in the group photos or the indexes. When I pressed my father and grandfather for details, they could only respond that "he was a judge at Nuremberg" and point to a faded black-and-white photograph on the wall of three black-robed men sitting in front of a large American flag. Over the years my curiosity about the trials grew. In college I reluctantly told a political science professor about the family's claims. He informed me that after the international tribunal, there had been a series of American trials at Nuremberg. When I asked German history professor John Fout if he knew anything about those American trials, he took me to the library, where we found fifteen formidable-looking green books. We took them down and began to search.

Each volume had a picture of a three-man tribunal and their biographical information. As I scanned the tomes, my heart began to sink—we had checked nine of twelve cases and still no Robert Maguire. Then suddenly my professor said, "Yes, he does sort of look like you," and handed me one of the volumes. I looked down and there was Robert F. Maguire staring at

me once again. It was the same picture that hung in my grandfather's hallway. His case was number 11, *United States Government v. Ernst von Weizsaecker,* also known as the Ministries case.

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

William Manchester's *Arms of Krupp* gave me a first, rather sensational account of the war criminal amnesty of the early 1950s. In an attempt to solve this and other mysteries, I contacted former Nuremberg chief counsel Telford Taylor. Our first meeting was in his Morningside Heights office in 1987; he was seventy-nine, I was twenty-two. When I produced the chart, Taylor put on his glasses and carefully studied it. He agreed that the sentences had been reduced way beyond the controversial McCloy decisions. However, he could offer no explanation why.[5]

Law and War is an attempt to transcend the simple oppositions of realism and idealism, positivism and natural law, liberalism and conservatism, might and right. During the 1990s, war crimes very much returned to center stage. If Nuremberg provides the legal and symbolic framework for defining and dealing with war criminals, its lessons remain unclear. In part, this is because what that name represents is really a series of contradictory trials that lead to no single, simple conclusion. It is my contention that over the course of the twentieth century, the United States attempted to broaden the laws of war to include acts that had previously been considered beyond the realm of objective judgment. During the early twentieth century, American leaders argued that law would replace blind vengeance as a means of conflict resolution. The apogee of this movement came at Nuremberg in 1946. In order to understand the context for America's radical post–World War II war crimes policy, it is necessary to know how the U.S. conception of international law differed from its European predecessor.

Generally speaking, after the Thirty Years War (1618–48), the era of the modern nation-state began.[6] European leaders viewed international poli-

tics as a never-ending and ever-changing struggle in which sovereignty and the national interest were the highest political ideals.[7] Americans tended to view war more like a contest in which total victory was the ultimate objective. The notion that enemies and their policies could be criminalized was not uniquely American; however, American lawyer-statesmen gave this idea its greatest impetus. After I examined the larger history of conflict resolution, it became obvious that the *U.S.–Dakota War Trials,* the trial of Captain Henry Wirz, the Dachau trials, and the Yamashita case were examples of traditional postwar political justice and that the Nuremberg trials were the anomaly. Under the traditional rules, the victor has no historical obligation to extend a wide latitude of civil rights to the vanquished. After reading Hans Delbrück, Michael Howard, Charles Royster, David Kaiser, John Keegan, and the more extreme views of J.F.C. Fuller on the history of war and conflict resolution, I began to see the American Civil War and the two World Wars as exceptional events that had raised the stakes of international conflict. After reading German military political and legal theorists like Carl von Clausewitz, Heinrich von Treitschke, and Friedrich Meinecke on international politics, and Carl Schmitt on the concept of "neutrality," I began to realize how radical and threatening America's punitive occupation policies, outlined in Joint Chiefs of Staff Directive 1067, must have appeared to post–World War II Germans.[8] Impressions, as my former professor Robert Jervis pointed out, are often more important than empirical facts, because they can be shaped to conform to the observers' preconceptions and expectations.

However, it was the foreign policy of my own country that made me question the sincerity of America's commitment to the new principles of international conduct that we had so aggressively advocated during the first half of the twentieth century. Although the second half of this book will focus very sharply on the Nuremberg trials, first I will take a step backward in order to examine America's unique historical relationships with law and war. The episodic histories in the first three chapters help to establish a much larger historical, legal, and political context from which the Nuremberg trials stand out as the legal, political, and historical revolution that they were intended to be. This three-dimensional, multidisciplinary approach is absolutely necessary if one is to enter the storm where war, law, and politics swirl and oscillate in a constant state of flux. As Otto Kirchheimer argued so eloquently, political justice is not illegitimate by its very nature; however, he warned that this is a high-risk arena where the line between "blasphemy and promise" is a very fine one.[9]

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

What also became clear, long before the United States even gained independence, was that the "others," in this case the slave population and North America's native inhabitants, would pay the greatest price for American freedom. Whether it was the Algonquin and the Pequot in the northeast, the Sioux in the Dakotas, or the Chumash in California, U.S. expansion cost American Indians their civilization. Initially colonial leaders deemed both slaves and Indians "barbarians" and "savages" and refused to grant them their natural rights. They would, however, grant them financial credit; as much as the West was won with blood and iron, it was won with whiskey, dependence, and debt. However, from the point of view of American leaders, these dualities were neither problematic nor paradoxical until well into the twentieth century. So what emerges quite naturally, even organically, are two sets of rules for war. When U.S. soldiers faced British and other European armies, they fought according to the customary European rules, with few exceptions. However, when American settlers and soldiers squared off against foes they deemed "savage" or "barbarian," they fought with the same lack of restraint as their adversaries.

The "barbarian" distinction allowed early U.S. leaders to offer messianic justifications for the forcible seizure of the American West and the brutal suppression of those unwilling to give in to the ever-increasing demands of a land-hungry American population. Although they did not hesitate to use force, early American leaders were careful to legalize their actions in the form of treaty law. After reading Dee Brown's sad and moving account of the fall of traditional North American Indian civilization, *Bury My Heart at Wounded Knee,* I was shocked not so much by the flagrant use of force as by the U.S. government's inability to honor either its treaties or its word. Carol Chomsky's excellent article on the Minnesota Indian War of 1862 and the trials and executions that followed, and Sven Lindquist's provocative

study of the role of colonial warfare in European history, *Exterminate All the Brutes,* were extremely helpful.

In 1862, for a brief moment, the United States simultaneously fought Sioux Indians in Minnesota and Confederate troops in the South. Although the Confederacy would not be crushed until 1865, comparing the U.S. government's treatment of the two groups of vanquished foes is very telling and again points to the fact that America fought according to different sets of rules depending on its adversaries. However, this was consistent with the military practices of the European powers, who fought formal restrained wars against one another and operated with a freer hand in their colonial wars. After 1860, the Indian Wars entered a more brutal, final stage in which American Indians were settled onto reservations. Those who refused were deemed hostile and hunted down by specially trained cavalry units like the one led by Colonel Chivington at Sand Creek in 1864. This policy successfully cleared the American frontier for settlement and reached a sad and inevitable apogee at Wounded Knee in 1890.

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

The American duality was embodied in Secretary of War Elihu Root, whose appointment in 1899 marked an important moment in the history of U.S. foreign policy. He was an outspoken advocate of the new codes of international law like the Hague Agreements of 1899 and even an international court, but he had no qualms about using Manifest Destiny to justify a brutal colonial war in the Philippines. Richard Drinnon's *Facing West* outlines the similarities between America's conduct in the Indian Wars and the Philippine War. American President Theodore Roosevelt dismissed the

Philippines' calls for independence by claiming that granting it would be like granting independence to an "Apache chief."

However, much of the American public was unconvinced by their leaders' official explanations. In order to contain the public dissent and the outcry over American conduct in this brutal war, Root ordered a number of war crimes trials for American officers like Major Littleton Waller and General Jacob Smith in Manila in 1902, after the war had been largely won. Although the court went through all the proper motions, the charges were hazy and in the end, the sentences were extremely light. Secretary of War Root used law strategically in order to quell a public relations problem that threatened to undermine American foreign policy. He also employed what would become the favorite device of the strategic legalists—using post-trial, nonjudicial means to further reduce already lenient sentences. In other words, once the public had been served its "justice," the sentences were quietly reduced behind the scenes. Earlier in his career, as a Wall Street lawyer, Root had learned how to use the law to further his clients' interests irrespective of facts. In the case of the Philippines, everyone from his biographer and noted international lawyer Phillip Jessup to biographer Godfrey Hodgson to journalist Jacob Heilbrunn pointed to Root's use of his considerable legal skills to deny charges that were basically true. In fact, one of the major arguments of this book is that the American lawyers who came to shape and dominate twentieth-century U.S. foreign policy employed and interpreted international law in an extremely cynical manner. I call this "strategic legalism," meaning the use of laws or legal arguments to further larger policy objectives, irrespective of facts or moral considerations. As Root pointed out: "It is not the function of law to enforce the rules of morality."

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

American lawyer-statesmen like Elihu Root deemed Germany "the great disturber of world peace."

World War I was a very different kind of war, in both scale and aims. With the American entry in 1917, it was fully transformed into a crusade against German tyranny, or as Root described it, "A battle between Odin and Christ." The emergence of democracy and total war in the late nineteenth century began to erode Europe's customary rules of warfare. The popular support required for total war also included a vilification of the enemy, and by the twentieth century, amnesties for wartime atrocities were being replaced by more punitive approaches. With the defeat of Germany came a window of opportunity for U.S. leaders to transform international relations. Germany was not only labeled with war guilt but also fined with reparations. Most dramatic of all, by indicting Kaiser Wilhelm and attempting to put him on trial, the world powers crossed a threshold, challenging the sanctity of sovereignty.

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

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

subject to post-trial, nonjudicial modification. German authorities simply allowed convicts to "escape" after their trials.

The interwar period saw a flurry of American-inspired international legal efforts, the most radical of which was the Kellogg-Briand Pact of 1928. Elihu Root was near the end of his life by then and had passed the torch to his apprentice, Henry Stimson, who had begun his career in Root's Wall Street law firm. Stimson was a forceful advocate of revolutionary new treaties like the Kellogg-Briand Pact. After the Japanese seized Manchuria in 1931, he declared, in what would come to be known as the Stimson Doctrine, that the United States reserved the right of "non-recognition" for governments that did not come to power through what it considered to be "legitimate means."

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

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

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

the *Dirlewanger* Regiment provide ample evidence that the Nazis spared few during Operation Barbarossa. However, on the Western Front, with a few famous exceptions, American POWs were treated far better by the Germans than by the Japanese in the Pacific Theater. Roughly 27 percent of the American POWs in Japanese captivity died, compared to only 3 to 5 percent in German and Italian captivity. Japanese contempt for the weak, defeated, and defenseless led to carnivals of atrocity that lasted for weeks in Asian cities like Nanking and Manila, where tens of thousands of women were raped and hundreds of thousands of civilians slaughtered. Books by Iris Chang, Sheldon Harris, Yuki Tanaka, John Dower, and Hal Gold helped me to better understand the contempt that the Japanese military forces displayed toward the weak and the vanquished.

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

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