

University of Pittsburgh School of Law
University of Pittsburgh School of Law Working Paper Series

Year 2006

Paper 46

Shooting The Messenger

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Shooting The Messenger

Richard Delgado

Abstract

This essay reviews Ward Churchill's "On the Justice of Roosting Chickens: Reflections on the Consequences of U.S. Imperial Arrogance and Criminality" (2003).

One of the most talked about — but least read — books of recent years, "On the Justice of Roosting Chickens" documents a long history of U.S. wars, invasions, and violations of international law on the way to concluding that when the terrible events of 9/11 took place, the U.S. deserved and should have expected retribution. In popular language, we "had it coming."

As the reader may recall, when Hamilton College rescinded Churchill's invitation to speak in the winter of 2004, it set in motion a cascade of events including further such cancellations, efforts in Colorado to dismiss him from his tenured position, and nightly discussion on Fox News.

The review evaluates Churchill's argument that the U.S. is an outlaw nation, as well as his "little Eichmanns" corollary that the investment bankers and stockbrokers who perished in the conflagration were complicit with the U.S. war machine and thus legitimate targets of the Muslim suicide bombers. It breaks his argument down into its component parts or premises, shows which ones are moral and which ones factual, and evaluates each one's plausibility and cogency.

The review also addressed the author's treatment at the hands of Colorado authorities and the implications of that treatment for academic freedom.

BOOK REVIEW

SHOOTING THE MESSENGER

*Richard Delgado**

Ward Churchill, *On the Justice of Roosting Chickens: Consequences of U.S. Imperial Arrogance and Criminality*, AK Press, 2003 \$15.95

Introduction: On the Value of Knowing One's Enemy

If you could choose, which would you rather know — what your best friends think of you, or your worst enemies? Most of us, I suspect, would, upon consideration, choose the latter. Equipped with at least some degree of self-knowledge, we know (or think we know) what our best traits and worst weaknesses are. We also assume that our best friends share our opinion or something like it. Learning exactly and in great detail what they think of us would not add much to what we already know.

Knowing what our enemies think is different. That neighbor who scowls whenever he sees us or our dog — what does he really think of us, and what might he be planning? That colleague at work who may or may not covet our job. What schemes might she be harboring? These are matters that could very well come in handy.

What is true about individuals would also seem so for nations. The United States would gain little from achieving intimate knowledge of what Canada or Tony Blair think of us. But knowing what our enemies, detractors, haters, and competitors think could prove enormously helpful. We could take defensive measures if they seemed likely to attack us. If the source of their displeasure turned out to be a simple misunderstanding, we could explain and set things straight. Recently, commentators as diverse as Thomas Friedman,¹ Fareed Zakaria,² and Phillip B. Heymann³ have lamented how little the United

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1. Thomas Friedman, *The Calm Before the Storm?*, N.Y. TIMES, Apr. 13, 2005, at A19 (arguing that U.S. intelligence community does not understand Arab street nor radical Jihadists' motives); see also Book Review, *Why They Hate Us*, N.Y. TIMES, July 17, 2005, (Book Review), at 11.

2. See *Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001 (cover story) (including essays by Fareed Zakaria and others on reasons why some in the Muslim world detest the West); see

States knows about its current *bête noir*, radical Islam, while others have pointed out that the State Department includes only a handful of operatives fluent in Arabic.⁴ How good can its knowledge of that part of the world be if it has to read everything in translation?

If knowledge of what our enemies think is useful, one absolutely must read Ward Churchill. For “On the Justice of Roosting Chickens,”⁵ which grew out of a controversial essay the author wrote shortly after the terrible events of September 11, 2001,⁶ sets out in stark detail every conceivable reason why the rest of the world might hate us. Churchill leaves no sin unearthed. With x-ray vision and the implacable logic of a longtime critic, he tells a story of America that is far removed from the one we know from mainstream texts and courses in U.S. citizenship and history.

One of the most talked-about, but least read, books of recent years, “On the Justice of Roosting Chickens” raises a host of questions: Is it well written? Coherent? True? Arguably true? False but worth reading anyway? True and of great value?

This review begins by summarizing the book’s central argument that when, on September 11, 2001, 19 Arabs commandeered planes and flew them into the World Trade Center towers and Pentagon, the United States deserved and should have expected retribution. In the popular phrase, we “had it coming.” It then considers Churchill’s provocative corollary that the victims of the World Trade Center conflagration were “little Eichmanns” mindlessly complicit in their country’s illegal conduct and thus richly deserving of their fate. It spells that argument out, outlines its structure, separates out its factual and moral premises, and subjects each to analysis. It then addresses the First Amendment implications of the controversy raging in Colorado over whether Churchill’s remarks justify firing him from his tenured position and what that controversy means for academic freedom and the right to criticize government.

also Robert A. Pape, *Blowing Up an Assumption*, N.Y. TIMES, May 18, 2005, at A23.

3. PHILLIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003) (advocating both tactical and strategic intelligence to understand the goals and skills of one’s enemy).

4. *E.g.*, Amy Argetsinger, *Arabic Language a Tough Assignment*, WASH. POST, July 3, 2004, at B1.

5. WARD CHURCHILL, *ON THE JUSTICE OF ROOSTING CHICKENS: CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY* (2003) (hereinafter cited by page number only).

6. Ward Churchill, “Some People Push Back”: *On the Justice of Roosting Chickens* (2001, on file with author) (hereinafter cited as Essay and by page number only).



I. "As Ye Sow . . ."

This meaty, detail-filled book is a frontal attack on two common beliefs — that the United States is a peace-loving country and that we are a nation of laws. Churchill counters both notions by means of lengthy chronologies accompanied by interpretive essays. The first chronology — according to the author the only one of its kind — is entitled “That ‘Most Peace-Loving of Nations,’” covers 46 pages, and includes every significant use of official force against a domestic or foreign target. The second, entitled “A Government of Laws?” spans 165 pages and lists actions that, according to Churchill, violate international law or custom.

A. The First Chronology

Both chronologies are eye-opening. The first aims to refute the notion that the United States is a peace-loving nation that goes to war only when it is attacked or has no choice, and that when it does unleash military force it does so humanely and with due regard for the safety of innocent civilians (pp. 12-18, 39-42).

In fact, Churchill writes, this notion is not only false, it stands as a major barrier toward achieving a realistic grasp of how the rest of the world sees us. Most Americans, according to Churchill, have little idea how warlike their history is. They could name, perhaps, our largest eight or ten wars — the Revolutionary War, the Civil War, the war with Spain, World Wars I and II, the Korean War, the Vietnam War, the current struggle in Iraq, and perhaps one or two others (pp. 39-40). Missing in this list would be the hundreds of Indian campaigns, the invasion of the Philippines, the overthrow of the Hawaiian monarchy, and dozens of landings, shows of force, and coups carried out to install a convenient dictator willing to advance U.S. interests in a far-flung land (pp. 40-83).

Churchill’s chronology shows that the United States has rarely been at peace and that peace, not war, is the exception in our history. Practically every year, beginning with 1776, contains an entry corresponding to some invasion, landing, occupation, annexation, or show of force aimed at avenging an insult to America’s honor. For example, the United States invaded Latin America no fewer than 30 times between 1823, when President James Monroe announced the hands-off doctrine that bears his name, and 1930.⁷ Many of these invasions

7. Compare pp. 47-62 with JOSÉ LUIS MORÍN, *LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES* 28-29 (2004) (recounting similar litany of U.S. landings and invasions).



changed the host country's government, but never in the direction of democracy.⁸ Many replaced a popularly elected leader with a dictator chosen because of his cooperative attitude toward American corporate interests.⁹ For example, the United States invaded the Dominican Republic in 1903, 1904, 1914, 1916-24, and 1965 with the objective, according to one author, of achieving "direct control over the economy . . . for the benefit of U.S. banking and commercial interests."¹⁰ Instead of spreading democracy in Latin America, we supported brutal dictators like Rafael Trujillo and Joaquin Balaguer.¹¹ In a moment of candor, Theodore Roosevelt explained, simply, "I took the Isthmus."¹² No rationalization, no high-flown language — he simply took it because he could.

As early as 1885, the United States recognized William Walker, a North American carpetbagger who engineered a coup, as the new president of Nicaragua.¹³ As his first official act, he declared English the country's official language; as his second, he legalized slavery.¹⁴ The United States occupied Haiti between 1915 and 1934, imposing a brutally autocratic and racist military regime.¹⁵

With the advent of the Cold War, the U.S.'s justification for intervening in Latin America changed when it began propping up murderous regimes in the name of anticommunism.¹⁶ The United States supported authoritarian governments in Argentina, Paraguay, and Brazil and outright dictators, like Somoza in Nicaragua, Trujillo in the Dominican Republic, Pinochet in Chile, and Stroessner in Paraguay, who practiced torture and "disappearance" of their enemies.¹⁷ In El Salvador, the country's militia conducted U.S.-backed counter-insurgency operations that left one-fourth of the population uprooted and homeless.¹⁸ Among those murdered were three U.S. nuns, a Catholic layperson, and Archbishop Oscar Romero.¹⁹ Salvadoran death squads murdered six Jesuit scholars, their housekeeper and her daughter, and

8. MORÍN, *supra* note 7, at 30; *see also* pp. 102-03.

9. *E.g.*, MORÍN, *supra* note 7, at 29-30; p. 103 (drawing similar conclusion).

10. MORÍN, *supra* note 7, at 29; *see also* pp. 59, 60 (making similar point).

11. MORÍN, *supra* note 7, at 29; pp. 62, 70 (noting U.S. support of Gen. Trujillo).

12. MORÍN, *supra* note 7, at 29-30; *see* pp. 56, 58.

13. MORÍN, *supra* note 7, at 30.

14. *Id.*

15. *Id.* at 30; *see also* p. 60 (making similar point).

16. MORÍN, *supra* note 7, at 30; pp. 74, 95.

17. P. 103; *see* MORÍN, *supra* note 7, at 29-30 (compiling similar lists of dictators)

18. *See* MORÍN, *supra* note 7, at 34; p. 74.

19. *See* MORÍN, *supra* note 7, at 34; p. 74.



massacred thousands of villagers at El Mozote.²⁰ U.S. intelligence agents helped depose democratically elected Salvador Allende in Chile and installed Augusto Pinochet whose henchmen tortured and assassinated thousands of citizens suspected of disloyalty.²¹

Every single year, for 226 years, the United States military has been in action somewhere in the world, often in more places than one (p. 41). Although it is difficult to draw exact comparisons, the record bears out Churchill's contention that the United States has very often resorted to force to advance its diplomatic, commercial, and imperial objectives and may be "the most consistently belligerent country" in the world (p. 41). This record stands in stark contrast to the general belief that the United States has been slow to resort to force, responds only when attacked, and never wages war to advance selfish objectives.

1. Accuracy

This part of Churchill's book seems generally accurate. Although Churchill may be correct when he asserts that his is the first chronology of every American war and show of force (p. 40), histories of U.S. relations with particular regions, such as Latin America, confirm that the United States has very often resorted to violence in pursuit of its national objectives.²² While a few other nations, such as Germany or the former Soviet Union, have been warlike as well, it seems likely that the U.S.'s conduct over the years has earned it a place near the top of any list of national bellicosity. Thus, while a few of his critics have found fault with one or two of Churchill's assertions, such as the charge that the U.S. Army deliberately supplied the Indians with smallpox-infested blankets (p. 13), none has disputed his larger thesis that the United States has often acted unilaterally and harshly toward other nations and its own domestic minorities.

20. See MORÍN, *supra* note 7, at 34; p. 74.

21. *Id.* at 32-33; p. 72 (reporting same event).

22. See *supra* notes 7-21 and accompanying text (comparing Churchill's findings with those of another scholar); *The Thoughtful Superhawk*, POLICY, Autumn 2005 (online) (interview with Robert Kagan) ("Americans don't have a sense of how the rest of the world views us. We're one of the most expansionist countries in the world. We've been expanding for over 400 years and yet we always think of ourselves as just sitting back minding our own business. I've found some great quotes from 1817 when American politicians were coming back from Europe shocked that everyone thought we were an incredibly aggressive country just because we'd stolen Florida, picked a fight with the Brits, were yelling that we wanted Canada, etc. It's a constant theme. Intervention? Expansion of influence? This is the history of America.").



2. Interpretation

When Churchill turns to his own interpretation of events, his tone becomes more argumentative and his statements open to alternative characterizations. Still, many of his observations have the ring of truth; one or two made at least this reader wince. For example, to rebut the idea that the U.S. military abides by the rules of war and applies force with sanitary precision, he points out that U.S. soldiers during the Indian campaigns made leggings out of the skins of their deceased enemies and collected fingers, noses, skulls, and other body parts in more recent wars, such as Vietnam (pp. 11-13, 41-42). And to counter the idea that American soldiers enter battle reluctantly, he cites a U.S. commander who marveled that “Nothing kills like an Iowa boy” — happily, enthusiastically, and with a blithe lack of conscience (p. 41). He quotes retired General Smedley Butler for the notion that most U.S. wars have been waged to protect corporate profits, not to vindicate some grand principle such as human freedom (p. 40).

It is certainly true, then, that the United States has often waged aggressive war and been less than careful about the safety of civilian populations. Whether this is an intrinsic feature of the American character or of our military policy, as Churchill posits, may be debated (pp. 41, 87). At times, the United States has displayed genuine sympathy toward domestic minorities and the poor.²³ On other occasions, it has shown compassion and humanity toward its defeated wartime enemies or to victims of foreign disasters.²⁴ Needless to say, events like these appear nowhere in Churchill’s book.

Equally debatable is Churchill’s assertion that the World Trade Center attack was a proportionate and limited response to U.S. actions in the Middle East and especially Iraq (pp. 14-17). Churchill begins with the much-quoted figure that U.S. policy toward that country, including its economic embargo in the ten years preceding the current war, killed over 800,000 adults and 500,000 children from starvation or lack of sanitation or medical treatment (pp. 5, 10, 76). During that same period, we bombed water, sewage, pharmaceutical plants, and prevented efforts to repair them (p. 14). For Churchill, the WTC attack then was a case of our adversaries “pushing back” (p. 10). Indeed, to truly even the scores, the Saudi pilots would have had to hit sewers, hospitals, water treatment plants, electric power stations, and other similar targets (p. 14). Further, because, of the United States’ much larger

23. Think, for example, of President Lyndon Johnson’s Great Society.

24. Recall, for example the Marshall Plan of aid to rebuild Europe in the wake of World War II, and to victims of the tsunami disaster of 2005.



population, they would have had to inflict many millions of casualties, not just three thousand (p. 14).

This assertion is questionable, not arithmetically but morally. According to settled norms of war — not to mention human decency — no nation ought to target civilian populations or infrastructure, no matter how legitimate its wartime goal. The phrase “pushing back” dodges this principle under the guise of an irrelevant mathematical equivalency.

B. The Second Chronology: A Nation of Laws

Churchill’s second chronology is a list of U.S. violations of international and domestic law (pp. 104-269). According to Churchill, Americans imagine themselves the world’s first democracy since ancient Greece (p. 86). They believe they enjoy a degree of personal freedom unlike anything the world has ever known, that ours is a government of laws, and that our Anglo-Saxon character assures that we will act justly toward ourselves and other people (p. 87). Because of this high opinion, we believe that any action, practically by virtue of our having done it, must be just (p. 87). Thus, according to Churchill, the average American reading his first chronology will think, “All those wars must have been for a good cause. We must have been defending ourselves, another nation, or an important principle of international law.”

The second chronology aims to dispel that notion. Americans, according to Churchill, are the most regulated people on earth, especially after enactment of the 2001 USA Patriot Act. Totally unnecessary laws govern how fast we can drive on open freeways, where and when we can smoke, where we can sleep, and even what we choose to check out of libraries (pp. 88-89). The upper classes are freer than the lower classes, and racial minorities least free of all (p. 90). Blacks and Latinos are 39 and 81 times more likely, respectively, than whites to receive a prison sentence for drugs in Massachusetts, and corporate criminals often receive light sentences for serious transgressions (pp. 89-90). Blacks who kill whites are many times more likely to receive the death penalty than whites who kill blacks (pp. 89-90). Police officers and high military officials almost never go to jail for brutal beatings or shootings, even when their offenses are captured on film and are entirely unprovoked (p. 91).

Much the same holds true in the international arena, where the United States has routinely declared itself an exception to well-established principles of international law. As evidence, Churchill lists hundreds of treaties and dozens of Security Council resolutions that the U.S. has violated (p. 95-97, 104-05, 109, 115, 116, 120-22, 125, 145, 153, 177, 182, 194, 200, 214, 220) and innumerable countries we have invaded directly or by proxy, such as Cuba

at the Bay of Pigs (pp. 97, 127). Many of the actions that appear in the first chronology appear again, this time accompanied by analysis under international legal norms.

Most of these violations are not mere technical breaches in response to some pressing need, such as safeguarding democracy in a fledgling nation. Instead, U.S. policy over the years has been to deter democracy whenever it threatens to break out (pp. 41, 102-03). Since democracy entails independence of U.S. will, most of our interventions have aimed at propping up an unpopular dictator chosen because he agreed to do our bidding (pp. 50, 102-03). Churchill gives dozens of examples, ranging from support to Cuba under Batista (pp. 68, 123), South Korea under strongman Syngman Rhee, South Africa, and Iran under the Shah (pp. 50, 102-03, 116, 130, 131, 143). Our behavior, Churchill concludes, is that of a “rogue, outlaw state” no different from many others that we routinely condemn (p. 104).

To make sure his readers grasp the full extent of the country’s outlawry, Churchill chronicles how the U.S. tested atomic weapons in the Marshall Islands, exposing hundreds of islanders to radiation and cancer (pp. 60, 64, 106), tested those same weapons above ground in Nevada, exposing U.S. citizens to similar risks (pp. 63-64, 122), foisted LSD and other dangerous chemicals on unsuspecting subjects (p. 115), and sprayed aerosols containing live viruses over San Francisco to test their dispersal under real-life conditions (p. 116). He recounts our use of chemical weapons, poison gas, and germ warfare in Vietnam (pp. 134-35, 139) and Cuba (pp. 128-29), our resistance to U.N. mandates to decolonize possessions such as Puerto Rico, Guam, and the Virgin Islands (pp. 215-16), our training of Latin American secret police in techniques of torture and interrogation (p. 145), and the use of weapons of mass destruction, such as napalm, cluster bombs, and nerve gas, in Vietnam and Iraq (pp. 42, 109, 149, 207, 240). He also describes our frequent veto — often the only one — of innocuous-seeming U.N. resolutions, such as those urging recognition of the rights of children, preserving the South Pole as a nuclear-free zone, or encouraging agricultural co-operatives in poor countries (pp. 97, 140-41, 172, 188-90, 194, 196-200, 216-18, 222, 225-34, 238-40, 263). He also cites the U.S.’s high incarceration rate, particularly of black males (pp. 89-90), and our refusal to join in international treaties condemning, racism, genocide, torture, and global warming (pp. 95, 110-11, 185-89, 194).

1. Evaluation

Most of the events, such as the CIA-sponsored invasion of Cuba at the Bay of Pigs (p. 127), the Sand Creek Massacre (pp. 41, 53), the killing of several hundred villagers at My Lai during the Vietnam War (pp. 41, 140), or the

slaughter of 10,000 fleeing Iraqi soldiers on the “Highway of Death” in the final days of the Gulf War (pp. 10, 206-07), that appear in the two chronologies are widely agreed to have happened. A few are plainly illegal.²⁵ With others, much rides on context, setting, and motivation. In a field, such as international law, governed by only a few broad principles and a handful of conventions, charter agreements, and treaties, only rarely will an act fall squarely on one side or the other of the line between legality and illegality. Nation A sends troops to take a position inside Nation B. This action violates international law — unless it is done defensively (Did Nation B attack Nation A first? Threaten to do so?), in which case it constitutes legitimate self defense. Perhaps Nation A did not act in response to a threat but was merely trying to adjust the border between itself and Nation B, which was drawn unjustly in a treaty 500 years ago in which Nation B dictated the terms following a war of aggression. Many of the actions Churchill chronicles are of dubious legality, but their status is not clear cut. Perhaps his point is that the United States very often skirts illegality and acts without securing approval of international tribunals or bodies. Or it may be that, regardless of the legality or illegality of this or that action, U.S. history, read as a whole, is a tale of aggression waged at the expense of weaker states.

Some of the events he recounts, such as refusal to endorse a U.N. resolution guaranteeing the rights of migrant workers and their families (p. 206), or a U.N. vote against a prohibition of the use of nuclear weapons against non-nuclear states (p. 170), are beyond dispute. But these actions are not illegal, they merely evidence a degree of unilateralism at odds with the notion of an altruistic, cooperative state. On this point, at least, Churchill seems to have the better of his critics.

II. “. . . So Shall Ye Reap:” Little Eichmanns and the Argument from Personal Responsibility

In his earlier essay,²⁶ Ward Churchill referred to the victims of the September 11 bombing as “little Eichmanns” who deserved their fate.²⁷ The

25. See p. 192 (describing International Court of Justice ruling that U.S. mining of Nicaraguan waters violated international law); see also p. 214 (describing March 8, 1992 publication of Pentagon’s Defense Planning Guide, explaining that U.S. security requires that the United States attain essentially complete domination of the world and that U.S. strategy must include not only prevention of the emergence of world competitors like the former Soviet Union, but regional competitors capable of threatening our interests).

26. See generally Essay, *supra* note 6.

27. See *id.* at 4.



book repeats the same charge, but without some of the flamboyant language that infuriated his critics and with additional supporting material (pp. 19-24). The essay refers to the civilians as forming

a technocratic corps at the very heart of America's global financial empire — the “mighty engine of profit” to which the military dimension of U.S. policy has always been enslaved. . . . To the extent that any of them were unaware of the costs and consequences to others of what they were involved in — and in many cases excelling at — it was because of their absolute refusal to see. More likely, it was because they were too busy braying, incessantly and self-importantly, into their cell phones, arranging power lunches and stock transactions, each of which translated, conveniently out of sight, mind and smelling distance, into the starved and rotting flesh of infants. If there was a better, more effective, or in fact any other way of visiting some penalty befitting their participation upon the little Eichmanns inhabiting the sterile sanctuary of the twin towers, I'd really be interest in hearing about it (Essay p. 4).

In the book, Churchill writes of these workers as a cadre of faceless bureaucrats who willingly (and profitably) harnessed themselves to the task of making America's genocidal world order hum with maximal efficiency. He defends his earlier statement by pointing out that he was not referring to the “janitors, firemen, and food service workers [who died in the tragedy, but] the much larger number of corporate managers, stockbrokers, bond traders, finance and systems analysts, etc., among those killed” (p. 19). Instead, he places the blame on a

representative 30-year old foreign exchange trader who, in full knowledge that every cent of his lavish commissions derived from the starving flesh of defenseless Others, literally wallow(ing) in self-indulgent excess, playing the big shot, priding himself on being “a sharp dresser” and the fact that “money spilled from his pockets” . . . flowed like crazy . . . [spent] on a black BMW and those clothes — forgetting to pack ski clothes for a Lake Tahoe trip dropping \$1,000 on new stuff How then are we to describe Eichmann himself? (pp. 19-20).

In a subsequent interview on National Public Radio,²⁸ Churchill clarified that the World Trade Center towers housed an FBI facility and offices of the Central Intelligence Agency and Department of Defense, and so were legitimate military targets, as was, of course, the Pentagon.²⁹ He also points out that when our bombers killed innocent Iraqi civilians who had the simple misfortune of living near a target we considered strategic, such as an electric power substation or water treatment plant, we deemed them “collateral damage”—unfortunate victims but not evidence of a war crime.³⁰

Although two wrongs do not make a right,³¹ Churchill’s argument does make a valid point: If we maintain that we may kill innocent civilians in the course of bombing legitimate military targets, we cannot easily complain when the other side does the same. The more troublesome argument is the one Churchill makes when he charges that the stock brokers, bankers, and other office workers killed during September 11 were not just collateral damage, but actively deserved their fate. This more audacious argument is worth outlining in some detail.

Its structure is as follows:

1. A citizen of a country engaged in an illegal and immoral war is complicit if he or she knows about it, is in a position to stop it, and does nothing. (This is roughly the standard the Americans applied to the German high command at Nuremberg.)

2. A citizen of such a country is also blameworthy if he or she is part of a profession that actively furthers the illegal activity and derives income, livelihood, or some other benefit from it. (This is Churchill’s application of the Nuremberg principles and the writings of philosophers Karl Jaspers and Hannah Arendt, discussed below.)

3. The stockbrokers, securities traders, bankers, etc., who occupied offices in the World Trade Center were part of the military-industrial complex that fueled the war in Iraq. (This is an empirical assertion and perhaps the weakest link in Churchill’s argument.)

4. That war was and is illegal under international law and basic humanitarian norms. (Most international law experts would agree with this premise.)

28. Interview with Amy Goodman, National Public Radio, (Feb. 18, 2005) (transcript on file with author) [hereinafter Interview].

29. *Id.*

30. *Id.*

31. *See supra* notes 24-25 and accompanying text.



5. A citizen of a country that is waging an illegal and immoral war and is complicit with it may legitimately be made a target of self-defensive force by the nation that is attacked. (This is a corollary of Churchill's assertion, under number four, that the war is illegal.)

6. Therefore, the stockbrokers, securities traders, bankers, etc., who worked in the World Trade Center were legitimate targets of the 9/11 attack. (In other words, Churchill's "little Eichmanns" conclusion.)

A. Discussion

Although Churchill does not outline his argument or break it down into its component parts as I have done, its structure seems to be very much as outlined above. As the reader will see, some of the premises are normative, such as the statements about a knowledgeable citizen's moral responsibility for the actions of his nation. The broad version of this premise, stated in proposition number 1, above, is debatable. Although the United States did apply a version of it to about one-fourth of the German population, including members of the Nazi Party, the German army, the reserves, prison guards, and the police (pp. 7, 80) we did not convict them, much less sentence them to death, but merely charged them with a form of collective responsibility sufficient to require postwar reparations to their victims.

The more specific form of responsibility stated in premise number 2 — that of a citizen whose profession directly advances the aims of the war — is more intuitively plausible.³² Under it, the bankers, stockbrokers, and intelligence officers who perished in the 9/11 attacks were legitimate targets and, under premises 3 through 5, should anticipate the risk of retribution. Like American insurance companies that insured slave owners and traders, thereby rendering slavery commercially profitable,³³ the office workers who perished in the WTC conflagration bore moral responsibility for the destruction of Iraqi society and were not free of guilt.

32. For example, assume for the sake of discussion that War X is blatantly illegal. The political leaders who ordered the nation to go to war, then, would likely be found to be war criminals, as would the generals who gave the orders and plotted the strategy. What about the individual foot soldiers? Probably the answer would depend on what they knew and whether they had a choice. What about the munitions makers who supplied the war and profited from it? The financiers who backed the munitions manufacturers? The stockbrokers and bond traders who profited from and enabled the war enterprise to blend in smoothly with the free enterprise system? Churchill would hold all of these responsible; some of us would not.

33. See *Farmer-Paellman v. FleetBoston Fin. Corp.*, No. 02-CV-1862 (E.D.N.Y. filed Mar. 26, 2002); Comment, *Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations for Slavery*, 9 CONN. INS. L.J. 211 (2005).



B. Evaluation

Churchill's "little Eichmanns" argument is sweeping and harshly judgmental. Drawing on the writings of philosopher Karl Jaspers³⁴ on the theory underlying the Nuremberg prosecution, and Hannah Arendt³⁵ on the banality of evil, he declares the everyday actions of Americans who aid the war industry morally reprehensible. Just as much war criminals as the former cruel Baathist leadership in Iraq, they may legitimately be made targets of the Arab opposition.

This argument is certain to repel many Americans. We like to think of our own wars as just or, at worst, misguided, and that citizens who support their government and economy by holding ordinary jobs are blameless even if our leaders are pursuing the wrong policy.³⁶ The idea that everyday citizens going to work wearing suits and carrying briefcases might look to the rest of the world like war criminals is shocking and unfamiliar. All the more reason, perhaps, to take Churchill's rendition of the argument seriously. Not only is the argument widely believed elsewhere in the world, it is, on its own terms, colorable, so that if one is to reject it, one must be prepared to identify the specific premise with which one disagrees. Rejecting an argument simply because one finds the conclusion unflattering is not only intellectually feckless, it forfeits the opportunity to see ourselves as others do.

III. How Could Such a Book Have Come to Be Written?

Ward Churchill's book stands alone, the only sustained treatment of America's wars and breaches of international law. Its treatment of our country's military campaign in Iraq goes squarely against the grain, and its conclusions are counterintuitive. Yet it is a piece of serious scholarship. On the whole well written (if sometimes prone to florid prose),³⁷ the book features an extended, but forceful, argument, good use of examples, and copious

34. Pp. 20-22, 84 n.35 (citing KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (2002)).

35. P. 20; Interview, *supra* note 28 (noting that for Arendt, Eichmann personified the "banality" of evil, i.e., the way it can become normalized and everyday).

36. *See supra* note 32.

37. For example, "Then there were the soldiers, conscripts mostly, butchered in the scores of thousands as they fled northward along what became known as the 'Highway of Death,' out of combat, in full compliance with U.S. demands that they evacuate Kuwait, effectively defenseless against the waves of aircraft thereupon hurled at them by cowards wearing American uniforms" (p. 10).



footnotes³⁸ and lists of sources,³⁹ including many standard reference books and works by major academic presses. The author is a well known Indian law scholar and historian who teaches at a major research university,⁴⁰ is the author of dozens of books, and has been cited in a standard legal database — a field not even his own — 135 times.⁴¹

How could such a book have come to be written? Two possibilities come to mind: double consciousness, and the beleaguered status of minorities. In “The Souls of Black Folks,”⁴² W.E.B. DuBois wrote that African Americans learn to see themselves in two ways at once — through the eyes of the white world, which sees them as criminal, lazy, dangerous, and threatening, and through their own eyes, in which they are normal.

This way of seeing everything in two ways at once is what DuBois called double consciousness, a kind of second sight that enables the possessor to achieve a more complete view of the world than is possible through either form of vision alone. Is it possible that Churchill, an Indian law scholar accustomed to seeing history in just such a fashion, finds it easier than most of us to envision how our actions might appear through our adversaries’ eyes?

Related to double consciousness is the beleaguered condition of most minorities in the United States.⁴³ Constantly on the alert for discrimination at work or in housing, followed and monitored when they shop, and subjected to ethnic profiling by the police and immigration officials, citizens of color find it easier to imagine than most whites do how official U.S. actions might look to the rest of the world. Having been on the receiving end of much suspicious treatment, they find it easy to approach U.S. foreign policy skeptically, visualizing how it must look to others and asking uncommon questions.

The philosopher Georg Friedrich Hegel pointed out that the slave knew the master better than the master knew the slave, because the master’s moods, proclivities, and preferences could spell the difference between life and death for the slave, while the master, who had all the power, was in a position to

38. Pp. 26-37 (notes for introductory essay, 179 in number); pp. 277-300 (notes for final essay, 284 in number).

39. Pp. 302-09 (listing sources used in compiling the two chronologies).

40. Churchill is a professor of ethnic studies at the University of Colorado-Boulder.

41. Lexis/Nexis, U.S. Journals and Law Reviews combined, last consulted July 17, 2005, available at <http://www.lexisnexis.com>.

42. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 38-39 (W.W. Norton 1999) (1903).

43. See, e.g., RICHARD DELGADO, *JUSTICE AT WAR: CIVIL LIBERTIES AND CIVIL RIGHTS DURING TIMES OF CRISIS* 79-81 (2003).



ignore the slave's feelings and personhood.⁴⁴ By the same token, scholars such as Churchill who study the fortunes of disempowered groups may sometimes acquire a sharpened sense of justice and be able to apply it to official actions in a way most of us cannot. Just as a political party out of power examines the actions of the party in office and subjects them to minute examination, outsider scholars like Churchill may be better positioned than most of us to examine issues that appear to us commonplace because they enjoy wide social support.⁴⁵

In a dangerous world, where knowledge of the enemy's mindset is a potentially invaluable commodity, maverick scholars like Churchill may be more useful than we care to admit.

IV. Ward Churchill's Fate: Academic Freedom at Colorado

Valuable or not, Ward Churchill's essay and book stirred intense opposition, especially at the University of Colorado, where he teaches in the Ethnic Studies department at the flagship Boulder campus. More than three years after he wrote the essay that he later developed into "On the Justice of Roosting Chickens," Churchill received an invitation to speak at Hamilton College, a small liberal arts school located in rural New York.⁴⁶ A storm of

44. See GEORGE W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* 229-40 (J.B. Baillie trans., 1967); see also JAMES BALDWIN, *THE PRICE OF THE TICKET* 554 (1995); STANLEY ROSEN, *G.W.F. HEGEL* 162-64 (1974).

45. For example, the United States is currently in the opening stages of what will probably be a prolonged campaign to strengthen the hand of the liberal, democratic, Westward-looking faction of Islam vis-à-vis the conservative, theocratic, sharia-enforcing, misogynist, homophobic, West-hating wing of that religion. Compare Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518 (1980) (positing that Cold War imperatives and the need to preserve international appearances brought about *Brown v. Board of Education*, not a moral breakthrough on the part of the Supreme Court). But how effectively can the U.S. maintain, to its European allies or to the wavering Arab street, that it is superior to other models if its president advocates government based on God's will, if it is curtailing women's procreative liberties, tolerates the placement of monuments to the Ten Commandments in public places, and its jails and prisons are full of brown and black bodies? See Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 *TEX. L. REV.* 121, 121-22, 138-43 (2003). A full grasp of outsider issues and the concerns of domestic minorities may easily prove a useful commodity in external struggles and foreign relations.

46. Interview, *supra* note 28; Michelle York, *Unrest on Campus over Speaker Who Sees U.S. Role in 9/11*, *N.Y. TIMES*, Jan. 31, 2005, at B3; Scott Smallwood, *Anatomy of a Free-Speech Firestorm: How a Professor's 3-Year-Old Essay Sparked a Firestorm*, *CHRON. HIGHER EDUC.*, Feb. 10, 2005 [hereinafter *Free-Speech Firestorm*].



protests broke out when a detractor discovered the essay posted on the Internet and mentioned it to a few others. After receiving a blizzard of angry e-mails and letters, some threatening violence, the college reluctantly cancelled Churchill's invitation.⁴⁷ Several other universities followed suit.

When the national press picked up the story, irate Colorado citizens flooded the university, the legislature, and the regents with letters, e-mails, and telephone calls demanding that he be fired. When a number of Colorado regents, legislators, and the governor called for his dismissal,⁴⁸ the chancellor of the Boulder campus convened a three-person committee, including himself, to read Churchill's writings and determine whether they exceeded the bounds of academic propriety⁴⁹ — first declaring that he found Churchill's statements "repugnant."⁵⁰ While the committee was carrying out this task, the university received complaints charging that in addition to making unpopular statements about U.S. foreign policy, Churchill was guilty of four other types of misconduct.

First, Churchill had misrepresented his ethnicity on his employment application, on which he listed himself as part Indian.⁵¹ Second, Churchill had been guilty of misappropriating an Indian voice in representing himself as an Indian in some of his writings.⁵² Third, he had plagiarized certain passages from the work of other scholars.⁵³ A fourth allegation charged that he had given inadequate credit to his research assistants.⁵⁴ This charge fell by the wayside when Churchill pointed out that he never had a research assistant, as did the first charge (misrepresenting himself as an Indian in his employment application to Colorado) when it came to light that the university had investigated it years earlier and deemed it without merit.⁵⁵ The second and

47. See generally *Free-Speech Firestorm*, *supra* note 46.

48. See Kirk Johnson, *Incendiary in Academia May Now Find Himself Burned*, N.Y. TIMES, Feb. 11, 2005, at A13.

49. Elizabeth Mattern Clark, *Education Professor Called for End to Churchill Review*, BOULDER (COLO.) DAILY CAMERA, Mar. 26, 2005; Stephan Edwards, *Churchill's Critics Might Be Worse than Churchill*, COLO. DAILY, Feb. 25, 2005, at A1.

50. Press Release, University of Colorado, DiStefano: Churchill Case to Go to Standing Committee (Mar. 31, 2005) (on file with author).

51. Charlie Brennan, *Churchill to Speak at College*, ROCKY MOUNTAIN NEWS, Feb. 11, 2005, at A5.

52. *Report on Conclusion of Preliminary Review in the Matter of Professor Ward Churchill*, U. COLO. NEWS, Mar. 24, 2005 (on file with author) [hereinafter *Report*].

53. *Id.*

54. Charlie Brennan, *2004 Work Nets Churchill a Raise: 2.28% Pay Hike Based on Reviews, Recommendations*, ROCKY MOUNTAIN NEWS, July 2, 2005, at A4.

55. *Id.*; *Report*, *supra* note 52.



third charges (holding himself out as an Indian in certain of his writings, and plagiarism) are still pending.

Without the hue and cry that attended his remarks about American foreign policy, it seems highly unlikely that Churchill's scholarly record would have come under intense scrutiny as it did. Consequently, although the screening committee ultimately decided that his comments about 9/11 were protected speech, the First Amendment aspects of the Churchill controversy still loom large. The relatively minor academic charges would almost certainly not have come to light had not his detractors publicized their disagreement with his position and launched a campaign to destroy his academic career.

The First Amendment protects political speech as one of its core functions.⁵⁶ In theory, our system of freedom of expression protects the speech "we hate as much as that which we love and hold dear."⁵⁷ Courts are especially reluctant to limit speech based on its content,⁵⁸ and even more so when regulation targets the speaker's viewpoint.⁵⁹ All these features of our system of freedom of expression came into play in the Churchill controversy and should have weighed decisively against any form of official discipline for saying what he did. None of his remarks fits any of the exceptional categories of unprotected speech. They are not fighting words, nor like shouting fire in a crowded theatre. Their harm is easily addressed by counter speech. They reveal no official secret, nor do they incite anyone to commit a crime. They might be argued to defame the office workers Churchill equated with little Eichmanns or to inflict emotional distress on their grieving relatives. But Churchill's remarks are clearly identified as his opinion, and an opinion cannot be defamatory,⁶⁰ even if the tort of defamation would lie on behalf of a dead person.⁶¹ And the same defenses should lie to an action for intentional

56. See Alexander Meikeljohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-56 (proposing unlimited protection for core political speech).

57. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343, 376 (1991).

58. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 580 (1978).

59. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 818-19, 829 (1995); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 818 (1985); Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 783-84 (2000).

60. Only false statements of fact may be defamatory. *Bussie v. Lowenthal*, 535 So.2d 378, 381 (La. 1988); see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (declaring that there is no such thing as a false idea).

61. See Arthur Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1912 (1985).

infliction of emotional distress brought by a surviving family member. Finally, his remarks are not hate speech, as that term is usually defined,⁶² because it targets the government or those who act in alliance with it, and the Constitution immunizes even scathing criticism of the state.

It would seem, then, that Churchill's searing indictment of U.S. policy and the role of various players, large and small, in it is protected speech. Our system thrives on self-correction through truth-telling. Churchill's version of the truth may not be ours. It may be unpalatable, uncomfortable, even slanted. But it is a legitimate contribution to the marketplace of ideas, and in a world in which our competitors see things radically differently from the way we do, it behooves us to expose ourselves to points of view far removed from our own. Oddly, Churchill's fate in the wake of writing his book — hounded, deprived of speaking opportunities, reviled on Fox TV nightly for two weeks running, forced to step down from his department chairmanship, his life threatened, his car defaced, his career ruined — illustrate two of his principal contentions: America brooks no dissent,⁶³ is cruel to its enemies, and does not fight fair or even abide by its own rules.

62. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004) (defining and mapping the contours of hate speech). Remarks and actions directed against Churchill and his friends come much closer to what most commentators understand to be hate speech or even hate crime. See *Churchill's Pickup Vandalized Painted Swastikas, 'Hate Mail' Reported by Embattled Prof*, ROCKY MOUNTAIN NEWS, Feb. 3, 2005, at A27; An Open Letter from the Department of Ethnic Studies, University of Colorado at Boulder to the Board of Regents, President Betsy Hoffman, and Interim Chancellor Phil DiStefano (n.d.) (on file with author) (citing "1000 e-mails and dozens of phone calls each day, many explicitly racist or threatening," and threats of death or violent attacks); see also Ward Churchill's Statement: Read What Controversial Professor Says about 9-11 Uproar (WorldNetDaily.com, on file with author) (citing "threats against my life").

63. See E.M. Clark, *CU Looking for Loyalty Oaths*, BOULDER (COLO.) DAILY CAMERA, Feb. 22, 2005 (stating that shortly after Churchill controversy broke out, Churchill's university required all professors who had not done so to sign loyalty oaths).

