

LEGAL AND MORAL DIMENSIONS OF CHURCHILL'S FAILURE TO WARN

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One of the most striking and widely published photographs of World War II depicts a single wall of the great Cathedral of Coventry, still standing after the devastating German bombing raid of the night of November 14, 1940. In the foreground with a bishop at his right is Prime Minister Winston Churchill in the act of taking a short step with the assistance of his cane. Churchill's head is hunched a bit forward in his famous bulldog expression. His rounded shoulders seem to hold up all of the burdens of mankind. His countenance is grim.

Throughout the world, people looking at that photograph could read in Churchill's face the well-known events of the bombing of Coventry. Air raid sirens had blared out over the industrial city located about ninety miles northwest of London, just a few minutes before the drone of the Luftwaffe Heinkels was heard. The town was taken by surprise. The first wave of attacks used incendiary bombs in order to light fires all over the city, thus illuminating targets for an immediately following wave of high explosive bombs. The bombs hit hospitals and homes, gas and water supply mains, and, of course, the famous Coventry Cathedral. A week later the fires were still smoldering.

As we now look at the famous photograph of Churchill at Coventry with the benefit of new facts, an even more grim visage, one of personal responsibility, is discernable. Churchill had been given at least forty-eight hours' warning that Coventry would be hit; he could have warned the people of Coventry of the impending attack. The British code breakers working on what is now known as the "Ultra Secret"¹ had given Churchill this advance notice of the German air raid. Yet Churchill determined that any advance warning to the people of Coventry would have enabled the Germans to deduce that their top secret code had been broken.

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¹ For a full account, see ANTHONY CAVE BROWN, *BODYGUARD OF LIES* 13-31 (1975).

Churchill does not mention the Ultra Secret or other code breaking in the six volumes of his memoirs;² only in the 1970s were historians apprised of the extensive Allied code breaking during World War II. And only in recent months have some of the main documents been declassified. We now know that by the summer of 1941 the British knew of the Holocaust through the code intercepts that Professor Halberstam has read to you.³ As historian Richard Breitman reports, a British Intelligence analyst wrote to Churchill in September 1941 that there was no point in forwarding any more of these intercepts because it was perfectly obvious that the Nazis were killing every Jew that they could lay their hands on.⁴

This panel has for the most part focused on two related theses: that the revelation of any information about these killings would cause the Germans to deduce that the code had been broken and the fact that the importance of keeping the code breaking secret is evidenced by Churchill's sacrifice of his own people at Coventry. I would like to challenge both propositions.

First, other ways to reveal information that could have bypassed the code system existed, thus providing warning to the public while maintaining a strategic advantage. For example, the British, knowing when the German planes were coming, could have feigned that their spotters along the channel noticed those planes. Then, fictitious reports could have been sent by those spotters warning all of the cities in the path of the planes—including Coventry. Given thirty minutes or an hour's notice, many lives would have been saved. The Germans might never have realized the ruse, as they would have assumed that their planes had been spotted. Nothing like this was ever attempted. Maybe the War Cabinet was preoccupied with other military matters; maybe Churchill felt that the loss of civilian lives was quite acceptable.

Later in the war, the Allies improved their communication without revealing that the code had been broken. However, I maintain that their initial silence, of which Coventry was a prominent example, was an error of monumental proportions. The

² See WINSTON CHURCHILL, *THE SECOND WORLD WAR* (1948-1953).

³ See Malvina Halberstam, *Framing the Issues*, 20 *CARDOZO L. REV.* 443, 450 (1998) (quoting Alan Cowell, *British Knew Early of Nazi Atrocities Against Jews*, *N.Y. TIMES*, Nov. 19, 1996, at A5).

⁴ See RICHARD BREITMAN, *OFFICIAL SECRETS: WHAT THE NAZIS PLANNED, WHAT THE BRITISH AND AMERICANS KNEW* (1998); see also DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

British War Cabinet had at least forty-eight hours following the Ultra Secret decoding in which to determine how to relay warnings effectively and covertly, yet it failed to do so.⁵ The British could have concocted a fictional account of a survivor about to be shot, who escaped and returned to provide an eyewitness account of everything. The papers could have dramatized the story to reveal what was happening. The codes need not have been the sole source of such confidential information.

As the war progressed, the codes were used as a way of focusing information that would then be manipulated to appear to have been received some other way in order to protect the viability of the code.⁶ That certainly could have been done to prevent the murder of Jews.

Churchill's memoirs are revealing. Despite his personal agenda of self-glorification and historical self-importance, the memoirs nevertheless reveal information that might have been suppressed had Churchill had more time to edit them. He was under a self-imposed time constraint to be the first to define the war and his place in it. As Prime Minister and Minister of War (the first person in English history to hold both positions), Churchill had access to all of the information and resources concerning the entire operation that were necessary to a timely and incisive documentation of the war.

I find three aspects of his memoirs to be most revealing. First, Churchill acknowledged that at the time he knew that Pearl Harbor was the turning point of the war. Once that happened, he predicted that the Allies would win. Interpreting this in light of both a moral perspective and Dr. Lamm's comments regarding innocent bystanders,⁷ I would argue that in World War II there was a huge difference between the events prior to December 7, 1941, and the events afterwards. Prior to that fateful day, we can almost say, as Professor Greenawalt suggests,⁸ that Churchill was trying to save the lives of his people. The outcome of the war for Great Britain

⁵ See Halberstam, *supra* note 3, at 450 (evidencing the negligence of the British War Cabinet).

⁶ Many of the ways in which this was done are recounted in BROWN, *supra* note 1.

⁷ Norman Lamm, *In Pursuit of the Pursuer: British Silence During and After World War II from the Vantage of Jewish Law*, 20 CARDOZO L. REV. 415 (1998); see also Rabbi Shear-Yashuv Cohen, *Breaking the Code: Was There a Moral or Legal Obligation to Warn?*, 20 CARDOZO L. REV. 543 (1998).

⁸ See Kent Greenawalt, *Secret Knowledge of Genocide: British Failure to Disclose the Killing of Jews in 1941*, 20 CARDOZO L. REV. 549 (1998).

was in serious doubt. Hitler might have won.⁹ After that date, however, the question was no longer whether the Allies would win the war; it was when and how.

Whatever the moral calculus was prior to Pearl Harbor, I maintain that it changed decisively after December 7, 1941, for it then became important to determine how we were going to conduct a war that we knew we would win. Interestingly, Churchill did not make any modifications. As reflected in his memoirs, he was in the same battle mode prior to Pearl Harbor as afterwards, despite the shift in military posture. Throughout the entire war, Churchill pursued an unchanging, totally aggressive strategy—as if lives were at stake when, in fact, they no longer were. This failure to modify the post-Pearl Harbor war tactics tremendously clouded Churchill's moral judgment.

The German generals, as we know, regarded the Holocaust as a diversion from the war effort. They resisted the employment of railroad lines and the use of bullets to kill inmates of the death camps. Hitler's "Order Police" was made up of Army rejects.¹⁰

But to Churchill, who did not have the pessimistic view espoused by the German generals, the Holocaust became morally relevant by default. In other words, Churchill knew that the Allies (with the assistance of the United States) were definitely going to win the war. Therefore, there was room to ask questions other than "Will we win?"—questions such as "Why are we fighting this war? What is its purpose? How can we continue the fight with minimum loss to innocent lives?" In short, Churchill had the luxury after Pearl Harbor to question *how* the war should be pursued consistent with the overriding moral aims of the Allies. *How* the War was fought assumed new importance. Therefore, I maintain, unlike my great friend Professor Greenawalt,¹¹ that from this standpoint a moral culpability for actions and failures to act does attach to the manner in which the Allies conducted the war, especially to leaders such as Churchill.

A second theme of the memoirs is that Churchill, while not talking about Karl von Clausewitz,¹² nevertheless reveals himself as very Clausewitzian through his overriding theme that war is merely an extension of politics by other means.¹³ By viewing war

⁹ See, e.g., MARK MAZOWER, *DARK CONTINENT: EUROPE'S TWENTIETH CENTURY* (forthcoming 1999).

¹⁰ See GOLDHAGEN, *supra* note 4, at 164-202 (discussing the Order Police).

¹¹ See Greenawalt, *supra* note 8.

¹² Prussian general, military philosopher, and author of books on military (1780-1831).

¹³ Clausewitz asserted that war was an extension of politics because that was an eco-

as just a branch of politics, Churchill was indeed a great statesman and an architect of the postwar era. But this “largeness of vision” was, in my view, minor compared to a larger vision of justice and morality.

It appears that Churchill, like many politicians, saw policy as an end in itself.¹⁴ As such, in Churchill’s hands, the war’s political goals became distortedly vague and amorphous, tending to be roughly synonymous with “Great Britain prevails.” Thus, one explanation for Churchill’s refusal to publicize the Holocaust was his preoccupation with keeping the Arab nations on the side of the Allies, which was stressed throughout the memoirs.¹⁵

Alternatively, if I had been one of Churchill’s secretaries at the time he was writing his memoirs, I might have suggested that keeping in the good graces of the various Arabian sultans and princes was not very important compared to saving millions of innocent lives. However, Churchill surely would have said that balancing such political and moral issues occurred many times daily in the course of a war. Sometimes British troops were led to slaughter simply for demonstrative purposes—that British soldiers would fight to the bitter end and never give up. If I were to concede that from a military point of view, this could be an appropriate strategy, but that morally it should not be done to these unwitting soldiers who have placed their trust in their leaders. Churchill would probably have responded that my comment shows why I am a civilian secretary rather than a military commander.¹⁶

Churchill was always able to trump his generals in the field by relying on the much respected Clausewitzian formula that war is conducted in the service of politics. Since Churchill knew politics better than any other general, it followed that he was the most knowledgeable as to the best military course of action. But I suspect that *vagueness and ambiguity* in Churchill’s own mental formulation of these policies served him well, for if the policies had been sharper and more distinct, his field and War Cabinet generals

nomical way in which to depict war. See CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. & trans., rev. ed. 1984).

¹⁴ Thus, if Clausewitz saw war not as an end in itself but as subordinate to politics, Churchill saw politics as an end in itself and not subordinate to morality or justice.

¹⁵ See CHURCHILL, *supra* note 2.

¹⁶ One can read Churchill’s memoirs and come away with the conclusion that he wanted you to come away with—that he understood the military situation better than his generals did and that, when he fired and replaced them, it was because they were not as competent as they should have been. One should take Churchill’s point of view lightly. Many of his military commanders during the war believed that Churchill’s military initiatives simply were not justifiable.

could have debated them with him. However, if the policies were amorphous and constituting “judgment-calls,” then Churchill could prevail over his generals despite the fact that they knew more about military strategy.

Having established the efficacy of an amorphous policy, it follows that such an amorphous policy would not necessarily be derailed by building in a set of moral constraints. What policies would have been—and how would they have been—affected by a more proactive stance against Hitler’s extermination of Jews? This is a question that, of course, does not ever come up in the six volumes of Churchill’s memoirs.¹⁷

There is a third area of Churchill’s blindness that is revealed by a modern reading of the memoirs: Churchill was afraid of Josef Stalin. Throughout the memoirs he railed against Stalin’s stubbornness and ingratitude; yet a close reading suggests that this very stubbornness and ingratitude kept Churchill on the defensive. No matter how much military matériel the British transported to the Soviet Union, it was insufficient; Stalin constantly berated Churchill for not sending more. Stalin refused to accept Churchill’s rationales that there were fronts in World War II other than the Eastern Front. Churchill regarded this as mental density on Stalin’s part, but in retrospect it is evident that, through these tactics, Stalin gained a strategic advantage over Churchill. Stalin exasperated Churchill, who did not know how to retaliate. As a result, the vast exterminations on the Eastern Front—both of the Russian people and especially of Jews within the Russian territories—were issues that Churchill was hesitant to broach with Stalin.

To conclude, imagine an extremely implausible hypothetical case: Churchill is indicted for genocide after World War II. There is no evidence of which I am aware that might support Churchill’s guilt with regard to complicity in genocide; such a crime requires a specific intent to execute a plan of genocide. In this case an honest prosecutor’s analysis of the evidence against Churchill would not reveal any such specific intent. On this issue I agree completely with Professor Greenawalt.¹⁸ It is implausible to think that either Churchill or the British people possessed any genocidal intent. However, the issue of their negligence is another matter. Under the principles of criminal law, negligent manslaughter¹⁹ is a felony,

¹⁷ See CHURCHILL, *supra* note 2.

¹⁸ See Greenawalt, *supra* note 8.

¹⁹ See MODEL PENAL CODE § 210.4(1) (1997) (defining negligent homicide as a “criminal homicide . . . when it is committed negligently”); BLACK’S LAW DICTIONARY

and reckless disregard for human life²⁰ constitutes manslaughter.

If a postwar tribunal were to acquit Churchill of genocide—as I believe it would have—I conclude that he should nevertheless have been charged with culpable negligence. If a race is being exterminated, and a world leader could have intervened but chose not to for various amorphous political reasons that seemed important at the time, is not that leader guilty of a heinous breach of morality?

Perhaps someday negligence of this order will legally amount to the degree of genocide. The international law of genocide would have to develop to go beyond intentional acts to acts of misfeasance and malfeasance. Such expansion would help to close an uncomfortable gap between international law and international morality, for morality and law are symbiotic in the long run.

1035 (6th ed. 1990) (defining negligent manslaughter as a “statutory crime in some jurisdictions consisting of an unlawful and unjustified killing of a person by negligence but without malice”).

²⁰ See BLACK’S LAW DICTIONARY, *supra* note 19, at 1270 (defining reckless homicide as homicide which some states characterize as a “wilful and wanton disregard of consequences resulting in death [which] . . . may amount to manslaughter” in some states).

