

Holocaust Memorial Museum
National Days of Remembrance
Keynote Address
Stephen Breyer
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We gather today to remember the Holocaust. I come here as a Judge and a Jew to participate in this annual ceremony — mandated by law - to speak about the role of the law in the task of recollection. As the Nazi atrocities fall further into past, direct recollection may become more difficult. But it will not become less important. The Book of Exodus frightens us when it speaks of a King, perhaps an entire new generation, "who knew not Joseph." And the French writer Albert Camus elaborates the thought in his book, *The Plague*, an allegory of the Nazi occupation of France. His hero, Dr. Rieux, explains (in a way that I find moving) why he has written down the story: It is because

the *bacillus de la peste*, the plague germ [a symbol for the evil in human nature], never dies; it never entirely disappears; it simply goes into remission, perhaps for decades, but all the while lurking: in the furniture, in linen cupboards, in bedrooms, in cellars, in trunks, in handkerchiefs, in file folders, perhaps one day to reawaken its rats, and then, to the misfortune or for the education, of mankind, to send them forth once again to die in some once-happy city.

What role can the law play in helping us, through recollection, guard against that day when that perpetual evil, analogous to the plague germ, might re-awaken? Let us consider three different kinds of answers to that question that the law provides. First, those who work with the law can engage in certain classic legal tasks, such as gathering and preserving evidence and creating legal precedent. When I was honored to appear here several years back, I spoke of a man who engaged in just those tasks, Justice Robert Jackson, once a Member of the Court on which I sit.

Sixty-five years ago Jackson put aside his work in Washington in order to serve as the Chief Prosecutor at

Nuremberg. He later described his Nuremberg work as the most important experience of my life, "infinitely more important than my work on the Supreme Court or . . . anything that I did as Attorney General." His object was to make "explicit and unambiguous" in law "that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds . . . is an international crime . . . for the commission [of which] . . . individuals are responsible" and "can, and will be punished."

He began by telling the Nuremberg tribunal that

"The wrongs we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

And then he built what he called a "drab case." He did not try, he said, to "appeal to the press" or public. He understood his role as collecting hard evidence largely built on the Nazis' own documents "the authenticity of which" could not be "challenged." And it was not challenged. The nineteen defendants could not answer that evidence. There was nothing to say.

Jackson collected the evidence, not simply to convict the war criminals, but also to document the facts for history to remember. "We must establish incredible events by credible evidence." The evidence must be presented

"with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people."

So the prosecutors brought to Nuremberg one hundred thousand captured German documents. They examined millions of feet of captured film. They produced 25,000 still photographs, "together with Hitler's personal photographer

who took most of them." For month after month, detailed by seventeen-thousand transcript pages, the prosecutors assembled a mountain of evidence to which no response was possible. History was there revealed, and remains revealed, for all the future to see.

Second, those who work with law can, through trials that tell stories, help produce emotional, as well as factual, understanding of just what occurred. Doing so was in significant part the object of another trial, which took place fifty years ago in Jerusalem. It was the trial of Adolf Eichman, the man in charge of transporting millions of Jews to death camps.

In prosecuting the case against Eichman, Israel's Attorney General, Gideon Hausner, provided documentation. But he did something more. He sought out survivors of the Holocaust to bear witness. About one hundred took the stand. They told their own stories about what they saw, what they endured, what they survived, and how they remembered those who did not survive.

The audience was different from that of Nuremberg. The trial was televised both in Israel and around the world. Millions in the United States watched the proceedings. For the first time many people heard the Holocaust survivors tell their stories with their own voices. Hannah Arendt described how the trial, not just told us, but showed us, the banality of evil. Historian Deborah Lipstadt tells us that the human stories involved "changed our perception of the victims of genocide."

Seen from the perspective of today's topic, remembrance, both trials had an important role to play. We remember through facts, figures, and rational argument; we also remember through human stories that carry emotion and implant feeling. The documented record prevents history from doubting what was done; the compelling personal stories help prevent the future from forgetting the victims themselves, their stories and their humanity.

Third, today throughout the world many are at work at another important practical legal task, building institutions that use law to protect us against law's antithesis, the exercise of arbitrary power. Since the end of World War II ever more Nations have adopted democratic forms of government that, like our own, guarantee basic

individual rights, in part through constitutions that an independent judiciary seeks to enforce. At the same time the example of Nuremberg has helped to inspire the establishment of tribunals, often international tribunals, with authority to protect basic human rights and to pursue those who violate them. Consider the European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia, the tribunal for Rwanda, and the International Criminal Court. The lessons of the Eichman trial also may have influenced other efforts to prevent us from forgetting past violations, as when South Africa's Truth and Reconciliation Commission through public exposure helped to inform the world about the human rights violations of the apartheid era. In these and in related ways, we have seen nations seek gradually to expand a rule of law designed to protect us against the re-emergence of Camus' plague germ.

Unfortunately, however, we need only look around today's world to see that the rights, rules, and obligations that the law sets forth are no more powerful than the human will to enforce them. Thus, the work of developing an enforceable rule of law proceeds slowly. Its product is imperfect. And like Penelope's tapestry, the legal cloth that we weave in the day is often unraveled during the night.

But that is all the more reason to remember, to continue the work, to substitute, as Justice Jackson reminded us, the power of Reason for the force of Power. The Talmud teaches us "it is not incumbent upon you to complete the work. But neither are you free to evade it." Despite the terrible examples of evil that this Museum contains, I find its final room (filled with silence, for what is there to say) but also with light, a symbol of hope.

Nuremberg can remind us that the Holocaust story ended with a fair trial. And that trial, along with the other ways in which law furthers the work of remembrance, can remind us of our eternal aspiration for Justice. Aeschylus wrote about that aspiration twenty-five hundred years ago in the *Eumenides*. Justice, overcoming the avenging furies, promises Athens that her seat, the seat of Justice, "shall be a wall, a bulwark of salvation, wide as your land, as your imperial state; none mightier in the habitable world." We reflect upon that aspiration as well when we say, with

the Psalmist, "Justice and Law are the foundations of Your Throne."