Some Uneasy Reflections on the Calley Case

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The Calley case and its aftermath have raised anguishing questions of conscience and responsibility, individual and national. It has brought together unlikely allies, such as Dr. Spock and Governor Wallace, who for different reasons are united in outrage. The range of reactions to this case is compelling evidence of our discord. An otherwise undistinguished lieutenant has been received as a hero, a scapegoat, and a mass-murderer—an aberration that is the military counterpart of the Manson murders, the penalty for which, by some grisly coincidence, was returned on the same day that the Calley verdict was rendered. The issues raised by the Calley verdict have understandably merged into, and are likely to be submerged by, larger issues. And, like other cases that touch the nerves of guilt, loyalty and frustration, Calley's has become a political weapon—against the army or its critics, against the doves or the hawks or ex-hawks, against the President or his opponents. The Calley case has become the symbol of the scarred spirit and the divisions of a nation that could not fully support nor fully end a war, extraordinary in its length, ugliness, and lack of popular support.

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Some have seen the shadow of Nuremberg over this case and in the chain of events that preceded it. It is because of my involvement with the international trial there that I was asked to be here today. Let me say now what I will shortly demonstrate: That experience gives me no special credentials for dealing with the issues raised by My Lai and its aftermath. But I recognize our common responsibility to grope through the puzzling and contradictory uproar. It is because I share in the general confusions and not because I can unequivocally resolve them, even for myself, let alone others, that I am in this classroom; it is an especially appropriate forum since its tradition is that unanswerable questions should be left for resolution by the young.

There are at least three questions that need to be examined: First, what standards or traditions warrant the punishment of any soldier for conduct that to many is in the nature of the war? Second, who else, if anyone, in the chain of command from private to President should be next? Third, are our institutions, and especially our system of military justice, adequate for the further inquiries that some see as indispensable for even-handed justice and for the cleansing of the nation?

You will have noticed that I have passed over the charge that the United States is guilty of the crime of aggressive war in Vietnam, a charge that invokes Nuremberg with special force. That charge raises complex issues, including the significance of de
facto boundaries such as the 17th parallel. Those issues are however, not central to the Calley case, and I will deal with them summarily. First, I cannot accept the charge that the United States is guilty of the crime of aggressive war in Vietnam. I reject that charge for these reasons: All of the ground fighting has occurred south of the 17th Parallel in South Vietnam; North Vietnamese forces crossed that parallel and joined the Viet Cong in an effort to destroy the government of South Vietnam. Sober students of international affairs have suggested that Korea, West-East Germany, and now Vietnam, illustrate that world peace is threatened by forcible intervention seeking to change de facto boundaries of countries divided by hot or cold wars. Indeed, it has been forcefully argued that armed incursions across such boundaries constitute aggression. In any case, the situation with respect to aggression was vastly different at Nuremberg from what it is in Vietnam. Despite the perennial difficulty of formulating a clear and acceptable definition of aggression and despite issues as to the basic causes of World War II, there was no question that the Germans had launched an aggressive war.

A force of three companies was airlifted into an area thought to be a Viet Cong stronghold and a nest of Viet Cong sympathizers. One of the companies, although expecting heavy opposition, encountered none. That company had little combat experience and had recently suffered casualties from mines and booby traps that had enraged and frightened the men. Members of that company moved down approximately 100 unarmed and unresisting inhabitants without regard to age or, if it is still permissible to say so, sex. A lieutenant in that company killed at least 20 inhabitants and tossed into a ditch a child of two and then fired into the ditch. The lieutenant claims that he did what his captain had ordered, but his captain, who is to be tried for charges based on the killings involved, denies that claim although he admits that he told the lieutenant to use captured Vietnamese as lead guides through a suspected mine field. The lieutenant also claims that he can recall nothing about his instruction in the laws of war but that he had been warned to suspect every Vietnamese. There were reasons for such warnings. The Viet Cong do not observe the provisions of the Geneva Convention calling for a combatant to "wear a fixed distinctive sign visible at a distance." Even women and children can and do plant booby traps and toss hand grenades. There was, however, no suggestion of a hostile move or act by the villagers who were killed at My Lai. For his alleged killings, the lieutenant is charged with violating the rules of war or rules dealing with the treatment of civilians, embodied in American military regulations.

Those charges which repudiate the maxim that all is fair in love and war, suggest that it is useful to consider the sources of, and the basis for, standards applicable to an enterprise whose immediate purpose and effect is death and destruction that envelop combatants and non-combatants alike. Standards governing the waging of war are embodied in the laws of war, violations of which are "war crimes." Those laws are not the invention of Nuremberg or World War II. They are of ancient origin and have
been enforced against our own forces as well as the enemy's throughout our history—albeit with differing zeal and energy.

The rules of war have a patently paradoxical quality. War, even if waged according to the rules, involves such a multiplication of horrors that to punish breaches of the rules of warfare seems to many like a mocking exercise in gentlemanly futility. Indeed, Goering at Nuremberg, attacked the Rules of Land Warfare as obsolete and inapplicable to a nation fighting a modern war. His attack was not new and cannot be summarily dismissed. All wars involve the progressive erosion of restraint and chivalry by both sides although in varying degrees. That tendency disturbed Grotius in the 17th Century and disturbs us today.

In any case, it is plainly war itself rather than war crimes that marks the paramount failure of civilization. It was that fact that led to the condemnation at Nuremberg of aggressive war as the supreme crime. And it was that condemnation that was arguably the novelty of Nuremberg. The application of the laws of war at Nuremberg was, to repeat, consistent with an old tradition.

That tradition rests on humane and practical considerations. The rules, despite unevenness of observance and enforcement, do operate to reduce suffering, protect POW's and civilians, and generally to restrain the suffering and carnage that all wars unleash. Furthermore, many of the acts condemned as war crimes are militarily counter-productive. Military efficiency is inconsistent with the notion that soldiers are free to kill and loot without regard to military necessity. Such conduct alienates occupied territories, stimulates reprisals, and complicates the task of peace-making. It further brutalizes the participants and increases the difficulties of their adjusting to the demands of civilian life.

These and related considerations have led to the incorporation of the rules of war into international treaties and conventions, and particularly the Hague and Geneva Conventions. The substance of these laws is, moreover, observed in the military law of many countries. In the United States, they are included in manuals, such as "The Law of Land Warfare," which also provide for enforcement machinery, employable against our own or enemy forces.

There can be no question, and no question has been raised, that the killing of defenseless and unresisting victims in our hypothetical case is a violation of the Army's Rules of Land Warfare. That conclusion, it must be emphasized, is independent of whether the Vietnamese War is viewed as wise or unwise, just or unjust, or whether Vietnamization is a sound policy. The answers to those questions doubtlessly influence the willingness of some to extoll, to condone, or to excoriate, L.t. Calley. Such scrambling of means and ends is, after all, not restricted to the laws of war. But those laws are designed to operate without regard to the nature of the war involved—however commanding that issue may be for other purposes.

But a basic question does remain about our hypothetical lieutenant and his responsibility. That question arises from his claim that he was acting under orders. The soldier's training is to obey. Automatic obedience may result from an internal compulsion that is bred into a soldier's bones. Furthermore, disobedience is a basis for harsh external sanctions, including death. How then can legal and moral responsibility be imposed on a soldier who obeys an order? An army is not a debating society. How can it be run if a soldier must at his peril judge the legality of an order? This dilemma is an old one, and I will not spell out the fluctuating resolutions that evolved over time. It is enough to note that the American Field Manual was revised in 1944 so as to reject superior orders as an absolute defense; the manual now provides that they may be taken into account in defense or mitigation. In this respect the manual resembled the approach previously embodied in the German Military Code and later embodied in the Nuremberg Charter.

Although I have not examined the authorities in any detail, it appears that two factors are of primary
importance in weighing a plea of superior orders urged in defense or mitigation. The first is knowledge of the illegality of an order and the second is fear of the consequences of disobedience. Regard for those factors reflects an effort to take account of general notions of criminal responsibility as well as the nature of military service, and, at the same time, to give effect to the rules of war. The difficulties in weighing those factors under some circumstances need no elaboration.

But all cases governed by pliable criteria are not hard. And even if our hypothetical lieutenant acted under orders to cut down all unnamed and unresisting inhabitants, those orders were so flagrantly in violation of the laws of war that he must be charged with knowledge of the illegality of those orders—unless the pressures of a guerrilla battlefield and the erosion of sensibility by virtue of his prior experiences had robbed him of minimal rationality and decency. As for the lieutenant’s fears concerning the consequences of disobedience, we know how easy it is for armchair moralists to dismiss the fears of others confronted by difficult situations. Nevertheless, there is nothing in the situation at hand to suggest that our lieutenant faced the choice of killing or of substantial danger to himself. Indeed, if I may add to our hypothetical case, some of his fellow soldiers refused to join in the slaughter and others insisted that it be exposed and punished. In any case, the military code, rejecting as it does superior orders as an absolute defense, imposes stern if uncertain obligations on military men. Those obligations, reminiscent of Dudley and Stevens*, may mean that under some circumstances the law of self-preservation may not be the highest law.

Let me turn now from the hypothetical case to the Calley case. The general verdict does not tell us how the jury dealt with the claim of superior orders: whether they found that no such order was given or whether they made the contrary finding but concluded that order should have been ignored. It is that ambiguity that contributes to the cry that Calley is a scapegoat who is being punished for the crimes and deficiencies of his superiors who have not yet been brought to book. Nevertheless, that contention suggests only that the responsibility should be wider, not that Calley was wrongfully ensnared.

The question at the heart of the cry of scapegoat remains—how many more American-made My Lai’s have there been in the Vietnamese war? The news has been full of other cases, the circumstances of which are far from clear, in which military personnel have been convicted of murder and other crimes against the Vietnamese. But the news has also been full of confessions of other outrages in Vietnam by personnel who have not been tried and who are now beyond the reach of court martial jurisdiction. These tales raise the question of unequal application of the law. Such inequality sometimes results, we know, from the failure of proof or apprehension and is an inescapable limitation of all law enforcement. But the charge here appears to go to a different kind of inequality—an inequality that involves the belated singling out of one accused in response to a popular outcry, coupled with the deliberate suppression of similar outrages that were or should have been known to the military authorities.

Such a charge raises anguishing difficulties for a system of military justice. Such a system, like other judicial systems, can deal with occasional deviations from a governing standard. But to deal with wholesale deviations would put into question the training, discipline, and honor of the service and to inflict another blow to the flagging morale of its men who,

*Regina v. Dudley and Stevens, 14 Q.B.D. 273 (1884). This is the celebrated case that ruled that the killing of the weakest member of a crew in a life-boat in order to save the others from probable death by starvation was not warranted by “necessity” and constituted murder. See Mallin, “In Warm Blood,” 34 University of Chicago Law Review 387 (1967).
it must be remembered, are still fighting a war. On the other hand, to sweep similar incidents under the rug or protect those who have sought to cover them up, is to flout the regulations and the standards invoked against Calley, to tarnish the traditions of the service, and to rob justice of a necessary proportion of equality. A satisfactory resolution of this dilemma, assuming the facts make it a genuine one, which is far from clear, may be beyond the army’s capacity. In a moment, I will raise the question of whether more competent tribunals are available.

Before doing so, there is a more subtle variant of the scapegoat charge that should be noticed. The suggestion is that My Lai is the natural result of the practices that have been built into our conduct of the Vietnam war. Those practices are a response to the nature of that war—a guerilla war, a multi-lateral war, a war without clearly defined fronts, or a clearly marked enemy—an enemy incidentally that has, at the highest level of responsibility refused to acknowledge the binding effect of the Geneva Conventions and has disregarded them in connection, e.g., with the treatment of P. O. W.’s. In such a war, as General Giap put it, each inhabitant is a soldier, each village is a fortress; the entire population participants. And in Mao Tse-Tung’s metaphor, the guerillas are fish and the people water in which the fish swim.

In responding to that war, we have relied heavily on aerial bombardment, search and destroy missions, and free fire zones. Such measures, and air power in particular, resemble My Lai in that they kill combatants and non-combatants alike. A bomber is plainly less discriminating than an infantryman’s rifle. But air power has been our preferred weapon and that preference in related contexts has been shared by Congress as well as the military. In any case, aerial bombardment was a common practice on both sides in World War II. The Nuremberg judgment was silent on such bombardment, and international conventions do not resolve its legality. But according to the actual practices of modern war, including the practices of both sides in World War II, a bomber may kill civilians as an incident of achieving military objectives, without violating the rules of war. But an infantry-man who deliberately mows down unarmed civilians has violated those rules. Whatever uneasiness such a distinction may evoke, aerial bombardment of civilian centers is not necessarily a war crime.

But the accusation, vaguely echoed last Saturday by a coalition of churchmen, goes far beyond aerial bombardment. It is in essence that our total tactics and strategy—aerial bombardment, search and destroy missions, free fire zones—are aimed at civilians, kill thousands of them, generate millions of refugees and involve a total lack of proportion between ends and means. This last point is critical for laws of war.

A standard calling for a proper proportion between civilian suffering and military objectives is unpredictable as well as harsh. I do not pretend to have either the facts or the wisdom required for its application to operations in Vietnam. But, I would emphasize, it is not Vietnam that has produced that harsh and pliable formula. That formula is the product of modern war itself and the imperfect guidelines for restraining its savagery—guidelines that have not digested and regulated a new and frightful technology. As a consequence, we must at least recognize the acute moral and legal ambiguities that the services and the President cannot escape, and we must also, I believe, avoid a national masochism that would use the horror of all war or of the Vietnamese war as a basis for a blanket indictment of the American military establishment for having committed war crimes.

But to refer to moral and legal ambiguities is not to resolve them, and the Calley case has provoked justifiable calls for an inquiry into the legality and morality of the means by which we have waged war in Vietnam and into the question of whether failures
of the higher command were responsible for My Lai and any similar outrages. The latter question evokes memories of General Yamashita, the Japanese general who was executed by an American military tribunal, basically for failing to control his troops who had been guilty of massive atrocities during the 11 month period of the final battle for the Philippines in 1944-1945. Bitterness against the Japanese did not immunize the Yamashita decision against criticism at the time it was rendered. Whatever one's view of that case, the wholesale atrocities which it involved serve to distinguish it from My Lai. But to the extent that evidence suggests that more My Lai's have occurred, the shadow of Yamashita looms larger over the American command in Viet Nam.

An inquiry directed at the questions that have been raised would plainly involve formidable difficulties—evidentiary, institutional, and political. The pertinent events have occurred at the other end of the world and over a long period of time. They would presumably have to be reconstructed by testimony, and the usual fallibility of testimony would be intensified by the passions, the fears, the loyalties generated by this war. Men of conscience and exhibitionists, truthful and otherwise, would come forward with evidence of outrages by our forces. The Vietnamese, whether their testimony was exculpatory or inculpatory, would doubtlessly be concerned about reprisals. The issues of credibility would plainly be formidable. Such issues were largely avoided at Nuremberg because the prosecution relied primarily on unquestioned documentary evidence—evidence that made it clear that war crimes had been coolly and willfully planned by the top Nazi command and were not the result of the loss of control by men caught up in the swirl of battle.

Plainly, a tribunal adequate to the task of examining the conduct of the Vietnam war would require the qualities of mind, judgment, disinterestedness, integrity, and commitment to an arduous and probably unpopular inquiry, that we associate with the best traditions of the law. Such a tribunal also should enjoy, as well as deserve, public confidence. Furthermore, it should not consist of appointees who would serve only as a front for the work of others.

Existing mechanisms, such as military tribunals or Congressional committees, would not satisfy the requirements that I have outlined. Under the system of military justice, charges of breach of military regulations, or the laws of war are brought by the superior officer of those to be accused. An officer corps that has developed and implemented tactics and strategy for a difficult war, in response to their conceptions of duty and military necessity can scarcely be expected to indict itself. The President, like his predecessor, is also deeply involved and properly concerned about resultant damage to the social fabric. Congress, moreover, is involved because it has appropriated money for a war whose practices raised questions which were known, or should have been known, by Congress. In any case, neither the temper of the country nor the tradition of Congressional committees suggests that such a committee would be suitable instrument of inquiry. The civil courts lack jurisdiction over those in the army and court martial lack jurisdiction over those who have left the military service.

There are perhaps even greater obstacles to such an inquiry that arise from the national mood. As the diverse response to the Calley case suggests, the means used to wage the Vietnam war have not been, and perhaps cannot be, separated from the ends for which it has been fought. And it may be that by an inversion of the usual formula, the means are condemned because of their ends. In any case, we may need a period of greater tranquility than we now have for the searching and dispassionate self-study that is needed, a period in which the military is free from the inexorable demands of war and the country more able to absorb the recriminations that might re-
sult. But there is the risk that tranquility will produce apathy with respect to an arduous and distasteful job. My own uninformed view is that we should press such an inquiry despite the difficulties involved.

An international commission, as some have urged, might prove a useful instrument for an inquiry. But it is not easy to insulate such a commission from the larger controversies that continue to shake the world. It is, moreover, doubtful that the leadership of a great power would admit probable cause for such an inquiry, or would accept the immediate and ultimate risk to its prestige and to its unity. The risks are those that are especially acute in controversies implicating politics—the risks of omniscient hindsight, the risks of conscious distortion, the risks of unconscious error, and the risks of truth. I naturally cannot appraise each of these risks, but I doubt that they are greater than those inherent in silence, in self-serving white papers in the face of grave accusation, or in the self-appointed tribunals that, for noble or ignoble motives, will rush into the investigatory vacuum.

The trial of Lt. Calley, coupled with the lack of institutions competent to judge the overall conduct of the war, produces a difficulty that Nuremberg illustrated but did not invent. There the victors applied the laws of war to the vanquished but did not comb their own ranks for violators. The Russians were not forced to defend their operations in Finland or Poland; we were not required to defend Hiroshima or Nagasaki. The nature and magnitude of Nazi savagery and the undeniable fact that it was their aggression that unleashed the whole chain of horrors strengthened our relative moral position. But those considerations do not conceal the basic flaw in the unilateral and unequal application of the controlling standards, including the newly formulated standard proscribing wars of aggression—a flaw that is the product of a primitive international system.

The Calley case has sharpened questions concerning a new inequality—an inequality within a nation rather than between nations. The judging of Calley, whatever inequality it may involve, was, in my view, demanded by what he was charged with. But his trial, unlike the Nuremberg trial, involved a theater of a guerilla war and a junior officer, and not the top leaders of a regime who had coolly built flagrant war crimes into the official structure of Nazi policy. So long as the actions and omissions of the top American command are left unexamined, we will be haunted by that new inequality and by the question that has already been voiced: Is judging Calley enough? Although I have doubts that there is an appropriate legal forum—or indeed—any other earthly forum in which that question can be judiciously resolved, we must, I believe, strive to do so. Despite such an effort, we may, in the end, have to resign ourselves to the fact that the greater questions are seldom answered by the law.