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1994

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### Repository Citation

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# THE VIETNAM WAR ON TRIAL: THE COURT-MARTIAL OF DR. HOWARD B. LEVY

ROBERT N. STRASSFELD\*

This Article examines the history of a Vietnam War-era case: the court-martial of Dr. Howard B. Levy. The U.S. Army court-martialled Dr. Levy for refusing to teach medicine to Green Beret soldiers and for criticizing both the Green Berets and American involvement in Vietnam. Although the Supreme Court eventually upheld Levy's conviction in *Parker v. Levy*, its decision obscures the political content of Levy's court-martial and its relationship to the war. At the court-martial Levy sought to defend himself by showing that his disparaging remarks about the Green Berets, identifying them as "killers of peasants and murderers of women and children," were true and that his refusal to teach medicine to Green Beret soldiers was dictated by medical ethics, given the ways in which the soldiers would misuse their medical knowledge. Ultimately, Levy put the war itself on trial by arguing that had he trained the soldiers he would have abetted their war crimes.

This Article seeks to recapture the history of the *Levy* case as a case about the Vietnam War. Yet the case was also about much more. The Article shows how

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\* Professor of Law, Case Western Reserve University. B.A. 1976, Wesleyan University; M.A. 1980, University of Rochester; J.D. 1984, University of Virginia. I owe more than the usual number of debts of thanks. First, I thank Dr. Howard Levy for permitting me to pry into a part of his past. He not only allowed me to consult his litigation files and talk with his lawyers about the case, but also authorized numerous Freedom of Information Act (FOIA) requests for files relating to him. For their help with various documentary materials, I also thank Laughlin McDonald and Donna Matern at the ACLU Southern Regional Office; Lt. Col. Gary Jewell and Carolyn Wade at the U.S. Army JAG Litigation Division; David Keogh in the archives and Jeffrey Hoskins in the special collections section of the U.S. Army Military History Institute; and Clay Farris at the U.S. Army Intelligence and Security Command, who displayed a commitment to the FOIA that regrettably is not universally shared. For permission to consult the *Parker v. Levy* case files in his papers, I thank Mr. Justice William J. Brennan. I also thank Skip DeLano, who shared materials from his files on the United States Servicemen's Fund and on the GI antiwar movement and shared his extraordinary knowledge about the GI movement; Willa Seidenberg and William Short, who gave me a copy of the transcript of their interview with Howard Levy; Richard Shusterman, who sent me various materials from his personal and litigation files relating to the court-martial; and the various participants in the Levy case who permitted me to interview them. For their extraordinary interlibrary loan efforts, I thank Deb Dennison and Andy Dorchak. I thank Laura Chisolm, Carol Chomsky, Jonathan Entin, Paul Giannelli (who also answered numerous questions about military law and procedure), Michael Grossberg, Candice Hoke, Andrew Morriss, Margaret Russell, Anne Standley, and Anne Strassfeld for their comments on an earlier draft and for their encouragement. I also thank Kim Mack, Margaret Russell, Anne Standley, and Charles Welch for their research assistance and Greta Jennings and Marilyn Burks for secretarial support. This Article is dedicated to the memory of Francis Hennigan, Jr., and Christopher Lasch.

imagery evoking beliefs about race and racial difference, war, frontier violence, and medicine and healing all came into play in the Levy case. It also explores the manner in which the court-martial became a forum in which the Vietnam War and aspects of U.S. Army policy and conduct were debated, and in which that debate was eventually suppressed. Ultimately, this Article begins the exploration of how American legal institutions coped with the crisis of political and moral legitimacy that they confronted in the late 1960s.

On June 19, 1974, the United States Supreme Court upheld the court-martial conviction of Dr. Howard B. Levy,<sup>1</sup> and with it, the constitutional validity of Uniform Code of Military Justice ("UCMJ") Articles 133<sup>2</sup> and 134.<sup>3</sup> The Court's announcement of its decision in *Parker v. Levy*<sup>4</sup> prompted an unusual display of ire; Justice Potter Stewart angrily read his dissenting opinion from the bench. One visiting Senator who witnessed this remarked: "My God, we don't treat each other that way at the Senate."<sup>5</sup> Despite the contentiousness of that moment, the Court's decision masked a far greater contentiousness that lay at the core of the case, for in his defense at the court-martial Dr. Levy had attempted to put the Vietnam War on trial.

This masking does not mean that the opinions in *Parker v. Levy* conceal the Vietnam War context of the case. Even the most superficial reading of the opinions unmistakably identifies the case as a product of the war. The court-martial had found Dr. Levy guilty of "willfully disobeying a lawful command of his superior officer" in violation of

1. Dr. Levy's rank was Captain (O-3). Reflecting what I assume would be his preference, I have chosen to refer to him as Dr. Levy (or just Levy) rather than Capt. Levy in the text, except where I am quoting material that refers to him as Capt. Levy.

2. Article 133 of the UCMJ provides: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." 10 U.S.C. § 933 (1993).

3. Article 134 of the UCMJ provides in part:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (1993).

4. 417 U.S. 733 (1974).

5. Interview with Judge Robert H. Bork, at the American Enterprise Institute, in Washington, D.C. (Apr. 28, 1993). Judge Bork notes that "there was a lot of . . . fire in [Justice Stewart's] voice," and that the Justices seldom read anything from the bench unless one of them "was very exercised and Stewart was very exercised . . ." Judge Bork is uncertain of his recollection, but believes that the Senator was William Proxmire. *Id.*; see also Warren Weaver, Jr., *Justices Uphold Levy Conviction*, N.Y. TIMES, June 20, 1974, at A1 (describing a "relatively emotional exchange").

UCMJ Article 90, of engaging in "conduct unbecoming an officer and a gentleman" in violation of UCMJ Article 133, and of publicly uttering various statements "with design to promote disloyalty and disaffection among the troops . . . to the prejudice of good order and discipline in the armed forces" in violation of UCMJ Article 134.<sup>6</sup> The Article 133 and 134 charges rested solely on statements that Levy made about the war,<sup>7</sup> about whether black soldiers ought to serve in it,<sup>8</sup> and about the conduct of United States Special Forces (the "Green Berets") in the war.<sup>9</sup> Justice Rehnquist's majority opinion reproduces these statements.<sup>10</sup> But while *Parker v. Levy* identifies the case's origins in the war, it also alters the relationship between the case and the war by shifting the war from the center to the periphery of the case. No longer a case that put the war in issue, *Parker v. Levy* had become, instead, a case that merely happened to arise against the backdrop of the war.<sup>11</sup>

The case came to the Supreme Court on appeal from the United States Court of Appeals for the Third Circuit, which had ruled for Levy in a habeas proceeding, declaring that Articles 133 and 134 were unconstitutionally vague and overbroad.<sup>12</sup> In reversing the Third

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6. For an exposition of the court-martial's findings, see generally Record at 2617. The court-martial record consists of 18 volumes. The court-martial transcript comprises volumes 3-9 of the record and its pages are numbered consecutively. I have adopted the citation form "Record at \_\_\_\_" for citations to the transcript. When citing to other parts of the court-martial record, I identify the record volume number (and where applicable a page number), the name of the cited document, and any other identifying information (e.g., "Prosecution Exhibit no. 5"). Two other charges brought against Dr. Levy relating to a letter he had written to a soldier in Vietnam were dismissed at the end of the court-martial. *Id.* at 2618. These charges based on the letter are discussed below.

7. "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so." *Parker v. Levy*, 417 U.S. at 738 n.5 (quoting Specification to Charge II under Article 134).

8. For instance: "I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties." *Id.* at 738-39 n.5 (quoting Specification to Charge II under Article 34).

9. For instance: "Special Forces personnel are . . . killers of peasants and murderers of women and children." *Id.* at 739 n.5.

10. 417 U.S. at 736-40.

11. As with *Tinker v. Des Moines Community Sch. Dist.*, 393 U.S. 503 (1969) (upholding the right of students to wear black armbands to school to protest the war), *Levy* had become a case of, but not about, the war.

12. *Levy v. Parker*, 478 F.2d 772, 793-96 (3d Cir. 1973). Shortly before the Third Circuit decided *Levy*, the United States Court of Appeals for the District of Columbia struck down portions of Article 134 on vagueness grounds in *Avrech v. Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973). The Supreme Court heard

Circuit, the Court focused on the applicability of the vagueness and overbreadth doctrines in a military justice setting. It framed the case as one about the proper standard of review for challenges to the UCMJ under the vagueness and overbreadth doctrines. More specifically, the Court asked whether Levy was entitled to challenge the Articles as vague on their face and whether he had standing to challenge them as overbroad even if his own speech was unprotected. The Court answered in the negative to both questions.<sup>13</sup> Only at the edges of Justice Rehnquist's opinion, which obliquely mentions "medical ethics"<sup>14</sup> and "participation in a war crime,"<sup>15</sup> can one see hints of issues of conscience relating to the war and of alternative constructions of the *Levy* case.

During Dr. Levy's court-martial seven years earlier, however, the case looked very different. To be sure, questions of statutory vagueness and overbreadth were always important. Moreover, there was never a single authoritative construction of the case. At issue in the court-martial was the question of how to frame the case. Although many facts were not in dispute, there was no single version of events. More important, there was no single version of what was at issue, what legal categories for interpreting events were appropriate for understanding the case, and what significance to ascribe to events.<sup>16</sup> The court-martial was, in other words, a contest over these issues. The silencing of one construction of the case, which ultimately resulted in the sterility of the Supreme Court's opinion, began at the court-martial.<sup>17</sup>

argument in the two cases together.

13. 417 U.S. at 752-61.

14. *Id.* at 736.

15. *Id.* at 761.

16. Cf. Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENV. U. L. REV. 283, 283 (1993) ("At stake at each axis of conflict is a contest over which narrative structure will prevail in the interpretation of events in the social world.").

17. My understanding of the ways that legal disputes become contests over the naming and interpreting of events is informed by Sally Engle Merry's writings. See SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990); Sally Engle Merry, *The Discourses of Mediation and the Power of Naming*, 2 YALE J.L. & HUMAN. 1 (1990). As Merry argues, naming and interpreting events are exercises of power and domination that direct legal outcomes and silence competing accounts. MERRY, *supra*, at 111, 130-33. Merry states:

One aspect of the power of law is its ability to establish a dominant way of construing events and to silence others, thus channeling and determining the outcome of legal proceedings. Legal processes can be seen as performances in which problems are named and solutions determined. . . . The ability to structure this talk and to determine the relevant discourse within which an issue is framed—in other words, in which the reigning account of events is established—is an important facet of the power exercised by law.

The prosecution attempted to focus on Levy's conduct, statements, and character, and to push the war into the background. It assumed the war to be a just cause and relevant only to the extent that the war heightened the dangerousness of Levy's words and deeds. For the defense, and for many observers of the court-martial, however, aspects of America's war in Vietnam were on trial. Charged with making disloyal statements, Levy sought to defend himself by proving the truthfulness of his statements that Special Forces were "killers of peasants" and "murderers of women and children."<sup>18</sup> He attempted to defend the charge of willful disobedience of an order to teach medicine to Special Forces aidmen (or medics) by arguing that given the ways in which the aidmen would misuse the training, the order demanded a breach of medical ethics.<sup>19</sup> And for a brief moment in the history of the case he raised a Nuremberg defense, the first ever heard in a U.S. court, charging that had he trained the aidmen he would have been complicitous in war crimes committed by Special Forces.<sup>20</sup> Rather remarkably, while civilian courts were routinely precluding similar defenses, the claim that the war was not merely wrong but unlawful was entertained, albeit in a limited manner, in the unexpected forum of a military court-martial. Yet, given the forum, the ultimate disposition of the questions relating to the war may have been preordained.

The defense's vision of the case did not prevail, at least at the Supreme Court. Levy lost. Nevertheless, the case's construction was ultimately the result of an ongoing contest between the Army and the defense to define it within legal rules and process constraints, as well as within other important exogenous constraints, such as time and resource limitations and government secrecy. Neither side was able to frame the case without reference to the other's construction, or without reference to the expectations, and sometimes the intervention, of various audiences for the stories that the two sides told. Consequently, to say that the Supreme Court opinion is authoritative, in any but the most formal sense, is to take

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Merry, *supra*, at 2. Merry focuses on the contest in lower courts and in mediation sessions to select the "discourse" that will apply to the problems plaintiffs present. She identifies the tendency in these fora to transform legal problems into moral or therapeutic issues by the substitution of moral or therapeutic discourse for legal discourse. MERRY, *supra*, at 110-33; Merry, *supra*, at 3-9, 34-36. While Merry is particularly interested in the redefinition of problems as non-legal, her vision of the contest to name and interpret events is also applicable to legal discourse, which is the focus of this Article. Law's power to silence has been explored by a number of feminist legal theorists. See, e.g., Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1987).

18. See *infra* notes 236-42 and accompanying text.

19. See *infra* notes 350-459 and accompanying text.

20. See *infra* notes 243-349 and accompanying text.

an ahistorical, static approach to the *Levy* case. The authority that we give to the Supreme Court's construction of a case tends to silence other understandings of that case including, quite often, the understandings of parties and other participants. To focus on the Court's construction alone also cabins our understanding of the case too narrowly by ignoring extralegal responses to it. It obscures the possibility that many people may reject the authoritativeness of the Court's construction, and that the case's greater significance may lie in the contrarian readings it spawned.<sup>21</sup>

*Levy's* court-martial was a cultural, as well as a political, event. The advocates drew on popularly held myths, symbols, and beliefs, as well as on legal doctrines, in an effort to persuade the decisionmakers. Tacitly, these myths and beliefs were reaffirmed or refashioned as the court-martial incorporated them into its understanding of the case. Yet the trial was not merely a venue for the consumption of culture. More than one hundred journalists crammed into the small courtroom to cover the case. As they used familiar myths and symbols, the participants were also engaged in the production of new ones.

This Article attempts to unmask the politics of the *Levy* case. It seeks to recapture *Levy's* context and to rehabilitate its multiple meanings that are submerged below the surface of the Supreme Court's decision. To do so, it focuses on one part of *Levy's* history: the court-martial and the events preceding it.<sup>22</sup> This Article begins by setting a context of time, place, and military culture. Because of their importance to the *Levy* case, this Article examines the Green Berets and the counterinsurgency doctrine with which they were so closely associated. An Army intelligence investigation played a critical role in prompting *Levy's* court-martial and in fashioning the manner in which the court-martial unfolded and was understood. Consequently, this Article closely examines Army Intelligence's role in the *Levy* case. It reveals the prevalence of reflexive anticommunism within the Army in the mid-1960s. It also shows how anticommunism, often coupled with racial bigotry, produced fear and intolerance of political dissidence and movements for social change.

In turning to the court-martial, this Article analyzes the way in which the prosecution and the defense framed the case. It focuses on the

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21. See Symposium, *Legal Histories from Below*, 1985 WIS. L. REV. 759.

22. In another article I intend to examine the idea of the military as a "separate society" that was the foundation for the majority's opinion in *Parker v. Levy*. I plan to identify the origins of the separate society idea, trace the myths of the professional soldier that it spawned, and examine the ways in which the *Levy* majority drew on those myths in the service of a vision of the military and its relationship to society, a relationship that was collapsing as it became more "civilianized" and civilian society became more militaristic.

competing stories that the prosecution and defense attempted to tell and on the myths, symbols, and ideas that they drew upon. This Article shows how imagery evocative of beliefs about race and racial difference, about war, frontier violence, and the civilizing force of law, and about medicine and healing, all came into play in the *Levy* case. And it explores the manner in which the court-martial became a forum for debating the Vietnam War and aspects of United States military policy and conduct, a debate that was ultimately suppressed.

## I. PRELUDE TO THE COURT-MARTIAL

### A. *The Army and Howard Levy*

Dr. Howard Levy staunchly opposed U.S. involvement in the Vietnam War when he arrived at Fort Jackson, South Carolina, on July 13, 1965, to begin two years of active military duty. Subject to an expansive doctors' draft, Levy chose in 1962 to avail himself of the "Berry Plan."<sup>23</sup> Under the Berry Plan, the Army deferred induction until a doctor had completed his medical specialty training and guaranteed him assignment within his medical specialty. Consequently, Levy was able to delay inevitable military service. His commitment, made without thought to Vietnam, did not come due until he completed his residency in 1965, during the escalation of U.S. involvement in Vietnam. Like many other draftees, Levy confronted what he saw as three dreary choices: flight to Canada, prison for refusing induction, or military service. Levy would subsequently say that he never considered going to Canada to be a palatable option and feared prison too much to refuse induction.<sup>24</sup> Instead, he entered the Army hoping that the time would pass as

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23. The Berry Plan was established in the 1955 draft amendments. 1955 Amendments to the Universal Military Training and Service Act, Pub. L. No. 84-118, 69 Stat. 223 (codified as amended at scattered sections of 37 & 50 U.S.C.). For a discussion of the "doctor's draft" and of the Berry Plan, see GEORGE Q. FLYNN, *THE DRAFT, 1940-1973*, at 153-60 (1993). Because of the Berry Plan's success, by 1962 many medical students were taking their chances on the draft.

24. William Short & Willa Seidenberg, *A Matter of Conscience: Resistance Within the U.S. Military During the Vietnam War* 32-33 (Jan. 15, 1989) (transcript of unpublished interview with Howard Levy, on file with author) [hereinafter Short & Seidenberg]. Short and Seidenberg have published a condensed version of the interview, along with condensed interviews with other GI dissenters. See WILLIAM SHORT & WILLA SEIDENBERG, *A MATTER OF CONSCIENCE: GI RESISTANCE DURING THE VIETNAM WAR* 18 (1992).



painlessly as possible, but recognizing that his beliefs might eventually come into conflict with Army command.<sup>25</sup>

In the years between medical school and active duty, Levy's political views had evolved significantly. Once very much a part of the generation of the 1950s,<sup>26</sup> Levy had come to describe himself politically as "liberal left."<sup>27</sup> In interviews Levy has suggested various cultural influences from the fifties and early sixties that may have played a role in this evolution, most notably the writings of C. Wright Mills, the beats, new wave cinema, and absurdist or avant-garde theater.<sup>28</sup> More important were the images and ideas of the civil rights movement, coupled with the

25. Short & Seidenberg, *supra* note 24, at 33; Interview with Dr. Howard B. Levy, in New York, N.Y. (July 19, 1993) (discussing entering the Army with the belief that at some point he might be asked to cross a line that he would be unwilling to cross). Shortly after his arrival at Fort Jackson, Levy stated in an interview with an Army Intelligence Agent that he "question[ed] the present US foreign policy in Vietnam as well as other areas," and that he could envision unusual circumstances where he might refuse to obey an order because it was immoral or unethical. Statement of Howard Levy, DA Form 19-24 (Oct. 7, 1965), in U.S. Army Intelligence Dossier No. 079300840, at 214, 216 (on file with author) [hereinafter Levy Army Intelligence File]. Donald Duncan, writing about the case in the publication *Ramparts*, notes that the doctor whom Levy was to replace at Fort Jackson wrote a letter to Levy that allayed Levy's concerns about working conditions there. However, the doctor subsequently told Levy that he had been ordered to write the letter. Donald Duncan & J.A.C. Dunn, *Notes Toward a Definition of the Uniform Code of Military Justice, as Particularly Applied to the Person of Captain Howard Levy*, RAMPARTS, July 1967, at 50, 52.

26. His father testified that Levy was interested in basketball and school, rather than politics, and that he had voted for Eisenhower in 1956. Record at 847-48. He was probably partly mistaken in his testimony, since Levy was only nineteen at the time, and the voting age was then twenty-one. Nevertheless, Levy also described himself as instinctively politically conservative at that time. See, e.g., Homer Bigart, *Captain Adamant Against War Duty*, N.Y. TIMES, May 10, 1967, at A22.

27. Statement of Howard Levy, DA Form 19-24, in Levy Army Intelligence File, *supra* note 25, at 215; see also Memorandum from Laughlin McDonald to File of Capt. Howard B. Levy 5 (Dec. 27, 1965), in Howard Levy Litigation Files (on file with ACLU Southern Regional Office, Atlanta, Ga.) [hereinafter Levy Litigation Files] (noting that Levy describes himself as "left liberal"). Levy's political evolution raises interesting questions about the relationship between the politics of sixties activism and the supposedly conformist culture of the 1950s that are beyond the scope of this Article. For explorations of this subject see WNI BRENES, YOUNG, WHITE, AND MISERABLE: GROWING UP FEMALE IN THE FIFTIES (1992); TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE 11-77 (1987).

28. Short & Seidenberg, *supra* note 24, at 13; Bigart, *supra* note 26, at 22. For a discussion of C. Wright Mills' impact on Levy's generation and American culture, see MORRIS DICKSTEIN, GATES OF EDEN: AMERICAN CULTURE IN THE SIXTIES 58-61 (1977); JOHN PATRICK DIGGINS, THE PROUD DECADES: AMERICA IN WAR AND IN PEACE, 1941-1960, at 249-50 (1988). On the impact of the beats, and of new wave cinema, see DICKSTEIN, *supra*, at 3-24, 88; GITLIN, *supra* note 27, at 28-29, 45-56.

reality of poor people's medicine encountered by Levy during his residency.<sup>29</sup> At Bellevue Hospital in particular, Levy saw the medical treatment available to the poor. He noted that his patient population was largely black or Puerto Rican and drew connections between what was occurring in the South and the experiences of poor nonwhites in the North.<sup>30</sup>

As Levy's politics gravitated leftward, the U.S. widened its involvement in Vietnam. In August 1964, Congress provided President Johnson with what would prove to be a blank check for escalation, in the Tonkin Gulf Resolutions.<sup>31</sup> As the time for Levy's military service approached, U.S. troop levels in Vietnam increased dramatically. By May 1965, U.S. combat strength in South Vietnam was more than 46,500. On July 28 of that year, Johnson publicly announced that he would immediately increase troop strength from 75,000 to 125,000, and secretly agreed to deploy an additional 50,000 troops.<sup>32</sup>

In the meantime, stirrings of opposition to U.S. policy in Southeast Asia were beginning to occur. The first nationwide demonstration against the war, organized by Students for a Democratic Society, drew 25,000 protesters to Washington, D.C., on April 17, 1965.<sup>33</sup> Antiwar teach-ins, beginning at the University of Michigan and spreading to other campuses, also marked that spring.<sup>34</sup> By late 1964, Levy, having read sporadically but apparently widely about the war, concluded that the U.S. should immediately withdraw.<sup>35</sup>

Opposition to U.S. Vietnam policy was but one reason that the match of Howard Levy and the Army was unpromising from the start. Levy

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29. James Finn, Personal Testimony: Howard Levy, M.D., in CONSCIENCE AND COMMAND 161, 163-64 (James Finn ed., 1971) (1969 interview of Levy conducted by Finn); Short & Seidenberg, *supra* note 24, at 22-23; Andrew Kopkind, *Captain Levy I—Doctor's Plot*, in TRIALS OF THE RESISTANCE 14, 16 (1970).

30. Short & Seidenberg, *supra* note 24, at 24.

31. See Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Act of Jan. 12, 1971, Pub. L. No. 91-672, 84 Stat. 2053, 2054; see also GEORGE C. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975, at 119-24 (2d ed. 1986); GUNTER LEWY, AMERICA IN VIETNAM 32-36 (paperback ed. 1978); MARILYN B. YOUNG, THE VIETNAM WARS 1945-1990, at 117-23 (1991).

32. HERRING, *supra* note 31, at 139; YOUNG, *supra* note 31, at 160.

33. GITLIN, *supra* note 27, at 177-86; YOUNG, *supra* note 31, at 152; NANCY ZAROULIS & GERALD SULLIVAN, WHO SPOKE UP? AMERICAN PROTEST AGAINST THE WAR IN VIETNAM 1963-1975, at 38-42 (1984).

34. YOUNG, *supra* note 31, at 152; ZAROULIS & SULLIVAN, *supra* note 33, at 38, 43-44.

35. Finn, *supra* note 29, at 164.

was in important ways an atypical soldier, often to the Army's irritation.<sup>36</sup>

Nonetheless, some of the tension between Levy and the Army was unexceptional within the medical corps. Levy was by his own admission lacking in matters of military dress and deportment.<sup>37</sup> Among military doctors, however, Levy's failings in these areas were hardly remarkable, if slightly more pronounced than average. The military, in desperate need of doctors, and perhaps regarding them as different, tolerated in its doctors a high degree of deviation from accepted standards of military dress and manner.<sup>38</sup> Yet a separate standard in these matters, along with such benefits as conferral of rank and more rapid promotion, did little to

36. In his closing argument to the court-martial, Levy's civilian defense counsel, Charles Morgan, Jr., stated: "I think, looking back on it, that each of you knows that Dr. Levy should never have been in the United States Army . . . ." Record at 2569. Levy would certainly have agreed. In response to William Short and Willa Seidenberg's question concerning whether he had received orientation as to "who you should salute or shouldn't salute or that sort of thing," Levy explained:

No, they sort of expected that you pick that up automatically. And the first time someone [saluted] me I just sort of laughed at them. I just thought it was the funniest goddamn thing I'd ever seen. I said Jesus, why . . . I mean it wasn't that I was discourteous. I just sort of wave[d] to them. And I didn't salute, of course, people superior to me, but then again I didn't know who was superior to me. Nor did it interest me to know. So it was sort of like Woody Allen arriving all of a sudden at Guadalcanal.

Short & Seidenberg, *supra* note 24, at 36-37.

37. Finn, *supra* note 29, at 167 ("I was a bit sloppier than even the average doctor, in truth."); Short & Seidenberg, *supra* note 24, at 36-37. Donald Duncan wrote of Levy:

Howard Levy gives the impression of a person who witnessed militarism close up, became horrified and consciously did everything possible to remain a civilian. His shoes appear never to have been contaminated by polish. His belt buckle seems in an advanced stage of gangrene. He invariably forgets to button at least one pocket. The day he had to stand before the ten field grade line of officers of his court-martial and hear himself pronounced guilty, he strolled forward with his right hand in his pocket.

Duncan & Dunn, *supra* note 25, at 52.

38. Record at 613 (testimony of Capt. Ivan Mauer); Jon Betwee, *Military Medicine: An Exercise in Conflict of Allegiance*, NEW PHYSICIAN, July 1974, at 14, 15; Peter G. Bourne, *The Hippocratic Revolt: The Army Physician and Vietnam*, RAMPARTS, July 1967, at 57, 58; see also ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 108-09, 128 (1970). Ironically, Levy had much in common in this regard with the Special Forces soldiers whom he would eventually refuse to train. In an article published in 1961 criticizing the Army for failing to recognize the need to recruit and retain "unconventional guys" to fight unconventional wars, George Goodman noted that Special Forces soldiers "were always in mild trouble on garrison duty. Their belt buckles went unshined and they hated parades." George J.W. Goodman, *The Unconventional Warriors*, ESQUIRE, Nov. 1961, at 128, 131, 132.

offset the resentment felt by drafted physicians. At Levy's court-martial, Lieutenant Colonel Richard Coppedge, Center Surgeon of the John F. Kennedy Center for Special Warfare from 1962 to 1966, testified that drafted physicians often resented the military. He noted that those doctors he spoke to at Fort Jackson about training Special Forces aidmen were apathetic, and he characterized their apathy as a "passive-aggressive reaction."<sup>39</sup> The military retained few doctors once they fulfilled their obligated tour of duty.<sup>40</sup> In addition to the usual inconveniences of military service and the reduced earnings endured by drafted physicians, the low morale of military doctors undoubtedly stemmed from the military medical bureaucracy's cramping of physician autonomy. The conflict between military medicine's stated goals of "preserv[ing] the fighting strength,"<sup>41</sup> and providing "the greatest good for the greatest number,"<sup>42</sup> and the doctors' allegiance to individual patients also contributed to morale problems. Yet another cause of low morale must have been the doctors' awareness that others of similar social and educational background had successfully avoided military service.<sup>43</sup>

39. Record at 2232.

40. *Betwee*, *supra* note 38, at 15-16. Indeed, with the escalation of the war, the Army found it difficult to retain even those physicians who had intended to make a career of military medicine. Many of these doctors sought to resign from the service, sometimes specifically to stave off service in Vietnam. Peter G. Bourne, *supra* note 38, at 57. In letters to his lawyers written while confined at Fort Jackson (upon conviction Levy was held at Fort Jackson until December 1967, when he was transferred to the United States Disciplinary Barracks at Leavenworth), Levy urged them to publicize two Fort Jackson doctors' decisions to resign their commissions to avoid a tour of duty in Vietnam. He further urged his attorneys to enlist help from within the peace movement to investigate the frequency of doctors resigning their commissions to avoid Vietnam service. *See* Letter from Dr. Howard Levy to Charles Morgan, Jr. (Aug. 15, 1967), *in* Levy Litigation Files, *supra* note 27; Letters from Dr. Howard Levy to Charles Morgan, Jr. (Aug. 31, 1967), *in* Levy Litigation Files, *supra* note 27.

41. *Betwee*, *supra* note 38, at 15-16.

42. Edwin T. Cooke et al., *Attitudes of Physicians Entering Military Service*, 14 ARCHIVES ENVTL. HEALTH 271, 273, 274-75, 277-78 (1967); *see* Record at 611 (testimony of Capt. Ivan Mauer).

43. Peter Bourne writes:

The doctor-draftee enters the service feeling that he has been discriminated against, a feeling which is not without some justification. Physicians are still drafted up to age 35, although few other Americans are drafted after age 26. Doctors are the only group drafted even if they have children. They are drafted with physical handicaps which would make anyone else 4F. At the present time, the "Selective Service" is selecting virtually 100 per cent of the country's eligible physicians. This was not the case until the recent military buildup, with its resulting increased demands for physicians. It has meant that many 33- and 34-year-old physicians, who have established practices, are suddenly being drafted into the service.

However typical Levy's casual approach to such military formalities as saluting and proper display of his insignia was among military doctors, his situation was distinctive in other important ways. At his trial, defense counsel offered evidence in mitigation to show that the Army sent Levy to Fort Jackson without his having undergone the normal course of basic training for doctors at Fort Sam Houston in Texas.<sup>44</sup> Levy thus missed the normal socialization process that would have alerted him to military customs and helped him to internalize military norms. This gap in his training may have contributed to Levy's tin ear for military customs and practices.<sup>45</sup>

Whether because of a tin ear, or simply indifference, Levy was not a typical officer. Soon after his arrival at Fort Jackson, Levy refused to join the Officers' Club, an apparently unprecedented act that caused considerable upset before the matter was resolved in Levy's favor.<sup>46</sup> He

Bourne, *supra* note 38, at 57. On the class nature of military service and combat service in the Vietnam War era, see generally CHRISTIAN G. APPY, *WORKING CLASS WAR: AMERICAN COMBAT SOLDIERS AND VIETNAM* (1993), especially chapters 1 and 2; LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, *CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION* 3-28, 39, 47-49 (1978); FLYNN, *supra* note 23, at 193-95; James Fallows, *What Did You Do in the Class War, Daddy?*, *WASH. MONTHLY*, Oct. 1975, at 5.

44. Record at 609-10 (testimony of Capt. Ivan Mauer); *id.* at 2413-16 (testimony of SFC George B. Curry); *see also id.* at 2127, 2228-31 (testimony of Lt. Col. Richard L. Coppedge) (describing importance of basic training for doctors).

45. Telephone Interview with Col. Earl V. Brown, Law Officer in Levy Court-martial (Sept. 24, 1993) (speculating on whether standard indoctrination would have alerted Levy to military norms and expectations). I am rather skeptical that this training would have altered events significantly. Certainly, it would not have changed Levy's opposition to the war or his beliefs regarding the ethics of training Special Forces aidmen. Nor would it have dampened Levy's commitment to civil rights or curbed his prickly individualism. On the other hand, it might have sensitized him to the limits of tolerance within the military to the effect of averting the charges relating to his statements to Special Forces trainees and other soldiers. Levy apparently tempered his statements after his first hospital commander, Col. Grossman, told him to do so, and insisted that had he been forewarned of the consequences, he would not have made the statements that led to the charges under Articles 133 and 134. Letter from Dr. Howard Levy to Charles Morgan, Jr. (July 27, 1967), *in Levy Litigation Files, supra* note 27 (abstract of conversation between Howard Levy and Col. Fancy during Levy's confinement after sentencing at Fort Jackson).

46. CHARLES MORGAN, JR., *ONE MAN, ONE VOICE* 115-16 (1979); Finn, *supra* note 29, at 168-71; *Interview with Howard Levy by KFPA's Denny Smithson* (San Francisco radio broadcast, Nov. 16, 1969) (audio tape on file with author) [hereinafter Smithson]. According to Levy, after he pointed out to his commanding officer, Col. Grossman, that the club's by-laws made membership voluntary, Grossman replied: "Well there are certain customs here in the Army, and one of the customs is that officers join the officers club." *Id.* This theme of the military's unwritten, but widely recognized and strictly observed rules, and of Levy's breach of those rules, recurs throughout the history

seemed indifferent to rank and did not differentiate between what he said to enlisted men and what he said to officers. His willingness to cross the boundaries of rank was remarked upon too many times in the court-martial testimony to have produced mere indifference among many of his fellow officers.<sup>47</sup>

Levy also crossed racial boundaries. On a Saturday morning in July shortly after Levy had arrived at Fort Jackson, he noticed a newspaper article that mentioned a campaign to register black voters in nearby Newberry County, South Carolina. Levy drove to Newberry, found the offices of the Summer Community Organization and Political Education ("SCOPE") project of the Southern Christian Leadership Conference ("SCLC"), and volunteered. That summer Levy spent his off-duty hours working in the Newberry County voter registration drive. After that project ended, Levy continued his civil rights activity as a volunteer with the South Carolina Voter Education Project ("VEP"). He also wrote for and assisted in the publication of *Carolina Contrast*, a newspaper published by the Voter Education Project.<sup>48</sup> Moreover, in his day-to-day

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of the Levy case. Indeed, in rejecting Levy's vagueness challenge, the Supreme Court partly relied on its conclusion that military "customs and usages" gave meaning to otherwise imprecise standards set forth in U.C.M.J. §§ 133 and 134. *Parker v. Levy*, 417 U.S. at 746-49, 754. One popular unofficial handbook for officers indicates the importance of the officers' club and hence the gravity of Levy's breach of military custom:

The officers' club . . . is the center of social activities for officers and their families. . . . An officer with permanent station at a post having a club should become a member at once. To fail to do so will cause the officer and the adult members of his family to miss the very heart of post social activity and, if he is married, deny his wife normal social contacts with other Army wives.

THE MILITARY SERVICE PUBLISHING COMPANY, THE OFFICER'S GUIDE 221 (23d ed. 1957).

47. See *infra* notes 220-24 and accompanying text.

48. For a discussion of Levy's civil rights activity, see generally the affidavits contained in Exhibit C to the Petition for Writ of Habeas Corpus, *Levy v. Parker*, 316 F. Supp. 473 (M.D. Penn. 1970) (No. 1057), *rev'd*, 478 F.2d 772 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974); see also Kopkind, *supra* note 29, at 17-18; Short & Seidenberg, *supra* note 24, at 41-42. For a discussion of SCOPE, see ADAM FAIRCLOUGH, TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR. 258-65 (1987); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 415-20, 440-42 (1986). For a discussion of the VEP, see STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 250-87 (1976); PAT WATTERS & REESE CLEGHORN, CLIMBING JACOB'S LADDER: THE ARRIVAL OF NEGROES IN SOUTHERN POLITICS 44-67 (1967); Charles D. Lowery, *Voter Education Project*, in ENCYCLOPEDIA OF AFRICAN AMERICAN CIVIL RIGHTS 557, 557-58 (Charles D. Lowery & John F. Marszalek eds., 1992).

dealings with black soldiers at Fort Jackson, Levy paid no heed to racial boundaries. A point of controversy in his court-martial was Levy's assertion that the court-martial was set in motion to punish him for his civil rights activities. The relationship among Levy's racial views, his civil rights activities, and the court-martial is controversial and will be explored below.<sup>49</sup> Suffice it to say that at the very least this was another way in which Levy was out of step with the norms of Fort Jackson.

Finally, Levy was not reticent about his opposition to the Vietnam War.<sup>50</sup> Having discovered that Army regulations, which would sometimes have required medical discharges if strictly adhered to, were being overlooked or deliberately ignored, he took advantage of such regulations to provide discharges for soldiers seeking a way out of the war.<sup>51</sup> He also shared his views about the war with those willing (or perhaps, at times, obliged) to listen, without regard for the listeners' rank.

### B. *The Green Berets*

As head of the dermatology clinic at the U.S. Army Hospital in Fort Jackson, Levy treated soldiers and their dependents for dermatological problems and venereal disease. A few months after his arrival, he was also given the task of providing dermatology instruction to Special Forces aidmen trainees. While Levy initially gave the required training, he ultimately concluded that he would not teach aidmen trainees. That decision eventually led to Levy's refusing an order to train the aidmen and later, his court-martial.

The Army created Special Forces in 1952 for a Cold War European mission. Special Forces members were intended to be specialists who would both engage in guerilla activities and train indigenous guerrilla bands well behind communist lines as partisan auxiliaries in a conventional war between NATO and Warsaw Pact forces in Europe.<sup>52</sup>

Of course, the anticipated war in Europe never occurred, but because of decolonization in Africa and Asia, U.S. defense planners soon

49. See *infra* notes 68-97 and accompanying text.

50. E.g., Record at 2038 (testimony of Capt. (Chaplain) Joseph H. Feinstein); *id.* at 2346 (testimony of Capt. David J. Travis); Kopkind, *supra* note 29, at 19; Short & Seidenberg, *supra* note 24, at 41; Smithson, *supra* note 46.

51. CLAUDIA DREIFUS, *RADICAL LIFESTYLES* 37 (1971); Short & Seidenberg, *supra* note 24, at 38-39.

52. LARRY E. CABLE, *CONFLICT OF MYTHS: THE DEVELOPMENT OF AMERICAN COUNTERINSURGENCY DOCTRINE AND THE VIETNAM WAR* 142-43 (1986); CHARLES M. SIMPSON III, *INSIDE THE GREEN BERETS: THE FIRST THIRTY YEARS* 35-36, 53 (1983); Donald Duncan, "The Whole Thing Was a Lie!", *RAMPARTS*, Feb. 1966, at 12, 14. For a discussion of the antecedents and early history of Special Forces, see ALFRED H. PADDOCK, JR., *US ARMY SPECIAL WARFARE: ITS ORIGINS* (1982).

perceived a new threat, and with it a new use for Special Forces. In response to Soviet Premier Khrushchev's expression of support for national liberation movements in the colonial world, President Kennedy told the 1962 graduating class at West Point that the United States faced

another type of war, new in its intensity, ancient in its origins—war by guerrillas, subversives, insurgents, assassins; war by ambush instead of combat; by infiltration, instead of aggression, seeking victory by eroding and exhausting the enemy instead of engaging him. It requires . . . a whole new kind of strategy, a wholly different kind of force.<sup>53</sup>

As Richard Slotkin writes, the American response to presumed communist-sponsored wars of national liberation was “to create a mirror-image of the enemy, an American guerrilla fighter, a Green Beret.”<sup>54</sup> The Kennedy administration quickly became captivated by the military doctrine of counterinsurgency. It revitalized Special Forces and, over the objection of the Joint Chiefs of Staff, restored to them the right to wear the green beret.<sup>55</sup> Proponents of counterinsurgency drew on America's

53. William P. Yarborough, *Foreword* to SIMPSON, *supra* note 52, at x (quoting John F. Kennedy, Address to the Graduating Class at West Point (1962)); *see also* YOUNG, *supra* note 31, at 76-77.

54. Richard Slotkin, *Gunfighters and Green Berets: The Magnificent Seven and the Myth of Counter-Insurgency*, 44 *RADICAL HIST. REV.* 65, 74 (1989).

55. LOREN BARITZ, *BACKFIRE: A HISTORY OF HOW AMERICAN CULTURE LED US INTO VIETNAM AND MADE US FIGHT THE WAY WE DID* 107-12 (1985); SIMPSON, *supra* note 52, at 65-69; RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* 489-504 (1992); YOUNG, *supra* note 31, at 75-78. For a description of the history of the green beret, *see* SIMPSON, *supra* note 52, at 29-33.

The Green Berets, in turn, became popularly associated with Kennedy, “as the military expression of the President's heroic style.” Slotkin, *supra* note 54, at 74. Both the Green Berets and the Peace Corps were seen as expressions of the youthful, heroic, activist Kennedy foreign policy of meeting the challenge of communist aggression in the third world by means of a tough-minded but not self-interested counteroffensive. Both were seen as symbols of Kennedy's proclaimed “New Frontier.” As Slotkin notes:

The Peace Corps and the Green Berets were two sides of this coin, mirror-images of Kennedy-style heroism. Both would pride themselves on their volunteer spirit, and their radical pragmatism—their ability to improvise techniques on the ground, and to overcome the hidebound regimes of red tape and bureaucratic restraint. Both would begin by achieving mastery of the local rules, mirroring the wiles of the native enemy to defeat that enemy on his own ground. For the Peace Corps, this meant a style of work that required the volunteer to “get his/her hands dirty.” In the case of the CIA and Green Berets, “fighting dirty,” fighting “like the Indians,” was part of the original charter.



frontier myths about Indian wars,<sup>56</sup> the experiences of the Greek Civil War, the successful campaign against the Hukbalahap insurgency in the Philippines, a misunderstanding of Mao's writings, and Kennedy's fascination with tough-minded heroism, technocratic problem solving, and elite, expert military troops. The proponents advocated an approach to warfare that emphasized improvisation, ruthlessness, the organization of indigenous paramilitary forces, and an ability to learn from the techniques of the enemy.<sup>57</sup> Just as James Fenimore Cooper's frontier hero, the "White man who knows Indians," knew them well enough to fight by their methods and with their level of "savagery," and thereby became

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*Id.* at 75; see also SLOTKIN, *supra*, at 503-04. Others, including Special Forces and its advocates, have noted this connection between the Peace Corps and Special Forces, as was exemplified by the Levy court-martial. See Record at 969 (testimony of Robin Moore describing the Green Berets as an "armed and mature peace corps").

56. As Richard Slotkin cautions, one must "keep in mind the distinction between the myth [of Indian war] and the real-world situations and practices to which it refers." RICHARD SLOTKIN, *THE FATAL ENVIRONMENT: THE MYTH OF THE FRONTIER IN THE AGE OF INDUSTRIALIZATION 1800-1890*, at 61 (1985). The literary and film myths of Indian warfare that fed the doctrine of counterinsurgency and led to the Special Forces' self-image as modern-day Indian fighters distort reality in many ways. Most notably, these myths "flatten" the diversity of North America's Indians. See PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 214-18 (1987) (discussing the traps for the historian writing Indian history). They also oversimplify by ignoring variations in time and historical development. *Id.* at 216. Don Higginbotham cautions against such an oversimplified view of colonial warfare. He writes that "neither Europeans nor Indians had an original commitment to total war and . . . whites, with such tactics as burning crops and villages better understood initially some of the psychological dimensions of warfare than did their opponents, who . . . were accustomed to an intertribal form of violence that usually took few lives and was seasonal and sporadic." Don Higginbotham, *The Early American Way of War: Reconnaissance and Appraisal*, 44 WM. & MARY Q. 230, 234 (1987). Higginbotham describes a more complex process "of cautious feeling out of each party by the other . . ." *Id.* at 233 (quoting Wilcomb Washburn, *Seventeenth-Century Indian Wars*, in NORTHEAST 89 (Bruce G. Trigger ed., 1978)). For a discussion of Indian and U.S. methods of warfare that takes into account the mid-nineteenth century laws of war and cultural differences between Indians and other Americans, see Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 86-88 (1990). As Chomsky shows, nineteenth-century noncombatants occupied a more ambiguous and less protected status than their Vietnam War era counterparts. Chomsky also shows that the U.S. Army was as likely to attack noncombatants as were its Indian foes. *Id.* For a discussion of the role of projection in American characterization of the enemy, see *infra* note 333 and accompanying text. For a discussion, drawing on psychoanalytic theory, of the myths of frontier warfare and of Indian savagery, see MICHAEL PAUL ROGIN, *RONALD REAGAN, THE MOVIE AND OTHER EPISODES IN POLITICAL DEMONOLOGY* 134-51 (1987).

57. DAVID BURNER & THOMAS R. WEST, *THE TORCH IS PASSED: THE KENNEDY BROTHERS AND AMERICAN LIBERALISM* 98-102 (1984); CABLE, *supra* note 52, at 113-55; JOHN HELLMANN, *AMERICAN MYTH AND THE LEGACY OF VIETNAM* 35-53 (1986); SLOTKIN, *supra* note 55, at 441-504; Slotkin, *supra* note 54.

"civilization's most effective instrument against savagery," the military planners assumed that the key to counterinsurgency was "the man who knows communists."<sup>58</sup> As Slotkin notes, counterinsurgency advocates concluded that "following the doctrine of Indian fighting . . . you need 'White savages' to combat 'Red.'"<sup>59</sup> For counterinsurgency warfare theorists, Vietnam was to be the "laboratory for counterinsurgency techniques and weapons."<sup>60</sup>

Fitfully and at times halfheartedly, U.S. military planners understood counterinsurgency not simply in military terms, but as a kind of political, social, and economic warfare. Again drawing on such examples as Ramon Magsaysay's (and Colonel Edward Lansdale's) success in the Phillipines, they theorized that "civic action" was a necessary part of counterinsurgency warfare.<sup>61</sup> According to this doctrine, civic action served the direct military ends of helping to isolate guerrilla forces from the popular base of support necessary for their operations,<sup>62</sup> and of helping to recruit indigenous paramilitary forces (the Civilian Indigenous Defense Groups, "CIDG," or "strike force"). Civic action was also a political measure intended to alleviate those conditions that undermined support for the ruling government.

The basic Special Forces unit was the twelve-man A-team, which included two aidmen.<sup>63</sup> The aidmen, like the other A-team members, were highly trained in unconventional warfare, and were cross-trained in at least one other military specialty in addition to their medical specialty. They were primarily combatants, who went on combat missions as often as their teammates and did not wear a red cross brassard.<sup>64</sup> The aidmen were expected to provide medical care for the A-team members, for the

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58. SLOTKIN, *supra* note 55, at 15-16, 446-47, 459.

59. *Id.* at 453.

60. YOUNG, *supra* note 31, at 82. The nature of the war changed with time as Gen. William Westmoreland adopted a "war of attrition" strategy, marked by search and destroy missions. *Id.* at 160-66; *see also* APPY, *supra* note 43, at 153-57; HERRING, *supra* note 31, at 150-56. While escalation and the change of strategy had some effect on the Special Forces, they continued primarily to fight a counterinsurgency war. SHELBY L. STANTON, *GREEN BERETS AT WAR: U.S. ARMY SPECIAL FORCES IN SOUTHEAST ASIA 1956-1975*, at 109-29 (1985).

61. *See* CABLE, *supra* note 52, at 148-55; SIMPSON, *supra* note 52, at 53-63, 159-63; YOUNG, *supra* note 31, at 82-84, 144-46.

62. Counterinsurgency theorists were greatly impressed with Mao's maxim: "Guerrillas are fish, and the people are the water in which they swim. If the temperature of the water is right, the fish will thrive and multiply." BARITZ, *supra* note 55, at 108 (citing ROGER HILSMAN, *TO MOVE A NATION* 413 (1967) (invoking Mao)). This same principle of counterinsurgency underlay the barbaric and disastrous strategic hamlet program. *See* YOUNG, *supra* note 31, at 82-86, 144-49.

63. *See* STANTON, *supra* note 60, at 322 (Charts 1 & 2).

64. SIMPSON, *supra* note 52, at 36-39.

South Vietnamese Special Forces (the Luc-Luong Dac-Biet or "LLDB") with whom they fought, and for the CIDG. They also had a critical civic action mission, to provide medical care in the villages and hamlets of the contested countryside, both in an effort to gain entree for the A-team so that the effort of recruiting a strike force could begin, and in the interest of the political struggle for the loyalty of the Vietnamese people.<sup>65</sup> To its friends, the medical care provided by the Special Forces aidmen was perhaps the single most important Special Forces civic action program; to Levy it was a "prostitution of medicine."<sup>66</sup>

### C. Army Intelligence: Counterinsurgency at Home<sup>67</sup>

Shortly after Levy's arrival at Fort Jackson, he became the subject of an Army Intelligence investigation. The investigation eventually prompted the Hospital Commander, Colonel Henry F. Fancy, to order

65. Record at 2023-25 (testimony of Col. Roger A. Juel); *id.* at 963 (testimony of Robin Moore); *id.* at 2321-22 (testimony of Capt. Peter Bourne); *see also* SIMPSON, *supra* note 52, at 36-39. The phrase "Vietnamese people" is a necessary but misleading shorthand that masks the presence of numerous ethnic groups within the physical boundaries of Vietnam who were not ethnic Vietnamese. For lack of any better way of referring to the indigenous peoples living in Vietnam, I will refer to them collectively as the Vietnamese.

66. Record at 963 ("[A]ll over the world . . . our medical patrols, special forces, and others . . . have been one of the greatest weapons we have had against communist subversion and this is particularly true to Vietnam.") (testimony of Robin Moore); ROBIN MOORE, *THE GREEN BEREYS* 312-13 (1965); Roy Reed, *Army Doctor Refuses to Train Guerrillas*, N.Y. TIMES, Dec. 29, 1966, at A1, A6 (quoting Levy).

67. During the Detroit riots in the summer of 1967, Maj. Gen. William P. Yarborough, the Army's Assistant Chief of Staff for Intelligence, and the former Commander of the JFK Special Warfare School, told his staff: "Men, get out your counterinsurgency manuals. We have an insurgency on our hands." JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA, 1775-1980*, at 241 (1991). Christopher Pyle attributes the same statement to Gen. Yarborough, but places it temporally during the April 1968 riots resulting from the assassination of Rev. Martin Luther King. CHRISTOPHER H. PYLE, *MILITARY SURVEILLANCE OF CIVILIAN POLITICS, 1967-1970*, at 328 (1986). General Yarborough states that he has been misinterpreted and that he did not believe that an insurrection was in the offing. Senior Officers Debriefing Program: Conversation Between Lt. Gen. William P. Yarborough, Ret., Col. John R. Neese, and LTC Houston P. Houser III 34-35 (June 2, 1975) (transcript on file at U.S. Army Military Institute Archives, Carlisle Barracks) [hereinafter Gen. Yarborough Interview]. As early as 1961, I.F. Stone predicted that America's newfound fascination with Special Forces and counterinsurgency warfare would lead to the implementation of counterinsurgency techniques against domestic dissent. I.F. STONE, *Anti-Guerilla War—The Dazzling New Military Toothpaste for Social Decay*, in *IN A TIME OF TORMENT* 173, 173-75 (1967); I.F. STONE, *When Brass Hats Begin to Read Mao Tse-Tung, Beware!*, in *IN A TIME OF TORMENT*, *supra*, at 170, 170-73.

Levy to train the Special Forces aidmen. It also profoundly affected the way the defense and some observers framed the case.

According to the defense, the investigation was politically and racially motivated. The investigation was, they argued, triggered by Levy's civil rights work, and nurtured by the bigotry of James B. West, an Army Intelligence agent, who appears ubiquitously through much of the Intelligence investigation.<sup>68</sup>

Suggestive evidence supports the defense's interpretation. Army Intelligence had long harbored an unhealthy fascination with domestic civil rights activities, or what it called "Negro Subversion."<sup>69</sup> The Army was certainly not free of racism, and James West looms darkly in the investigation. There are curious coincidences of time and place. Two days after Levy began his civil rights work in Newberry County, Agent West's home,<sup>70</sup> someone made the first notation in Levy's personnel file suggesting the need for a security investigation.<sup>71</sup> While testifying at the preliminary hearing that preceded the court-martial,<sup>72</sup> Agent West

68. For the defense's fullest articulation of these events, see Brief of Petitioner at 29-158, *Levy* (No. 1057) [hereinafter District Court Habeas Brief]. For further explanation of this theory, see SHERRILL, *supra* note 38, at 100-19; see also MORGAN, *supra* note 46, at 120-25; Finn, *supra* note 29, at 172-73; Short & Seidenberg, *supra* note 24, at 41-44; Smithson, *supra* note 46.

69. JENSEN, *supra* note 67, at 239-41; ROY TALBERT, JR., *NEGATIVE INTELLIGENCE: THE ARMY AND THE AMERICAN LEFT, 1917-1941*, at 113-34, 243-44, 267-73 (1991); Stephen G. Tompkins, *Army Feared King, Secretly Watched Him*, MEM. COM. APPEAL, Mar. 21, 1993, at A1, A8; Stephen G. Tompkins, *In 1917, Spy Target Was Black America*, MEM. COM. APPEAL, Mar. 21, 1993, at A7. "Negro Subversion" was the name of a file opened by Military Intelligence in the summer of 1917. Its first entry identified "several incidents of where colored men had attempted to make appointments with white women," which it took to be a barometer of "general unrest among the colored people." TALBERT, *supra*, at 113.

70. West lived in the town of Prosperity (pop. 757), the third largest community in Newberry County, and a town in which Levy did civil rights work. See District Court Habeas Brief, *supra* note 68, at 37-38. Levy, who spent weekends and most evenings in Newberry County that summer, used his car, readily identifiable by its New York license plates and Fort Jackson officer stickers, to drive prospective registrants to the court house and for other related work. See Affidavit of Howard Brett Levy, Exhibit C to the Petition for Writ of Habeas Corpus at 142, 143-44, *Levy* (No. 1057). The governing wisdom among civil rights workers in the South at this time was that an identifiable car, and most notably one with "foreign" license plates, put one in grave peril. See CHARLES W. EAGLES, *OUTSIDE AGITATOR: JON DANIELS AND THE CIVIL RIGHTS MOVEMENT IN ALABAMA* 68, 73 (1993); WILLIAM BRADFORD HUIE, *THREE LIVES FOR MISSISSIPPI* 119, 135 (1965).

71. The entry on a sheet of paper in Levy's 201 file read: "Determine whether [sic] loyalty investigation should be made 19 July, 1965." Record, vol. 15, at 314-15.

72. This was the Article 32 investigation. For a brief explanation of the Article 32 investigation, see *infra* note 118 and accompanying text.

elusively suggested that Levy's civil rights work had been investigated by someone within Army Intelligence.<sup>73</sup> Further, while the defense never did establish that West was a Klan member (something they assumed), there can be little doubt that he was a bigot who was fixated on Levy's racial views and interactions with blacks.<sup>74</sup> West played a major role in

73. At the Article 32 investigation, during the examination of Agent West by Levy's lawyer, Charles Morgan, Jr., the following exchange occurred:

Q: "Did you make any investigation of Capt. Levy relating to his activities on affairs around South Carolina?"

Col. Severin (the officer presiding over the Article 32 investigation): "Do you mean in the city as opposed to out here in the military?"

Q: (By Mr. Morgan) "Non-military, yes."

A: "I did not *myself*."

Q: "Do you know whether or not someone else did?"

A: "I cannot answer that. I had better delay answering that until I can see, because this possibly could be a security matter. I do not have that. I do not know that."

Q: "Well, now, I am not asking you whether or not someone else did at this point. I am asking you whether or not you know whether or not someone else did?"

A: "Well, I will have to decline to answer that."

Record, vol. 13, at 520-21 (emphasis added).

74. See Affidavit of Jack Chatfield, Exhibit C to the Petition for Writ of Habeas Corpus at 21, 24, *Levy* (No. 1057) (quoting an informant who, on the basis of conversations with West, concluded that "West is 'one of the worst bigots' he has ever known."); Letter from Howard Levy to Charles Morgan, Jr. 1 (Dec. 4, 1969), in *Levy* Litigation Files, *supra* note 27 (recounting conversation in which Joe Cole heard West say of blacks: "They live like animals. Its [sic] unbelievable!"); Letter from Howard Levy to Charles Morgan, Jr. (Oct. 10, 1969), in *Levy* Litigation Files, *supra* note 27 (indicating Steve Klein [sic] had heard West refer to blacks as "niggers," and that Joe Cole would testify that West told him "every civil rights organization is a commie front" and that "[blacks] live like pigs. The way they live they deserve it."). Private Joe Cole was one of the Fort Jackson 8. For material on the Fort Jackson 8, see FRED HALSTEAD, *GIS SPEAK OUT AGAINST THE WAR: THE CASE OF THE FT. JACKSON 8* (1970); MICHAEL STEVEN SMITH, *NOTEBOOK OF A SIXTIES LAWYER: AN UNREPENTANT MEMOIR AND SELECTED WRITINGS 57-84* (1992). Steve "Klein" may have been Pvt. Steve Kline, one of the participants in an attempted pray-in for peace at the Ft. Jackson Chapel. See SMITH, *supra*, at 81; Douglas Robinson, *Two at Fort Jackson Face Court-Martial Over War Doubts*, N.Y. TIMES, Feb. 22, 1968, at A10.

In investigating Levy, West conducted interviews seeking information about Levy's racial views and associations. Most striking of the witness statements taken by West was that of Sgt. Debenvion Landing. Landing not only recounted that Levy had on various occasions (dates and names of individuals had been forgotten) discussed Vietnam behind closed doors with black patients for extensive periods, but also raised the spectre of interracial sex. According to Landing's statement: "I have heard Levy express a desire to 'date' Negro female patients after treating attractive Negro patients in his office, but I never knew him to date one." Statement of Debenvion Landing, DA Form 19-24 (Oct. 12, 1966), in *Levy* Army Intelligence File, *supra* note 25, at 73-74; see also Agent

the Levy investigation. He set in motion Colonel Fancy's decision to give Levy the order to train and alerted Fancy to a G-2 dossier on Levy. At times West's testimony was evasive to the point of obstruction.<sup>75</sup> At other times, it was utterly incredible.<sup>76</sup> The Army's decision to withhold most of the G-2 dossier from Levy's civilian defense counsel fueled speculation that it must be concealing embarrassing secrets.

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Report, DA Form 341 (Oct. 26, 1966), in Levy Army Intelligence File, *supra* note 25, at 70-71 (West's report elaborating on Landing's statement by identifying a specific incident and raising smutty implications by placing quotation marks around the word "date"). At the Article 32 hearing preceding the court-martial, Landing testified that West had "asked a lot of questions" relating to race and Levy's racial attitudes and had asked something along the lines of whether Levy had expressed an interest in black women. Record, vol. 14, at 635. West was not the only agent to focus on race and to elicit statements that described Levy's racial views in negative terms. See, e.g., Statement of Sgt. William Cain, DA Form 19-24 (Feb. 18, 1966), in Levy Army Intelligence File, *supra* note 25, at 184-85 (Statement of Sgt. Landing's predecessor in the dermatology clinic, taken by Agent Lawrence Gysin, but witnessed by Agent West, stating among other things: "Levy was quite pro-Negro, too [sic] the side of the Negroes when discussing Civil Rights matters, and appeared to think more of the Negroid [sic] race than the White race," and incorrectly describing Levy's conversations with a black soldier who was brought to the dermatology clinic from the stockade by stating that "[h]e often visited a young Negro Private who was confined in the Post Stockade . . . although I am unaware just what their association together was."); Agent Report, DA Form 341 (Feb. 18, 1966), in Levy Army Intelligence File, *supra* note 25, at 186-87 (Report of Agent Henry L. Durant on interview with David Cooper, Jr., a University of South Carolina law student, who depicted Levy as a civil rights militant, well connected with the movement in South Carolina. Cooper related an argument he had with Levy when Cooper referred to non-Southerners involved in the civil rights movement as "maggots" and Levy identified himself as "one of those 'maggots.'").

On the unsuccessful defense efforts to connect West to the Klan, see generally Memorandum by Jack Chatfield: Newberry County (undated), in Levy Litigation Files, *supra* note 27; Memorandum by Laughlin McDonald: A Summary of Trip to Whitmire, Newberry, Prosperity, etc. (March 21-24, 1969), in Levy Litigation Files, *supra* note 27.

75. In addition to the testimony quoted *supra* note 73, see Record, vol. 13, at 516 ("Q: Who is your immediate superior in the Columbia office? A: Mr. David Delevergne. Q: Is he an Army officer? A: Sir, I cannot answer that. I am not at liberty myself to answer that.").

76. West testified that he was unaware of the summer of 1965 voter registration drive in Newberry County. Record at 2534-35. Others attested to the improbability of that assertion. See Affidavit of Franklin B. Ashley, Exhibit C to the Petition for Writ of Habeas Corpus at 19, 20, *Levy* (No. 1057) ("Suring [sic] the entire summer of 1965, the main, almost only, topic of conversation among the white citizenry, were these racial incidents. Everyone who had an I.Q. above a moron's level was aware that Newberry was having its hottest summer."); Affidavit of Jack Chatfield, Exhibit C to the Petition for Writ of Habeas Corpus at 21, 25, *Levy* (No. 1057); Affidavit of Marvin D. Wall, Exhibit C to the Petition for Writ of Habeas Corpus at 51, 57-58, 60-61, *Levy* (No. 1057).

While it is conceivable that Army Intelligence initiated the investigation because of Levy's civil rights work, a more mundane explanation seems likely. Withholding the majority of the intelligence dossier from Levy's civilian counsel probably reflected the Army's banal bureaucratic mindset and the FBI's resolution in enforcing the rule against third-agency release of its documents, rather than indicating a cover-up.<sup>77</sup> The withheld pages of Levy's intelligence dossier do not describe his civil rights work, or otherwise indicate a scheme to punish him for his

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77. See Memorandum from Col. Dmitri J. Tadich, Chief, Personnel Security Division, to Cmdr. Gen., Fort Jackson (Jan. 21, 1967), in Levy Army Intelligence File, *supra* note 25, at 575; Memo for Record from LTC C.R. Smithson (Feb. 6, 1967), in Levy Army Intelligence File, *supra* note 25, at 389 ("Dossier contains an FBI report and considerable info relative to complaint investigation of LEVY. In view of '3rd Agency Rule,' need to protect sources and methods, and the fact that this material has no bearing on the GCM charges, this material should not be released."); Appellate Exhibit 6, Letter to Capt. Sanders (Mar. 17, 1967), in Record, vol. 12 (regarding release of Intelligence Dossier); Appellate Exhibit 6, Letter from Charles Morgan, Jr. to the Comm. Gen. (Apr. 4, 1967), in Record, vol. 12 (requesting the entire dossier); Appellate Exhibit 6, Letter from Comm. Gen. to Charles Morgan, Jr. (Apr. 11, 1967), in Record, vol. 12 (responding to request for files).

The issue of releasing the G2 dossier's remaining pages reemerged in the *Levy v. Parker* federal habeas proceeding. Again, Army Intelligence resisted releasing much of the material, as did the FBI. See Memorandum from LTC Arnold I. Melnick, Litigation Div., OTJAG, to Director, Counterintelligence & Security, ACSI (Mar. 20, 1970), in Levy Army Intelligence File, *supra* note 25, at 253-54 (requesting review of dossier to determine releasability of documents, noting government's opposition at a Mar. 16, 1970, hearing before U.S. District Court Judge Michael H. Sheridan, and indicating that initial step would probably be *in camera* review of the contested materials by Judge Sheridan); Letter from ACSI to TJAG Litigation Division (Mar. 25, 1970) in Levy Army Intelligence File, *supra* note 25, at 264-65 (responding to Mar. 20 request and describing procedure for obtaining permission for release of FBI generated documents); Memorandum to Director, Federal Bureau of Investigation (Mar. 27, 1970), in U.S. Army Judge Advocate General Corps, Litigation Division Files [hereinafter JAG Files] (JAG request to FBI for review of FBI generated documents in the dossier); Notes of Conversation with Kevin Maroney, Internal Security Division, Dep't of Justice (June 30, 1970), in JAG Files, *supra* (probably transcribed by Capt. Michael Katz) ("Spoke to Mr. Maroney . . . He received a memo from the FBI in which that agency takes the position that they do not want to release the files even to the judge for *in camera* inspection. They are 'mad at the Army' for allowing those documents to come into play in the court-martial proceedings to begin with."); Letter from J. Walter Yeagley, Ass't Att'y. Gen., Internal Security Division, to Lt. Col. Charles W. Bethany, Jr., Acting Chief, Litigation Division, JAG 3 (July 6, 1970), in JAG Files, *supra* (stating opposition to release of documents, even to judge *in camera*, to avoid establishing any precedent "for unnecessarily involving the FBI and FBI information in the military prosecutive process in general"). Judge Sheridan ultimately denied Levy's motion for disclosure of the G2 dossier. *Levy v. Parker*, 316 F. Supp. 473, 477-80 (M.D. Pa. 1970).

racial views and civil rights activities.<sup>78</sup> Apparently, West did not begin

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78. On February 11, 1993, the Freedom of Information/Privacy Office of the United States Army Intelligence and Security Command produced 526 pages of its 578-page intelligence file on Dr. Levy. The file, which was produced redacted, contains both the G-2 dossier and other materials relating to Levy, mostly generated after the preferal of charges and court-martial. Portions of the G-2 file that were given to the civilian defense counsel are an unredacted part of the court-martial record, *see, e.g.*, Appellate Exhibit 2, Agent Reports of James B. West, in Record, vol. 12, and for those pages I consulted both the court-martial record and the Army Intelligence FOIA production. All but one of the pages that were withheld from the FOIA production (which has been produced by Army JAG) are FBI documents, including 24 pages of documents in the G-2 file relating to *Monthly Review Associates*, *Studies on the Left*, *The National Guardian*, *New World Review* (a journal to which Levy did not subscribe), and the *Militant Labor Forum*. My FOIA request to the FBI for those documents, and for all other documents relating to Dr. Levy, is pending.

For the reasons described *supra* note 69 and accompanying text, I believe it is highly probable that Army Intelligence did spy on one or more of the civil rights organizations Levy worked for in South Carolina, and that the documents produced in that operation may refer to Levy. Unfortunately, as a result of Senator Ervin's early 1970s investigation regarding Army surveillance of civilians, the Army Intelligence files from post World War II were largely destroyed or broken up in a manner that made them unsearchable. TALBERT, *supra* note 69, at 273-74, 290. Indeed, the Army Intelligence files on Levy may have survived that period only because the G2 dossier was at issue in the Levy case. Not surprisingly, U.S. Army Intelligence and Security Command determined that they could find nothing responsive to my FOIA requests for documents relating to South Carolina VEP and SCLC-SCOPE, the civil rights organizations with which Levy worked, and *Carolina Contrast*, VEP's publication. Letter from Jane B. Sealock, Chief, Freedom of Information/Privacy Office, U.S. Army Intelligence and Security Command, to Author (Apr. 28, 1993) (on file with author).

Hoping that Army Intelligence might have shared the fruits of its surveillance with either the FBI or the South Carolina Law Enforcement Division ("SLED"), I filed FOIA requests for documents relating to Dr. Levy or to South Carolina VEP, SCOPE-SCLC, or *Carolina Contrast* with the FBI and its Columbia, South Carolina, Charlotte, North Carolina, Atlanta, Georgia, and New York City field offices. I also filed similar requests under the South Carolina Freedom of Information Act with SLED. To date, the FBI has identified approximately 1360 pages of material that is responsive to my request. *See* Letter from J. Kevin O'Brien, Chief, Freedom of Information-Privacy Acts Section, FBI, to Author (Oct. 27, 1993) (on file with author); Letter from J. Kevin O'Brien to Author (Nov. 10, 1993) (on file with author); Letter from Joseph P. Schulte, Jr., Special Agent in Charge, Charlotte, N.C., FBI Field Office, to Author (Nov. 2, 1993) (on file with author). The FBI has also indicated that certain documents pertaining to SCOPE were destroyed. Letter from Mollie Johnson Halle, Principal Legal Advisor, Atlanta Field Office, to Author (June 29, 1993) (on file with author). To date, the Charlotte Field Office has produced seven redacted pages of documents and withheld two documents in their entirety. These relate to Levy's antiwar activities after his release from prison. The remaining documents are still being processed. SLED responded to my FOIA requests by stating that it found no information in its files relating to Levy or to the civil rights organizations he aided. Letters from Lt. Michael J. Brown, S.C. Law Enforcement Division, to Author (June 28, 1993) (on file with author). I have described SLED's



work at Army Intelligence until after the investigation had been initiated.<sup>79</sup> The documentary evidence does not link West to the investigation any earlier than February 11, 1966, long after the investigation had begun.<sup>80</sup>

Also, the investigation originated from within the G-2 section of Fort Jackson, not from the Columbia, South Carolina, field office of Army Intelligence (a separate command). At its inception, the investigation was both modest in its goals and consistent with governing Army regulations. The investigation appears to have initially been the product of the nation's cold war mentality and the Army's lumbering bureaucracy. Once set in motion, a combination of chance, obsessive anticommunism, and perhaps the zeal of the local Army Intelligence agents propelled it forward until it culminated in Levy's court-martial.

By the Army's own rules, Howard Levy did not belong there. On January 28, 1965, Levy filled out the Armed Forces Security Questionnaire ("DD Form 98"), required of all prospective members of the Army.<sup>81</sup> In a costly act of scrupulousness he noted in the remarks section to Part IV that he had attended meetings of the Militant Labor Forum ("MLF"). He had also contributed to the MLF, and received its publications. While the Militant Labor Forum was not on the Attorney

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response to my request to a number of South Carolina attorneys familiar with SLED's history of hostility toward civil rights organizations and student and antiwar groups. The attorneys reacted with amused skepticism, especially to the assertion that SLED had no records relating to the civil rights organizations.

79. As described below, the investigation began in August 1965. According to West's testimony at the Article 32 hearing, he began work as a civilian employee of Army Intelligence on November 1, 1965, and initially had limited duties until he received his badge and credentials. Record, vol. 13, at 516, 552-53. To be sure, West's testimony is less than perfectly reliable, and his testimony as to when he became involved in the Levy investigation is, at best, confused. Asked when he first heard of Levy, West responded: "I do not know exactly. I would say December of 1966." *Id.* at 517. That date is obviously wrong; perhaps he meant to say December of 1965. Asked later when he began work on the investigation, West said: "[W]ell, it would have been the summer of 1965. You see, I was not assigned to this until November of 1965." *Id.* at 552. While West's rather bizarre statement might be understood to mean that he had begun a freelance investigation of Levy before coming to Army Intelligence, it is a thin reed on which to hang a conspiracy theory. It probably signifies nothing more than confusion.

80. Statement of Sgt. William Cain, DA Form 19-24 (Feb. 11, 1966), in Levy Army Intelligence File, *supra* note 25, at 184-85. Special Agent Gysin took the statement, but West witnessed it. *Id.* at 185. The statement reveals the flavor of the Columbia Field Office's role in the investigation. In addition to attributing disloyal stances on Cuba, the Dominican Republic, and Vietnam, to Levy, Cain states: "Levy was quite pro-Negro, too [sic] the side of the Negroes when discussing Civil Rights matters, and appeared to think more of the Negroid [sic] race than the White race." *Id.* at 184.

81. See Armed Forces Security Questionnaire, DD Form 98 (Jan. 28, 1965), in Levy Army Intelligence File, *supra* note 25, at 197-99.

General's list of subversive organizations, and therefore need not have been mentioned by Levy, Levy noted his involvement because the group was obviously related to the Socialist Workers Party.<sup>82</sup> Army regulations prohibited the appointment of any applicant who had "qualified" his DD Form 98, until his case had been investigated and resolved.<sup>83</sup> Levy nevertheless slipped through the cracks,<sup>84</sup> and the investigation that should have occurred before he entered the Army began instead in the summer of 1965.

The earliest inquiries regarding Levy appear to have come from within the G-2 section at Fort Jackson. Their stated purpose was to clarify his security status.<sup>85</sup> U.S. Army Intelligence Corps Command ("USAINTC") replied that Levy had undergone a national agency check in 1962 with favorable results.<sup>86</sup> In the meantime new questions arose: Levy's January DD Form 98 had turned up, and it was inconsistent with a second form that he had completed shortly after his arrival at Fort Jackson.<sup>87</sup> On the second form Levy failed to mention his connection to the Militant Labor Forum. G-2 noticed that the earlier form was qualified and that there was a disparity between the two versions. They directed the Columbia Field Office of the 111th Army Intelligence Group to obtain a statement from Levy regarding his DD Form 98s.<sup>88</sup>

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82. *Id.* at 198.

83. AR 604-10 Personnel Security Clearance ¶ 16(c) (Nov. 4, 1959).

84. "Slipping through the cracks" may not be the most appropriate metaphor, as the "cracks" may have been quite large. Selective Service had not yet demonstrated its disregard of First Amendment values by adopting the policy of removing deferments from anti-war protesters and reclassifying them as 1-A. *See FLYNN, supra* note 23, at 183-87, 215-19.

85. *See* Request for and Results of Personnel Security Action, DA Form 2748 (Aug. 6, 1965), *in* Levy Army Intelligence File, *supra* note 25, at 225-26. The request was directed by G-2 at Fort Jackson to the U.S. Army Intelligence Corps Command (USAINTC), at Fort Holabird, Maryland. It requested a records check, rather than an investigation, for the purpose of granting security clearance, and it explained that Levy's records were devoid of any evidence of clearance or a national agency check. Shortly after his arrival at Fort Jackson, Levy was asked to complete another DD Form 98, because, he recalls being told, the first one was missing. Laughlin McDonald, Memorandum to File of Capt. Howard B. Levy (Dec. 27, 1966), *in* Levy Litigation Files, *supra* note 27. That recollection was consistent with G-2's remarks to USAINTC, and suggests a benign interpretation of the cryptic July 19 notation in Levy's personnel file. *See supra* note 71.

86. Levy Litigation Files, *supra* note 27, at 226.

87. Armed Forces Security Questionnaire, DD Form 98 (July 15, 1965), *in* Levy Army Intelligence File, *supra* note 25, at 202-04.

88. Record, vol. 15, at 311 (memorializing Capt. Russell of G-2 and Maj. Gipson of Personnel Division's discussion regarding discrepancy between the two forms); Request for Interview (Aug. 18, 1965), *in* Levy Army Intelligence File, *supra* note 25, at 122. The request for an interview was consistent with Army regulations. AR 604-10 ¶ 26.

In a series of conversations in early October 1965, Levy explained to an Army Intelligence agent that in late 1964 and early 1965 he had attended approximately eight public lectures sponsored by the Militant Labor Forum, where a variety of speakers, most notably Malcolm X,<sup>89</sup> addressed such topics as foreign policy and civil rights.<sup>90</sup> The intelligence agent asked about more than Levy's involvement with the MLF. He pressed Levy on his political beliefs and learned of the journals to which Levy subscribed. Levy stated that he was not a pacifist, although he had pacifistic leanings, and that he questioned U.S. policy in Vietnam. Foreshadowing future events, Levy also stated that he could "envision situations in which I could conceivably refuse to obey a military order given me by a commander. This would be in such a situation in which I felt that the order was ethically or morally incorrect."<sup>91</sup> He added that under such unusual circumstances, disobedience would be an act of greater loyalty than obedience.<sup>92</sup>

Fort Jackson G-2 was apparently uncertain about how to proceed after receiving the agent's report on his interview with Levy. It recommended against giving Levy security clearance, but rejected the idea of initiating a "flagging action," a more serious step that would accompany the beginning of a "complaint type investigation."<sup>93</sup> At some point, the issue was forwarded to the Intelligence Command of the

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89. Levy undoubtedly heard Malcolm X distance black Americans from the Vietnam War in his response to a question: "Address myself to Vietnam for two minutes? It's a shame—that's one second. . . . But they're trapped, they can't get out. You notice I said 'they.' *They* are trapped, *they* can't get out." He also compared U.S. policy in Vietnam to that in the Congo. Malcolm X, *Two Minutes on Vietnam*, in *VIETNAM AND BLACK AMERICA: AN ANTHOLOGY OF PROTEST AND RESISTANCE* 59 (Clyde Taylor ed., 1973) (responding to question at meeting of Militant Labor Forum, Jan. 7, 1965). The idea that black Americans had a questionable stake in U.S. involvement in Vietnam would become critical in the Levy court-martial. See *infra* text accompanying notes 197-231.

90. Statement of Howard B. Levy, DA Form 19-24 (Oct. 7, 1965), in Levy Army Intelligence File, *supra* note 25, at 214-15. He stated that failing to qualify his second Form 98 was an oversight on his part.

91. *Id.* at 216.

92. *Id.* at 214-16.

93. Record, vol. 15, at 312-13 (memorializing phone conversation between the Chief of Personnel Division and Capt. Russell, G-2); *id.* at 309-10 (Memorandum from Personnel Division (Nov. 19, 1965)); AR 604-10 ¶¶ 25(c), 26(c); AR 600-31, Flag Control Procedures for Military Personnel in National Security Cases and Other Investigations or Procedures (May 1969). Paragraph 26(c) of Army Regulation 604-10 says no flagging can occur until there is "sufficient credible derogatory information to warrant its classification as a complaint type investigation." AR 604-10 ¶ 26(c). Levy's file was eventually flagged on May 17, 1966.

Third U.S. Army.<sup>94</sup> The Third Army, in turn, requested that USAINTC initiate a "limited investigation to determine if a loyalty investigation . . . is warranted."<sup>95</sup>

That the defense may have mistaken the Army's usual response to Vietnam War dissent and unorthodox political beliefs and activity for aberrant behavior with conspiratorial origins is understandable, given the secrecy in which the Army cloaked its investigation, the reality of virulent racism, both within and without the Army, and evidence suggestive of a nefarious scheme as described above. The defense had fallen prey to what David Fischer calls the "fallacy of identity," the belief that causes must resemble their effects.<sup>96</sup> Thus, they assumed that events that in their culmination seemed pathological must have had pathological roots as well. In assuming that the Army set the court-martial in motion in Newberry County on the first morning that Levy sought out the SCOPE office, the defense underestimated both the power and depth of paranoid anticommunism within the Army (especially within the Intelligence command) and the Army's perception that Levy's words and deeds posed a serious threat.

Although the court-martial was probably not instigated by a scheme to punish Levy for his civil rights work, this should not be understood to diminish the importance of racism in Levy's story. In the hands of Army Intelligence, the investigation repeatedly circled back to questions of race in a way that shaped the accusers' perception of Levy and framed the Army's characterization of Levy at trial. Moreover, racial animus may explain why the Columbia field office continued to investigate Levy after USAINTC had completed its investigation in May 1966, with the effect of producing hostile witness statements that may have been necessary to revivify the investigation.<sup>97</sup> In other words, racism helped to frame the investigation, and may have helped to sustain it, even if it was not the initial cause. Finally, there can be little doubt that Levy's violating Fort Jackson's racial norms and otherwise breaching military etiquette reduced the possibility that his accusers would seek an alternative short of court-martial or would consider compromise.

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94. Here, too, G-2 seems to have adhered to Army Regulations. AR-604-10 ¶ 25(b). Fort Jackson was within the command of the Third U.S. Army.

95. Request for and Results of Personnel Security Action, DA Form 2748 (Nov. 22, 1965), in Levy Army Intelligence File, *supra* note 25, at 117-18 (investigation completed May 5, 1966).

96. DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 177-78 (1970).

97. See *infra* note 103. For hostile witness statements, see generally Levy Army Intelligence File, *supra* note 25, at 98-115.

#### D. *The Refusal to Train*

On May 5, 1966, USAINTC had completed its investigation of Levy, which it forwarded to headquarters of the Third Army. Its Report of Investigation noted somewhat inconclusive results.<sup>98</sup> The investigation had unearthed both favorable and unfavorable character references. The Report of Investigation also noted Levy's attendance at lectures sponsored by the Militant Labor Forum, his subscription to "several Communist-line or Socialist publications," and his failure to identify these associations in his DD Form 98.<sup>99</sup> These acts and associations might, the report stated, fall within the criteria for eliminating Levy from military service or for taking other action under the Army regulation for personnel security clearance.<sup>100</sup>

Matters might have stopped there. The Commanding General of the Third Army, perhaps disinclined to a hysterical reaction to the material contained in the Report, or mindful of the potential need to replace Levy with another doctor, concluded that the investigation had not shown that Levy "embraces subversive ideology," and provided "insufficient basis for elimination from the service."<sup>101</sup> He recommended retaining Levy on active duty provided that Levy be ineligible for security clearance, and apparently the U.S. Army Industrial and Personnel Security Group ("USAPSG") agreed.<sup>102</sup> The Personnel Security Division disagreed, recommending that the case be reprocessed by the USAPSG with a view toward Levy's elimination from the military.<sup>103</sup> The Personnel Security

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98. See Request for and Results of Personnel Security Action, DA Form 2748 (Nov. 22, 1965), in Levy Army Intelligence File, *supra* note 25, at 117-18; Report of Investigation, DA Form 342 (May 4, 1966), in Levy Army Intelligence File, *supra* note 25, at 119-20.

99. *Id.* at 119.

100. *Id.* at 119-20; see AR 604-10 Personnel Security Clearance ¶ 14 (Nov. 4, 1959). The report specifically characterized Levy's conduct and associations as possibly falling within the Regulation's Criterion 4, paragraph 14(b) ("Membership in, or affiliation or sympathetic association with" any "subversive" organization), and within Criterion 3, paragraph 14(c) ("Any deliberate misrepresentation, falsification, or omission of material fact").

101. Letter from Capt. T.M. Ballew, Ass't Adj. Gen., Headquarters, Third United States Army, to Chief, U.S. Army Personnel Security Group (May 23, 1966), in Levy Army Intelligence File, *supra* note 25, at 578.

102. See *id.*; see also Disposition Form, DA Form 2496 (Aug. 1, 1966), in Levy Army Intelligence File, *supra* note 25, at 386 (discussing Letter from Headquarters, Third Army (May 23, 1966), and the recommendation of the USAPSG). The USAPSG document is not contained in the Levy Army Intelligence File. The USAPSG's role as the next actor beyond the "Major Commander" is described at AR 604-10 ¶ 27.

103. See Deposition Form, DA Form 2496 (Aug. 1, 1966), in Levy Army Intelligence File, *supra* note 25, at 386. In addition to the materials of the investigation

Division prevailed in its position, and the Adjutant General of the Army directed the Commanding General of the Third Army to reconsider his recommendation.<sup>104</sup> The Third Army reopened the investigation.<sup>105</sup> The information subsequently obtained would lead to Levy's court-martial.

By early October, Army Intelligence resumed its investigation, now focusing on aidman training and Levy's statements about politics and the war.<sup>106</sup> Sometime during the week of October 2, Army Intelligence Agent James West interviewed Colonel Henry F. Fancy, Levy's Hospital Commander, regarding Levy's performance of duties. His questioning alerted Fancy to the possibility that Levy was not training Special Forces aidmen.<sup>107</sup> Upon investigation, which included, at Agent West's suggestion, a trip to the G-2 Office at Fort Jackson on October 7, Colonel Fancy decided to give Levy a direct verbal and written order to train the aidmen.<sup>108</sup> On October 11, Fancy gave the order, and Levy refused it, explaining that he objected on ethical grounds.<sup>109</sup>

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completed in May, 1966, the Personnel Security Division had in its possession a supplemental report prepared by the Columbia Field Office of the 111th Intelligence Group, which contained the first indication of Levy's refusal to train Special Forces aidmen. *Id.* (referring to Levy's statements about Vietnam and U.S. policy in the Caribbean and to Levy's refusal to train the aidmen); Letter from LTC Andrew J. Nolte, Acting Commander, Headquarters, 111th Intelligence Corps Group, Fort McPherson, Georgia, to Comdr. Gen., U.S. Army Intelligence Command (June 27, 1966), *in* Levy Army Intelligence File, *supra* note 25, at 93; Summary of Information, DA Form 568 (June 23, 1966), *in* Levy Army Intelligence File, *supra* note 24, at 94-97. There is no indication as to why and on what authority the Columbia Field Office continued its investigation after it had been completed by USAINTC.

104. Letter from the Adj. Gen. to Comdr. Gen., Third U.S. Army (Aug. 22, 1966), *in* Levy Army Intelligence File, *supra* note 25, at 92 (written "BY ORDER OF THE SECRETARY OF THE ARMY").

105. Letter from Headquarters, Third U.S. Army to Comdr. Gen., U.S. Army Training Center, Fort Jackson (Dec. 13, 1966), *in* Levy Army Intelligence File, *supra* note 25, at 576.

106. The shift in focus was doubtless prompted by the Columbia Field Office's supplemental report. DA Form 341 is the earliest indication that the investigation had resumed. Appellate Exhibit 2, Agent Report of Interview with LTC Jackie Jacob (Oct. 4, 1966), *in* Record, vol. 12, at 40. For an indication of the focus of the investigation, see Record, vol. 13, at 513-70 (Article 32 Hearing Testimony of Agent James B. West).

107. Record at 252 (testimony of Col. Henry F. Fancy). According to Col. Fancy's testimony, his first meeting with Agent West occurred on October 6. Col. Fancy stated that he had already heard something about problems with Levy's training the aidmen but had not bothered to investigate. West's visit generated a new-found sense of urgency on Col. Fancy's part. Record at 252-53.

108. Col. Fancy testified that he decided to take "strong corrective action" on October 7, based on his own investigations and trip to G-2. Record at 252, 255.

109. See Prosecution Exhibit 2, Letter Order from Col. Fancy and Enclosure (Oct.

### E. *The Decision to Court-Martial*

The then-current rotation of aidmen trainees was scheduled to last until late November. Colonel Fancy informed Levy that he would have training critiques prepared at the middle and end of the rotation.<sup>110</sup> In late November, Fancy concluded that Levy had defied his order to train the aidmen. He then initiated the process for imposing the mildest available sanction, non-judicial punishment under Article 15 of the UCMJ.<sup>111</sup> On December 14, 1966, Fancy submitted the paperwork for an Article 15 punishment to the Staff Judge Advocate at Fort Jackson.<sup>112</sup> Fancy was then contacted by G-2 at Fort Jackson and invited to look at the completed Intelligence dossier.<sup>113</sup> Fancy found the dossier to be alarming. After reading it, and consulting with the Staff Judge Advocate and the Commanding General of Fort Jackson, Fancy withdrew the Article 15 paperwork and upgraded the charges to the level of a general court-martial.<sup>114</sup>

Colonel Fancy set the court-martial process in motion when he preferred two charges on December 23, 1966, and forwarded them to the Commanding General of Fort Jackson on December 28.<sup>115</sup> The initial charges stated violations of Article 90 of the UCMJ, for Levy's refusal to train,<sup>116</sup> and Article 134, for his various statements.<sup>117</sup> Upon completion of an Article 32 investigation, the military's rough equivalent

11. 1966), *in Record*, vol. 10; Record at 232-33 (testimony of Col. Henry F. Fancy).

110. See Prosecution Exhibit 4, Memorandum from Col. Fancy to Capt. Levy (Nov. 4, 1966) (entitled Mid-Term Critique, Special Forces Aidmen), *in Record*, vol. 10.

111. U.C.M.J. art. 15, 10 U.S.C. § 815 (1988). Col. Fancy describes his decision to institute an Article 15 sanction in the Record at 257-59.

112. Record, vol. 14, at 90-91 (Article 32 testimony of Col. Chester Davis).

113. Record at 259-60; Memorandum from Col. Dmitri J. Tadich, Chief, Personnel Security Division, to Comdr. Gen., Fort Jackson (Jan. 21, 1967), *in Levy Army Intelligence File*, *supra* note 25, at 575.

114. Record at 259-61 (testimony of Col. Henry F. Fancy).

115. Appellate Exhibit 4, Charge Sheet, *in Record*, vol. 11. The Charge Sheet is the rough equivalent of an indictment or information. Among other things, it identifies the accused and contains the charges, specifications, and formal preferral, the sworn signature of the accuser that he or she believes the charges to be true based on knowledge of the facts or investigation. The charge identifies the allegedly violated code section. The specification is a statement of facts constituting the violation. See 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE §§ 6-10.00 to 20.00 (1991). Colonel Fancy forwarded the charges to Maj. Gen. Gines Perez, the Comander General of the United States Army Training Center, Fort Jackson, who had the statutory power to convene a general court-martial. See U.C.M.J. art. 22(a), 10 U.S.C. § 822(a).

116. See Appellate Exhibit 4, Charge Sheet, *in Record*, vol. 11. The specification under this charge is reproduced in Appendix I, *infra*.

117. *Id.* The specification under this charge is reproduced in Appendix I, *infra*.

of a preliminary hearing,<sup>118</sup> Colonel Fancy preferred an additional charge under Article 133 ("Additional Charge I"). This charge was recommended by the investigating officer, and stemmed from Levy's statements, which were alleged to constitute conduct unbecoming an officer and a gentleman.<sup>119</sup>

Colonel Fancy preferred two final charges ("Additional Charge II" and "Additional Charge III" or, collectively, "the letter charges") under Articles 133 and 134, on February 8.<sup>120</sup> These charges related to a letter, critical of U.S. policy in Vietnam and elsewhere, that Levy sent in September 1965 to Army Sergeant Geoffrey Hancock, Jr., who was stationed in Vietnam.<sup>121</sup>

In addition to his appointed military counsel, Levy sought civilian counsel. At the suggestion of the South Carolina Voter Education Project field director, Levy contacted Charles Morgan, Jr., director of the American Civil Liberties Union's Southern Regional Office. Morgan was initially skeptical. He asked his associate, Laughlin McDonald, who was heading home to nearby Winnsboro, South Carolina, for Christmas, to interview Levy. On McDonald's recommendation, Morgan agreed to take the case.<sup>122</sup>

Fort Jackson authorities rebuffed the defense's initial efforts to find a compromise that would avert a court-martial.<sup>123</sup> The handful of

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118. See U.C.M.J. art. 32, 10 U.S.C. § 832. The analogy to a preliminary hearing is quite rough. One of the important functions of the Article 32 hearing is to afford the defense an opportunity to engage in pretrial discovery. For a discussion of Article 32 investigations, see GILLIGAN & LEDERER, *supra* note 115, at 325-56.

119. Appellate Exhibit 5, Charge Sheet, *in Record*, vol. 12. The specification under this charge is reproduced in Appendix I, *infra*. The Article 32 investigating officer's recommendation is found at Appellate Exhibit 4, Investigating Officer's Report, (Feb. 1, 1967) *in Record*, vol. 11.

120. Appellate Exhibit 5, Charge Sheet, *in Record*, vol. 12. The specification for Additional Charges II and III are reproduced in Appendix I, *infra*.

121. The Hancock letter is discussed in the Record at 755-81 (testimony of SFC Geoffrey Hancock, Jr.), and at 1058-68 (testimony of William Treanor). The letter is found in Prosecution Exhibits 5 and 5A, *in Record*, vol. 11, and is reproduced in Appendix II, *infra*.

122. MORGAN, *supra* note 46, at 122-23; Interview with Dr. Howard B. Levy, *supra* note 25; Memorandum from Laughlin McDonald to File of Capt. Howard B. Levy (Dec. 27, 1965), *in Levy Litigation Files*, *supra* note 27.

123. Finn, *supra* note 29, at 178; Short & Seidenberg, *supra* note 24, at 49; Interview with Dr. Howard B. Levy, *supra* note 25. The Army would subsequently turn down Levy's application for conscientious objector status. That application was doomed to be denied, because Levy claimed his status as a selective conscientious objector. See Request for Conscientious Objection, DA Form 1049 (Jan. 8, 1967), *in Levy Litigation Files*, *supra* note 27; Letter from the Adj. Gen. to Capt. Howard Levy (May 2, 1967), *in Levy Litigation Files*, *supra* note 27 (denying request). While the Supreme Court had



previous court-martials of GI dissenters had garnered little media attention. Thus, neither the local authorities nor the Pentagon had yet recognized how much using the bludgeon of a court-martial would cost in adverse publicity and further stimulation of GI dissent.<sup>124</sup> Levy's final effort to avert court-martial failed. Levy had brought a class action suit, seeking both to enjoin the court-martial and to have a special three-judge court declare Articles 133 and 134 unconstitutionally vague and overbroad, and prosecution under either Article or under Article 90 to

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not yet foreclosed the possibility of exemption from military service on the basis of selective objection to war, draft boards and courts widely assumed that selective c.o.'s were not entitled to exemption. See FLYNN, *supra* note 23, at 179. In 1971, the Supreme Court declared that there was no statutory or constitutional exemption for selective conscientious objectors. *Gillette v. United States*, 401 U.S. 437, 463 (1971), *reh'g denied*, 402 U.S. 934 (1971).

124. Second Lieutenant Henry Howe, in all likelihood the first GI dissenter prosecuted by the military, participated in an antiwar rally in November 1965. While off duty and out of uniform, he carried a sign stating on one side, "End Johnson's Facist [sic] Aggression in Viet-Nam," and on the other, "Let's Have More Than a Choice Between Petty, Ignorant Facists [sic] in 1968." He was convicted of violating UCMJ Articles 133 and 88 (the latter of which prohibits the use of contemptuous words by a commissioned officer against the President and various other public officials). See *United States v. Howe*, 17 C.M.A. 165, 37 C.M.R. 429, 431-32 (1967). Howe's case received minimal press coverage. See Terry H. Anderson, *The GI Movement and the Response from the Brass*, in *GIVE PEACE A CHANCE: EXPLORING THE VIETNAM ANTIWAR MOVEMENT* 93 (Melvin Small & William D. Hoover eds., 1992); *Officer Is Found Guilty in Protest*, N.Y. TIMES, Dec. 23, 1965, at A22 (short piece reporting Howe's conviction); see also Franklin Whitehouse, *A.C.L.U. Will Aid Army War Critic*, N.Y. TIMES, Jan. 17, 1966, at A5; *Army Critic of Johnson Free*, N.Y. TIMES, Mar. 25, 1966, at A47; *Army Reduces Sentence of Officer in War Protest*, N.Y. TIMES, Jan. 29, 1966, at A3 (other brief discussions of the case). The Fort Hood 3, Pvts. Dennis Mora, James Johnson, and David Samas, the first soldiers to refuse orders to Vietnam, received more press coverage than Howe. They announced their refusal at a press conference arranged by the Fifth Avenue Peace Parade Committee. See Martin Arnold, *3 Soldiers Hold News Conference to Announce They Won't Go to Vietnam*, N.Y. TIMES, July 1, 1966, at A13. However, while their news conference and arrest received substantial media coverage, their court-martial were only passingly mentioned, despite efforts to raise the question of the war's legality in their defense. See, e.g., Ronald Sullivan, *Army Opens Trial for Vietnam Foe*, N.Y. TIMES, Sept. 7, 1966, at A4; *Convictions of 3 Soldiers Approved by First Army*, N.Y. TIMES, Nov. 8, 1966, at A32. For a discussion of the Fort Hood 3 news conference and the group's impact on the antiwar movement, see CHARLES DEBENEDETTI, *AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA*, 155 (1990); ZAROULIS & SULLIVAN, *supra* note 33, at 86-88. The defendants' and government's briefs on the illegality or legality of the war are on file with the author. The cases of Howard Petrick and Andy Stapp, occurring about the same time as the Levy court-martial, also received scant attention in the *New York Times*.

For a discussion of changes in the military's approach to GI dissent over the course of the war, see Anderson, *supra* note 124, at 98-102, 112-115; Short & Seidenberg, *supra* note 24, at 52.

punish political affiliation or private expression of political opinion similarly unconstitutional.<sup>125</sup> On the eve of the court-martial, a split panel of the United States Court of Appeals for the District of Columbia Circuit, persuaded that Levy had not shown irreparable injury, denied Levy's application for a stay of the court-martial proceedings and petition for a writ of mandamus ordering the district court to convene a three-judge court.<sup>126</sup>

## II. THE COURT-MARTIAL

### A. The Participants

The court-martial began on May 10, 1967, in a small, crowded frame building at Fort Jackson. Prosecuting the case were two outsiders to Fort Jackson, Captain Richard M. Shusterman and his Assistant Trial Counsel, Captain Blair Shick.<sup>127</sup> Shusterman, nearing the end of his

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125. See Complaint of Capt. Howard Brett Levy at 19-21, *Levy v. McNamara*, Civ. No. 953-67 (D.D.C. May 3, 1967), *petition for writ of mandamus and application for stay denied sub nom. Levy v. Corcoran*, 389 F.2d 929, 930 (D.C. Cir.), *application for stay denied*, 387 U.S. 915, *cert. denied*, 389 U.S. 960 (1967).

126. *Corcoran*, 389 F.2d at 930-31. There is some indication that the panel, which heard argument on the morning of May 9, 1967, may have initially decided in Levy's favor, and then changed its vote later in the day. See Handwritten Notes of LTC Robinson (May 9, 1967), in JAG Files, *supra* note 77 (noting original message that mandamus had been granted and subsequent notation cancelling original message). Of the three panel members, Judge Harold Leventhal expressed the greatest doubt about the position he was adopting, and almost certainly would have been the swing judge. *Corcoran*, 389 F.2d at 930-31. Levy may have been the victim of poor timing. The decision reflected the historic reluctance of courts to interfere in the business of the military, a reluctance that would erode somewhat by decade's end. See Interview with Judge Royce Lamberth, in Washington, D.C. (Apr. 29, 1993). In 1972, Judge Lamberth, then Capt. Lamberth of the Litigation Division of the U.S. Army Judge Advocate General Corps, argued the Levy case on behalf of the United States Army before the United States Court of Appeals for the Third Circuit. But just as Levy's case may have arisen too early for a different outcome, it may have arisen too late. In concluding that Levy was not facing irreparable constitutional harm because the military justice system had shown its inclination "to apply to men in the military service the protection of pertinent Supreme Court decisions based on constitutional grounds," *Corcoran*, 389 F.2d at 931, both Judge Tamm and Judge Leventhal relied on the United States Court of Military Appeals' then two-week-old decision in *United States v. Tempia*, 37 C.M.R. 249 (1967) (holding *Miranda* principles applicable to court-martial proceedings).

127. The military refers to the prosecutor as Trial Counsel, to the military defense lawyer as Appointed Counsel, and to any civilian defense lawyer as Individual Counsel. Shusterman asked for the authority to pick his Assistant Trial Counsel and selected Shick, whom he knew from University of Pennsylvania School of Law where Shick had been a class ahead of him. Shick was stationed at Fort Gordon, but was teaching in the Military

stint in the Army JAG Corps, had earned a reputation as a talented trial lawyer that went beyond the boundaries of Fort Gordon, Georgia, where he was stationed.<sup>128</sup> Seizing upon the fact that Shusterman, like Levy, was Jewish, many journalists and others who discussed the case concluded that the Army must have picked Shusterman to be Trial Counsel in an effort to deflect comparisons with the Dreyfus affair. That view, however, ascribes to the local commander (or to whoever made the decision not to staff the case from within Fort Jackson) greater prescience about the symbolic value of the case than was likely at so early a stage.<sup>129</sup>

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Police School, and was not in the JAG Corps. So far as Shusterman knew, Shick had no previous trial experience. Telephone Interview with Richard Shusterman (Aug. 23, 1993).

128. See U.S. Army Officer Efficiency Report, DA Form 67-5 (Sept. 22, 1966) (on file with author) (glowing efficiency rating of Richard Shusterman); Letter from Judge George W. Latimer to Maj. Gen. Walter B. Richardson, U.S. Army School Training Center, Fort Gordon, Ga. (Aug. 5, 1966) (on file with author) (commending Shusterman's prosecution of Capt. Stephen J. Borys); Interview with Judge Royce Lambeth, *supra* note 126 (stating recollection that Shusterman had a good reputation); Telephone Interview with Col. Earl V. Brown, *supra* note 45 (describing Shusterman as one of the best prosecutors that he had seen). The Borys court-martial was the retrial of a fairly notorious case involving charges of rape, sodomy, larceny, and robbery and raising Fourth, Fifth, and Sixth Amendment issues. It ended in a successful conviction of Borys the summer before Shusterman was sent to Fort Jackson for Levy's court-martial. See *United States v. Borys*, 39 C.M.R. 608 (1968).

129. At any rate, if that was the goal, they failed. See JOSEPH DI MONA, *GREAT COURT-MARTIAL CASES* 224 (1972); MORGAN, *supra* note 46, at 114; SHERRILL, *supra* note 38, at 98-99; Duncan & Dunn, *supra* note 25, at 50, 52; Kopkind, *supra* note 29, at 22; Elinor Langer, *The Court-Martial of Captain Levy: Medical Ethics v. Military Law*, 156 *SCIENCE* 1346, 1347 (1967); Nicholas von Hoffman, *The Conviction of Captain Levy*, *NEW REPUBLIC*, June 17, 1967, at 9, 10; Nicholas von Hoffman, *The Troubled World of Captain Levy*, *WASH. POST*, May 21, 1967, at A3 (all drawing on the Dreyfus image, and some accusing the Army of appointing Shusterman as Trial Counsel to defuse that image). If the Army did deliberately seek out a Jewish prosecutor, it did so at the risk of trading the imagery of the Dreyfus affair for the imagery of the Rosenberg case, where many believed that the Rosenbergs, as Jews, received especially harsh treatment from a Jewish judge and a Jewish prosecutor. See RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE: A SEARCH FOR THE TRUTH* 288 (1983) (quoting Vincent Lebonitte, jury foreman, saying: "I felt good that this was strictly a Jewish show. It was Jew against Jew. It wasn't the Christians hanging the Jews.").

Although I doubt that Shusterman was appointed Trial Counsel because he was Jewish, the decision to reach beyond Fort Jackson to appoint Trial Counsel was an uncommon occurrence, beyond the power of the local commander without either the consent of the commanding general of Fort Gordon or the authority of someone up the chain of command. It indicates that even at this early stage, both the local commander and others were treating the case as an unusual one. Conversation with Professor Paul Giannelli, Case Western Reserve University School of Law (undated). *But see* Telephone Interview with Col. Robert H. Ivey (ret.), Former Staff Judge Advocate, Fort Gordon (July 27, 1993) (stating that he had loaned JAG officers to another command on other occasions). Neither Col. Ivey nor his executive officer at Fort Gordon, Col. B.J.

The Staff Judge Advocate of Fort Jackson appointed Captain Charles M. Sanders, Jr., as defense counsel and Captain Walter H. Jones, Jr., as assistant defense counsel.<sup>130</sup> The principal role in Levy's defense, however, was played by his lead civilian counsel, Charles Morgan, Jr. Morgan, who has been described by Samuel Walker as "the only other charismatic figure in ACLU history besides Roger Baldwin," had returned to his native South in 1964 to open the ACLU's Southern Regional Office in Atlanta.<sup>131</sup> Coming to the ACLU after working briefly at the American Association of University Professors and then at the NAACP Legal Defense Fund, Morgan already had achieved a historic Supreme Court victory in *Reynolds v. Sims*,<sup>132</sup> and brought with him a docket of civil rights cases from his private practice. While his efforts at the Atlanta office focused most notably on voting rights and jury discrimination, Morgan had already taken on one Vietnam War-related case: representing Julian Bond in his effort to be seated in the Georgia state legislature. In addition, he would soon mount a challenge to the induction of blacks by the virtually all-white draft boards of South Carolina and Georgia.<sup>133</sup> Morgan was assisted by Laughlin McDonald

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Shuman, recalls why Shusterman was appointed Trial Counsel. *Id.*; Telephone Interview with Col. B.J. Shuman (July 22, 1993). I have found no documents relating to the appointment, and I have been unable to trace either the Fort Jackson Staff Judge Advocate serving at the time of the Levy case, or his executive officer. Shusterman insisted on using Blair Shick, whom he knew from law school, rather than a lawyer from the Fort Jackson Staff Judge Advocate's Office, as Assistant Trial Counsel. *See* Telephone Interview with Richard Shusterman, *supra* note 127.

130. *See* Court-Martial Appointing Order No. 6, in Record, vol. 2; Court-Martial Appointing Order No. 11 (May 2, 1967), in Record, vol. 2. On defense attorney Charles Sanders, see Kopkind, *supra* note 29, at 27-28.

131. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 268 (1990); *cf.* Nicholas von Hoffman, *Court-martial Can Be Very Trying for Civilian Lawyers*, WASH. POST, May 29, 1967, at A3 ("Morgan works for the American Civil Liberties Union, a very restrained, constitutional and Brooks Brothers-ish outfit, but he's colorful all the same."). Morgan had been driven out of Birmingham, Alabama, after giving a speech to the Young Men's Business Club condemning the previous day's bombing of Birmingham's Sixteenth Street Baptist Church, in which four children died, and arguing that the community as a whole was responsible for the killings. *See* CHARLES MORGAN, JR., A TIME TO SPEAK (1964) (describing Birmingham and these events); *see also* HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 179-85 (Penguin ed. 1983) (interviews of Charles Morgan and Chris McNair).

132. 377 U.S. 533 (1964). For Morgan's discussion of *Reynolds* and the reapportionment cases, *see* MORGAN, *supra* note 46, at 60-70.

133. WALKER, *supra* note 131, at 268-71; *see generally* MORGAN, *supra* note 46. Morgan discusses the events leading up to *Bond v. Floyd*, 385 U.S. 116 (1967). *See* MORGAN, *supra* note 46, at 150-61. The challenge to the racially discriminatory draft boards arose in *Sellers v. McNamara*, 398 F.2d 893 (5th Cir. 1968), *cert. denied sub*

from the Atlanta office, and, for part of the trial, by Alan Levine, Eleanor Holmes Norton, and two non-lawyer New York Civil Liberties Union staff members, Ira Glasser and Ramona Ripston.<sup>134</sup>

The members of a military court-martial, the panel of court members that hears and decides the case, have certain powers that most civilian juries lack. Most notably, the court-martial, not the military judge, has the power to sentence the defendant upon conviction.<sup>135</sup> Nevertheless, at the time of Levy's court-martial, the UCMJ provided for a "law officer," who served many functions analogous to those of a civilian court judge.<sup>136</sup> The law officer presiding over Levy's court-martial was Colonel Earl V. Brown. Brown, a 1941 West Point graduate, returned to school after World War II to obtain a law degree. He entered the JAG Corps in 1953 and was sent to Korea as legal adviser to the prisoner exchange. There, he also served as defense counsel for two soldiers accused of collaborating with the enemy. Brown, who was nearing the end of his military career, was the executive officer of the United States Army Judiciary, and it was widely assumed that Brown had been chosen to ensure against any Army misstep.<sup>137</sup>

Levy faced a court-martial that was as military as he was not, and it is only with a touch of irony that one would suggest that this was a jury of Levy's peers. Levy's court-martial consisted of ten officers of superior

*nom.* Sellers v. Laird, 395 U.S. 950 (1969). For Morgan's discussion of *Sellers*, see MORGAN, *supra* note 46, at 163-66.

134. WALKER, *supra* note 131, at 272.

135. See 1 GILLIGAN & LEDERER, *supra* note 115, at 516. Under the current rules, a court-martial defendant may request a trial by judge alone, in which case sentencing power resides in the military judge. R.C.M. § 903(a)(2); see Uniform Code of Military Justice, 10 U.S.C. §§ 804, 815, 817.

136. The 1968 amendments to the UCMJ changed the title and some of the functions of the law officer, who became the "military judge." Military Justice Act of 1968, art. 16, § 816, Pub. L. No. 90-632. For a discussion of the role of the military judge, see 1 GILLIGAN & LEDERER, *supra* note 115.

137. As the officer with administrative control over the Army's law officers, Brown exercised his authority to appoint himself to the case. Telephone Interview with Col. Earl V. Brown, *supra* note 45; Nicholas von Hoffman, *The Troubled World of Captain Levy*, WASH. POST, May 21, 1967, at A31; Levy 'Judge Ran a Relaxed Court', N.Y. TIMES, June 4, 1967, at A12; Court Martial (undated), in Levy Litigation Files, *supra* note 27. Colonel Brown's rank as Executive Officer, U.S. Army Judiciary, is noted on the court papers in Levy's action in the D.C. District Court action. See, e.g., Complaint of Captain Howard Brett Levy, *McNamara* (No. 953-67). News accounts of the court-martial generally referred to Brown as the Army's "senior" or "top" law officer. E.g., Duncan & Dunn, *supra* note 25, at 54; Kopkind, *supra* note 29, at 22; Levy 'Judge Ran a Relaxed Court,' *supra*; see also MORGAN, *supra* note 46, at 131.

rank: two colonels, four lieutenant colonels, and four majors.<sup>138</sup> All ten were dependent on the convening authority, Major General Gines Perez, for advancement in their careers.<sup>139</sup> Presiding over the court-martial was Colonel John S. Baskin, a South Carolinian whose wife presided over the Fort Jackson Officers' Wives Club.<sup>140</sup> Eight members were white. The one black and one Japanese-American on the court-martial were both majors. Eight were Southerners, including five South Carolinians.<sup>141</sup> Two were West Point graduates, and one had graduated from the Citadel. Two had attended the counterinsurgency course at the U.S. Army Special Warfare School. The panel members had served an average of 19.3 years. Major Nishimoto, the court member with the least service, was soon to mark the ninth anniversary of his commission. Four members had served in Vietnam, and one had lost an eye there while rescuing two GIs from a friendly minefield. None were doctors, nurses, or other health workers. None were draftees, enlisted personnel, or non-career officers. And none were Jews.<sup>142</sup>

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138. UCMJ Article 25(d)(1) states: "When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." 10 U.S.C. § 825(d)(1); see also *MANUAL FOR COURTS-MARTIAL* ¶ 4c (1951) [hereinafter *M.C.M.*] ("An officer may be tried only by a court-martial composed of officers.").

139. For a discussion of the command influence problem in the military justice system, see Luther C. West, *Command Influence*, in *CONSCIENCE AND COMMAND* 73, 73-135 (James Finn ed., 1971); Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 *UCLA L. REV.* 1 (1970). Reforms of the military justice system have mitigated the problem of command influence, but they have not completely eliminated it as an issue. For a recent decision of the Supreme Court rejecting a challenge to the military justice system grounded in the issue of command influence, see *Weiss v. United States*, 114 S. Ct. 752 (1994). More recently, unlawful command influence by the Chief of Naval Operations, Adm. Frank B. Kelso II, was a basis for dismissing the last remaining charges against Navy personnel arising out of the 1991 Tailhook Symposium. See 140 *CONG. REC.* H460-63, H474-75 (daily ed. Feb. 10, 1994) (statement of Rep. Schroeder, putting into the record Capt. Vest's decision in *United States v. Miller*).

140. *Mrs. Baskin Leads Slate of Jackson OWC*, *ARMY TIMES*, May 10, 1967, at W3. The *Manual for Courts-Martial* provided that the senior member of the court-martial serve as its President. *M.C.M.*, *supra* note 138, ¶ 40.

141. The other two panel members were from California and West Virginia.

142. Record at 15; *MORGAN*, *supra* note 46, at 130; *Kopkind*, *supra* note 29, at 22; Court Martial (undated), in *Levy Litigation Files*, *supra* note 27. Nicholas von Hoffman, covering the case for the *Washington Post*, wrote, "There are a Negro and an Oriental on the court-martial, but every officer still looks the same, mouths turned down at the corners like tragic masks, upside-down suspension bridges, grim arches. 'A row of ten Toby mugs,' Homer Bigart of the *New York Times* called them." Nicholas von Hoffman, *The Troubled World of Captain Levy*, *WASH. POST*, May 21, 1967, at A3.

After voir dire of the court-martial panel, the court-martial was recessed for a one-and-one-half day hearing on defense motions. The law officer denied all defense motions, including objections to the composition of the court-martial;<sup>143</sup> challenges on due process and other grounds to various court-martial procedures;<sup>144</sup> attempts to gain access to various documents thought necessary for the defense;<sup>145</sup> motions to dismiss the charges on various grounds;<sup>146</sup> and challenges to the constitutionality of the court-martial system and of UCMJ Articles 133 and 134.<sup>147</sup>

### B. The Prosecution Case: Levy on Trial

A prosecutor's story, the interpretation of events that she attempts to persuade the decisionmaker to adopt, is grounded in the legal elements of the offenses with which the accused is charged. In the ideal-type unambiguous case, it might have something of a connect-the-dots feel to it, as the prosecutor takes the decisionmaker step by step through the

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143. Record at 36-38 (objection to exclusion of doctors and soldiers of the same or lower rank from court-martial panel); *id.* at 38-41 (objection to composition of court-martial on grounds of command influence); *id.* at 42-44 (objection to procedure for challenges for cause to court-martial); *id.* at 138-44 (motion to dismiss on grounds of exclusion of women from court-martial); *id.* at 144-45 (motion to dismiss court-martial on grounds that commanding general selected the court-martial).

144. *Id.* at 38-41 (objection to oath administered by Trial Counsel to court-martial members and to Trial Counsel's role in administering the oath); *id.* at 45-47 (objection to Staff Judge Advocate's role because of command influence problems); *id.* at 47-51 (objection to exclusion of the press at the Article 32 hearing); *id.* at 51-56 (objection to method of obtaining defense witnesses giving Trial Counsel control over the subpoenaing of defense witnesses); *id.* at 102-04 (motion for severance of the charges).

145. *Id.* at 81-89, 125 (motion for access to G-2 dossier); *id.* at 201-02 (motion to produce questionnaires sent by Trial Counsel to various Levy patients).

146. In addition to the other motions described above, and the constitutional challenges noted *infra* note 147, see Record at 69-81 (motion to dismiss on grounds that prosecution was politically motivated); *id.* at 89-94 (motion to dismiss Additional Charges II & III or to reopen Article 32 hearing with regard to those charges because of evidentiary deficiencies at the original Article 32 hearing); *id.* at 94-102 (motion to dismiss Additional Charges II & III as cumulative); *id.* at 104-12 (motion to dismiss Article 134 charges for failure to show elements of offense); *id.* at 112-15 (motion to dismiss Charge II as preempted by 18 U.S.C. § 2387); *id.* at 115-22 (motion to dismiss Additional Charge III as grounded in an asserted violation of 18 U.S.C. § 2387, which is inapplicable to military personnel); *id.* at 130-36 (motion to dismiss on grounds of failure to disclose portions of Levy's G-2 dossier).

147. *Id.* at 136-37 (motion for trial by jury on Sixth Amendment grounds); *id.* at 145-79, 208 (motion to dismiss Articles 133 and 134 charges on vagueness and overbreadth grounds).

elements of the offense and, using an internally consistent story, connects the accused with each element.<sup>148</sup>

The Army did not have an ideal-type unambiguous case against Levy. Most notably, Levy's intentions, conduct, and statements were subject to conflicting interpretations. How one interpreted Levy's intent, statements, and acts reflected, in turn, one's characterization of Levy himself. The prosecution attempted to tell a story that removed any ambiguities regarding Levy, his intent, and the harmful character of his conduct.

According to the prosecution and its witnesses, Levy was immature and unable to conform to the Army's norms. Consequently, he was given to defiance for defiance's sake, but a more important cause of his conduct was his excessively passionate and extreme politics. Succumbing to his antiwar zealotry, he sought to undermine the war effort by defiantly disregarding his own duty and by subverting the performance of others. In so doing, he endangered the Army and its soldiers and betrayed his obligations to and the trust of each.

The prosecution's case regarding the Article 90 or order charge was relatively straightforward. To make out a violation of Article 90, the prosecution had to show that Levy received a command from his superior officer, and that knowing of the command and that it emanated from his superior officer, Levy willfully disobeyed it.<sup>149</sup> Most facts underlying this part of the prosecution's case were not in dispute. Levy did not dispute that Colonel Fancy had given the order to train, that he told Colonel Fancy that he would not obey it, and that he had, in fact, continued to refuse to train Special Forces soldiers.<sup>150</sup> Not surprisingly, the prosecution focused first on the order charge. Its presentation of that case was a thorough, careful, and rather mechanical recitation of the events leading to the order and Levy's refusal to obey it. Anticipating a defense that the order was given with the expectation of its refusal for the sole purpose of enhancing punishment,<sup>151</sup> the prosecution elicited

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148. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 94-98 (1981). Given a trial's rules of the road, the storytelling is never likely to be so linear as the "connect the dots" metaphor suggests.

149. M.C.M., *supra* note 138, ¶ 169b; Record at 2590 (instructions to court-martial).

150. The defense, nonetheless, did insist on instructing the court-martial as to the Article 90 charge for the lesser included offense of dereliction of duty, an offense that would not require a finding of willful disobedience of the order. Record at 2514-15.

151. The 1951 Manual for Courts-Martial states: "Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article." M.C.M., *supra* note 138, ¶ 169b.



Colonel Fancy's testimony that "[i]t was [his] personal feeling and hope" that Levy would comply.<sup>152</sup>

The prosecution faced a more ambiguous case with regard to the General Articles charges. The law officer instructed that to find Levy guilty of violating Article 134 the court-martial must find first that he publicly made the statements in question and that the statements were disloyal. In addition, the court-martial had to find that Levy made the charged statements with the "design to promote disloyalty and disaffection among the troops"; and that the statements had the "clear and reasonable tendency" to promote disloyalty and disaffection "to the prejudice of good order and discipline in the armed forces."<sup>153</sup> Additional Charge II, the Article 133 charge involving the Hancock letter, similarly required a finding of intent to impair or interfere with Hancock's performance of his duty, as well as the probability that the letter would have the intended harmful result.<sup>154</sup>

The prosecution would have little difficulty showing that Levy had said more or less what he was accused of saying. Their challenge, aside from the legal issues regarding the extent of First Amendment protection of Levy's statements and the statutory vagueness of the General Articles, would be to show bad intent, and the statements' dangerousness or probability of causing harm. The prosecution had reason to doubt that it could demonstrate intent and the harmful tendency of the statements, and Shusterman privately held grave doubts as to whether Levy had ever intended to make anyone disloyal.<sup>155</sup> Most of the statements fell into

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152. Record at 244-45.

153. Record at 2593-94. The law officer's instruction regarding Additional Charge III similarly required a finding that Levy had sent Hancock a letter with the intent to impair his loyalty, morale, and discipline, and with the likely effect of so impairing Hancock's loyalty. *Id.* at 2601-02. The instruction was confusing as to whether it required determination of "a clear and present danger," the then-prevailing standard in prosecutions involving speech. Despite first defining the standard as "a clear and reasonable tendency to promote disloyalty and disaffection," seemingly a less demanding standard, Colonel Brown subsequently instructed the court-martial that the statements' prejudicial nature was an essential element of the offense, and that to find this they had to find "that these statements presented a clear and present danger of creating disloyalty, disaffection, insubordination, refusal of orders, or mutiny among the troops." *Id.* at 2595.

154. Record at 2599-600. The instruction on Additional Charge I, the Article 133 charge relating to the oral statements made by Levy to Special Forces soldiers and others, did not include a finding of specific intent. It did require a finding that the statements were "intemperate, contemptuous, defamatory, provoking, and/or disloyal." *Id.* at 2598. It also required a finding that the conduct was "unbecoming an officer and gentleman." *Id.*

155. Telephone Interview with Richard M. Shusterman, *supra* note 127. Shusterman also had strong reservations on First Amendment grounds about the General Articles charges. He had no similar reservations regarding the Article 90 charge.

one of three categories: hostile or insulting statements directed at Special Forces soldiers;<sup>156</sup> criticism of U.S. foreign policy or involvement in Vietnam;<sup>157</sup> and statements that blacks, as victims of discrimination, should not fight in Vietnam.<sup>158</sup> As Levy's lawyers would argue, throwing Special Forces soldiers out of his clinic while calling them "liars," "thieves," and "murderers" hardly seemed like a plausible strategy for persuading them to disaffect and become disloyal.<sup>159</sup> While Levy's other statements were susceptible to a variety of interpretations, ranging from counsel to disobey orders, to vigorous debate with no expectation that it would alter anyone's behavior, the circumstances militated against the view that Levy had a design to undermine the war effort by counseling mutiny. As the defense would repeatedly point out, out of the thousands of soldiers and patients Levy had encountered, the prosecution succeeded in finding only a handful of soldiers who had heard Levy make statements against the war or regarding black soldiers serving in Vietnam, and none had become disloyal.<sup>160</sup>

The prosecution sought to resolve the ambiguities of Levy's behavior by emphasizing those statements that indicated a motive, political passion, and anti-American extremism, and hence suggested intent. The prosecution built its case partially on the testimony of various Green Berets who recalled the invective that Levy directed at them.<sup>161</sup> Perhaps most helpful to its effort to supply intent by constructing Levy as a radical extremist was Levy's letter to Sergeant Geoffrey Hancock, Jr.<sup>162</sup>

156. For example, "I hope when you get to Vietnam something happens to you and you are injured." Additional Charge I, *quoted in* Parker v. Levy, 417 U.S. at 739 n.6; *see also supra* note 9 (from Charge I).

157. *See, e.g., supra* note 7; Additional Charge III, (paraphrasing Letter from Howard Levy to Sgt. Geoffrey Hancock, Jr., 2, 5 (Sept. 10, 1965) [hereinafter Hancock Letter]: "The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition. . . . Are the North Viet Nameese worse off than the South Viet Nameese? I doubt it . . ."). The Hancock Letter is found at Prosecution Exhibits 5 & 5A, *in* Record, vol. 10. It has been reproduced in Appendix II, *infra*.

158. *See, e.g., supra* note 8. The one statement included in the specifications that does not fit any of these categories is: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey." Additional Charge I. For the full text of the specifications, *see* Appendix I, *infra*.

159. Record at 2568.

160. *Id.* at 2567-68.

161. *E.g., id.* at 643 (testimony of Sp5c Wayne M. Barrows); *id.* at 676 (testimony of Sp4c Clifton H. Davis); *id.* at 712-13 (testimony of Richard W. Gillum).

162. The Hancock letter was the basis for the letter charges, Additional Charge II and Additional Charge III.

Levy wrote to Hancock at the behest of his friend and civil rights co-worker, William Treanor. Treanor met and befriended Hancock in the Army, where they served in the same Intelligence unit. Their friendship continued after Treanor left the Army, and they maintained a correspondence. In the summer of 1965, Hancock, who was then stationed in Vietnam, wrote to Treanor complaining of antiwar protests in the U.S. and the lack of domestic support for the U.S. war effort. Treanor showed Hancock's letter to Levy and suggested that he write a reply, which Treanor enclosed with a short letter of his own.<sup>163</sup>

The letter charges, arguably duplicative of the other Article 133 and Article 134 charges, were a particularly problematic part of the prosecution's case. The letter nowhere invited Hancock to disobey orders or otherwise neglect his duty, although it was critical of U.S. involvement in Vietnam, and by explicit extension, critical of Hancock's personal role. Instead, it invited further dialogue.<sup>164</sup> It was sent in the context of a friendly correspondence between Treanor and Hancock after Hancock had raised the subject of antiwar protests. Treanor expected that it might generate a dialogue that would bring Levy and Hancock to a greater understanding of each other's position.<sup>165</sup> The letter made Hancock angry, but not disloyal. He in turn showed the letter to several other soldiers with whom he was stationed. Most importantly, at least for the "conduct unbecoming" charge, it did not clearly indicate that Levy was an Army officer and left Hancock with the misimpression that Levy was a civilian doctor in the Army's employ.<sup>166</sup>

The letter charges were sufficiently fraught with difficulty for the prosecution that the court-martial found that Levy did not have the specific intent to impair or interfere with Hancock's performance of

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163. Record at 1058-61 (testimony of William Treanor). Treanor testified that "I thought . . . it is [sic] important that people with different points of view discuss it with each other." *Id.* at 1065. In response to the question whether he was trying to create a situation where Levy and Hancock could express their disagreements with one another, he answered: "Their disagreements and their agreements. If they developed their ideas on the war to each other, I thought it would be to a better understanding between two people I know to be very concerned about world affairs." *Id.*

164. Levy closed the letter by writing: "I would appreciate your views on some of the points I have raised. In any event let me wish you good luck & safe conduct in your present situation." Hancock Letter, *supra* note 157, at 8.

165. *Id.* at 760-64 (testimony of Sgt. Geoffrey Hancock, Jr.).

166. Record at 1058-61, 1064-66 (testimony of William Treanor). According to Col. Brown's instruction regarding the other Article 133 charge, the fact that listeners knew Levy was an officer constituted one of the offense's elements, although that element was omitted in the instruction on the letter charge. *Id.* at 2598-600.

duties.<sup>167</sup> But the letter itself, which the prosecution read to the court-martial, was inflammatory and helped create an image of Levy necessary for his conviction on the other Article 133 and 134 charges.<sup>168</sup> Levy identified himself in the letter as "one of those 'people back in the states' who actually opposes our efforts [in Vietnam] & would refuse to serve there if I were so assigned." The latter clause meant little to Hancock, given his assumption that Levy was a civilian.<sup>169</sup> The same phrase spoke loudly to the court-martial. Levy argued that U.S. involvement in Vietnam could be understood only in the context of U.S. cold war era foreign policy, which he described as "a diabolical evil," orchestrated by "the big business-military complex." That foreign policy, he argued, was marked by consistent support for right-wing alternatives to popular left-liberal liberation movements to further the interests of U.S. companies and American investors.<sup>170</sup>

Levy's comments on liberation movements in developing countries, on U.S. allies, and on communist regimes such as Cuba and North Vietnam were even more likely to disquiet the court-martial. He described the press as the handmaiden of the U.S. government, ready to find communist subversion in any liberation movement that conflicted with U.S. interests. American intervention in the Dominican Republic and its support for tyrants in places such as the Congo could not be justified on the grounds of containment of communism, because the communist threat in these places was more imagined (or manufactured) than real.<sup>171</sup> But Levy did not rest his argument on dismissing a communist challenge. Instead, he argued that we must accept the fact that some people will choose communism and that in some contexts their choice will be rational:

What if the majority of a people decide that Communism is good for them. Do we, does anybody have a right to deny them their choice. We might . . . try to prove that our way is better but by any stretch of any moral principal can we deny them the choice. Is communism worse than a U.S. oriented government? The fastest growing economy in Latin America is Cuba. Everybody reads & writes in Cuba. Everybody has

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167. The court-martial found Levy guilty of the lesser included offenses of writing the letter with "culpable negligence" for the impairment of Hancock's performance of his duty. *Id.* at 2618. The prosecution then sought to dismiss the charges on the ground that the court-martial's findings were tantamount to an acquittal. *Id.* at 2619.

168. *Id.* at 756.

169. Hancock Letter, *supra* note 157, at 1.

170. *Id.* at 2-3, 6.

171. *Id.* at 4.

medical care. Was this true with the previously American backed governments? Not on your life. . . . Are the North Vietnamese worse off than the South Vietnamese? I doubt it. If they are why do so many back the Viet Cong? Guerilla terrorism? Unlikely. The truth is that the North has instituted land reform, schools, & medical facilities . . . . Why hasn't it happened in the South & why do you insist that it will happen. It hasn't in any of our other colonies. . . .

Geoffrey who are you fighting for? Do you know? . . . You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard the Vietnamese? A dead woman is a dead woman in Alabama & in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy? Diem, Trujillo, Batista, Chiang Kai Shek, Franco, Tshombe —Bullshit?<sup>172</sup>

Finally, as the last paragraph quoted above indicates, Levy linked U.S. involvement in Vietnam to the oppression of blacks and poor whites in the U.S. Not only were the two situations parallel in result, but they were results of the same cause. He wrote: "The same people who suppress Negroes & poor whites here are doing it all over again all over the world & your [sic] helping them."<sup>173</sup> The same paternalist attitudes, coupled with the profit motive, underlay domestic and foreign policy toward "[un]sophisticated" peoples.<sup>174</sup>

Levy's letter to Geoffrey Hancock did more than just define him as a political extremist before the court-martial. It violated the Army's construction of the Vietnamese. Nations prepare their citizens and armies prepare their soldiers for war by demonizing and dehumanizing the enemy. In earlier wars, the U.S. had similarly fashioned the enemy in racist terms as something alien and subhuman.<sup>175</sup> Indeed, many of the pejoratives applied to the Vietnamese were recycled from earlier Asian wars.<sup>176</sup> Yet, soldiers in Vietnam, unlike soldiers in most prior

172. *Id.* at 4-7.

173. *Id.* at 6.

174. *Id.* at 6-7.

175. See generally JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1986) (discussing the demonization of the Japanese enemy by Americans and of the American enemy by the Japanese during World War II).

176. David Desser, "Charlie Don't Surf": *Race and Culture in Vietnam War Films*, in *INVENTING VIETNAM: THE WAR IN FILM AND TELEVISION* 81, 96-97 (Michael Anderegg ed., 1991). In fact, U.S. Marines first used the term "gook" to refer to Nicaraguans during the U.S. intervention in Nicaragua in 1912. LT. COL. GARY D.

American wars, had trouble distinguishing between friend and foe.<sup>177</sup> It is not surprising that soldiers called all Vietnamese “gooks,” “slopes,” “slants,” or “zips” in a setting where it was difficult to tell hostile from friendly civilians, where the civilian population resented and feared the Americans instead of welcoming them as liberators, and where the official and unofficial rules of engagement and the emphasis on maximizing body counts created an atmosphere where anything that moved or anyone who was dead was often deemed the enemy.<sup>178</sup> Indeed, Christian Appy writes that many American soldiers held greater respect for the enemy than for Vietnamese civilians.<sup>179</sup>

American conceptualizations of the Vietnamese fell along two extremes. Most typically, they were the alien Other. Drawing on the racial imagery and mythology of America's past experience with “savage war,” Americans called themselves “cowboys” and talked of Vietnam as “Indian Country.”<sup>180</sup> The language and metaphors of cowboys and Indians flowed freely in Vietnam. In regard to this posturing and the invocation of Old West imagery to depict the Vietnamese enemy and name ground and air operations and outposts,<sup>181</sup> Richard Drinnon has noted that: “It was as if Cowboys and Indians were the only game the American invaders knew.”<sup>182</sup> At other times, Americans made their characterizations of the Vietnamese as subhuman more explicit. To

SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 138 (1989). The term was almost certainly a corruption of the pejorative “goo-goos,” by which American soldiers referred to Filipinos at the turn of the century. See DOWER, *supra* note 175, at 151-52, 162.

177. On the difficulty of distinguishing civilians from insurgents during the U.S war in the Philippines after the Spanish-American War, and the consequent loss of civilian life, see DOWER, *supra* note 175, at 151.

178. APPY, *supra* note 43, at 106-07; see also Gordon S. Livingston, M.D., *Healing in Vietnam*, in CRIMES OF WAR 430, 433 (Richard A. Falk et al. eds., 1971).

179. APPY, *supra* note 43, at 295-96.

180. See RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING* 447-48 (1980); SLOTKIN, *supra* note 55, at 494-96, 523-25, 546-47. Henry Kissinger would describe himself as the “Lone Ranger of American foreign policy.” *Id.* at 754 n.31. This image of cowboys and Indians was not reserved for Vietnam. The CIA referred to its mercenaries employed against Cuba as “cowboys.” DRINNON, *supra*, at 434-35. The concept of “savage war” is discussed *infra* note 318 and accompanying text.

181. Examples include “Prairie,” “Sam Houston,” “Hickory,” “Davy Crocket,” “Daniel Boone,” and for that matter, “Crazy Horse.” “Dodge City” seems also to have been a popular name. See DRINNON, *supra* note 180, at 443; SLOTKIN, *supra* note 55, at 524-25. Dodge City was also the name of a Montagnard outpost in John Wayne's *THE GREEN BERETS* (Warner Bros. 1968).

182. See DRINNON, *supra* note 180, at 450 n.\*.

General William Westmoreland, they were "termites";<sup>183</sup> to the soldiers at My Lai, "ants."<sup>184</sup>

Still other characterizations made Vietnam and the Vietnamese so alien that they were unnameable and unknowable, or that they became invisible.<sup>185</sup> American soldiers gave voice to this sense that the war "belonged] to an unearthly place" when they spoke of the U.S. as "The World."<sup>186</sup> Lieutenant Calley expressed the further reaches of this logic when he said: "We weren't in My Lai to kill human beings, really. We were there to kill *ideology* that is carried by—I don't know. Pawns. Blobs. Pieces of flesh; and I wasn't in Mylai [sic] to destroy intelligent men. I was there to destroy an intangible idea."<sup>187</sup>

At the other extreme was a different assumption that rendered real Vietnamese just as invisible: the assumption that the Vietnamese, indeed, that everyone, wanted to be like Americans.<sup>188</sup> Expressing this idea, a colonel in the movie *Full Metal Jacket* says: "Inside every gook there is an American trying to get out."<sup>189</sup> One sees an example of this unwillingness to see the Vietnamese as Vietnamese in the practice of renaming Vietnamese admitted to U.S. military hospitals with English nicknames in place of "perfectly adequate, pronounceable Vietnamese name[s]."<sup>190</sup> Similarly, Lyndon Johnson could imagine buying peace

183. *Id.* at 448-49. Westmoreland's statement originally appeared in Lloyd Norman, *How the Generals View the War Now*, NEWSWEEK, Mar. 27, 1967, at 28-29.

184. DRINNON, *supra* note 180, at 451.

185. See generally Desser, *supra* note 176; Cynthia J. Fuchs, *All the Animals Come out at Night: Vietnam Meets Noir in Taxi Driver*, in *INVENTING VIETNAM: THE WAR IN FILM AND TELEVISION* 33-55 (Michael Anderegg ed., 1991). Desser quotes several Vietnam novels that express this idea of an invisible enemy, including: MARK BAKER, *NAM: THE VIETNAM WAR IN THE WORDS OF THE MEN AND WOMEN WHO FOUGHT THERE* 111 (1981) ("I could deal with a man. That meant my talent against his for survival, but how do you deal with him when he ain't even there?"); PHILIP CAPUTO, *A RUMOR OF WAR* 55 (1977) ("[T]here was no enemy to fire at, there was nothing to retaliate against. . . . Phantoms, I thought, we're fighting phantoms."); Desser, *supra* note 176, at 93-94. The enemy's invisibility often was reality for U.S. troops in Vietnam. Mines, by most estimates, accounted for one-fifth to one-fourth of all U.S. casualties, and even in firefights the enemy often went unseen. APPY, *supra* note 43, at 169-73.

186. APPY, *supra* note 43, at 250. Appy writes that "[w]hen I get back to The World . . . ' was a standard conversational opening." *Id.*

187. LIEUTENANT CALLEY: HIS OWN STORY 103 (1971), *quoted in* DRINNON, *supra* note 180, at 456 (emphasis in original).

188. Desser, *supra* note 176, at 83. In making this argument, Desser draws on arguments made by Loren Baritz. See LOREN BARITZ, *BACKFIRE: A HISTORY OF HOW AMERICAN CULTURE LED US INTO VIETNAM AND MADE US FIGHT THE WAY WE DID* (1985).

189. *FULL METAL JACKET* (Warner Bros. 1987), *quoted in* Desser, *supra* note 176, at 83.

190. Livingston, *supra* note 178, at 433.

from the NLF and North Vietnamese by bringing the Great Society and the TVA to Vietnam.<sup>191</sup>

Levy's letter defied both of these ways of imagining the Vietnamese. General Westmoreland would later pronounce that "[t]he Oriental doesn't put the same high price on life as does the Westerner. Life is plentiful, life is cheap in the Orient. As the philosophy of the Orient expresses it, life is not important."<sup>192</sup> Levy, by contrast, wrote to Sergeant Hancock that "[a] dead woman is a dead woman in Alabama & in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem."<sup>193</sup> In so writing, Levy demanded that Hancock see the pain and the death that the U.S. brought to Vietnam and insisted on the humanity of the Vietnamese.<sup>194</sup> And if the Vietnamese were no less human than Americans, could the Hippocratic Oath's command to "abstain from whatever is deleterious and mischievous" apply any less to them?<sup>195</sup> Thus, Levy's refusal to train, and his insistence that his conduct was grounded in medical ethics also repudiated the characterization of the

191. Lyndon B. Johnson, American Policy in Viet-Nam: Remarks at Johns Hopkins University, Baltimore, Md. (Apr. 7, 1965), in *THE VIET-NAM READER* 343, 348 (Marcus G. Raskin & Bernard B. Fall eds., 2d ed. 1967) ("For our part I will ask the Congress to join in a billion dollar American investment in this effort as soon as it is underway. . . . And there is much to be done. The vast Mekong River can provide food and water and power on a scale to dwarf even our own T.V.A."). Americans erroneously believed themselves to be operating in Vietnam on a blank slate, that there was no indigenous political culture. As Larry Cable shows, U.S. military doctrine of the period rejected the possibility of an "organic and unsponsored insurgency." CABLE, *supra* note 52, at 145. Rather, "Any seemingly domestic insurgent movement was either externally sponsored or was soon captured by an external sponsor." *Id.* at 5. In the apparent absence of a pre-existing indigenous political culture, the process of "nation-building" became one of Americanization. Slotkin, *supra* note 54, at 84.

192. *HEARTS AND MINDS* (Touchstone/WarnerBros. 1975), *quoted in* APPY, *supra* note 43, at 254. For a discussion of how this idea is represented in the 1978 movie *Go Tell the Spartans* (AVCO-Embassy), see Desser, *supra* note 176, at 91-92. Americans expressed assumptions about Vietnamese valuation of Vietnamese lives in the amounts paid as solacium payments for the accidental deaths of Vietnamese civilians. According to Eric Herter, an Army private assigned to USAID, the going rate was \$35 for an adult, and \$14.40 for a child under fifteen. See JAMES W. GIBSON, *THE PERFECT WAR: TECHNOWAR IN VIETNAM* 310 (1986).

193. Hancock Letter, *supra* note 157, at 7.

194. Richard Drinnon discusses how Graham Greene develops this theme of the inability to see beyond abstraction to real wounds and real death in Greene's novel, *THE QUIET AMERICAN* (1955). The novel was modeled on Col. Edward Lansdale, an architect of U.S. counterinsurgency in the Philippines and in Vietnam. DRINNON, *supra* note 180, at 416-18, 427-28.

195. See *Oath of Hippocrates*, in *EXPERIMENTATION WITH HUMAN BEINGS* 311 (Jay Katz ed., 1972).



Vietnamese exemplified by Westmoreland's statement, and asserted the equal preciousness of Vietnamese and American lives.

The Hancock letter also rejected the second common construction of the Vietnamese: the unexamined assumption that they wanted to be Americans. Levy asked Hancock to consider the possibility that the Vietnamese would choose not to be like us, and to accept their decision to embrace that which we rejected.<sup>196</sup> His letter assumed the common humanity of Vietnamese and Americans, but it also recognized (and accepted) their differences, and in so doing spoke heresy about the American character and the American mission.

The prosecution did not explicitly develop the theme of Levy's heretical construction of the Vietnamese, although it not only read the letter to the court-martial, but also began closing argument with it.<sup>197</sup> The prosecution did, however, paint a picture of Levy as a dangerous violator of boundaries of rank and race by focusing on Levy's conversations with black enlisted men. Specifically, the prosecution elicited testimony from five black soldiers concerning conversations that Levy had with them about race and Vietnam. Their testimony, and the cast put on it by the prosecution, evoked frightening images of mutinous black soldiers and the white "outside agitator."<sup>198</sup>

The gist of the testimony was that Levy told these soldiers that he did not understand why blacks would fight in freedom's name abroad, when they had not won the struggle for freedom at home. Levy also stated that were he black he would not fight in Vietnam. Levy was not the first to express these ideas. Various civil rights activists and leaders had similarly linked the civil rights struggle with struggles of people of color worldwide. Various civil rights activists and leaders had also said that blacks should not fight for the freedom in Vietnam that they did not enjoy at home. However, at the time, this probably remained a minority view

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196. In addition to the passage beginning "[w]hat if the majority of a people decide that Communism is good for them . . . ." quoted above, Levy wrote, "Geoffrey these people may not be sophisticated (American style), but their [sic] grown men & women who have a right to live & choose their own government." Hancock Letter, *supra* note 157, at 8.

197. Racial imagery regarding the Vietnamese would nevertheless play an important role in the court-martial. See *infra* notes 320-33 and accompanying text; *supra* notes 175-96 and accompanying text.

198. This imagery was not lost on Donald Duncan, who wrote: "Many of us at the trial were horrified at the incipient racism contained in the Iago-like-portrayal of Levy . . . as a sinister figure who sulked about preying on the weaknesses of disadvantaged people in order to subvert and disaffect them." Duncan, *supra* note 52, at 52.

among blacks and in the civil rights community.<sup>199</sup> Of course, these

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199. The earliest movement statement linking civil rights and opposition to the Vietnam War was a leaflet circulated in McComb, Mississippi, under the heading "HERE ARE FIVE reasons why Negroes should not be in any war fighting for America." The text was then published in the Mississippi Freedom Democratic Party of McComb Newsletter in July 1965, to the chagrin of the MFDP executive committee. The leaflet, which was prompted by the death in Vietnam of John Shaw, a black McComb native, concluded by stating:

We can write and ask our sons if they know what they are fighting for. If he answers Freedom, tell him that's what we are fighting for here in Mississippi. And if he says Democracy, tell him the truth—we don't know anything about Communism, Socialism and all that, but we do know that Negroes have caught hell right here under this American Democracy.

*The War on Vietnam: A McComb, Mississippi, Protest*, in *BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES 1619 TO THE PRESENT* 415, 416 (Joanne Grant ed., 1st ed. 1968). For a discussion of the McComb MFDP leaflet, see MICHAEL FERBER & STAUGHTON LYND, *THE RESISTANCE* 31-33 (1971). The Student Nonviolent Coordinating Committee ("SNCC"), which was closely related to the MFDP, also was a source of early opposition to the war. Robert Moses of SNCC, speaking at an August 1964 memorial meeting for James Chaney, Michael Schwerner, and Andrew Goodman, the three civil rights workers murdered in Neshoba County, Mississippi, specifically linked escalation of the war and the federal government's failure to enforce civil rights and to protect black Mississippians. Moses also spoke at the April 1965 antiwar demonstration in Washington. *Id.* at 29-30; ZAROLIS & SULLIVAN, *supra* note 33, at 41; HOWARD ZINN, *DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY* 129-30 (1990). In January 1966, SNCC released a statement expressing "sympathy with and support" for draft refusers, and like the McComb leaflet, linked the civil rights struggle with the struggle for freedom "of the colored people in . . . other countries." The statement partly paralleled the structure and themes of the Hancock letter in stating:

The murder of Samuel Younge [a SNCC worker who was shot when he attempted to use a "white" restroom] in Tuskegee, Alabama is no different from the murder of people in Vietnam . . . . In each case, the U.S. government bears a great part of the responsibility for these deaths.

Samuel Younge was murdered because U.S. law is not being enforced.

Vietnamese are being murdered because the United States is pursuing an aggressive policy in violation of international law.

Statement on Vietnam (Jan. 6, 1966), in *BLACK PROTEST*, *supra*, at 416-17; see CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960s*, at 186-89 (1981); see also Interview with Dr. Howard B. Levy, *supra* note 25 (describing SNCC poster captioned "Uncle Sam Wants You, Nigger"). When SNCC communications director Julian Bond refused to disavow the statement, he was denied his seat in the Georgia House of Representatives, which he had won the previous November. Bond was ultimately seated in January 1967, after the U.S. Supreme Court ruled in his favor. *Bond v. Floyd*, 385 U.S. 116 (1966); see also GARROW, *supra* note 48, at 458-59; MORGAN, *supra* note 46, at 150-61. By the summer of 1967, seventeen SNCC staff members had been indicted for refusing induction. FERBER & LYND, *supra*, at 127. For a discussion of SNCC and the Vietnam War, see generally CARSON, *supra*, at 183-89.

Martin Luther King's public criticism of the war and calls for negotiations began in 1965. It was, at first, couched hesitantly. His speech of April 4, 1967, at the Riverside

critical voices came mostly from outside the Army.<sup>200</sup>

Church, given at the invitation of Clergy and Layman Concerned About Vietnam, was his most important statement on the war, his act to "break the betrayal of my own silences" on the war. King explicitly connected the civil rights and poor people's struggles with the need to oppose the war and offered "five concrete things" that the U.S. should do immediately to extricate itself from the war. GARROW, *supra* note 48, at 541-77 *passim*; YOUNG, *supra* note 31, at 198-200. For the text of the Riverside Church address, see Martin Luther King, Jr., *Beyond Vietnam*, in VIETNAM AND BLACK AMERICA, *supra* note 89, at 79-98. For additional criticisms of the war from within the civil rights movement, see Robert S. Browne, *The Freedom Movement and the War in Vietnam*, in VIETNAM AND BLACK AMERICA, *supra* note 89, at 61-78, and generally the essays and poems collected therein.

A highly influential critic of the war was boxing's heavyweight champion, Muhammad Ali, who was stripped of his title and convicted for refusing induction into the armed forces. Ali's conviction was ultimately reversed by the U.S. Supreme Court. Clay, AKA, Ali v. United States, 403 U.S. 698 (1971). For discussions of the Ali case, see ALICE LYND, WE WON'T GO 226-34 (1968) (containing partial transcript of the administrative appeal concerning Ali's draft classification); MORGAN, *supra* note 46, at 162-82 (discussing Morgan's involvement in the case). For a discussion of Ali's influence, especially among black Americans, see *Ain't Gonna Shuffle No More (1964-1972)*, in EYES ON THE PRIZE II: AMERICA AT THE RACIAL CROSSROADS—1965 TO 1985 (Blackside, 1989).

For differing views on the extent of black opposition to the war from 1965 to 1967, compare FERBER & LYND, *supra*, at 30 ("By August 1965 every civil rights group was under pressure from below to take a stand on the war.") with GARROW, *supra* note 48, at 551-56 (discussing opposition within and without the civil rights community to King's stance on Vietnam) and Interview with Dr. Howard B. Levy, *supra* note 25 (noting that most of the people in the communities where he worked supported the war, and that the black civil rights workers who testified on his behalf at the court-martial did so despite their disagreement with him on the war, and despite the risks they incurred by testifying).

200. Private First Class James Johnson, a black soldier and one of the Fort Hood 3, would, however, tie his opposition to the war to the civil rights struggle:

Now there is a direct relationship between the peace movement and the civil rights movement. The South Vietnamese are fighting for representation, like we ourselves. . . . Therefore the Negro in Vietnam is just helping to defeat what his black brother is fighting for in the United States. When the Negro soldier returns, he still will not be able to ride in Mississippi or walk down a certain street in Alabama. There will still be proportionately twice as many Negroes as whites in Vietnam. Those Negroes that die for their country still cannot be assured of a burial place that their family feels is suitable for them.

*Speech by PFC James Johnson*, in THE SIXTIES PAPERS: DOCUMENTS OF A REBELLIOUS GENERATION 308-09 (Judith C. & Stewart E. Albert eds., 1984). Shortly after the Levy court-martial, two black Marines, Lance Cpl. William Harvey and Pvt. George Daniels, were convicted of violating Article 134 for telling other Marines that Vietnam was a white man's war in which black men should not participate, and for urging their fellow Marines to seek a meeting with their commander to discuss the issue. They were sentenced to six and ten years respectively; the sentences were later reduced to three and four years. United States v. Harvey, 19 C.M.A. 539, 42 C.M.R. 141 (1970); United States v. Daniels, 19 C.M.A. 529, 42 C.M.R. 131 (1970). The Harvey and Daniels cases are

The testimony of Specialist Wayne Barrows, a black Green Beret who received dermatology training before Levy's decision not to train, marked the transition from the order charge portion to the General Articles charges portion of the prosecution case. Barrows' testimony is typical of testimony that the prosecution elicited from other soldiers.<sup>201</sup> He described a conversation in which Levy pressed him on his reasons for joining Special Forces and spoke contemptuously of them.<sup>202</sup> He added that Levy was critical of U.S. involvement in Vietnam. Turning to the question of black soldiers and Vietnam, the following colloquy occurred:

A: "He told me the colored American is discriminated against in the United States and America. He also told me that myself being a colored American should not fight in Vietnam because I am discriminated against in the United States."

Q: "What was your reaction to that?"

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discussed in PETER BARNES, PAWNS: THE PLIGHT OF THE CITIZEN-SOLDIER 177-79 (1972); Edward F. Sherman, *Justice in the Military*, in CONSCIENCE AND COMMAND, *supra* note 29, at 42. For a discussion of these cases focusing on the First Amendment issue and sympathetic to the military's position, see JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 152-54, 160 (1974).

By 1969, one survey showed that nearly two-thirds of black enlisted men in Vietnam (and one-quarter of black officers and senior non-commissioned officers) thought that "their fight is in the U.S." Almost a third of the black enlisted men thought the U.S. should withdraw immediately because it had no business being in Vietnam. Wallace Terry II, *Bringing the War Home*, in VIETNAM AND BLACK AMERICA, *supra* note 89, at 200, 204-05. Horace Coleman captures these sentiments in his poem, *A Downed Black Pilot Learns How to Fly*, in his closing lines: "Next time/I'll wait and see if they've declared/war on me—or just America." Horace Coleman, *A Downed Black Pilot Learns How to Fly*, in CARRYING THE DARKNESS: THE POETRY OF THE VIETNAM WAR 75 (W.D. Ehrhart ed., 1985).

The history of the GI antiwar movement is terribly underwritten. This oversight is especially pronounced in the case of black GI resistance. For a brief discussion of black GI resistance, see David Cortright, *Black GI Resistance During the Vietnam War*, 2 VIETNAM GENERATION 51 (1990).

201. The testimony was atypical in one important way. Of the five, Barrows was the only witness who testified that Levy expressly said Barrows should not fight in Vietnam. The others testified somewhat more ambiguously that Levy had said that were he a Negro he would refuse to go to Vietnam. Record at 677 (testimony of Spc. Clifton H. Davis); *id.* at 685 (testimony of Spc. James E. Jackson); *id.* at 695 (testimony of Sgt. John R. Ware; ambiguous testimony or a garbled transcription); *id.* at 739, 741 (testimony of Pfc. Eddie L. Cordy).

202. According to Barrows, Levy said that Special Forces were "trained as killers and rapers of women." Record at 643.

A: "Well, sir. I told him where I was brought up I never knew any — never seen any discrimination?"

Q: "Did he ever tell you what he would do if he were a colored soldier?"

...

A: "He told me that if he was a colored soldier he would refuse to fight, sir."<sup>203</sup>

In addition to talking to black soldiers about the disparity between America's asserted aims in Vietnam and the condition of blacks in the United States, Levy talked to some soldiers about discrimination within the Army. Specialist Clifton Davis, a black Green Beret, testified that Levy told him that blacks were assigned the hardest duty in Vietnam and suffered most of the casualties.<sup>204</sup>

Other soldiers also testified against Levy, relating his caustic comments about Special Forces and U.S. involvement in Vietnam. But the prosecution quickly passed over that testimony in its closing argument, and emphasized instead Levy's conversations with a handful of black soldiers. That the case against Levy would be cast this way is not

203. *Id.* at 644.

204. *Id.* at 676; *see also id.* at 685 (testimony of Spc. James Jackson). Levy's purported statement was grossly exaggerated, but not groundless. Martin Luther King, in his Riverside Church speech, put it more temperately when he said that the war was not only "devastating the hopes of the poor at home," but also "sending their sons and their brothers and their husbands to fight and to die in extraordinarily high proportions relative to the rest of the population." King, *supra* note 199, at 81. During the first 11 months of 1966, black soldiers accounted for 22.4% of all Army troops killed in action in Vietnam, almost double the proportion of black draft-age males in the total U.S. population. JOHN H. FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 491 (6th ed. 1988). At the beginning of 1967, black soldiers had accounted for 20.6% of the combat dead. In response to the adverse publicity from civil rights leaders, the Defense Department made a conscious decision to reduce the proportion of black casualties, and by the war's end, the overall figure was proportionate to the percentage of black draft-age males. APPY, *supra* note 43, at 20-21; *see also* DAVID PARKS, *GI DIARY* 86-88 (1968) (describing being assigned to dangerous forward observer job in his mortar platoon by a racist sergeant who reserved that job for black and Puerto Rican soldiers).

There was much to Levy's assertion that blacks were discriminated against generally in the Army and in Vietnam. Studies of the military justice system showed that blacks were more likely to be convicted than whites, and that black soldiers were punished much more harshly than their white counterparts for similar offenses. BASKIR & STRAUSS, *supra* note 43, at 138-39.

surprising given the tone the military intelligence investigation had taken in the hands of the Columbia Field Office of the 111th Military Intelligence Group. Once the intelligence investigation of Levy became fixed within a matrix of race, it was almost inevitable that the prosecution would remain within the same perimeters. Moreover, the prosecution may have recognized that without Levy's comments to black soldiers the Army did not have much of a case, at least for those charges that required a showing of a design to create disloyalty or to impair another soldier's performance of his duty.<sup>205</sup> Calling a Special Forces trainee a "murderer[] of women and children"<sup>206</sup> may be intemperate, but it is an implausible strategy for making political converts or for causing disloyalty or disaffection. Yet the prosecution focused on Levy's comments about service in Vietnam directed to black soldiers, not white ones.<sup>207</sup> In so doing, the prosecution tapped into longstanding racial fears and evoked powerful images of insurrectionary armed blacks and of the white race agitator. It is a testament both to the Army Intelligence investigation's powerful impact on the case and to how deeply rooted the images evoked were within the collective unconsciousness of white America that men of unquestionable decency on racial matters framed the case as they did while other equally decent observers failed to voice any criticism.<sup>208</sup>

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205. Additional Charge I, which involved conduct unbecoming an officer and a gentleman (UCMJ Article 133), may be satisfied not only by disloyal statements, but by "[i]ntemperate, "defamatory," "provoking," "contemptuous," and "disrespectful" ones. See Appendix I, *infra*.

206. Record at 700 (testimony of Spc. Warren Gerig).

207. *Id.* at 732-33 (testimony of Spc. Daryl E. Radebaugh).

208. There is no reason to question Richard Shusterman's recollection that he found offensive the racism, anti-semitism, and bigotry of all sorts that he saw both in the Army and in civilian society. See Telephone Interview with Richard Shusterman, *supra* note 127. Andrew Kopkind confused Shusterman's zealous advocacy for his client with a flight from moral choice under the camouflage of deference to institutional authority. He mistakenly assumed that Shusterman had resolved all doubts about the case in the name of "military necessity and good order." See Kopkind, *supra* note 29, at 22-23. *But see* Telephone Interview with Richard Shusterman, *supra* note 127 (recalling reservations regarding the Article 133 and 134 charges both because of First Amendment concerns and because of uncertainty as to whether the factual foundation for finding intent existed). Yet even in this uncharitable portrayal of Shusterman as a product of 1950s conformism—"Shusterman is Levy before Bellevue"—Kopkind nowhere suggests bigotry on his part. Kopkind, *supra* note 29, at 23.

Yet, the prosecution's presentation of Levy as a white predator evoked racial fears and racist stereotypes. While the racist character of the prosecution's case was either lost or ignored by the mainstream press, it was noted by Levy and his entourage. Letter from Dr. Howard Levy to Charles Morgan, Jr. (July 27, 1967), in Levy Litigation Files, *supra* note 27 (recounting conversation with Col. Herbert); Duncan & Dunn, *supra* note 25, at 50.

John Blassingame has identified two slave characters that pervade antebellum Southern literature: Sambo and Nat.<sup>209</sup> Southern writers attributed to Sambo, by far the most prevalent character, such stereotypical traits as indolence, childishness, docility, and musicality. In an effort both to rebut critics of slavery and to relieve their own anxieties, they also described him as faithful and loyal to the point of self-sacrifice on behalf of his master.<sup>210</sup> Yet this stereotype could not hide or alleviate the slaveholders' endemic fear that Sambo was really Nat, a bold, treacherous, bloodthirsty rebel who might murder them in their sleep. Southern whites sought to reconcile these two images, and to reassure themselves by insisting that contented, docile, loyal slaves became rebellious only when incited by fanatical or opportunistic outsiders.<sup>211</sup>

Since colonial times, the prospect of black soldiers has raised nightmarish fantasies of bloody racial insurrection for some whites. Those images and more general doubts about the loyalty of black soldiers endured well into the twentieth century. They continued to spark fears and, at times, attacks on black soldiers. At the time of Levy's court-martial, this imagery had become far more potent because of the vivid images of race riots in American cities and expectations of another long hot summer in 1967. Paradoxically, these frightening images of dedicated insurrectionary black soldiers competed with stereotypes of black soldiers' incompetence or cowardice.<sup>212</sup>

209. JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 132-53 (1972). Blassingame identifies a third slave character, Jack, who appears far less frequently in this literature. *Id.* at 133-34.

210. Blassingame writes: "The epitome of devotion, Sambo often fought and died heroically while trying to save his master's life. Yet, Sambo had no thought of freedom; that was an empty boon compared to serving his master." *Id.* at 134.

211. *Id.* at 142; see also HERBERT AP THEKER, *AMERICAN NEGRO SLAVE REVOLTS* 105-13 (Int'l Publishers Co. 1963) (1943) (discussing tendency to attribute insurrections to abolitionist "incendiaries"); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 137-38 (1956); cf. Alex Lichtenstein, "That Disposition to Theft, with Which They Have Been Branded": *Moral Economy, Slave Management, and the Law*, 21 J. SOC. HIST. 413, 426-27 (1988) (describing planter views regarding the disruptive consequences of slaves trading or associating with "white people of unexceptional character").

212. ARTHUR C. COLE, *THE IRREPRESSIBLE CONFLICT 1850-1865*, at 341 (1934) (noting that fear of black jacobins alternated with assertions of black cowardice); DIGGINS, *supra* note 28, at 29; ROBERT V. HAYNES, *A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917*, at 57, 65 (1976); JENSEN, *supra* note 67, at 185-86; Benjamin Quarles, *The Colonial Militia and Negro Manpower*, in *BLACK MOSAIC: ESSAYS IN AFRO-AMERICAN HISTORY AND HISTORIOGRAPHY* 25, 25-34 (1988) ("Slave or free, Negroes were excluded from the militia, save as noncombatants or in unusual emergencies. This policy of semiexclusion became so prevalent as to constitute a basic tenet of American military

The extent of concern about the loyalty and reliability of black soldiers can be seen in the amount of reassuring discussion that was dedicated to the issue in popular magazines.<sup>213</sup> The military also expressly addressed popular concerns through no less prominent a spokesman than General William Westmoreland. In late April 1967, President Johnson brought General Westmoreland, then the commander of U.S. forces in Vietnam, back to the U.S. for a series of appearances to bolster domestic support for the war. After addressing an Associated Press luncheon in New York, Westmoreland traveled to Columbia, South Carolina, the location of his mother's home and Fort Jackson.<sup>214</sup> Addressing the South Carolina General Assembly barely three weeks after Martin Luther King's Riverside Church speech condemning U.S. involvement in Vietnam, and fifteen days before Levy's court-martial was to begin, Westmoreland praised the courage, skill, and loyalty of black servicemen in Vietnam.<sup>215</sup>

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tradition."); SLOTKIN, *supra* note 55, at 114-15; Stephen G. Tompkins, *Army Feared King, Secretly Watched Him*, MEM. COM. APPEAL, Mar. 21, 1993, at A1, A8; Stephen G. Tompkins, *In 1917, Spy Target Was Black America*, MEM. COM. APPEAL, Mar. 21, 1993, at A7.

213. See, e.g., Simeon Booker, *Negroes in Vietnam: "We, Too, Are Americans,"* EBONY, Nov. 1965, at 89; *Special Issue: The Black Soldier*, EBONY, Aug. 1968; *Democracy in the Foxhole*, TIME, May 26, 1967, at 15, reprinted abridged as *The Negro's Bright Badge of Courage*, READERS DIG., Aug. 1967, at 59, 59 ("In Vietnam our Negro troops are proving that there is no color in war; merit is the only measure of a man."); *Only One Color*, NEWSWEEK, Dec. 6, 1965, at 42. These articles tended to advance, in addition to a reassuring message about the quality and loyalty of black soldiers, a pro-civil-rights message. Drawing on the melting-pot imagery of the formula World War II combat film, these articles often offered the hope that shared combat experience would help to overcome racial antagonism.

214. At the AP luncheon, Westmoreland said that he, and the soldiers in Vietnam, were "dismayed . . . by recent unpatriotic acts here at home." *Text of Westmoreland's Address at A.P. Meeting and His Replies to Questions*, N.Y. TIMES, Apr. 25, 1967, at A14; see also Peter Kihss, *Westmoreland Decries Protests*, N.Y. TIMES, Apr. 25, 1967, at A1. General Westmoreland did not specify to which "unpatriotic acts" he was referring, but he subsequently wrote that his comments were prompted by an American flag burning in Central Park. GENERAL WILLIAM C. WESTMORELAND, *A SOLDIER REPORTS* 225-26 (1976).

215. *Westmoreland Hails Negro G.I.*, N.Y. TIMES, Apr. 27, 1967, at A10. Westmoreland's message and motivation were more complicated than simply attempting to reassure a nation historically wary of black soldiers. He had, after all, chosen to deliver his inclusive message about black soldiers to the all-white South Carolina Legislature, and in so doing gave voice to the progressive potential within the military's relationship to the black soldier. The day was replete with racial symbolism. Along with his address to the General Assembly, and his receipt of an honorary doctor of laws degree from the University of South Carolina, Westmoreland visited long-time family friend James Byrnes, the arch-segregationist former governor of South Carolina. *Id.* Westmoreland would repeat his praise for black GIs in an address to a joint session of



Within this context of racial fears, Captain Shusterman used his closing argument to construct an image of Levy as a predatory subversive. Levy, he argued, sought out vulnerable soldiers, found their weaknesses, and exploited their feelings of racial injury in his project to sabotage the war effort. Indeed, this was true even of Sergeant Hancock, who, as a white soldier married to a black woman, had experienced discrimination. Hancock was especially "sensitive to" and "susceptible to" Levy's comparisons of the terror inflicted on American blacks and on the Vietnamese, as well as to Levy's suggestion that Hancock's talents were misdirected from the civil rights struggle.<sup>216</sup> Even more susceptible to this appeal, however, were the black soldiers with whom Levy spoke.

Turning from Hancock to these soldiers, Shusterman said: "The same appeal, the turning of a just cause into an illegal purpose is seen in Captain Levy's direct contact with a whole group of American Negro soldiers who came to him either as students anxious to learn or as patients."<sup>217</sup> Shusterman's framed Levy's conversations with black soldiers not as incidental conversations, or as genuine expressions of friendship and interest, but as cynical misuses of a just cause and an attempt to manipulate vulnerable prey. Repeatedly, the closing argument played on images of Levy stimulating and then preying on the injured sensibilities of black soldiers in order to subvert them. In speaking of Specialist Barrows, Shusterman described Levy's *modus operandi*:

He walked into the office and Captain Levy approached him. How? First, he questioned him about his background, learning the same types of indicia of interest that he knew or thought he knew at the time he wrote the [Hancock] letter. "Where are you from? What kind of education do you have? Wouldn't you like to better your life? Haven't you felt discrimination?" The same questioning until he found in this man that type of appeal, that type of area where an appeal would be effective.<sup>218</sup>

Similarly, he said of Specialist Davis: "Here was a man who . . . casually dropped the thought that he had worked with SNICK [sic]. . . ."

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Congress two days later. Tom Wicker, *Westmoreland Tells Congress U.S. Will Prevail*, N.Y. TIMES, Apr. 29, 1967, at A1, A10.

216. Record at 2554-56. Rather than saying that Treanor told Levy about Hancock, Shusterman says four times that Levy "found out" pertinent facts about Hancock. He thereby characterizes Levy as active in discovering Hancock's supposed susceptibility to a civil rights appeal. *Id.*

217. *Id.* at 2556.

218. *Id.* at 2557.

Captain Levy picked that up. Here is his weakness, his sensitivity. 'I will get him for my cause.'<sup>219</sup>

The prosecution described these black soldiers as especially "susceptible" or "sensitive" to Levy's appeal, a characterization that would resonate with the U.S. Army Board of Review, which affirmed Levy's conviction.<sup>220</sup> It argued that these soldiers were easy marks for manipulation because of their youth and inexperience, their limited education and (in some cases) limited intelligence, and their feelings of racial injury.<sup>221</sup> It also highlighted the disparity between Levy's rank and the witnesses'. The prosecution suggested that crossing boundaries of rank and race implied a malign purpose. For example, the prosecution characterized Levy's patient, Private Eddie Cordy, as "not particularly bright," and said: "Surely Captain Levy wasn't interested in an abstract debate with this young man."<sup>222</sup> The implication is clear. His friendship was feigned. Why would someone like Levy bother to talk with someone like Cordy, unless in pursuit of some ulterior motive? Cordy, however, understood the relationship quite differently:

Well, you know, he was different from everybody else, you know. Around an officer, I was still new in the Army, see, and around an officer, you know I assumed the at attention manner and everything, but he made me feel that—he would talk to you

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219. *Id.* at 2558. Here, as elsewhere in the closing argument, Shusterman uses a testimonial voice without distinguishing between actual testimony (or close paraphrase of testimony) and interpretive gloss.

220. *Id.* ("[H]ere is a man who is susceptible."); *id.* ("[H]ere is his weakness, his sensitivity."); *id.* at 2559 ("an individual not particularly bright, somewhat slow, a man who might be particularly susceptible"); *id.* at 2560 ("Surely this young man was susceptible to having his morale affected. Here was a man who had gone AWOL . . . a man not particularly bright, a man particularly sensitive to the appeal that Captain Levy directed to him."). In affirming Levy's conviction and sentence, the U.S. Army Board of Review echoed this characterization stating: "The statements . . . were directed to individuals of the enlisted grades, mostly Negro, and many of whom emotionally and educationally were susceptible to being influenced." *United States v. Levy*, 39 C.M.R. 672, 677 (1968).

221. *See, e.g.*, Record at 2558 ("Here is a man at the very early stage of his Army career; here is a man who is susceptible."); *id.* at 2559 ("And through the testimony of these witnesses you will recall, these are people for the most part with high school educations, some of them with less. You saw Specialist Jackson, an individual not particularly bright, somewhat slow, a man who might be particularly susceptible to this type of feeling.");

222. *Id.* at 2560.

like another EM or something. I considered him as sort of a friend and everything.<sup>223</sup>

In his closing argument, Shusterman repeatedly described Levy as these soldiers' "teacher" and "officer."<sup>224</sup> He intimated that they looked to Levy for guidance and for help, but that Levy betrayed their trust. Recognizing their vulnerability and their need for guidance, Levy attempted to manipulate them for his own purposes.

This image of Levy as a subverter of the military culture, as a violator of the boundaries of race and rank, and as a deceptive and

223. *Id.* at 739. Levy's manner with enlisted men did violate the unwritten protocol of the military, and struck both officers and enlisted men as unusual. In addition to Pvt. Cordy's testimony, *see id.* at 695 (testimony of Sgt. John Ware) ("Initially, I thought it rather strange that a man in his position would be talking about things of such complexity to a Private [Ware's rank at the time]. It struck me as being rather peculiar."). Levy's rank also affected how his comments were heard. Some witnesses indicated that they took Levy's comments more seriously than they would have had they come from a fellow enlisted man. *E.g., id.* at 743 (testimony of Pfc. Cordy). Nevertheless, the witnesses also indicated that they were not overawed by Levy's rank. Levy did not cause any witnesses to be disloyal or impair their performance of duties. Several of the witnesses testified to arguing with Levy vigorously. *See, e.g., id.* at 712-15 (testimony of Richard Gillum, noting, however, that he restrained himself slightly because of Levy's rank). Rabbi Feinstein testified that "essentially Doctor Levy has not incorporated into his personality the philosophy that one speaks differently depending on their rank. . . . When he says something to a Private he's not saying it as Captain to Private, but as man to man, the same way he says it to me or to a Colonel or anyone else." *Id.* at 2041-42. Rabbi Feinstein attributed this absence of consciousness of rank to the peculiar status of military doctors, who (like military chaplains) hold rank without command. *Id.*

No doubt the prosecution emphasized the disparity of rank in part to bolster its case on the Article 133 charges ("conduct unbecoming an officer and a gentleman"). The testimony relating to this issue and the emphasis given to it by the prosecution suggests that for those socialized to the mores of the military, Levy's casual familiarity with enlisted men and his willingness to discuss forbidden subjects with them struck at the core of Article 133, notwithstanding its vagueness. In discussing the case, Richard Shusterman contends that Levy's speech was more egregious because it was directed to enlisted men, and that such talk, officer to officer or enlisted man to enlisted man, might have been tolerated. Telephone Interview with Richard Shusterman, *supra* note 127.

224. *E.g., Record* at 2557 ("Captain Levy was [Barrows'] teacher. A man who is an officer he is expected to live up to."). This imagery of Levy as a teacher and an example for young troops may have had especial potency because Fort Jackson was one of the Army's basic training camps. Six of the court-martial members were attached to training brigades at Fort Jackson, and another was the Director of Training of the Third Army Drill Sergeants School. *See Court Martial* (undated), in *Levy Litigation Files*, *supra* note 27. At the time of the court-martial, Fort Jackson processed nearly 90,000 recruits annually. Pat D. Kaye, *Antiwar Protest Cancelled* (Feb. 22, 1968), in *Levy Litigation Files*, *supra* note 27 (clipping from unidentified newspaper).

ruthless manipulator of vulnerable, young, mostly black soldiers, echoed recurring images in American, and especially southern, culture of the "outside agitator." These images reached back as far as the portrayal of the abolitionists by slavery's apologists, and the portrayal of Radical Republicans and "carpetbaggers" by the Redeemers.<sup>225</sup> More recently, these images had been used to denigrate Communist Party activism among blacks, including Party involvement in the Scottsboro case, and to explain the civil rights movement.<sup>226</sup> As the court-martial approached, this imagery was given full play in the press. Various columnists claimed to see in Martin Luther King's opposition to the war the manipulating hand of either communists or of "well-heeled whites," who, in either case, were exploiting blacks as the shock troops of the anti-war movement.<sup>227</sup>

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225. See sources cited *supra* note 211.

226. MARK NAISON, *COMMUNISTS IN HARLEM DURING THE DEPRESSION*, at xv-xvii (1983); CARSON, *supra* note 199, at 180-85; EAGLES, *supra* note 70, at 258-61; HUIE, *supra* note 70, at 130-31. In one survey conducted in December 1963, 39% of Northerners and 52% of Southerners surveyed agreed with the statement that "'Others' are really behind the Negro protest movement, while 21% of Northerners and 27% of Southerners thought that those "others" were communists. Paul B. Sheatsley, *White Attitudes Toward the Negro*, 95 *DAEDALUS* 217, 231 (1966). A Gallup poll in November of 1965 showed that 48% of those questioned thought that there was "a lot" of communist involvement in the civil rights movement and another 27% thought there was some communist involvement. Gallup Poll (Nov. 19, 1965), cited in CARSON, *supra* note 199, at 183. In *Gibson v. Florida Legislative Investigation Comm'n*, 372 U.S. 539, 540-43 (1963), the U.S. Supreme Court struck down the contempt conviction of the NAACP Miami branch president for refusing to divulge membership information to a legislative committee. The purported state interest was to determine whether 14 people previously identified with the Communist Party or related organizations were NAACP Miami branch members. See also I.A. NEWBY, *JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA* 160-61, 170-73 (1965) (discussing "outside agitator" figure in early twentieth century southern thought).

227. For a discussion of the characterization of King's Riverside Church speech as the product of communist manipulation, see GARROW, *supra* note 48, at 554-55, 576-77. The statement about "well-heeled whites" is from Kenneth Crawford, *Let the Negro Do It*, *NEWSWEEK*, May 8, 1967, at 46. In that particularly scurrilous piece, Crawford wrote:

Negro activists have volunteered to spearhead the overt resistance movement. But they are to get covert financial support from well-heeled whites who disapprove of the war but prefer to have somebody else carry the banner. If the movement evokes a violent reaction, it will be the Negro and the cause of civil rights that suffer. The whites will remain safe behind their moneybag revetments.

. . . .

Without doubting the sincerity of King's explanation that his commitment to nonviolence requires him to oppose the war, it is obvious that less idealistic considerations entered into his decision to divert the "spirit" of the civil-rights movement into a new channel. And it seems to be working.

In a trial evoking images of the white race agitator and charging Levy with attempting to promote disloyalty, Oedipal projections were inevitable. Levy was at once the rebellious son and the bad father portrayed in the Oedipal myth.<sup>228</sup> His rebellion against the Army, its war effort, its hierarchy of rank, its political and social axioms, and its first principle of command and obedience, is plain. Usually, that rebellion was cast as the product of antiwar sentiments gone amuck, but at times the prosecution seemed to frame it as unreasoned rebelliousness flowing simply from the need to defy a father figure.<sup>229</sup>

Because of his casual social relations with blacks and his "design" to plant the seeds of rebellion among black soldiers, Levy was again the rebellious son: a dangerous race traitor.<sup>230</sup> But as an officer bent on

It has tapped new sources, or retapped old sources, of the money any public cause must have.

*Id.* Crawford saw rich whites, fearing that their sons would have to go to war, revivifying King and Stokely Carmichael, who were willing pawns because they recognized that the civil rights movement was being furthered. Crawford also suggested the possibility that Robert Kennedy was behind King's Riverside Church speech. *Id.*

228. Cf. NORMAN COHN, WARRANT FOR GENOCIDE: THE MYTH OF THE JEWISH WORLD-CONSPIRACY AND THE PROTOCOLS OF THE ELDERS OF ZION 256-68 (1967) (examining the Oedipal projections of the "bad son and bad father" fantasy underlying the myth of a Jewish world-conspiracy).

229. In his closing argument, Shusterman said of Levy's refusal to train:

There was the testimony of Lieutenant Wasserman, a personal friend of Captain Levy . . . He found out about the order, and Captain Levy said, "I had an order from Colonel Fancy, but I am not going to do it." Willful defiance. "Why not, Captain Levy? You know, Howard, why not do it? After all, you will get yourself in trouble." "I don't care; I'm not going to do it." Why, any explanation? No. Defiance of authority. . . . The testimony of Dr. Mauer to the same effect, a personal friend of Dr. Levy, encouraging him to do this training . . . Dr. Levy to Dr. Mauer, "No, I won't do it." Any explanation? No. Defiance of authority.

Record at 2564. The decision of the U.S. Army Board of Review, affirming the court-martial conviction and sentence similarly speaks of unearned rebellion:

The record of trial in this case . . . depicts a thirty-year-old man of better than average background and advantages, who agreed to serve his country for two years if he would be permitted first to obtain a medical degree, but who, when called upon to fulfill his bargain, failed miserably.

United States v. Levy, 39 C.M.R. 672, 675 (1968).

230. Cf. EAGLES, *supra* note 70, at 260. Eagles writes of the shooting of two white civil rights workers in Lowndes County, Alabama:

[Tom] Coleman did not shoot Ruby Sales or Joyce Bailey. Although he probably could not have fired at any woman, white or black, Coleman also knew that the two whites posed a much greater threat. He shot Daniels and Morrisroe because they were white men. They offended him the most. In Coleman's view . . . they had grievously betrayed their race doubly by siding with the blacks and by associating publicly with black women. Traitorous

manipulating those to whom he owed leadership, he was also the bad father, ready to sacrifice his young to whom he owed fatherly guidance. From the comfort and safety of the dermatology clinic, he tried to ruthlessly misuse black soldiers in turning them into the shock troops of his antiwar efforts. Notably, Levy shared his views about the war with officers as well as enlisted men, but he was prosecuted only for his statements to enlisted men.<sup>231</sup>

### C. *The Defense Case: Putting the War on Trial*

The Vietnam War was never at the center of the prosecution's case, but it was always present as a backdrop. Vietnam was a place where the skill and courage of young soldiers such as Hancock, Cordy, and Barrows would be tested, and it was therefore important that Levy nurture, not undermine, that skill and courage.<sup>232</sup> In the prosecution's case, the nature of the war went unquestioned. Its legality was assumed and, at any rate, nonjusticiable, and thus beside the point.<sup>233</sup>

Defense counsel mimicked the prosecution's case by framing an alternative image of Levy. They offered a counter-story of a consummate civilian and doctor, who should not have been expected to adhere to, or even to have recognized, unwritten military norms. The defense portrayed a victim of Army persecution prompted by a dislike of his unconventional convictions.<sup>234</sup> This comprised an attempt to weaken the prosecution's case by casting doubt on the prosecution's construction of Levy. Unlike the prosecution, however, the defense counsel also moved

whites threatened white dominance more than insubordinate blacks because they represented a breach in white solidarity.

231. *E.g.*, Record at 2038 (testimony of Capt. (Chaplain) Joseph H. Feinstein); *id.* at 2346 (testimony of Capt. David J. Travis).

232. Record at 2555-56, 2557, 2561-62.

233. Anticipating a defense that the war was illegal under international and U.S. law, the prosecution prepared briefs arguing both the legality of the war and Levy's lack of standing to raise the issue. *See* Telephone Interview with Richard Shusterman, *supra* note 127; Government Brief on the Question of the Legality of the Viet Nam War Under United States Constitutional Process [unsubmitted], *United States v. Levy*, 39 C.M.R. 672 (1968), *appeal denied*, No. 21,641 (C.M.A. Jan. 6, 1969) (on file with author). The defense did not raise the issue in the manner expected by the prosecution, and the prosecution apparently never submitted the briefs, which, at any rate, did not become a part of the appellate record.

234. MORGAN, *supra* note 46, at 131. The defense characterization of Levy had a lasting impact on both Col. Brown's and Richard Shusterman's understanding of events, although neither would characterize his prosecution as the product of a political vendetta. *See* Telephone Interview with Col. Earl V. Brown, *supra* note 45; Telephone Interview with Richard Shusterman, *supra* note 127.

the war to the center of the case. They attempted to frame the case so that the war and the Army were on trial.

The defense faced several problems as it forged its strategy. First, the court-martial panel would at best be baffled by, and almost certainly hostile to, Levy and his beliefs. Second, the defense case rested on arguments that were unprecedented in a military justice setting. Defense counsel would have to convince the law officer that the defenses were cognizable before they could become the bases for the stories that the court-martial heard. Third, unlike the prosecution, which basically had to tell one story that pulled together the different charges under a single, unified theory of Levy's motives and acts, the defense had a less tidy case. It would tell several stories to appeal to multiple audiences.

In addition to the legal arguments that the defense would make with an eye to the reviewing courts, the defense also would address itself to Colonel Brown, the law officer, and to the court-martial, within the constraints imposed by the law officer. The defense was also aware that the court-martial was a political event with a larger audience. The public might, through the prism of the trial, come to view Levy, the Army, and the war differently. While it is not clear how this awareness actually affected the defense's courtroom conduct—indeed, it may have checked any inclination to politicize the trial too overtly—outside the courtroom, the defense aggressively attempted to influence the public's understanding of the case.<sup>235</sup>

The defense framed a strategy that would put the war on trial in two ways. First, it offered a defense of truth to counter the charges arising from Levy's statements to the Green Berets. Second, the defense sought to portray the order to train the aidmen as unlawful because it was inconsistent with Levy's understanding of medical ethics.

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235. Dr. Levy has said that he never doubted that the court-martial would convict him; his only concern was with the political impact of the trial. Morgan, however, believed that he could win an acquittal and, at any rate, recognized the need both to build a record for appeal and to minimize the sentence. Further, Levy credits Morgan with being astute and skillful in his dealings with the press, and states that because Morgan's mastery in that area was quickly clear to him, Morgan successfully curbed some of Levy's instincts to push the political message too hard. Levy also notes that Morgan quickly helped him to recognize that he would win the political battle only if the public believed that he was trying to win the court battle. Interview with Dr. Howard B. Levy, *supra* note 25. For Morgan's statement that he was attempting to "build constitutional defenses for appeal and cut the sentence," see MORGAN, *supra* note 46, at 131.

## 1. TRUTH AND THE NUREMBERG DEFENSE

Drawing on *New York Times v. Sullivan*<sup>236</sup> and *Garrison v. Louisiana*<sup>237</sup> as legal support for the concept of truth as a defense, Levy's counsel sought to show that Special Forces were "killers of peasants and murderers of women and children."<sup>238</sup> Morgan first introduced the truth defense rather casually in his cross-examination of Special Forces aidman Specialist Wayne Barrows. From the start the difficulty that he would face was apparent.<sup>239</sup> After taking Barrows through a long list of weapons to determine which ones he had been trained to use,<sup>240</sup> Morgan established that Barrows had been trained to use a 105 millimeter howitzer. When Morgan asked Barrows to describe "what the 105 [millimeter] howitzer does," Brown sustained the prosecution's objection on relevance grounds. In arguing relevance, Morgan said: "The man testified that Dr. Levy told him that special forces were killers of women and children. I'm trying to demonstrate what the 105 howitzer does." In again sustaining the prosecution's objection, Brown stated that while Levy's subjective belief might be relevant, the objective truth of his statements was not.<sup>241</sup> In an out-of-

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236. 376 U.S. 254 (1964).

237. 379 U.S. 64 (1964).

238. Levy's asserted defense stretched the meaning of *Sullivan* and *Garrison*. Unlike those cases, which dealt with libel, the Article 134 prosecutions were basically for incitement, and nothing in *Sullivan* or *Garrison* suggested that incitement could not be prosecuted if it relied on truthful statements for its effect. The Article 133 prosecutions raised a somewhat different issue, and Morgan's argument that truth-telling about public issues could never be "dishonorable" or "conduct unbecoming" ought to have been taken more seriously. Finally, some of the particular offenses charged in the specifications for Additional Charge I included the making of "defamatory" statements. Regarding those offenses, the argument that *Garrison* should govern, while debatable, was quite strong.

239. An indication of the defense's casual preparation for this part of the case can be seen in Morgan's statement: "We raised the defense of truth on the statements . . . that special forces were killers of women and children. I think that is explicit in this kind of warfare, and I think the court could almost take judicial notice of that." Record at 949. By then Brown had rejected the truth defense, but he also indicated that he thought that Levy's statements implied more than just that civilians get killed in modern wars. *Id.* The defense also sought to subpoena Col. Francis J. Kelly, the Commander of Special Forces in Vietnam. The value of this strategy, aside from the political impact of putting Kelly on the stand, was that he would have had knowledge relevant to both the truth and medical ethics defenses. Brown denied the request. *Id.* at 835.

240. Morgan was establishing the cross-training of Green Beret aidmen to bolster both the truth defense and the medical ethics defense by showing that the aidmen were primarily combat soldiers.

241. Record at 651. The prosecution immediately sought an out-of-court hearing on the relevance of Levy's subjective beliefs, arguing that they were similarly not a



court hearing on the first morning of the defense's case, Brown again ruled that the objective truth of Levy's statements was not a defense to the speech charges. He further stated that neither Levy's subjective belief that the statements were true, nor his belief that the order was unlawful, was a defense, but that either might be adduced in mitigation of his sentence.<sup>242</sup>

Then, unexpectedly, the case took a remarkable turn. In the course of his ruling, Brown, having just stated that the order to train was presumptively legal, began to talk of Nuremberg:

Now the defense has intimated that the special forces aidmen are being used in Vietnam in a way contrary to medical ethics. My research on the subject discloses that perhaps the Nuremberg Trials and the various post war treaties of the United States have evolved a rule that a soldier must disobey an order demanding that he commit war crimes, or genocide, or something to that nature. However, I have heard no evidence that even remotely suggests that the special forces of the United States Army have been trained to commit war crimes, and until I do, I must reject this defense.<sup>243</sup>

Perhaps Brown meant nothing more by his injection of the Nuremberg principles than to explain why evidence of Levy's subjective belief that Special Forces were being trained to commit war crimes would be admissible in mitigation of sentencing.<sup>244</sup> But Brown had thought a lot about Nuremberg. As a law instructor at West Point in the late 1940s, he had often discussed the implications of the Nuremberg and Tokyo war crimes trials with his students and colleagues. The movie *Judgment at Nuremberg*<sup>245</sup> had made a lasting impression on him. He had read a number of law review articles about the Nuremberg trials. He had doubts about the wisdom, if not about the legality, of the Vietnam War. And

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defense to either the order or the speech charges. Brown accepted the prosecution's briefs and deferred a ruling on the issue until the beginning of the defense case. *Id.* at 654-62. During the defense's cross-examination of Spc. James Jackson, who was not a Green Beret, the prosecution raised no objections when Morgan adduced Jackson's testimony that he had killed a woman in Vietnam and had seen a child killed there. *Id.* at 686-87.

242. *Id.* at 874-76.

243. *Id.* at 875.

244. *Id.* This is the point Brown immediately went on to make.

245. (Roxlom Films 1961).

Brown was worried about how *he* might be judged if he foreclosed any ventilation of the issues that Levy raised.<sup>246</sup>

As Morgan pondered how he could go about proving a Nuremberg defense, Shusterman and Brown debated the boundaries of the Nuremberg principles, until Brown stated that if the aidmen were being "trained to commit war crimes, then I think a doctor would be morally bound to refuse" to train them.<sup>247</sup> Shusterman objected: "There has been not even an intimation of that in this case," and Brown agreed that "the issue has not been raised."<sup>248</sup> Morgan took the plunge: "It is about to be I think."<sup>249</sup>

Morgan would later write: "We were fresh out of defenses."<sup>250</sup> Brown had denied Levy his truth defense, and had expressed doubt that Levy's concerns about medical ethics were relevant for any purpose beyond sentence mitigation.<sup>251</sup> Before the trial, the defense rejected the Nuremberg defense as "infeasible" and likely to antagonize the court-martial.<sup>252</sup> Now it asked for an extra day to prepare the defense. Matching Morgan's matter-of-fact tone, Brown granted the request.<sup>253</sup>

246. Telephone Interview with Col. Earl V. Brown, *supra* note 45. There seems also to have been an element of calling the defense's bluff. *See* Record at 948-49.

247. Record at 878. Brown quite consciously described this as a moral duty, leaving the legal question ambiguous.

248. *Id.* at 879.

249. *Id.*

250. MORGAN, *supra* note 46, at 135.

251. Record at 874-75.

252. MORGAN, *supra* note 46, at 136. Interview with Dr. Howard B. Levy, *supra* note 25. Captain Sanders considered the possibilities of challenging the legality of the war or of Special Forces conduct in Vietnam in a memorandum to Morgan. Sanders concluded:

Of course, it taxes credibility too severely to believe that such defenses, even if the facts on which they are based are proved true beyond a shadow of a doubt, would ever be recognized in a military court. But the reasons are far more of practical expedience than of theory. The Nurenberg [sic] Trials demonstrated the necessity that the courts at least admit that such defenses should exist, regardless of whether the judge would ever have the courage, shall I say the word, to hold that the prosecution of a particular war is illegal and that, therefore, a soldier may refuse to obey orders designed to further that war or that because certain individuals or groups in the military forces have committed war crimes, that an officer could refuse to train other persons who are members of the group.

Memorandum from Capt. Charles M. Sanders to Charles Morgan, Jr. 6 (Apr. 4, 1967), in Levy Litigation Files, *supra* note 27.

253. Record at 893; *see also id.* at 950. Morgan had previously asked for a recess until the following Tuesday, to allow him to gather his witnesses, including one coming from Vietnam. After the Nuremberg issue was raised, Brown agreed to extend that recess until Wednesday, giving the defense a week to prepare.

*New York Daily News* reporter Anthony Burton captured some of the madness of the moment in writing with deadpan understatement that Morgan "must return to court next Wednesday with any witnesses or evidence he can find. Prosecutors at the Nurnberg [sic] war crimes trials had longer."<sup>254</sup> Finally, Brown indicated that he wanted to assess the war-crimes testimony out of the hearing of the court-martial. The Nuremberg defense would go to the court-martial only if the defense made a prima facie showing that Special Forces policy was to commit war crimes.<sup>255</sup>

While the defense was delighted that Brown had introduced the Nuremberg defense, they also recognized how narrowly he had bounded it by requiring a showing "that the special forces of the United States Army have been trained to commit war crimes."<sup>256</sup> Brown characterized the defense position as saying that U.S. involvement in Vietnam "is wrong, immoral, and illegal,"<sup>257</sup> but he did not intend to entertain claims of this sort. His statement that "I know of no court, civilian or military, that is going to sit in judgment on the President's exercise of his power in disposing the troops of the United States,"<sup>258</sup> resolved all doubts as to the imposed limitations on the defense. Later, Brown added that he was "almost ready to take judicial notice" that the aidmen were not committing war crimes.<sup>259</sup> Thus, the limited scope of Levy's Nuremberg defense resulted from the restrictions of time and subject matter placed on his counsel by the law officer and not, as Donald Duncan and Andrew Kopkind would later surmise, from restrictions placed on the defense by the ACLU Board.<sup>260</sup>

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254. Anthony Burton, *Levy Asks Peace Units for "War Crime" Data*, N.Y. DAILY NEWS, May 19, 1967, at 10.

255. Record at 880-81.

256. *Id.* at 875.

257. *Id.* at 876.

258. *Id.* at 875-76.

259. *Id.* at 947.

260. Duncan & Dunn, *supra* note 25, at 56; Kopkind, *supra* note 29, at 25-27. The case did create an uproar within the ACLU, and Vietnam would remain a divisive issue within the ACLU beyond the *Levy* case. WALKER, *supra* note 131, at 271-72, 279-87; Report Prepared by Edward Ennis, ACLU General Counsel, on *United States v. Levy* (May 29, 1967), in *Levy* Litigation Files, *supra* note 27; Memorandum from "The Office" to the Board of Directors, ACLU (June 1, 1967), in *Levy* Litigation Files, *supra* note 27; Minutes, Executive Committee Meeting, ACLU (May 26, 1967), in *Levy* Litigation Files, *supra* note 27. Despite the dissension over whether the ACLU ought to directly represent clients like Levy in cases that raised controversial non-civil liberties issues, and over whether the ACLU should issue a statement distancing itself from Levy's defense on the non-free-speech issues, the Board accepted its obligation not to bring these issues to the public consciousness while the court-martial was in progress, for fear that it would jeopardize the defense. The documents in the ACLU file show considerable

The defense was unprepared for the challenge of building a Nuremberg defense because they had ruled it out early on and did not anticipate that Brown would thrust it upon them. As Laughlin McDonald and Charles Sanders prepared to go to Fort Bragg to study Special Forces training manuals, Morgan appealed to critics of the war to come forward with war-crime evidence.<sup>261</sup> The next few days produced feverish activity as the defense sought out potential witnesses, mostly from the antiwar movement and the press. They were deluged by documents and offers to testify. Rumors abounded that Jean-Paul Sartre, Bertrand Russell, Mary McCarthy, Martin Luther King, and high officials in the NLF might testify.<sup>262</sup> In the end, given Brown's constraints on the Nuremberg defense, few of the offers were material. Overwhelmed by the response, Morgan issued a press release on May 23, clarifying that despite Levy's opposition to the war, the testimony that the defense intended to offer would relate only to "the role of Special Forces in [land] warfare."<sup>263</sup>

When the out-of-court hearing reconvened on the morning of May 24, the defense had found three witnesses. Two of them, Donald Duncan and Robin Moore, arguably knew as much about Special Forces in Vietnam as anyone outside the military, the Defense Department, and the CIA.<sup>264</sup> Duncan was a former Special Forces Sergeant, who became

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uneasiness within the organization about the *Levy* case, but do not support the contention that the ACLU interfered with or narrowed the Nuremberg defense. According to Levy, the dissension within the ACLU had no influence on how the Nuremberg defense was presented. "[I]hat's not what happened with Nuremberg. . . . There's no way Chuck could've held me back had we had more of an opening [from Brown]. . . . There's no way he would've been held back." Interview with Dr. Howard B. Levy, *supra* note 25.

261. MORGAN, *supra* note 46, at 137-38; Homer Bigart, *Captain's Trial Opened to 'War Crime' Evidence*, N.Y. TIMES, May 18, 1967, at A2; Anthony Burton, *Levy Asks Peace Units for "War Crime" Data*, N.Y. DAILY NEWS, May 19, 1967, at 10.

262. Kopkind, *supra* note 29, at 25; Burton, *supra* note 254, at 10. None of these officials testified. Sartre sent a supporting telegram, and Russell sent a crate of documents from the International War Crimes Tribunal that he had convened in Stockholm that May, but the documents arrived too late to be incorporated into the Nuremberg defense. MORGAN, *supra* note 46, at 138-39.

263. Statement by Charles Morgan, Jr. 1 (May 23, 1967), in *Levy* Litigation Files, *supra* note 27; *Captain Asserts the Green Berets Are His Target, Not U.S. Policy*, N.Y. TIMES, May 24, 1967, at A3.

264. For discussions of the relationship between Special Forces and the CIA in Vietnam, see generally DONALD DUNCAN, *THE NEW LEGIONS* (1967); ROBIN MOORE, *THE GREEN BERETS* (1965); JEFF STEIN, *A MURDER IN WARTIME: THE UNTOLD SPY STORY THAT CHANGED THE COURSE OF THE VIETNAM WAR* (1992); WESTMORELAND, *supra* note 214, at 106-09; see also Record at 959 (testimony of Robert L. Moore, Jr., better known as Robin Moore); *id.* at 996 (testimony of Capt. Peter G. Bourne); *id.* at 1013 (testimony of Donald W. Duncan).

disaffected while serving in Vietnam and resigned from the Army. Writing of his experience in the leftist and antiwar journal *Ramparts*, he declared that the U.S. justifications for involvement in Vietnam as support of "the aspirations and desires of the Vietnamese people," was a lie," since "the vast majority of the people were pro-Viet Cong and anti-Saigon."<sup>265</sup> Duncan became the military editor of *Ramparts*, and at the time of the court-martial he was awaiting publication of his book, *The New Legions*, which dealt with U.S. involvement in Vietnam, Duncan's experiences in Special Forces, and the effects of militarism on American society.<sup>266</sup> Duncan had turned down a request to testify on behalf of the Fort Hood 3 at their court-martial, and was reluctant to testify for Levy.<sup>267</sup> According to Morgan, Duncan was eventually persuaded to testify by various supporters within the peace movement.<sup>268</sup>

The idea of using Robin Moore as a witness apparently came from Duncan, who accurately predicted that Moore would unwittingly be an excellent defense witness.<sup>269</sup> In 1962, Moore, a public relations director of the Sheraton Hotels, convinced a military aide to Vice President Johnson to help him get permission to undergo Special Forces training and to visit several Green Beret encampments in Vietnam. His research culminated in a bestseller, *The Green Berets*.<sup>270</sup> Like Duncan, Moore had a new book coming out, *The Country Team*, and Morgan lured Moore through his publisher, who "shrewdly inferred that the trial was a talk show where competing books might be reviewed or discussed."<sup>271</sup>

The defense did not need to lure their third witness, Captain Peter Bourne, an Army psychiatrist about to leave the service. While stationed in Vietnam, Bourne had studied the effect of combat stress on Green Beret A-team members.<sup>272</sup> Upon first reading about the case, Dr. Bourne wrote to Levy, hinting that he would like to help with his defense.<sup>273</sup> Though anxious about the trustworthiness of this "so

265. Duncan, *supra* note 52, at 21-22.

266. See DUNCAN, *supra* note 264.

267. Conversation with Stanley Faulkner, Counsel for the Fort Hood 3 (undated notes), in Levy Litigation Files, *supra* note 27.

268. MORGAN, *supra* note 46, at 140.

269. Conversation with Donald Duncan (undated notes), in Levy Litigation Files, *supra* note 27.

270. MOORE, *supra* note 264. Moore describes how he came to write the book at *id.* at 1-5; see also Record at 956-57 (testimony of Robin Moore); Kopkind, *supra* note 29, at 25.

271. MORGAN, *supra* note 46, at 140.

272. PETER G. BOURNE, M.D., MEN, STRESS, AND VIETNAM 103-25 (1970).

273. Record at 1001 (testimony of Capt. Peter G. Bourne); Interview with Dr. Howard B. Levy, *supra* note 25.

smooth and so slick” expert on Special Forces who had fallen into their laps, the defense brought Bourne to Fort Jackson to bolster the medical ethics defense.<sup>274</sup> When Nuremberg entered the case, Bourne’s knowledge of Special Forces in Vietnam made him an obvious choice as a witness. The defense’s hoped-for fourth witness, Associated Press correspondent Malcolm Browne, did not materialize.<sup>275</sup>

In addition to the witnesses’ testimony, the defense submitted Duncan’s *Ramparts* article and Moore’s book.<sup>276</sup> Columbia University industrial engineering professor Seymour Melman, who had been collecting newspaper accounts reporting U.S. violations of the law of land warfare in Vietnam, worked with Ramona Ripston of the New York Civil Liberties Union to organize more than 4,000 such articles to be submitted as exhibits.<sup>277</sup> These articles included accounts of Special Forces violations of the law of war, but were by no means limited to instances involving Special Forces. They were proffered to establish Levy’s knowledge of a pattern of war crimes and to stretch the confines of Brown’s narrow framing of the Nuremberg defense by placing Special Forces conduct in the larger context of U.S. military policy in Vietnam. With these materials, the defense submitted a brief prepared with the help of Richard Barnet of the Institute of Policy Studies, and Princeton international law professor Richard Falk, a leading critic of the war’s legality.<sup>278</sup> The brief outlined relevant provisions of the law of war and provided Levy’s proof on the war crimes issue.<sup>279</sup> The defense also

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274. “So . . . this guy’s a Green Beret, comes out of the clear blue sky; that seems too good, somehow.” Interview with Dr. Howard B. Levy, *supra* note 25. Notwithstanding their anxiety, the defense recognized that they had to take a chance on Bourne. *Id.* (“I mean, the guy writes to you with those credentials, we weren’t going to turn our back on him.”).

275. Witness Lists for Out-of-Court Nuremberg Hearing (undated notes), in Levy Litigation Files, *supra* note 27. Browne authored *THE NEW FACE OF WAR* (1965).

276. Moore claimed that the book, with the exception of the last chapter, recounted actual events, but that for a variety of reasons he had decided to present them in the genre of fiction. He writes: “You will find in these pages many things that you will find hard to believe. Believe them. They happened this way. I changed details and names, but I did not change the basic truth.” MOORE, *supra* note 264, at 11. Peter Bourne testified at the court-martial that he had either witnessed or heard about events similar to those described in Moore’s book. The Pentagon was furious with Moore after the book’s publication, charging numerous breaches of security. HELLMANN, *supra* note 57, at 53-54.

277. MORGAN, *supra* note 46, at 139. Melman’s compilation of newspaper articles was subsequently published. See *IN THE NAME OF AMERICA* (Seymour Melman ed., 1968).

278. Appellate Exhibit 19, Memorandum on the Law of War and Defendant’s Offer of Proof of War Crimes, in Record, vol. 16.

279. *Id.*

submitted a list of thirty-eight people to be subpoenaed should Brown determine that a prima facie case existed, permitting the Nuremberg issue to go to the court-martial. These were mostly "reporters, photographers, doctors, and members or former members of the armed forces," who, according to the defense, had witnessed the commission of war crimes.<sup>280</sup> To Shusterman's dismay, Morgan also requested permission to take depositions in Vietnam.<sup>281</sup>

The defense hinged its showing of war crimes on the Army's manual, *The Law of Land Warfare*,<sup>282</sup> published "to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land."<sup>283</sup> The testimony and documentary evidence showed specific violations of several laws of war described in *The Law of Land Warfare*, committed either by Special Forces or by their Vietnamese counterparts (the LLDB, and strike forces), whom the Special Forces trained and advised and with whom they fought.<sup>284</sup> The violations they described included assassinations and placing a "price on the enemy's head," mutilation of the dead, forcible removal and resettlement of civilians, wanton destruction of civilian homes and property, torture and summary execution of prisoners, and impressment of civilians. Arguably, using weapons that caused unnecessary suffering, such as the M-16 rifle and white phosphorous, also constituted violations.

What is remarkable about the Nuremberg hearing, beyond its having occurred at all, are the diverging interpretations of what occurred and what was shown. Ira Glasser, the Associate Director of the New York Civil Liberties Union, certainly a partisan, but nevertheless thoughtful and

280. *Id.* at 15.

281. Shusterman had a young child, and his wife was sick and pregnant. He did not relish the prospect of going to Vietnam for depositions. Telephone Interview with Richard Shusterman, *supra* note 127. Morgan specifically mentioned wanting to take the deposition of Col. Francis J. Kelly, Commander of Special Forces in Vietnam. Record at 1047. Brown had previously denied Morgan's request to subpoena Kelly. *Id.* at 835.

282. DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE* (1956) [hereinafter *THE LAW OF LAND WARFARE*]; see also *IN THE NAME OF AMERICA*, *supra* note 277, at 45-54 (reproducing table of contents and selections from the Army Field-Manual).

283. *THE LAW OF LAND WARFARE*, *supra* note 282, ¶ 1.

284. Nothing in this discussion should be understood to imply that one side had a monopoly on war crimes in Vietnam. It is important that we not forget that the PLAF and North Vietnamese also committed atrocities, as did the other forces in Vietnam. Cf. Staughton Lynd, *The War Crimes Tribunal: A Dissent*, *LIBERATION*, Dec. 1967-Jan. 1968, at 76-79 (criticizing the Russell International War Crimes Tribunal for refusing to investigate the war crimes committed by both sides). Suffice it to say that the law of war does not recognize a defense of "the other side was doing it too," and as a normative matter, the argument that the enemy's war crimes licensed our own is gossamer-fine.

generally careful in his discussion of the Nuremberg defense (and of other aspects of the case), concluded that the defense proved several violations of the law of war.<sup>285</sup> A perhaps equally partisan but less thoughtful *Time* article proclaimed that “[t]o the surprise of almost no one, [the Nuremberg defense] failed dismally,” having produced no evidence of Green Beret crimes.<sup>286</sup> Brown, conceding only a bit more than *Time*, ruled that “[w]hile there have been perhaps instances of needless brutality in this struggle in Vietnam about which the accused may have learned . . . there is no evidence that would render this order to train aidmen illegal on the grounds that eventually these men would become engaged in war crimes.”<sup>287</sup>

Perhaps such polarized interpretations were inevitable, given the national rift over the war and the symbolic potency of the Nuremberg principles. Certainly, given the setting, the limitations placed on the defense, the difficulty of finding people who would confess to committing war crimes, and the infeasibility of developing the case in a week, Brown’s ruling hardly seems surprising. Yet, even if the outcome was preordained, the expression of that outcome and the differing interpretations of what the defense showed owed much to the old frontier myth of the Indian fighter and the new frontier myth of the Green Beret.

Having initially chosen not to challenge the legality of the war, the defense had little time to craft its story in preparation for the Nuremberg hearing. It did, nonetheless, have a story to tell. Now cast in the role of prosecutor, the defense had to show a pattern of Special Forces violations of the law of war. It did so by emphasizing the image of Special Forces as ruthless pragmatists, rule-breakers, and dirty fighters. In other words, the defense portrayed the Special Forces as modern-day Indian fighters, whose success resulted from their willingness to adopt the methods ascribed to the enemy and to ignore the restraints of “impractical” civilized authority, far removed from the real war. This image was double-edged, however. Juxtaposed against the law of war, the image exposed a dark underbelly of the counterinsurgency doctrine, and the casualness with which it discarded as soft-hearted and impractical the

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285. Ira Glasser, *Judgment at Fort Jackson: The Court-Martial of Howard B. Levy*, 4 *LAW IN TRANSITION* Q. 123, 145-46 (1968). Glasser was one of the people dispatched by the New York Civil Liberties Union to assist the defense. MORGAN, *supra* note 46, at 139 n.\*. A non-lawyer, Glasser wrote the best analysis of the applicability of the law of land warfare to the acts described at the Nuremberg hearing, notwithstanding his occasional factual misstatements.

286. *Men at War*, *TIME*, June 2, 1967, at 15-16. The following week, *Time* added that Levy “appeared more often stricken by confusion than conscience.” *Guilty as Charged*, *TIME*, June 9, 1967, at 33.

287. Record at 1049.



limited achievements of international law in curbing some of the worst barbarities of war. Yet it was precisely this disregard for the rules, along with cunning and extraordinary skill, that rendered first the Indian fighter and the gunfighter and then the Green Beret cultural icons and heroes.

Morgan readily established the theme of Special Forces as flouting the ordinary rules of war. Asked “[i]s there any way to fight Guerrilla warfare by the rules?,” Robin Moore responded: “Not that I know of. I have never seen it work yet.”<sup>288</sup> Removing any doubt as to the meaning of Moore’s statement, Morgan elicited Moore’s assertion that assassination “is an integral part of guerrilla warfare.”<sup>289</sup> Morgan amplified this theme in the following exchange with Donald Duncan:

Q: “Can you teach guerrilla warfare without teaching the application of terror?”

A: “I can’t—I can’t see how it is done, and this is the thing we used to talk about at the warfare school at Fort Bragg. We at that time used to state that we were trained in all the aspects of guerrilla warfare . . . and assassination and terror, and the application of these things are an integral part of guerilla warfare.”<sup>290</sup>

Some of the testimony regarding violations of the law of war were destined to fall on deaf ears given our high tolerance for the shocking in a post-Dresden, post-Hiroshima world.<sup>291</sup> Some of the rules do seem antiquated, intended, as Guenter Lewy argues, “for very different weapons in a very different world.”<sup>292</sup> Thus, while both the Hague

288. *Id.* at 968.

289. *Id.*

290. *Id.* at 1024. References to Special Forces links to the CIA in Vietnam may have further enhanced this characterization of Special Forces. *See id.* at 959 (testimony of Robin Moore); *id.* at 996 (testimony of Capt. Peter G. Bourne).

291. The Vietnam War nevertheless produced its share of shocking images, such as those of a terrified girl burned by napalm and running naked to escape the fighting near An Loc; of General Nguyen Ngoc Loan, head of the South Vietnamese National Police, summarily executing a handcuffed People’s Liberation Armed Forces suspect in Saigon during the Tet offensive; and of the ravine full of dead bodies at My Lai. Film images of American casualties, both of the returning dead, and, perhaps more horrifically, of news broadcast images from the field of battle of the wounded, played a major role in ultimately turning popular opinion against the war.

292. LEWY, *supra* note 31, at 224. I do not mean to suggest that war was in any sense more civil and less brutish in some bygone era.

Convention<sup>293</sup> and *The Law of Land Warfare*<sup>294</sup> prohibit weapons that cause unnecessary suffering, the defense could not have been surprised that Brown did not see war crimes in American use of either the M-16 rifle,<sup>295</sup> when other "legal" weapons were just as capable of ripping a body apart, or in using white phosphorous,<sup>296</sup> when other weapons destroyed property just as extensively or caused equal agony to their victims. Testimony that the Special Forces forcibly relocated civilians and destroyed their villages and crops had no greater impact on Brown.<sup>297</sup>

Other testimony described acts that could not so easily be dismissed as the unfortunate results of military necessity. *The Law of Land Warfare*

293. Hague Convention, Oct. 18, 1907, annex. no. IV, art. 23(e), reproduced in 1 THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE 627 (Oxford University Press edition, 1907).

294. THE LAW OF LAND WARFARE, *supra* note 282, ¶ 34.

295. The arguments about the M-16 rifle stem from its high-velocity bullets, which sometimes explode upon impact and pivot or "tumble" through the body. The bullets cause a wound similar to those caused by "dum-dum" expanding bullets, expressly prohibited by the 1899 Hague Convention. See Record at 960 (testimony of Robin Moore that he had seen photographs of people hit in the heel by an M-16 round and killed); *id.* at 1005 (testimony of Capt. Peter Bourne regarding tumbling effect of M-16 bullet); *id.* at 1018-19 (testimony of Donald Duncan: "I have seen this little bullet actually take off a man's leg, with one bullet. . . . I hit a man in the chest with one of these bullets at very short range and he just had no chest left."); see also IN THE NAME OF AMERICA, *supra* note 277, at 271-73. Arthur Danto has noted the paradox that "[t]he M-16 rifle, our routine infantry issue, has been ruled out on humane grounds for use against big game in all fifty states." Arthur Danto, *On Moral Codes and Modern War*, in WAR, MORALITY, AND THE MILITARY PROFESSION 481-82 (Malham M. Wakin ed., 1979).

296. White phosphorous, an incendiary weapon, was used to mark targets and provide smoke screens, but was also used to burn houses and huts, often together with napalm. LEWY, *supra* note 31, at 243. In addition to the physical destruction caused by white phosphorous, fragments of it that lodged in the body would continue to burn (because it could burn almost anaerobically) until they were extracted. See Record at 1021 (testimony of Donald Duncan); *id.* at 961 (testimony of Robin Moore); IN THE NAME OF AMERICA, *supra* note 277, at 271 (quoting a *Journal of the American Medical Association* article relating the problem of continuing tissue destruction until all phosphorous is extracted). *The Law of Land Warfare* permitted the use of incendiaries under some circumstances, but not their indiscriminate use. See LEWY, *supra* note 31, at 247.

297. See Record at 966 (testimony of Robin Moore); *id.* at 993-94, 999, 1008-09 (testimony of Capt. Peter G. Bourne); see also IN THE NAME OF AMERICA, *supra* note 277, at 131-52, 305-41. But see Record at 970 (cross-examination testimony of Robin Moore, stating that strike forces often voluntarily move themselves and their families into camps for protection). *Contra* Appy, *supra* note 43, at 226-27, 288-89 (on voluntariness of relocation to refugee camps). These acts were implicated in THE LAW OF LAND WARFARE, *supra* note 282, ¶¶ 56, 58, 281, 504(j), as well as in provisions of the 1907 Hague Convention and the 1949 Geneva Convention.

prohibits "putting a price on an enemy's head," and mutilating the dead.<sup>298</sup> Both Moore and Duncan testified that it was common practice to pay a bounty to the strike forces for their kills; to ensure that the bounty was earned, the practice was to pay only for the number of ears delivered by the strikers.<sup>299</sup> While mutilation of the dead (or the dying) began as a way of keeping a tally, it was often used to terrify the enemy or as an outlet for sadism.<sup>300</sup>

*The Law of Land Warfare* also prohibits the assassination of enemy soldiers or civilians.<sup>301</sup> Duncan and Moore both described assassination as an integral part of Special Forces guerrilla-warfare training.<sup>302</sup> Asked about assassination teams, Moore indicated that their targets were often the political, not military leadership of the enemy: "If you have a political chief, say in Vietnam, and you know that . . . he is damaging our effort, it only makes sense to assassinate him if possible."<sup>303</sup> Asked about Special Forces' role in training these teams, Moore replied: "I know of an instance where special forces are giving this advice. Thank God they are, because, the Vietnamese do a pretty botched up job of it left to their own advice."<sup>304</sup>

298. THE LAW OF LAND WARFARE, *supra* note 282, ¶¶ 31, 504(c).

299. Record at 965 (testimony of Robin Moore); *id.* at 1036 (testimony of Donald Duncan); MOORE, *supra* note 264, at 35-37 (offer of bounty and display of collection of ears); *id.* at 136-37 (payment for kidnapping of PLAF officer).

300. Record at 964 (testimony of Robin Moore) (describing significance of decapitation to Buddhists); *id.* at 1036 (testimony of Donald Duncan); *see also* IN THE NAME OF AMERICA, *supra* note 277, at 61-66. One incident that Duncan discussed with the defense but did not describe at trial involved a Vietnamese officer who, frustrated with an unsuccessful interrogation, cut out the gall bladder of a prisoner (to be worn later as an amulet) as two Green Berets looked on. DUNCAN, *supra* note 264, at 180-82; Notes on Testimony of Donald Duncan and Dr. Peter Bourne (undated), in Levy Litigation Files, *supra* note 27.

301. THE LAW OF LAND WARFARE, *supra* note 282, ¶ 31.

302. Record at 957 (testimony of Robin Moore); *id.* at 1012 (testimony of Donald Duncan); MOORE, *supra* note 264, at 5-6.

303. Record at 968. By 1965, Special Forces was involved in the predecessor of the CIA's Phoenix program, which was an effort to "neutralize" the "Viet Cong infrastructure" ("VCI") and which would result in the killing of 20,000 supposed members of the VCI from 1968 to mid-1971. *See* YOUNG, *supra* note 31, at 212-13. *See generally* STEIN, *supra* note 264. The defense could not have anticipated the ultimate scope of that "counter terror" program. They did have some inkling, however, that Special Forces-sponsored assassinations were not uncommon. *See* Conversation with Donald Duncan (undated notes), in Levy Litigation Files, *supra* note 27 ("Appel [sic], R.W., Jr. [referring to *N.Y. Times* correspondent R.W. Apple, Jr.] The best kept secret in Vietnam—SF trained assassination teams to work w/ pacification teams to kill uncooperative village chiefs.").

304. Record at 968-69. Moore added that "[i]t is a necessity of winning a war." *Id.* For additional enthusiastic discussion of assassination teams, *see id.* at 978 (testimony

At its most riveting, the Nuremberg testimony focused on the mistreatment and murder of unarmed suspects and prisoners. Donald Duncan testified that while he was accompanying a strike force patrol, the strike force, under the pretext of capturing "Viet Cong suspects," forced civilians to carry the patrol's supplies and equipment and abused them psychologically and physically. When these civilians were no longer needed for their labor, they were no longer deemed to be suspects and let go.<sup>305</sup>

Still more dramatic was the testimony of torture and murder. Duncan testified that while Special Forces doctrine favored the use of psychological methods of interrogation, Special Forces training also included torture techniques. He explained that Special Forces were taught that it is impossible to resist interrogation by a determined interrogator. A course called "countermeasures to hostile interrogation" was ostensibly for the purpose of teaching Special Forces what they might expect if captured. In reality, teacher and students alike understood that the course was designed to teach physical methods that might be useful where psychological techniques were impractical.<sup>306</sup>

of Robin Moore).

305. *Id.* at 1025-26. For prohibitions of such conduct, see THE LAW OF LAND WARFARE, *supra* note 282, ¶¶ 266, 271, 504(m).

306. Record at 1015-16. Duncan gives a more detailed description in *The New Legions*. DUNCAN, *supra* note 264, at 156-61. There he describes the following exchange between a student and the instructor:

"Sergeant Lacey, the name of this class is 'Counter-measures to Hostile Interrogation,' but you have spent most of the period telling us there are no counter-measures. If this is true, then the only reason for teaching them, it seems to me, is so that we'll know how to use them. Are you suggesting we use these methods?"

The class laughs, and Lacey looks down at the floor, creating a dramatic pause. When he raises his head, his face is solemn but his deep-set eyes are dancing. "We can't tell you that, Sergeant Harrison. The Mothers of America wouldn't approve." The class bursts into laughter at the sarcastic cynicism. "Furthermore," a conspiratorial wink, "we will deny that any such thing is taught or intended."

*Id.* at 159. Duncan stated that he had both taken and taught the class on torture. Record at 1015-16. Later, other Vietnam veterans who had been interrogators would tell very similar stories of what James Gibson has described as the "dual structure" of the Army's intelligence curriculum, "a 'legal' education in the formal educational materials, and an illegal education taught orally by instructors." GIBSON, *supra* note 192, at 183-85. Inga Markovits describes a quite similar dual structure in the instruction of East German judges. The East German Supreme Court would issue "Guidelines" or "Viewpoints" regarding noncontroversial matters to help direct lower court judges and prosecutors. Policy directives that dealt with more ticklish matters or that contravened the formal protections of East German law, such as the policy of denying the protections of the Labor Code to people who had applied for exit visas, were hidden as part of the oral instruction

Moore, Bourne, and Duncan each told of the nearly universal Special Forces practice of turning prisoners over to their South Vietnamese counterparts or to the CIDG, even though it was understood that once handed over, prisoners would be tortured and, frequently, murdered.<sup>307</sup> Often these prisoners were tortured in the presence of Americans. While they may have found torture distasteful and counterproductive, Special Forces soldiers acquiesced in the practice and continued to turn prisoners over to the Vietnamese. Duncan stated that "[t]he normal practice was when it started you turned around and lit a cigarette."<sup>308</sup> Moore attempted to explain this acquiescence:

I have seen torturing, but if an American was present, . . . the only way he was allowed to express dissent and even though it was his camp, . . . the only recourse allowed him by our own rules was that he could walk out on it. . . . So if he did any more than that, if he tried to stop the Vietnamese [camp commander] chances were he would be relieved and his career would suffer and also it would cause an incident between the Vietnamese senior corps and American.<sup>309</sup>

Yet, when asked by Morgan whether he had any knowledge of any Green Beret who had been punished for attempting to stop the torture of a prisoner, Moore had to acknowledge that he knew of no such case.<sup>310</sup>

Prisoners can be a liability in counterinsurgency warfare. Their intelligence value may be offset by their taxing of limited supplies and

of East German judges. Inga Markovits, *Last Days*, 80 CAL. L. REV. 55, 82-85 (1992).

307. Record at 964-65 (testimony of Robin Moore); *id.* at 995 (testimony of Capt. Peter Bourne); *id.* at 1013-14, 1021-22 (testimony of Donald Duncan); *see also* MOORE, *supra* note 264, at 39-43, 46-47, 80, 229; IN THE NAME OF AMERICA, *supra* note 277, at 58-61, 66-87; Duncan, *supra* note 52, at 21. For further examples, not contained in the court-martial record, *see* DUNCAN, *supra* note 264, at 166-69, 179-82. Article 12 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War limits the circumstances under which a country that has captured prisoners of war may transfer them to another country's control, and specifically requires that the capturing country satisfy itself of the transferee's willingness to abide by the Convention. Geneva Convention Relative to the Treatment of War, Aug. 12, 1949, art. 12; *see also* THE LAW OF LAND WARFARE, *supra* note 282, ¶ 88. *The Law of Land Warfare* treats complicity in the commission of war crimes as a war crime. *See id.* ¶ 500. Numerous paragraphs deal with the treatment of prisoners of war, outlawing torture, cruel treatment, and putting prisoners to death summarily. *See, e.g., id.* ¶¶ 89, 90, 93, 118, 128, 175, 215, 270, 271, 502.

308. Record at 1014.

309. *Id.* at 972-73.

310. *Id.* at 976-77.

tendency to impede a patrol's mobility in enemy or contested territory.<sup>311</sup> Duncan testified that in his training he was taught "to avoid taking prisoners as much as possible," and that those taken and not converted to our side had to be "eliminated."<sup>312</sup> Asked if he had ever been told to dispose of prisoners, Duncan recounted one mission behind enemy lines where the team inadvertently took two prisoners on the first day. This jeopardized the mission, so Duncan radioed back for instructions. Duncan was told to "[g]et rid of them," and when he instead returned with the prisoners he was reprimanded for not killing them.<sup>313</sup>

Sometimes the killing was in revenge for a village's support of the PLAF (the so-called Viet Cong) or motivated by pure sadism, rather than by a tactical purpose. Bourne described an instance where his patrol captured a village known to be harboring PLAF or their sympathizers. After suspects were weeded out and other villagers were given some time to gather belongings, the houses were set afire to ensure that the PLAF could not use the village. Bourne angered the LLDB lieutenant by rescuing one man who had been tied up and left to burn to death in a hut. Bourne filed a report on the incident, but was told by the Special Forces captain in charge, "Don't rock the boat." The captain explained that while he would be happy to pass the report up the chain of command, "As soon as it gets to the Special Forces Corps advisor, he will just have to ignore it."<sup>314</sup>

Although the defense was able to develop negative images by demonstrating Special Forces' violations of the law of war, their construction of Special Forces as rule breakers evoked positive images as well. Special Forces' willingness to cast aside the restrictions of the law and traditions of war (or of one set of traditions of war) placed them in the mythic tradition of the frontier fighter and ranger.<sup>315</sup> Throwing off the constraints of the somewhat effete, Europeanized metropolis, they became pragmatic innovators who embraced the methods of the "savage" enemy, thereby appropriating his power for themselves.<sup>316</sup> When one

311. *The Law of Land Warfare* nonetheless prohibits killing prisoners "even in the case of . . . commando operations." *THE LAW OF LAND WARFARE*, *supra* note 282, ¶ 85.

312. Record at 1021-22.

313. *Id.* at 1016-17; *see also id.* at 995 (Capt. Peter Bourne testifying that the Vietnamese felt that there was no value in torturing "hard core VC" and that the Vietnamese would usually "kill them immediately").

314. *Id.* at 993-95.

315. *See* SLOTKIN, *supra* note 55 *passim*. Slotkin also specifically addresses the "ranger mystique." *Id.* at 453-61.

316. *Id.* at 455. The apotheosis of this mythic imagery in recent American culture is the ex-Green Beret John Rambo. For a discussion of Rambo as an expression of the

of Robin Moore's Green Beret captains was forced by his new, "in the country for one week," B-team superior to divulge an intelligence source to his Vietnamese counterpart, leading inevitably to the source's death, a Green Beret intelligence specialist "grunt[ed] in disgust. . . . 'It takes a good B-team commander a couple of months, sometimes more . . . to learn when not to go strictly by State and Defense Department policy.'"<sup>317</sup> Only then was he ready to fight a dirty war.

Richard Slotkin writes that at the core of the frontier myth was the myth of "savage war." In the wilderness, temporarily separated from the metropolis, the American would regress to a more primitive state, and struggle both against a hostile environment and a primitive but relentlessly savage people in a savage war, leading ultimately to triumph and "regeneration through violence." Savage wars are especially horrifying and bloodthirsty struggles that result from "ineluctable political and social differences—rooted in some combination of 'blood' and culture—[that] make coexistence between primitive natives and civilized Europeans impossible on any basis other than that of subjugation." The savagery of the natives necessarily provokes an in-kind response; the rules of civilized society, including the law of war, must be temporarily set aside. In the face of native savagery, these wars "inevitably become 'wars of extermination.'"<sup>318</sup> To Americans culturally nourished on the

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struggle of the wilderness against the metropolis and of his origins in the "liberal aspirations of the Kennedy era," see John Hellmann, *Rambo's Vietnam and Kennedy's New Frontier*, in *INVENTING VIETNAM: THE WAR IN FILM AND TELEVISION* 140, 141 (Michael Anderegg ed., 1991). The contrast between European and American fighting styles is a recurrent strand in American folklore and literature. See HELLMANN, *supra* note 57, at 28-29.

317. MOORE, *supra* note 264, at 105.

318. SLOTKIN, *supra* note 56, at 53 ("'Savage war' was distinguished from 'civilized warfare' in its lack of limitations of the extent of violence, and of 'laws' for its application."); SLOTKIN, *supra* note 55, at 10-12. Slotkin notes that the image of the Indian savage was such that death was more welcome than capture and therefore: "Military folklore from King Philip's War to Braddock's Defeat to Custer's Last Stand held that in battle against a savage enemy you always saved the last bullet for yourself." *Id.* In *The New Legions*, that tradition is echoed by the Special Forces instructor teaching the course in counter-measures to hostile interrogation: "If you are operating a guerrilla net in a foreign country, you must not be taken prisoner. . . . You will be interrogated by experts. . . . I recommend that those of you who are Catholics and have scruples about taking a pill try to make a break and get yourselves shot." DUNCAN, *supra* note 264, at 157.

One important difference between savage war and the counterinsurgency war of Special Forces in Vietnam was that in its counterinsurgency phase, the war was never conceived of as a war of extermination. Instead, its premise was that the hearts and minds of the Vietnamese could be won, leaving the NLF and its insurgents isolated. The war took on the coloration of a war of extermination only after the build-up of 1965, and the accompanying strategic transformation from a counterinsurgency to a war of attrition.

Hollywood Western and the frontier myth, Vietnam looked like one more recurrence of the frontier cycle. Philip Caputo captures these beliefs in *A Rumor of War* when he writes:

As for the United States, we did not call it "the World" for nothing; it might as well have been on another planet. There was nothing familiar out where we were, no churches, no police, no newspapers, or any of the restraining influences without which the earth's population of virtuous people would be reduced by ninety-five percent. It was the dawn of creation in the Indochina bush, an ethical as well as geographical wilderness. Out there, lacking restraints, sanctioned to kill, confronted by a hostile country and a relentless enemy, we sank into a brutish state.<sup>319</sup>

The image of the Green Beret as frontier Indian fighter did more than simply loosen the restraints of the law of war—it evoked images of the Vietnamese as the savage, primitive Other.<sup>320</sup> These images were reinforced by the prosecution's response to the Nuremberg testimony: an effort to distance Special Forces and the Army from the acts of their Vietnamese counterparts. Repeatedly, the prosecution elicited agreement from the defense witnesses that the savagery they described were acts of

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See sources cited *supra* note 60.

319. PHILIP CAPUTO, *A RUMOR OF WAR*, at xx (1977), quoted in APPY, *supra* note 43, at 252.

320. The linkage between Indian savagery and that of the Vietnamese enemy is quite stark in John Wayne's loose adaptation of Moore's book in the film version of *THE GREEN BERETS* (Warner Bros. 1968). When the Chief of a Montagnard village refuses to cooperate with the "Viet Cong," the Chief and various other villagers are brutally murdered and the young men are forced to join the communist forces. The enemy's depravity is symbolized by the fate of the Chief's young granddaughter, who is carried off into the woods by five Viet Cong soldiers where, we are to presume, she is repeatedly raped and then murdered. The sight is apparently so ghastly that the Green Beret medic who finds her will not let the antiwar journalist, who has attached himself to the A-team, see her body. The film audience is similarly spared. Here, Wayne repeats a familiar trope from two John Ford/John Wayne Westerns, *RIO GRANDE* (Republic 1950) and *THE SEARCHERS* (Warner Bros. 1956). For a discussion of the use of this convention in those films to represent the Indian enemy's "horror," see SLOTKIN, *supra* note 55, at 361, 465-66. Soon after this incident, when the Viet Cong overrun the strike force camp that the Green Berets are protecting, they are shown looting the bodies of the dead over the din of "war whoops," a scene reminiscent of the Hollywood western. This construction of the Vietnamese as Indians was not reserved for the enemy. *Time's* anonymous reviewer noted that "*Berets* even has the South Vietnamese talking like movie Sioux: 'We build many camps, clobber many V.C.'" *Far from Vietnam and Green Berets*, *TIME*, June 21, 1968, at 84 (quoted in HELLMAN, *supra* note 57, at 91).



the LLDB or the strike force and that they had not seen Special Forces soldiers engaged in atrocities. There was no testimony that Special Forces soldiers had mutilated the enemy dead. Special Forces soldiers did not go out on assassination team missions.<sup>321</sup> They did not torture or murder prisoners.<sup>322</sup> To be sure, American soldiers sometimes witnessed these acts, but as helpless bystanders, not participants.<sup>323</sup> Indeed, Robin Moore would testify that the American presence had a moderating effect on the Vietnamese inclination toward brutality.<sup>324</sup>

The image that emerges from this attempt to separate Special Forces from these acts portrays the Vietnamese as the barbaric, alien, Oriental Other. In his examinations of Moore and of Bourne, Brown referred to the "endemic" propensity toward torture and the "rather careless attitude toward life," which "seems to cover all [the indigenous people] of Southeast Asia."<sup>325</sup> Moore, after playing on the image of the savage Orient where "brutality . . . is a way of life," volunteered, "there seems to be something in the brain cells of the people over there that this is part of the game."<sup>326</sup>

In reviewing the Nuremberg hearing, Ira Glasser writes:

The chilling fact is that the army does not deny the existence of war crimes; it simply denies its responsibility for such crimes, despite the clear requirements of its own written law. The army continues to protest that American soldiers do not themselves practice torture or commit murder, as if that alone released them from all charges of complicity . . . .

. . . And so the Special Forces do not practice torture in Vietnam. Torture just happens, murder just happens, war

321. Record at 978 (cross-examination testimony of Robin Moore).

322. *Id.* at 972-73, 979 (cross-examination testimony of Robin Moore); *id.* at 1004 (examination of Capt. Peter G. Bourne by law officer); *id.* at 1027 (cross-examination testimony of Donald Duncan).

323. For conflicting testimony regarding the extent that LLDB control over the camps was real or nominal, compare *id.* at 973 (testimony of Robin Moore) with *id.* at 995-96 (testimony of Capt. Peter G. Bourne).

324. *Id.* at 975.

325. *Id.* at 979, 1000. Morgan reports that Bourne paused and stared at Brown before "icily" responding: "I gathered that this sort of feeling was regarded in some way as a defense to what the Japanese did in World War II, but I think we judge [sic] them by our standards then and I suppose this is how we judge incidents now." MORGAN, *supra* note 46, at 144 (quoting Record at 1000). For a discussion of the use of similar imagery to depict the PLAF and to justify U.S. involvement in Vietnam, see SLOTKIN, *supra* note 55, at 527-28.

326. Record at 973.

crimes just happen. No one does it; no one is responsible. It's called complicity and, in many ways, it is the major unpunished crime of our century.<sup>327</sup>

Glasser is correct in his characterization of the intellectual gymnastics the Army engaged in to say, "This is not our act." The same rationale allowed Brown to agree that while there may have been instances of *unnecessary* savagery, there was insufficient evidence to conclude that Levy, or the Army, needed to worry about entanglement with war crimes. Yet, by likening this distancing to the protests of the Nazi bureaucrat, as Glasser does, he may understate the degree of Special Forces and U.S. complicity in these atrocities.<sup>328</sup> For Levy's Nuremberg hearing contained evidence not simply of acquiescing in, but of directing the brutal acts of Vietnamese.

The Nuremberg hearing illustrated a kind of division of terror. United States forces used such "legal" terrors as free fire zones, napalm, white phosphorous, defoliation, fragmentation bombs, the torching of huts with Zippo lighters, and massive air strikes on populated target areas. Our allies were relegated to such terrors as mutilation, assassination, and the torture and murder of prisoners. We achieved a kind of savage war by proxy. U.S. forces were not merely helpless onlookers, but benefitted from the brutal acts of their Vietnamese or strike force counterparts. While Americans might have considered Vietnamese torture techniques to be unrefined, they thought that the information gleaned was useful all the same.

Moreover, the testimony showed that, at least sometimes, this division of terror was deliberate, and the brutality of our counterparts was at our direction. This does not mean that U.S. forces corrupted a gentle, pacific people. Certainly, the Vietnamese were capable of brutality without instruction by Americans, the French, or the Japanese.<sup>329</sup> Yet,

327. Glasser, *supra* note 285, at 154.

328. To be sure, Glasser's comparison is not with just any Nazi bureaucrat. The elided text in the passage quoted above is:

Adolf Eichmann lodged a similar protest at his trial in Jerusalem; "With the killing of Jews I had nothing to do. I never killed a Jew, or a non-Jew for that matter—I never killed any human being. I never gave an order to kill either a Jew or a non-Jew; I just did not do it."

*Id.* at 154 (quoting testimony of Adolf Eichmann, *quoted in* HANNAH ARENDT, *EICHMANN IN JERUSALEM* 19 (1963)). Glasser's discussion seems to encompass not only the Eichmanns, but those who are much more remote and yet ultimately necessary for the commission of mass crimes. *Id.* at 154-55.

329. See, e.g., NEIL SHEEHAN, *A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM* 101-10 (1988) (describing use of torture, as well as indiscriminate bombing, and Vann's belief that these activities were both immoral and

the reason Montagnard strikers returned to camp with their victims' ears was not because of something coded "in the[ir] brain cells," but because Americans paid piece rate and demanded confirmation of their kills. Special Forces did teach assassination and other "counter terror" techniques. Duncan testified that in Special Forces training, teachers emphasized that it was important to avoid the *appearance* that U.S. soldiers were involved in torture or murder because of the racial resentment such involvement would generate.<sup>330</sup> Writing of the incident when he was told to "get rid of" prisoners he had taken while on a mission, Duncan recalls that when he returned to base a major told him, "You know we almost told you right over the phone to do them in." When Duncan said that he could not have done that and would have refused, the major responded: "Oh, you wouldn't have had to do it; all you had to do was give them over to the Vietnamese."<sup>331</sup> Duncan bluntly described American direction of torture in *The New Legions* (which had not been published and was not in evidence at the Nuremberg hearing). He quotes his instructors in countermeasures to interrogation as having said:

When you are in a foreign country as part of a guerrilla organization, you will not be doing the interrogating. Your job is to teach the various methods of interrogation to your indigenous counterpart. It would be very bad form for you, as an outsider, to do the questioning—especially if it gets nasty. The forces opposing your guerrillas will probably be native, be the same color, have the same religion. If you display a willingness to harm the natives, even though they are the enemy, it could be misunderstood by your guerrillas as prejudice. The indigenous guerrilla leader must believe that the idea for a course of action comes from himself; your control must be by suggestion.<sup>332</sup>

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counterproductive). For a critical discussion of the tendency of some on the antiwar left to project the idealized image once reserved for America onto the NLF and North Vietnamese, and onto third world liberation movements more generally, see GITLIN, *supra* note 27, at 261-63, 270-74.

330. Record at 1015, 1022.

331. Duncan, *supra* note 52, at 21. In his *Ramparts* article, Duncan wrote of the emphasis that his instructors put on the need not to be saddled with prisoners. "We were continuously told 'You don't have to kill them yourself—let your indigenous counterpart do that.'" He adds: "I know of a couple of cases where it was suggested by Special Forces officers that Viet Cong prisoners be killed." *Id.* at 14, 21.

332. DUNCAN, *supra* note 264, at 159. The instructor also taught that prisoners may need to be disposed of: "[A]gain, this must be done by the indigenous leader." *Id.* at 161.

The defense was unable to show that this division of terror, while partly real, also masked the reality of American brutality. Descriptions of Vietnamese savagery were in part a strategy of projection to help Americans evade responsibility for their participation in a savage war.<sup>333</sup> As the returned soldiers testified at the Vietnam Veterans Against the War Winter Soldier Investigation<sup>334</sup> and at the Dellums Committee Hearings on War Crimes in Vietnam,<sup>335</sup> the Vietnamese held no monopoly on brutality. While it was contrary to official military dogma, U.S. soldiers sometimes tortured prisoners.<sup>336</sup> Christian Appy notes that: "Mutilation was not universally practiced by American infantrymen; but in some units it was common-place, and most combat veterans at least witnessed it."<sup>337</sup> And the rape and indiscriminate killing of Vietnamese civilians were commonplace enough to make My Lai remarkable for its scale, but not for its occurrence.<sup>338</sup> Yet, these veterans most importantly tried to show that there was no clean or unsavage side to the division of terror. As Appy writes, the deaths of at least a half-million Vietnamese civilians were not "unfortunate accidents [but the] inevitable result of American military strategy."<sup>339</sup>

Some of the evidence that the defense offered during the Nuremberg hearing was little more than a description (sometimes a hearsay description) of what might be an isolated incident. As a law officer, Brown knew that individual soldiers sometimes violated the law of war, and that the military prosecuted them for their offenses. He could easily assimilate isolated bad acts to his image of the U.S. military as a lawful

333. APPY, *supra* note 43, at 253; *cf.* SLOTKIN, *supra* note 55, at 12-13 (describing process of scapegoating Indians "for the morally troubling side of American expansion").

334. THE VIETNAM VETERANS AGAINST THE WAR, *THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES* (1972).

335. THE DELLUMS COMMITTEE HEARINGS ON WAR CRIMES IN VIETNAM: AN INQUIRY INTO COMMAND RESPONSIBILITY IN SOUTHEAST ASIA (Citizens' Commission of Inquiry eds., 1972).

336. See GIBSON, *supra* note 192, at 182-87.

337. APPY, *supra* note 43, at 265; *see also* PARKS, *supra* note 204, at 95, 108-09 (describing incidents of mutilating the dead); John Balaban, *Mau Than*, in *CARRYING THE DARKNESS*, *supra* note 200, at 9, 10 ("One counts the ears on the GI's belt."). The practice of collecting ears and fingers of the dead had become so prevalent that in October 1967, Gen. Westmoreland issued a directive to all commanders ordering that steps be taken to end it. LEWY, *supra* note 31, at 329. Nevertheless, the practice continued with such sufficient regularity that in 1971, the U.S. Army Criminal Investigation Division was compelled to outline a written policy on how to handle customs seizures of body parts. MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* 367 n.\* (1992). On the prevalence of this practice during World War II, *see* DOWER, *supra* note 175, at 63-71.

338. APPY, *supra* note 43, at 268-77.

339. *Id.* at 8.

participant in the war. Other evidence, such as the testimony regarding the M-16 rifle, put into question universal U.S. military practice. But the law of war held the rifle to such vague and seemingly inapt standards as the prohibition of weapons that caused "unnecessary suffering," which if applied in this case might have led to paradoxical results. It was unlikely that the fitness of the M-16 rifle would be settled in this forum.<sup>340</sup> Brown may also have been inclined to discredit Donald Duncan's testimony. At the end of Duncan's testimony, Brown asked him if the point of his *Ramparts* article was that we were supporting the wrong side in Vietnam.<sup>341</sup>

Nevertheless, the defense offered substantial evidence that certain violations did occur, not as deviations from the norm but as routine practice. Certainly this was true with regard to the treatment of prisoners and the American practice of turning prisoners over to an ally whom we knew would not abide by the standards of the Geneva Conventions. Certainly it was also true of paying bounties for kills and the concomitant encouragement of mutilation. Significant evidence seemingly showed that Special Forces taught and counseled assassination.

Other grounds might have foreclosed the Nuremberg defense. It could have been argued that the Geneva Conventions were largely inapplicable to South Vietnam and U.S. conduct in South Vietnam, especially as it affected civilians. However, the U.S. did not adopt that position.<sup>342</sup> Application of the Nuremberg principles to Levy would arguably extend them beyond existing precedents because of his attenuated relationship to Special Forces conduct in Vietnam.<sup>343</sup> Yet, instead of

340. At the same moment, the M-16 was under attack by critics who claimed that it tended to jam and fail in battle. See William Beecher, *Marines' Chief Defends the M-16 Rifle*, N.Y. TIMES, May 27, 1967, at A3; Dick Elliot, *M16: Combat Weapon, Center of Controversy*, COLUM. S.C. STATE, May 28, 1967, at 7; Eugene B. Sloan, *Levy Trial Issue: M16*, COLUM. S.C. STATE, May 28, 1967, at 1, 7.

341. Record at 1040.

342. For a discussion of the competing views, see LEWY, *supra* note 31, at 224-28; TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 130-34 (1970).

343. Telford Taylor argues this position, likening Levy's invocation of Nuremberg as a basis for his refusal to train to that of a hypothetical cook who might refuse to feed aidmen at Fort Jackson because of their conduct in Vietnam. TAYLOR, *supra* note 342, at 164. The analogy is inapt because unlike the cook's act of feeding, Levy's act in training the aidmen is directly related to their combat roles in Vietnam, since the purpose of requiring the training was to facilitate their political and military mission in Vietnam. The cook analogy would have been better suited had Levy refused to treat aidmen. Notwithstanding the argument that Taylor frames, the question of how attenuated a relationship would still support invocation of the Nuremberg principles was not a trivial one. Taylor was quite sympathetic to Levy's medical ethics defense. *Id.* at 164-65.

grounding the denial of the defense in one of these arguments, Brown simply ruled that Levy had failed to make a prima facie showing.

Perhaps, then, I.F. Stone was right in cautioning that the invitation of the Nuremberg defense "looks like a trap."<sup>344</sup> Certainly, the constricted nature of the Nuremberg defense that Levy was permitted to raise and the lack of time to develop the case gives hindsight support to Stone's view. As Levy recalls: "If I had to prove that the whole war was in violation of [the Nuremberg principles], that would've been simple as pie. . . . To prove that the special forces medics were violating . . . that's drawing the net pretty finely."<sup>345</sup>

Yet, if it was a trap, it was not deliberately set. "Nuremberg" carried with it connotations of Nazis and Nazi atrocities, and in so doing set too high a threshold. Certainly few Americans could accept an analogy likening U.S. behavior to the Nazis.<sup>346</sup> Indeed, Americans would find it hard to believe that we could be capable of atrocities of any sort.<sup>347</sup> As Edward Opton and Robert Duckles showed in their study of psychological defenses employed in the aftermath of the My Lai revelations, a characteristic American response was disbelief that "[o]ur boys would[] do this."<sup>348</sup> Against this backdrop of strong psychological incentives for denial, two intellectual forces helped to doom the Nuremberg defense. On the one hand, the defense's failure resulted from the construction of the war, of ourselves, and the Vietnamese within which Brown, and at that time, most Americans, were prepared to hear Levy's arguments. War was brutal, we told ourselves. And wars like the one in Vietnam were especially savage. But the savagery was not our act; it came from them. On the other hand, the defense failed because of the awe and trepidation that any court (even one not presided over by a judge

344. I.F. Stone, *The Meaning of the Nuremberg Issue in the Capt. Levy Court Martial*, I.F. STONE'S WEEKLY, May 29, 1967, at 2.

345. Interview with Dr. Howard B. Levy, *supra* note 25.

346. Some within the new left embraced this analogy in adopting the Germanic spelling "Amerika." See GITLIN, *supra* note 27, at 288, 408; CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 494 (1991). Their rhetoric was neither illuminating nor likely to persuade the unconverted.

347. See ZAROULIS & SULLIVAN, *supra* note 33, at 352-53 (describing minimal interest in the findings of the Russell tribunal and in *In the Name of America*).

348. Edward M. Opton, Jr., & Robert Duckles, *It Didn't Happen and Besides, They Deserved It*, in *CRIMES OF WAR* 441, 441 (Richard A. Falk et al. eds., 1971) (condensed version of a study published by the Wright Institute under the title *MY LAI: IT NEVER HAPPENED AND BESIDES, THEY DESERVED IT* (1970)); cf. DOWER, *supra* note 175, at 61 ("The Japanese public was not completely unaware of brutal behavior by Japanese troops abroad. . . . To the majority of Japanese, as to the Anglo-Americans, atrocities committed by one's own side were episodic, while the enemy's brutal acts were systematic and revealed a fundamentally perverse national character.").

who regarded the President as his Commander-in-Chief) would feel having been asked "to sit in judgment on the President's exercise of his power in disposing the troops of the United States."<sup>349</sup>

## 2. MEDICAL ETHICS AND THE CRITIQUE OF COUNTERINSURGENCY

[T]here is every possibility of a positive use of Special Forces in underdeveloped areas, in the manner of the 'Colonel Hillandale' of *The Ugly American*, who had such a great personal influence on Asian people by offering medical aid to their children.<sup>350</sup>

Like the prosecution, the defense attempted to tell a story built upon its characterization of Levy. Of course, unlike the prosecution, the defense described Levy not as a subversive, but as a good doctor. In its attempt to defend Levy's refusal to teach Special Forces aidmen on medical ethics grounds, the defense told a story of Levy as a caring and dedicated doctor.<sup>351</sup> According to that story, Levy, true to the precepts of his profession and to his oath as a doctor, refused to compromise his duty as a healer or to facilitate the misuse of his medical knowledge. In framing its story this way, the defense evoked popular images of the doctor as a dedicated healer.<sup>352</sup>

The defense described three ethical objections to training the aidmen. First, the aidmen's intrusion into the dermatology clinic threatened the privacy of Levy's women patients and those patients seeking treatment for venereal disease.<sup>353</sup> Levy's other objections bore directly on the way

349. Record at 876.

350. George J. W. Goodman, *The Unconventional Warriors*, *ESQUIRE*, Nov. 1961, at 128, 130. On the influence of William Lederer and Eugene Burdick's novel, *The Ugly American*, on U.S. foreign policy and counterinsurgency doctrine, see HELLMANN, *supra* note 57, at 3-38; SLOTKIN, *supra* note 55, at 447-53.

351. See, e.g., Record at 610-11 (testimony of Capt. Ivan Mauer, describing Levy as an excellent doctor and teacher); *id.* at 2035 (testimony of Capt. Joseph H. Feinstein, noting his satisfaction with Levy as a physician); *id.* at 2084-85 (similar testimony of Capt. Ernest Porter); *id.* at 2181 (testimony of Capt. Robert Petres); *id.* at 2628-29 (statement of Individual Counsel (Morgan) before sentencing deliberations).

352. On the image of the doctor in popular culture, see generally RICHARD MALMSHEIMER, "DOCTORS ONLY": THE EVOLVING IMAGE OF THE AMERICAN PHYSICIAN (1988); JOSEPH TUROW, *PLAYING DOCTOR: TELEVISION, STORYTELLING, AND MEDICAL POWER* (1989). Respondents to a survey conducted in 1961 indicated that they were considerably more satisfied with and admiring of their own doctor than they were satisfied with and admiring of the medical profession overall. Richard Carter, *What Women Really Think About Their Doctors*, *GOOD HOUSEKEEPING*, Aug. 1961, at 60.

353. For the defense's development of this aspect of Levy's medical ethics defense, see Record at 250-51, 263-64, 273-74, 506-13 (cross examination of Col. Fancy); *id.* at

in which Special Forces employed the aidmen in Vietnam (and potentially elsewhere). The defense showed that the aidmen, unlike other medical corpsmen, performed a medical role similar to doctors, and portrayed them as lacking the necessary knowledge and skill to avoid great medical mischief. Finally, the defense argued that the aidmen were more than merely medically incompetent. As warriors and participants in civic action, the aidmen conflated the roles of combatant and medic in violation of the Geneva Conventions and medical norms prohibiting the subordination of medicine to political and military goals. Consequently, the aidmen practiced a politicized, distorted form of medicine. This last defense argument suggested a broad critique of counterinsurgency doctrine. While focused on medical civic action programs, it suggested more broadly that the benevolent facade of counterinsurgency's civic action hid a raw exercise of power and imposition of American will throughout the world. The subordination of medicine to political and military ends was inimical both to medicine and to the freedom of those receiving America's supposed beneficence.

As noted above, the defense argued that the aidmen were incompetent to perform their medical role in Vietnam. That role was first to administer to the medical needs of their A-team and their Vietnamese counterparts. They also had a critical civic action mission, to provide medical care in the villages and hamlets of the contested countryside. The trial testimony made plain two distinctions between the aidmen and other medics: aidmen were not limited in their medical role to providing first aid, and they generally operated without a doctor's supervision. The defense distinguished between first aid—limited, stabilizing care for emergency situations—and more advanced medical skills. Defense witnesses testified that the former should be universally taught, while the latter should not be taught indiscriminately because of the potential for misuse.<sup>354</sup> The course coverage for aidmen at Fort Jackson indicated

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615-16 (cross examination of Capt. Ivan Mauer); *id.* at 1079-94 (testimony of Dr. Robert W. Ball, Director, Division of Venereal Disease Control, S.C. Board of Health); *id.* at 1094-2005 (testimony of Mrs. Marjorie Helton); *id.* at 2005-11 (testimony of Mitchell R. Helton). Developing this as an important part of the ethics defense bolstered the defense's portrayal of Levy as a good and caring doctor. Nevertheless, privacy appeared to be a secondary aspect of Levy's objection to the training program for aidmen. Indeed, during the period before Levy banished the aidmen from the dermatology clinic, he had dealt with this issue without incident by simply excluding the aidmen from the room when he examined a woman patient or took her medical history. Record at 701 (testimony of Spc. Warren Gerig).

354. See, e.g., Record at 2070-71 (testimony of Capt. Ernest Porter: "I interpreted their role to be as corpsmen, first aidmen"; "as first aid corpsmen, they had no need for a stethoscope or a ophthalmoscope which involved certain diseases that require a doctor's attention . . . they had too little background of education, and medicine itself, to be able



that they were being prepared to do more than render first aid.<sup>355</sup> The dermatology training that Fancy ordered Levy to give the aidmen evinced a similar expectation regarding the role of aidmen in Vietnam.<sup>356</sup>

Witnesses agreed that Special Forces aidmen in Vietnam were permitted to do things that only a doctor could do in the United States, though they disagreed about the conclusions that one should draw from that fact. Peter Bourne testified that Special Forces aidmen in Vietnam dispensed drugs and narcotics with as free a hand as a U.S. physician, but without equivalent judgment.<sup>357</sup> Lieutenant Col. Richard Coppedge, formerly the Center Surgeon of the JFK Center for Special Warfare, conceded that no state licensed Special Forces aidmen to practice medicine in the U.S. in the manner that they did in Vietnam. He added that probably none ever would.<sup>358</sup> Because of the nature of counterinsurgency warfare, aidmen, unlike other Army medics, operated essentially without physician supervision.<sup>359</sup>

to handle the problems that required the use of the ophthalmoscope or the stethoscope"); *id.* at 2074 (testimony of Capt. Porter); *id.* at 2270-71 (testimony of Jean Mayer).

355. The rotation schedule for aidmen trainees divided their nine weeks among surgery, dermatology, podiatry, pediatrics, dentistry, urology, orthopedics, cardiology, general medicine, and contagious diseases. Prosecution Exhibit 1, Master Rotation Schedule Course: 300-F1 Class No. 9, *in Record*, vol. 12; *Record* at 551-55 (testimony of Sfc. Herman Cornell). The list of subjects also shows that soldiers were not the only intended beneficiaries of the aidman's care. *See* Lt. Col. Louis T. Dorogi, *Early Special Forces Medical Training 1952-1971*, 3 *SPECIAL WARFARE* 28, 29-30 (1990) (describing detailed didactic training in appendectomy procedure in the 1950s).

356. *See* Prosecution Exhibit 2, Letter Order from Col. Fancy and Enclosure (Oct. 11, 1966), *in Record*, vol. 12; *Record* at 2319-21 (testimony of Capt. Peter Bourne that of all the diseases that Levy was ordered to cover in his instruction, at most one fell within the ambit of first aid training). Despite official dogma ostensibly providing stricter control over Army medics and Marine corpsmen than over aidmen, actual practice often deviated from stated dogma. *See* Appy, *supra* note 43, at 280 (medic performing operations in the field); *id.* at 284 (medics freely dispensing amphetamines).

357. *Record* at 2321.

358. *Id.* at 2136.

359. *Id.* at 2334 (testimony of Capt. Peter Bourne); *see also* Dorogi, *supra* note 355, at 29 ("The prevailing philosophy was that the enlisted personnel were, in essence, independent aidmen and *physician substitutes* . . . . The restrictions that applied to stateside medicine would not be valid in a guerilla situation—especially when evacuation from behind enemy lines was out of the question."); Interview with Col. Roger A. Juel, U.S. Army Medical Corps, by Lt. Col. Louis Dorogi (Dec. 17, 1976) (on file with the U.S. Army Military History Institute Archives, Carlisle Barracks) [hereinafter Col. Juel Interview] (noting that they had assumed that an aidman faced with a problem beyond his level of competence would radio for a doctor's help, but that in Vietnam radio communication was often impossible for tactical reasons, necessitating that the aidman do the best he could on his own).

Special Forces aidmen scored well on the Army's intelligence tests.<sup>360</sup> Yet the limits in their education, maturity, and medical training ensured that some would do harm as medical practitioners. Captain Ernest Porter, a Fort Jackson ophthalmologist, testified that they were young, often high-school dropouts, whose greatest shortcoming was poor judgment. This was not Porter's view alone. He explained that he was repeating the opinion of a Captain who had come to Fort Jackson from the Army Medical Field Service School to explain the aidmen training program.<sup>361</sup>

At the time Levy refused Colonel Fancy's order, aidmen followed a thirty-seven week course of training.<sup>362</sup> In addition to the eight-week basic medic's course, aidmen received an extra ten weeks of classroom instruction. Following the classroom work, they pursued a nine-week "applicatory phase" in an Army hospital, such as the hospital at Fort Jackson. There they rotated through various hospital wards and clinics, spending approximately ten hours in each. Then they returned to the JFK Special Warfare School at Fort Bragg for additional classroom study and participation in the "dog lab."<sup>363</sup>

Speaking of the Army's civic action medical programs in Vietnam, one proponent conceded of the "village sick-call patrol" that "[i]n many cases less medicine is practiced than 'medical show business.'"<sup>364</sup>

360. Record at 2020 (testimony of Col. Roger A. Juel). Aidmen were required to have a GT score of at least 100, and their average score was 127. The GT test score was roughly equivalent to an IQ test score. *Id.*

361. Record at 2081. The rapid expansion of Special Forces in the mid-1960s was widely thought to have diluted the quality of the Green Beret recruits, including aidmen. See DUNCAN, *supra* note 264; Col. Juel Interview, *supra* note 359, at 18-19 (comment by Dorogi, describing "inferior product" produced in 1965-66).

362. Dorogi, *supra* note 355, at 32. Soon afterwards, the Army reduced the program to 32 weeks. *Id.* at 33.

363. *Id.* at 32. In the dog lab, each aidman received a dog whose vocal cords had been removed and who had been shot in the leg. The aidman performed the necessary surgery on the leg wound, and then cared for the dog during its recovery. The aidman also amputated the dog's left front paw. The purpose of the exercise was to teach both surgical technique (debridement and amputation) and compassion. Record at 571-73 (testimony of Spc. Sanford Henry); Gen. Yarborough Interview, *supra* note 67, at 20; Interview with Lt. Col. Richard Coppedge, U.S. Army Medical Corps, by Lt. Col. Louis Dorogi (undated) (audio tape on file with the U.S. Army Military History Institute special collections; copy of tapes on file with author). Morgan recounts that after he sent Laughlin McDonald and Charles Sanders to Fort Bragg to gather evidence for the Nuremberg hearing, *New York Times* correspondent Homer Bigart told him, "I think all that your young man will come up with at Fort Bragg is the largest [h]erd of three-legged, nonbarking dogs in captivity." MORGAN, *supra* note 46, at 137-38.

364. C.R. Webb, Jr., *Medical Considerations in Internal Defense and Development*, 133 MIL. MED. 391 (1968), quoted in E.A. Vastyan, *Warriors in White: Some Questions About the Nature and Mission of Military Medicine*, 32 TEX. REP. ON

Irrespective of the Army's and Special Forces' intent, often the training of Special Forces aidmen had a similar Potemkin-village quality. Lieutenant Colonel Coppedge noted that the doctors he spoke to at Fort Jackson about training Special Forces aidmen were "quite uninterested in the program."<sup>365</sup> Their nonengagement stemmed from the hospital command's indifference, as well as their own. Prior to the time that Colonel Fancy presented Levy with his written order to train, the hospital staff had not been told what training they were expected to give. Indeed, no other doctor was told what to teach before the preferral of charges against Levy.<sup>366</sup> The other doctors who testified said that they tolerated the aidmen's presence, but did little more than permit them to observe. Not knowing why the aidmen were in their wards or clinics, the doctors offered little formal instruction and limited it to teaching first aid.<sup>367</sup> Captain Porter testified that he did not learn of the purpose and nature of the aidmen training until the day before his testimony, when some members of the hospital staff met with a captain who had been dispatched by the Army Medical Field Service School to Fort Jackson.<sup>368</sup>

There was little doubt that many of the aidmen were idealistic and dedicated. At least some had been good students in their medical

BIOLOGY & MED. 327, 334 (1974).

365. Record at 2232. Coppedge added that he "[w]ould much preferred [sic] to have had expressions of disagreement rather than the apathetic reception that we encountered." *Id.*

366. See, e.g., *id.* at 635 (cross-examination testimony of Capt. Del Lutsenhizer); *id.* at 2070-71 (testimony of Capt. Ernest Porter); *id.* at 2169, 2172, 2181 (testimony of Capt. Robert Petres).

367. *Id.* Captain Petres stated that he assumed that the aidmen were merely corpsmen assigned to help him. *Id.* at 2169. Captain Porter said that he assumed that the instruction was to be in first aid only and refused to let them use a stethoscope or ophthalmoscope. *Id.* at 2070-71, 2081.

368. *Id.* at 2074-76. It was not clear whether Capt. McBride's visit was simply a matter of exquisite bad timing on the Army's part in scheduling its annual visits to hospitals participating in Phase II of aidmen training, or whether his visit was an effort to bolster the testimony of the Fort Jackson hospital staff in the hopes of averting further embarrassing incidents like the adverse testimony of prosecution witness Capt. Ivan Mauer. For a description of Mauer's testimony, see *infra* text accompanying notes 429-31. Porter testified that after the court-martial charges were preferred against Levy, he received a list of five diseases that he was supposed to talk about with the aidmen, but since the list made little sense to him, he ignored it and continued to teach them first aid. *Id.* at 2074.

One Army doctor, Maj. Billy Jones, head of the dermatology clinic at Fort Gordon, Georgia, testified that the aidmen dermatology training was adequate and was consistent with medical ethics. He stated that "[i]n medical school, I had two hours of dermatology my whole four years. . . . These men are getting more than I did in medical school." Record at 2441.

training.<sup>369</sup> It was far less clear from the court-martial testimony whether the aidmen were adequately prepared for their mission in Vietnam and whether, as a purely medical matter, they were doing more good than harm.

Both those persons charged with overseeing the Special Forces medical program and the Fort Jackson doctors who testified noted their concern that aidmen recognize and not exceed the limits of their knowledge and ability.<sup>370</sup> Lieutenant Colonel Coppedge acknowledged that “[t]he real difficult thing, of course, to train anyone is judgment.”<sup>371</sup> From the vantage of the Fort Jackson hospital, Levy’s witnesses could only speculate about the harms that might result from the aidmen’s poor judgment or incompetence: perhaps they would misdiagnose an eye disease,<sup>372</sup> or perform a nonindicated tracheotomy,<sup>373</sup> or promote disease-resistant strains of diseases through the indiscriminate use of medicines.<sup>374</sup> Brown was evidently unimpressed.<sup>375</sup>

Among Levy’s nonhostile witnesses, only Peter Bourne had detailed knowledge of aidmen practices in Vietnam. Bourne testified that despite Army regulations relating to narcotics and drugs there were no real controls on their use. He stated that during a period when he had oversight of twenty-six A-camps, there were problems in some camps with aidmen “using up vast quantities of drugs and being unable to

369. See Smithson, *supra* note 46 (Levy noting idealism of many of the Special Forces soldiers he encountered). *But see* Interview with Dr. Howard B. Levy, *supra* note 25 (commenting on the cynicism of many of the Special Forces soldiers with regard to their activity in Vietnam). For a study that examines the idealism and personality of Green Berets and of war resisters, see generally DAVID MARK MANTELL, *TRUE AMERICANISM: GREEN BERETS AND WAR RESISTERS; A STUDY OF COMMITMENT* (1974). In cross-examining Spc. Wayne Barrows, Morgan asked a series of questions about the treatment of syphilis and gonorrhea. Record at 669-70, 672. Barrows appears not to have stumbled, and Morgan did not pursue that tactic again in cross-examining other aidmen.

370. See, e.g., Record at 2139-40 (testimony of Lt. Col. Richard Coppedge); *id.* at 2170-78 (testimony of Capt. Robert Petres).

371. *Id.* at 2139.

372. *Id.* at 2086 (testimony of Capt. Ernest Porter that aidmen were unequipped to diagnose any eye diseases other than conjunctivitis).

373. *Id.* at 2173-74 (testimony of Capt. Robert Petres describing the risks of unnecessary tracheotomy).

374. *Id.* at 2177-78 (testimony of Capt. Robert Petres relating to the risks of prescribing medicines). This last danger was not all that speculative given the availability of various medicines, the limits on supplies, and a medical delivery system built partly on the village sick-call patrol.

375. *Id.* at 2178-79 (sustaining prosecution’s objections and asking Morgan “to bring it right back to Fort Jackson”).

explain where they went, using them promiscuously."<sup>376</sup> Major Craig Llewellyn, who served for sixteen months as group surgeon for the Special Forces in Vietnam, insisted that "there is a great deal of control exercised over what drugs we allow them to requisition."<sup>377</sup>

Bourne thought that the aidmen "were practicing inadequately"<sup>378</sup> and were using medicine primarily for political purposes, in violation of professional norms.<sup>379</sup> Nevertheless, Bourne was willing to train aidmen because he thought that the little good they did outweighed the harm.<sup>380</sup> The Army's witnesses, along with Robin Moore, were much more enthusiastic about the aidmen's medical performance.<sup>381</sup>

The testimony regarding the aidmen's value to the indigenous population bespoke the arrogance of Western medicine and again reflected a tendency either to see the Vietnamese as alien or to assume that they inhabited a cultural vacuum. However limited the value of the aidmen's care, it was at least within Western traditions of medicine and thus presumptively superior to the care otherwise available to the Vietnamese. Indigenous medicine, by contrast, was "primitive by our standards of scientific medicine."<sup>382</sup> The Montagnards integrated disease into their religious beliefs and sought cures through "spirit worship," sacrifices, and the aid of "witch doctors."<sup>383</sup> Other Vietnamese relied on "Chinese doctors."<sup>384</sup> Except for Major Llewellyn, who noted that some "herbalist doctor[s] . . . do a great deal of good," the witnesses were utterly dismissive of Vietnamese medicine. Dr. Edward Kimbrough, testifying as a prosecution rebuttal witness, stated:

There were many—I don't know exactly what they were—I called them Chinese Physicians—I am sure that they weren't Chinese or physicians either, but kind of witch doctors that

376. *Id.* at 2321, 2332.

377. *Id.* at 2487. Llewellyn's statement was somewhat ambiguous and may have addressed only the issue of controlling drug supply, but not use.

378. *Id.* at 2331. He described the village sick-call as a kind of rapid-turnover mass medicine marked by "rapid and superficial diagnosis and passing out pills." *Id.* at 2318.

379. *Id.* at 2322.

380. *Id.*

381. *See, e.g., id.* at 971 (testimony of Robin Moore); *id.* at 2406-08 (testimony of Dr. Edward E. Kimbrough); *id.* at 2488 (testimony of Maj. Craig Llewellyn).

382. *Id.* at 1037 (Prosecution's question during cross-examination of Donald Duncan).

383. *Id.* (testimony of Donald Duncan). Duncan's description appears to have been accurate, although somewhat incomplete. For further discussion of Montagnard beliefs regarding disease, see BOURNE, *supra* note 272, at 145-65 (1970).

384. Record at 2486 (testimony of Maj. Craig Llewellyn).

treated patients with aqua puncture [sic] and cupping on the chest and painting designs on the chest for severe diseases.<sup>385</sup>

In Robin Moore's testimony, the "Chinese doctors" or "witch doctors" disappeared completely, leaving a void. Asked about the medical care available to people in Vietnamese villages, he replied that "[t]he only medical care they had was what medical care special forces gave them."<sup>386</sup> In such a perceived vacuum, it is little wonder that the aidmen, despite their deficiencies, were thought to be doing at least a little good for the Vietnamese.

Nine years later, some of the friends of Special Forces medicine would be far less sanguine about the aidmen's competence and achievements in Vietnam. In interviews conducted for a proposed monograph on the medical role of Special Forces in Vietnam, Major Llewellyn and Colonel Roger A. Juel, who had command over Special Forces medical training at the Medical Field Service School, revealed doubts about the aidmen's training and ability, as well as their significant problems in the field. Colonel Juel, in particular, dismissed the aidmen as a "primitive product," and while insisting that many of them performed impressively, he also commented that the program was rife with incidents of inadequate treatment.<sup>387</sup> Major Llewellyn noted that some of the aidmen they received had long since completed their medical training and in the interim had been assigned to non-medical duties and become quite "rusty." He added that Special Forces did not inform U.S. Military Assistance Command (MACV), Vietnam, of this problem, because had MACV known, it would have pulled those aidmen from the field.<sup>388</sup> Asked if aidman training was "adequate for Vietnam," Colonel Juel replied: "No, it was the best we could do."<sup>389</sup> Asked if the aidman could be tactically justified, he responded: "They are incompetent."<sup>390</sup> The court-martial did not hear these criticisms and concerns, however.

385. *Id.* at 2406.

386. *Id.* at 971.

387. Col. Juel Interview, *supra* note 359, at 17-18, 24, 26-27. At the time of the interview, Juel was engaged in a campaign to have Special Forces replace the aidman with a more thoroughly trained physician's assistant, and he was meeting resistance from Special Forces. *Id.* at 17-18, 32. Consequently, his criticism of the aidman program might not have been wholly disinterested, much like his earlier praise.

388. Interview with Maj. Craig Llewellyn, U.S. Army Medical Corps, by Lt. Col. Louis Dorogi (undated) (audio tape on file with the U.S. Army Military History Institute special collections; copy of tapes on file with author); *see also* Col. Juel interview, *supra* note 359, at 25 (describing problem of unused skills getting rusty). On the whole, the Llewellyn interview is more positive about aidman performance than Juel's.

389. Col. Juel Interview, *supra* note 359, at 32.

390. *Id.* at 17.

Other risks of the aidman program, such as frequent use of the antibiotic chloromycetin,<sup>391</sup> never seemed to register. The case that Special Forces aidmen were, as a purely medical matter, a harmful addition to the Vietnam countryside, was never sufficiently made.

For Levy, political and military use of medicine and the conflation of medical and military roles were the most objectionable aspects of the aidman program.<sup>392</sup> No one denied that the aidmen were first and foremost combat soldiers whose healing role was subordinate to their combat mission. Like other Green Berets, the aidmen were cross-trained in at least one other military specialty, and took their turns on patrols.<sup>393</sup>

By blending military and medical functions, Special Forces had abandoned the traditions of military medicine dating back to the first Geneva Convention. Tracing that tradition from the 1860s through the 1949 Geneva Conventions, Harvard nutritionist Jean Mayer, an expert on paramedical personnel and a former officer in the Free French Forces, stated that "the whole thrust of progress has been to separate the functions of the doctor and his auxiliary from the main function of our means which has to do with destruction of life and property . . ."<sup>394</sup> Mayer explained that this tradition of separation served the utilitarian principle

391. See Record at 2082 (testimony of Capt. Ernest Porter regarding chloromycetin, but not linking it to Special Forces medicine in Vietnam); *id.* at 614 (testimony of Capt. Ivan Mauer regarding dangers of chloromycetin). Levy said of this practice: "They use drugs, such as Chloromycetin, that I hesitate to use myself." See Elinor Langer, *The Court-Martial of Captain Levy: Medical Ethics v. Military Law*, 156 SCIENCE 1346, 1349 (1967) (quoting Levy). Chloromycetin can cause aplastic anemia and other blood disorders, resulting in death. It also can result in the overgrowth of nonsusceptible organisms. In light of these dangers, the 1967 edition of the *Physicians' Desk Reference* included a warning box for chloromycetin. It cautioned that chloromycetin "should not be used when other less potentially dangerous agents will be effective," and that it "should be used only for serious infections." It also noted that "[i]t is essential that adequate blood studies be made during treatment with the drug" in order to detect some resulting blood disorders before they became irreversible. MEDICAL ECONOMICS, INC., PHYSICIANS' DESK REFERENCE TO PHARMACEUTICAL SPECIALTIES AND BIOLOGICALS 908-908B (21st ed. 1966). For contemporary cases noting the dangers of chloromycetin, see *Stottlemire v. Cawood*, 213 F. Supp. 897 (D.D.C. 1963); *Incollingo v. Ewing*, 282 A.2d 206 (Pa. 1971).

392. Interview with Dr. Howard Levy, *supra* note 25.

393. See, e.g., Record at 569 (testimony of Specialist Sanford Henry); *id.* at 1005 (testimony of Capt. Peter Bourne); *id.* at 1010 (Statement of the Information Office of the U.S. Army Special Warfare Center); *id.* at 2205 (testimony of Donald Duncan). Robin Moore wrote: "Every man is cross-trained in at least two other basic team skills. A medic, say, can not only efficiently patch up the wounded and care for the sick, but knows how to lay down a deadly accurate mortar barrage and blow up the enemy's rail lines and bridges." MOORE, *supra* note 264, at 10.

394. Record at 2269.

of distinguishing doctors and medics from other soldiers on the battlefield, so they could continue to provide care unmolested and without regard for the tides of battle or whether their forces had withdrawn.<sup>395</sup> He added that it was also derived from the medical ethics principle that the doctor must be an impartial healer.<sup>396</sup>

The Geneva Convention provided that medical personnel should not abandon their patients when their forces retreat. Special Forces aidmen purported, however, to have opted out of the Geneva Convention protections.<sup>397</sup> Unlike other medics, they were subject to the command of a non-medical officer, who was the final arbiter of whether and when they would function in a combat or a medical role.<sup>398</sup> In that capacity, the A-team commander made decisions regarding how the aidman would practice medicine.<sup>399</sup> Donald Duncan testified that when a CIDG camp was overrun, all Special Forces soldiers, including aidmen, were ordered to evacuate and to leave their non-American patients behind.<sup>400</sup>

Jean Mayer noted that as an officer in the Free French Forces he would not countermand his medical personnel. He said that it would violate his conscience to train paramedical personnel if he knew that they would be required to subordinate medical judgment to their commanders' political and military judgments.<sup>401</sup>

Prosecution rebuttal witnesses saw their ethical duties differently. Dr. William DeMaria of Duke University Medical School testified that his obligation was to give the paramedical trainee the best education possible. But in an eerie echo of the Nuremberg Hearing division of labor theme, he added: "I cannot be responsible for his action once he completes this

395. *Id.*; see also *id.* at 2324 (testimony of Capt. Peter Bourne). This principle of separating roles was widely believed imperiled by the North Vietnamese and the PLAF, who were accused of showing little respect for the red cross brassard. Telephone Interview with Col. Earl V. Brown, *supra* note 45.

396. Record at 2269-70.

397. *Id.* at 1010 (Statement of the Information Office of the U.S. Army Special Warfare Center).

398. *Id.* at 2151-52 (testimony of Lt. Col. Coppedge); *id.* at 2319 (testimony of Capt. Peter Bourne).

399. *Id.* at 2319 (testimony of Capt. Peter Bourne).

400. *Id.* at 1023; see also *id.* at 2152 (testimony of Lt. Col. Coppedge conceding this possibility); MOORE, *supra* note 264, at 63-66 (describing how preparations to evacuate all Green Berets from camp under attack despite the medic's warning that "[i]f we pull out . . . a lot of wounded are going to die," were obviated by last minute air support destroying the attacking battalion).

401. Record at 2270-71, 2274. Asked if he would change his mind if shown that these paramedical personnel did some medical good, Mayer responded that the threat to medical independence seldom came from its opponents but rather "it is much more likely to come from people who have very good intentions." *Id.* at 2271.



level of training."<sup>402</sup> This ethical detachment of cause from effect was undergirded by a Panglossian view of what the aidman did in Vietnam. Dr. DeMaria testified that knowing an aidman's commander might order the aidman to abandon his patient for the greater good did not alter his view on training aidmen. Nor would he question the order to abandon a patient. If the commander gave the order, it would be appropriate.<sup>403</sup> Conflating the roles of healer and combat soldier similarly failed to trouble DeMaria. His testimony spoke of the aidman's combat role as casually as one might of someone's hobby: "I think the fact that he chooses to do something else in addition to his health act is not my concern ethically as a physician."<sup>404</sup> Reassured that aidmen do not wear the red cross brassard, prosecution witness Dr. Amos Johnson thought the conflation of killer and healer beneficial. Once the fight was over, he explained, who but the aidman could best minister to those whom he had wounded but failed to kill.<sup>405</sup>

While Levy had a "fleeting idea" of the Geneva Conventions' prohibitions, he did not turn naturally to them in shaping a critique of Special Forces medicine: "Those . . . questions . . . were largely raised by lawyers."<sup>406</sup> The Geneva Conventions argument was but one translation of Levy's fundamental objection to the aidman program for an audience of legal decisionmakers: that it used medicine as an instrument to effect political and military objectives. The challenge for the defense was to cast that objection in a way that would enable a court-martial to find Levy's disobedience of Colonel Fancy's order excuseable.

At the court-martial, the defense could show only a handful of examples of Special Forces aidmen using medicine for immediate overt military ends. No biological warfare laboratories were hidden in the

402. *Id.* at 2364. On the relationship between Duke's physician's assistant program and Special Forces, see Col. Juel Interview, *supra* note 359, at 22-23.

403. *Id.* at 2365; *cf.* Dr. Robert T. Jensen, *Another View of Medical Ethics and the Military*, 20 *THE NEW PHYSICIAN* 505, 509 (1971) ("[I]t is not inappropriate that [medical officers] should be responsible to the line commanders in combat units . . . . If war is too important to be left to the generals then medical care, and . . . medical ethics, is too important to be left entirely to doctors."). Dr. Jensen's article is a response to a position paper of Physicians for Social Responsibility, which was authored by three doctors, including Dr. Victor Sidel, one of Levy's medical ethics defense witnesses. Dr. Robert Liberman et al., *Medical Ethics and the Military*, 17 *THE NEW PHYSICIAN* 17 (1968). Both articles focused much of their attention on issues raised in the court-martial.

404. Record at 2364.

405. *Id.* at 2398-99. Levy captured the absurdity of these conflated roles when he doffed a green beret and came "charging into his chief counsel's motel room screaming, 'Kill! Kill! Cure! Cure!'" Nicholas von Hoffman, *The Troubled World of Captain Levy*, *WASH. POST*, May 21, 1967.

406. Interview with Dr. Howard Levy, *supra* note 25.

CIDG camps. The defense did elicit Robin Moore's acknowledgment of at least one instance in which an aidman administered sodium pentathol to aid in the interrogation of a prisoner.<sup>407</sup> *The Green Beret*, which had been placed in evidence, added only a couple of other instances of Green Berets using medicine for immediate military purposes.<sup>408</sup>

But Levy's conversations with the Green Berets who sought instruction in his clinic had led him to conclude that the danger of Special Forces medicine was not especially that the aidmen would kill by medical means (at least not in the sense of injecting poisons or pathogens into their victims).<sup>409</sup> He reached the decision to stop teaching medicine to the aidmen when he came to see "that the medical aspect of the Green Berets was a ruse . . . a method by which you could infiltrate Vietnam villages" to achieve military ends.<sup>410</sup> Levy had concluded from his conversations with aidmen that the aidman program converted medicine into a sophisticated weapon of war. Under the benign face of medical aid, the aidman would gain entree into Vietnamese villages. They would next militarize them by recruiting their inhabitants, isolating the insurgent enemy from its popular base and destroying it. He recognized, in other words, that civic action was merely another method of warfare. Levy came to believe that his participation in this program violated his ethical obligations as a doctor and transformed him into something only slightly removed from a combatant.<sup>411</sup>

407. Record at 966-67.

408. MOORE, *supra* note 264, at 112-13, 119 (aidman fits Vietnamese girl with diaphragm so she can become mistress of PLAF colonel and eventually lure him to his capture); *id.* at 137 (aidman injects sodium pentathol in captured colonel before interrogation); *id.* at 305, 307, 309 (aidman administers "nerve-paralyzing serum" in portion of book that Moore does not purport to base on real incidents—a fantasy of insurgency in North Vietnam). Writing about the court-martial, Dr. Peter Bourne described an incident where aidmen "deliberately used their skills on the wives of known Viet Cong in the hopes that these women could then be persuaded to provide intelligence information which in turn would probably lead to the deaths of their husbands." Bourne, *supra* note 38, at 58. This description was absent from his testimony.

409. It did occur to him, however, that those taught to cure plague could similarly be taught to spread it. Interview with Dr. Howard Levy, *supra* note 25.

410. *Id.*

411. Levy said:

I had already said to myself . . . I would go into the Army but I probably wouldn't go to Vietnam. That's where I would draw the line . . . I knew that there would be a line drawn that I wouldn't cross and that line probably was Vietnam. Well, . . . as I'm training these guys, I'm getting perilously close to being in Vietnam even though I haven't gotten orders to go to Vietnam, by proxy. So I'm saying to myself, wait a minute, this is where we draw the line right now.

*Id.*

Levy was unaware at the time that the proponents of counterinsurgency had explicitly described medicine as a kind of Trojan horse, well-suited to the battle for the hearts and minds of Asian peasants. Captain Leonard R. Friedman, a Special Forces psychiatrist, put it bluntly in entitling an article he published in 1966: *American Medicine as a Military-Political Weapon*.<sup>412</sup> Friedman declared medicine the "cornerstone" of civic action and "one of the most successful instruments . . . in stability operations."<sup>413</sup> He proclaimed that "Western medicine has been the key to the oriental home and has unlocked a store of goodwill for Western man entering an Eastern world."<sup>414</sup> Friedman explained that in Vietnam, the tactical use of medicine might lead first to a greater acceptance of the Saigon government by its people, especially non-ethnic Vietnamese, and then to "further acceptance of Western ideas and ideals." "Subsequently," he continued, "the minority group may be led to a wish to provide its own military contribution to the Central Government" as an expression of gratitude for its medical beneficence.<sup>415</sup>

The value of medicine for counterinsurgency lay partly in its appearance of universality and neutrality. Colonel Spurgeon Neel, a former Surgeon of the U.S. MACV, could write with no apparent sense of irony that the medical component of stability operations provides an "essentially apolitical avenue through which favorable influence may be maintained."<sup>416</sup>

E.A. Vastyan, a critic of these "warriors in white," documents that the doctrine of political medicine embraced both political and military

412. Capt. Leonard R. Friedman, *American Medicine as a Military-Political Weapon*, 131 MIL. MED. 1273 (1966). The U.S. Army exhibit at the 1967 American Medical Association convention, which prominently featured a picture of a Special Forces aidman treating a Vietnamese patient, appeared under the title: "medicine as a weapon." Liberman et al., *supra* note 403, at 19.

413. Friedman, *supra* note 412, at 1273. "Stability operations" was a common synonym for counterinsurgency.

414. *Id.* at 1276. Friedman lay partial blame for the fall of China on American failure to use medicine to gain a foothold there. For a different view of the political efficacy of political medicine, at least among the Montagnards, see BOURNE, *supra* note 272.

415. Friedman, *supra* note 412, at 1277.

416. Col. Spurgeon Neel, *The Medical Role in Army Stability Operations*, 132 MIL. MED. 605, 605 (1967). The contradiction was not lost on Richard J. Cowan, a medical student who wrote in a letter to the *New England Journal of Medicine* that what Neel was calling apolitical, others would recognize as interference "in the internal political affairs of other countries, in behalf, if necessary, of governments disliked by their people." Cowan added that "[m]edicine is to be used politically because it provides a facade of apolitical activity." Richard B.T. Cowan, *Letter to the Editor*, NEW ENG. J. MED., Feb. 8, 1968, at 336.

objectives. He further shows some of the ways in which this approach to medicine as an instrument of war distorted medical values and practices. Political medicine generated a theory and practice of what Vastyan calls "political triage" and "psychological triage."<sup>417</sup> Political triage entails subordinating decisions regarding treatment and the allocation of medical resources to such political and military goals as intelligence gathering and cementing local loyalty.<sup>418</sup> Psychological triage entails medical decisionmaking that seeks to achieve the greatest immediate loyalty impact instead of medical impact.<sup>419</sup>

Though unable to point to published Army doctrine, the defense attempted to show that in Vietnam, Special Forces had converted medical care into a military and political weapon. Donald Duncan spoke of the aidmen as "your greatest chance of getting entree" into contested villages.<sup>420</sup> Duncan explained that:

Once he leaves the camp [his primary mission] would be the treatment of local civilians, holding sick call, and whatever. It's in training—it is pointed out that in many areas in which you will go, you are going to be very unpopular, especially you as a guy carrying a gun, that is coming in there trying to organize them into going out to get themselves shot in some sort of a village defense organization; that the one great "in" that you have is this medic because people are short on doctors and trained medical personnel in there; that the thing to do is sort of

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417. Vastyan, *supra* note 364, at 333-34.

418. *Id.* at 334 (describing treatment in ancillary role to intelligence and the procedures for justifying admittance of Vietnamese civilians to U.S. Army hospitals).

419. *Id.* at 333-34. Spurgeon Neel noted that U.S. military hospitals admitted Vietnamese civilians selectively for "'high impact' surgical procedures," focusing on corrective surgery for major deformities and disfigurements, primarily in children. Neel writes that "[t]he psychological impact on the inhabitants of the village to which the restored patient is returned is tremendous." Neel, *supra* note 416, at 607. In response, Richard Cowan would write, "It seems to me that this program uses an indication for surgery with which I am unfamiliar—namely, psychological impact on the patient's community." Cowan, *supra* note 416, at 336. In the mid 1970s, Col. Roger Juel, a hostile defense witness at the court-martial, expressed the extent to which political and military objectives had displaced medicine in civic action medicine. When told by Louis Dorogi that some aidmen delivered babies in Vietnam, Juel responded with dismay. He explained that aidmen were taught that they should defer to the village midwife, who would be far more practiced in this area, and at most take a helping role under her direction. He then made clear the source of his concern: "Leave the responsibility where it belongs, because they could destroy a team's mission by being thrown out of a village or having some important person's wife die as a result of their actions." Col. Juel Interview, *supra* note 359, at 26-27.

420. Record at 2204.

push a medic up there in front and let him get the confidence of these people by treating them; usually it starts off—sometimes it starts off very slow, but the word gets around. More and more people are coming for this treatment; certain dependency is sometimes involved; then, of course, this lays the way open now for the rest of the team to come in and organize them in their primary mission which could be border surveillance; it could be CIDG strike force; it could be regional forces, popular forces.<sup>421</sup>

Bourne and Moore similarly defined the aidmen's function, which Bourne labeled "the pursuit of political medicine,"<sup>422</sup> as the effort to win hearts and minds through the allurements of medical care.<sup>423</sup>

The prosecution's rebuttal witnesses and the hostile defense witnesses emphasized that the aidmen's primary mission was to ensure the health of the A-team and their Vietnamese counterparts and diminished the importance of the aidmen's civic action.<sup>424</sup> The prosecution emphasized the value of the aidmen to their comrades in situations where, because of the nature of the mission, evacuation to an Army hospital might be impossible. Lieutenant Colonel Coppedge, one of the architects of the Army's doctrine regarding medicine's role in counterinsurgency, did not mince words, however. Asked what was medicine's primary mission in Vietnam, he replied:

It became rather evident with our increasing involvement in [counterguerrilla warfare] that the victory in this sort of struggle was more than a matter of weapons, that is, arms, gunfire; that in a struggle like this which is in many respects a social struggle that we have got to turn to use of social instruments such as medicine. *So in this way we sought to use medicine as a means of approaching the enemy and imposing our will on his.*<sup>425</sup>

Referring to Mao's aphorism that the guerrilla is a fish and the people are the sea, Coppedge added: "The basic support for the guerrilla is really the

421. *Id.* at 1034-35.

422. *Id.* at 2318.

423. *Id.* at 963 (testimony of Robin Moore); *id.* at 2321-22 (testimony of Capt. Peter Bourne).

424. *See, e.g., id.* at 2025-26, 2029 (testimony of Col. Roger Juel); *id.* at 2476-78 (testimony of Maj. Craig Llewellyn).

425. *Id.* at 2128-29 (emphasis added).

people around him. . . . We sought to deny the population support for the guerrilla by winning him to us."<sup>426</sup>

To succeed with the medical ethics defense, Levy's counsel had to show first that Levy's objections were indeed those of a doctor rather than those of an opponent of the war. Additionally, although the defense witnesses stated that ultimate responsibility for ethical judgments must reside in the individual doctor,<sup>427</sup> they needed to show that Levy was not a crank.<sup>428</sup> The defense sought supporting testimony from other doctors to show that Levy's ethical concerns about the aidman program were within the medical ethics mainstream.

Their case began to gel somewhat unexpectedly when prosecution witness Captain Ivan Mauer demonstrated that Levy was not alone in his concerns. Mauer, who was probably Levy's closest friend among the Fort Jackson doctors, had been called to testify that he had pleaded with Levy to reconsider his refusal of the order to train.<sup>429</sup> On cross-examination, Mauer, who had succeeded Levy in the dermatology clinic, but who had not been asked to teach aidmen, stated that if aidmen were trained for combat and served as combatants or were used to gain entree into Vietnam villages, he would refuse to teach them medicine.<sup>430</sup> Mauer's testimony was sufficiently dramatic to capture the headline in some newspaper accounts from the day's other big story, testimony by the parade of black soldiers.<sup>431</sup>

As Mauer left the courtroom, someone at the defense table whispered audibly, "[T]here goes our next client."<sup>432</sup> Mauer was not prosecuted, but the rumor that he had been reassigned to Vietnam as punishment for his testimony seemed all too plausible to defense witness Captain Ernest

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426. *Id.* at 2129.

427. *See, e.g., id.* at 1003 (testimony of Capt. Peter Bourne); *id.* at 2338-39 (testimony of Dr. Benjamin Spock).

428. In an out-of-court hearing on the admissibility of Lt. Col. Coppedge's testimony and the testimony of other doctors on the medical ethics question, Brown said: "I wonder if it would be advisable for me to hear testimony as to the respectability of such a belief from other medical sources to show that it's really not so odd with the accused." *Id.* at 2226.

429. On Levy's relationship with Dr. Mauer, see Interview with Dr. Howard Levy, *supra* note 25. Levy's closest friendships, however, were within the local civil rights community. *Id.*

430. Record at 616, 624-26. The dermatology instruction had been farmed out to a civilian doctor.

431. Homer Bigart, *An Army Doctor Backs Capt. Levy: Says He, Too, Would Refuse to Teach Combat Men*, N.Y. TIMES, May 16, 1967, at 8; Tony Burton, *Another Doc Says He Won't Teach Green Berets*, N.Y. DAILY NEWS, May 16, 1967, at 5.

432. Nicholas von Hoffman, *Nuremberg Raised at Capt. Levy's Trial*, WASH. POST, May 16, 1967, at A4.

Porter.<sup>433</sup> Fearing that he would share Mauer's or Levy's fate, Porter repeatedly attempted to invoke the Fifth Amendment when asked his views about teaching the aidmen medicine.<sup>434</sup> While Porter, who had previously limited his instruction to first aid, attempted to avoid saying that he would refuse to teach the aidmen more advanced topics, he nevertheless indicated that he shared Levy's ethical objections to the aidman program.<sup>435</sup> Captain Robert Petres, though repeatedly prevented from answering Morgan's questions regarding the aidman program, also expressed his ethical doubts about Special Forces medicine.<sup>436</sup>

In addition to Peter Bourne and the Fort Jackson doctors, the defense called a number of medical luminaries to lend credence to the medical ethics defense and to bolster the image of Levy as the good doctor. Along with Jean Mayer, Drs. Louis Lasagna,<sup>437</sup> Victor Sidel,<sup>438</sup> and Benjamin Spock<sup>439</sup> testified on Levy's behalf. Each witness testified

433. Record at 2100-01 (testimony of Capt. Ernest Porter). Mauer was not sent to Vietnam.

434. *Id.* at 2072-74, 2089-92.

435. The following exchange is typical:

Q [Shusterman]: "The question is, Dr. Porter . . . ."

A: "Are you asking me, will I continue to train them the way I had trained them?"

Q: "Yes."

A: "I think that could incriminate me. I refuse to answer that."

Q [by law officer]: "How would that incriminate you?"

A: "If you're asking me the way I train them, it would appear, presently, since I have been informed how they are to be trained, and that the way I trained them in the past was improper, and to state that I'm going to continue that way, I think, would be to incriminate myself. To say that they be taught—if I say they're going to be taught all the intricacies of medicine, I think that I would find myself going against the Hippocratic Oath in some way."

*Id.* at 2090.

436. *Id.* at 2176-80, 2182-83.

437. Dr. Lasagna was on the faculty at Johns Hopkins Medical School and had published widely in the field of medical ethics. *Id.* at 2293-95.

438. Dr. Sidel was on the Harvard Medical School faculty. He had published on a variety of topics in medical ethics, including issues relating to medicine and warfare. *Id.* at 2279.

439. Dr. Spock was on the Western Reserve Medical School faculty. A leading figure in the antiwar movement, Spock would soon face trial (along with Rev. William Sloane Coffin, Jr., Mitchell Goodman, Michael Ferber, and Marcus Raskin) for his part in the circulation and publication of *A Call to Resist Illegitimate Authority*, a statement encouraging draft resistance. On the Boston 5 Conspiracy Trial, see JOHN F. BANNAN & ROSEMARY S. BANNAN, *LAW, MORALITY AND VIETNAM: THE PEACE MILITANTS AND THE COURTS* 87-106 (1974); RON CHRISTENSON, *POLITICAL TRIALS: GORDIAN KNOTS IN THE LAW* 131-37 (1986); JESSICA MITFORD, *THE TRIAL OF DR. SPOCK* (1969); Noam Chomsky et al., *Reflections on a Political Trial*, in *TRIALS OF THE RESISTANCE* 74-105

that medical ethics was central to the practice of good medicine; that the separation between the roles of healer and combatant created by the Geneva Conventions was grounded in important ethical and practical considerations; and that medicine must remain nonpartisan and not serve as an instrument for achieving military or political goals.<sup>440</sup> Each, when presented with a hypothetical based on the aidman program, supported Levy's decision as ethically appropriate.<sup>441</sup> In rebuttal the prosecution called several witnesses who testified that they did not see a basis for an ethical objection to the aidman program.<sup>442</sup> Whose ethics witnesses fared best was a matter in the eye of the beholder.<sup>443</sup>

In its medical ethics case the defense sought to deemphasize Levy's political motivation for refusing Colonel Fancy's order. Instead, it cast Levy's act in terms of universal medical principles embodied in the Hippocratic Oath and the American Medical Association Principles of Medical Ethics.<sup>444</sup> To do otherwise would have strengthened the prosecution's efforts to depict Levy as bent on subverting the war effort. Yet, by universalizing the argument, the defense blunted the impact of its critique of the Army's use of medicine in Vietnam.

Also, the attempt to cloak Levy's act under the mantle of the good, apolitical doctor created contradictions within the medical ethics defense. Shusterman was right in characterizing Levy's refusal to train aidmen as bound up with his opposition to U.S. intervention in Vietnam. Levy would say retrospectively:

[A]t that time . . . I had very strong feelings, but they were largely political feelings. I knew what the war in Vietnam was

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(1970).

440. Record at 2269-70, 2274-75 (testimony of Jean Mayer); *id.* at 2280-81, 2283-84, 2287-88 (testimony of Dr. Victor W. Sidel); *id.* at 2299-302, 2307-08 (testimony of Dr. Louis Lasagna); *id.* at 2337-40 (testimony of Dr. Benjamin Spock); *see also id.* at 2324 (testimony of Capt. Peter G. Bourne).

441. *Id.* at 2270-71, 2274 (testimony of Jean Mayer); *id.* at 2283 (testimony of Dr. Victor W. Sidel); *id.* at 2299-300, 2304-05 (testimony of Dr. Louis Lasagna); *id.* at 2341 (testimony of Dr. Benjamin Spock).

442. The prosecution called Drs. William J. DeMaria, Amos Neill Johnson, Edward E. Kimbrough, Maj. Billy E. Jones, Capt. Sander S. Shapiro, and Maj. Craig Llewellyn.

443. Compare Telephone Interview with Col. Earl V. Brown, *supra* note 45, and Telephone Interview with Richard Shusterman, *supra* note 127 (expressing view that prosecution medical witnesses were more convincing than defense witnesses) with Interview with Dr. Howard B. Levy, *supra* note 25 ("People . . . love Ben Spock . . . Craig Llewellyn just ain't no match for Ben Spock.").

444. Dr. Spock testified that general medical principles, not his opposition to the war, undergirded his support for Levy's decision. Record at 2341-42.



all about, and I was very profoundly . . . opposed to that war. So, much of what I said and did was colored by that background. Had it not been that, who the hell knows what I would have done. . . . To me, medical ethics is not just an abstraction out there. If it were just an abstraction, I might not have done anything. I might have been just like all the other doctors. But, in the background was my opposition to the war.<sup>445</sup>

As Levy noted, his response to the aidmen program was not typical of the other doctors. Although Ira Glasser would later report that other Army doctors who were not permitted to travel to Fort Jackson for the court-martial were prepared to testify that they shared Levy's objections to training the aidmen, there could be little doubt that Levy did not represent the dominant view in the medical profession.<sup>446</sup> The effort to frame Levy's objection as a doctor's response was undermined by its atypicality.

The attempt to identify Levy with the image of the good doctor also left the defense vulnerable to criticism that drew on less flattering images of doctors as monopolists and elitists.<sup>447</sup> The prosecution cast Levy as an elitist who would sooner see American soldiers denied medical care than permit paramedical personnel to attend to them.<sup>448</sup> Indeed, the prominence of Levy's medical ethics witnesses in contrast to such homespun prosecution witnesses as small-town North Carolina practitioner Amos Johnson may also have undermined Levy's medical ethics defense.<sup>449</sup>

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445. Interview with Dr. Howard B. Levy, *supra* note 25.

446. IRA GLASSER, JUDGMENT AT FORT JACKSON: THE TRIAL OF HOWARD LEVY M.D. (Southern Student Organizing Committee) 4 (1967), reprinted in CHRISTIANITY AND CRISIS, Aug. 7, 1967. More probably the American Medical Association expressed the dominant view within the profession. See *infra* note 474.

447. This image of the profession has a long history. For discussions of nineteenth century characterizations of the medical profession as aristocratic and monopolistic, see generally JOSEPH F. KETT, THE FORMATION OF THE AMERICAN MEDICAL PROFESSION: THE ROLE OF INSTITUTIONS, 1780-1860, at 97-131 (1968); WILLIAM G. ROTHSTEIN, AMERICAN PHYSICIANS IN THE NINETEENTH CENTURY: FROM SECTS TO SCIENCE 123-74 (1972).

448. Record at 2003-04 (cross-examination of Marjorie Helton); *id.* at 2009-10 (cross-examination of Sgt. Mitchell Helton). Elinor Langer detected this tactic and discussed it in her article reporting the case. See Elinor Langer, *The Court-Martial of Captain Levy: Medical Ethics v. Military Law*, 156 SCIENCE 1346, 1350 (1967); see also Telephone Interview with Richard Shusterman, *supra* note 127 (characterizing Levy's medical ethics defense as elitist).

449. See Telephone Interview with Col. Earl V. Brown, *supra* note 45 (discussing relative impact of Johnson's testimony and the testimony of Levy's witnesses). Johnson described how he trained a black paramedic to assist him in his practice. His assistant

*New York Times* correspondent Homer Bigart called the medical ethics defense "eloquent." "Yet," he added, "in the minds of the ten stony-faced career officers [of the court-martial panel], there must have remained a simplistic but commonsense notion that the Green Beret medics did more good than harm."<sup>450</sup> In the end, the court-martial panel was not asked to decide the issue.

Brown ruled that Levy's medical ethics objections to teaching medicine to the aidmen did not give rise to a defense. He instructed the court-martial that the order was lawful and that Levy was not entitled to disobey on the grounds of a conflict between the order and his notion of medical ethics.<sup>451</sup> Colonel Brown has said that he would have been very troubled and might have let the medical ethics defense go to the court-martial had Levy shown that Special Forces were using the aidmen as a recruiting device in Vietnamese villages.<sup>452</sup> He is also convinced that Levy made no such showing at the court-martial. Perhaps Brown's perspective on the medical ethics issue has evolved over time, and he was far less willing to recognize so unprecedented a defense at the time than he now believes. Perhaps the evidence of the political and military use of medicine was overwhelmed and lost in the untidiness of the case. Or perhaps, as was true of the war crimes evidence, the difficulty of acknowledging that these acts were ours and not some other nation's made it all too easy not to see what had been shown.

Brown's ruling left unanswered the questions whether and when a doctor could be compelled to follow military orders that required that she or he disregard personal beliefs regarding the dictates of medical ethics.<sup>453</sup> At first blush, the claim that an Army doctor might refuse to obey a facially lawful order on medical ethics grounds closely resembles

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was trusted by both Johnson and his patients and performed a large array of procedures skillfully without immediate supervision. Record at 2391-94 (testimony of Dr. Amos Johnson).

450. Homer Bigart, *Military Justice: The Issues Went Beyond the Case of Captain Levy*, N.Y. TIMES, June 4, 1967, at D4.

451. Record at 2591.

452. Telephone Interview with Col. Earl V. Brown, *supra* note 45.

453. For a recent variant on the issue involving conflicting demands of obedience to military and religious authority, see Eric Schmitt, *Military Chaplain Fights a Battle over Loyalties*, N.Y. TIMES, Dec. 21, 1993, at A20 (describing Air Force Chaplain Garland L. Robertson, who was disciplined and discharged after he published a letter shortly before the start of the Persian Gulf War in which he questioned the morality of using force against Iraq). The question of conflicting loyalties and professional ethical obligations within the military has received scant attention in nonlegal sources as well. For one exception, see Arlene K. Daniels, *The Captive Professional: Bureaucratic Limitations in the Practice of Military Psychiatry*, 10 J. HEALTH & SOC. BEHAV. 255 (1967).

a claim of selective conscientious objection, and it is not surprising that so construed, the argument was fated to fail.<sup>454</sup> Beyond the claim of selective conscientious objection, however, lay a more potent argument, though one that never quite gelled at trial, that suggested that the military's power to direct the conduct of its doctors was subject to the constraints of law.

If such constraints did exist, they derived from two sources. First, as a signatory to the Geneva Conventions, the U.S. could not use its military medical personnel as combatants. Most directly, as Levy's defense argued, this meant that using medical personnel like the aidmen to realize military objectives constituted a violation of the laws of war. Therefore Levy might legitimately refuse to abet such violations. More indirectly this allowed the defense to argue, or at least to suggest, that Levy's role itself had been transformed from physician to an ancillary to combat in violation of the Conventions' separation of the roles of healer and combatant.

Somewhat more perilously, the defense might have drawn on the Supreme Court's suggestion in *Orloff v. Willoughby*<sup>455</sup> that the government may not specially subject doctors to the draft because of their professional skills, but deny them the opportunity to practice medicine once conscripted.<sup>456</sup> The defense could have used this suggestion to argue that requiring Levy to violate his understanding of medical ethics would be tantamount to the deprivation condemned in the *Orloff* dicta. The defense might have argued, in other words, that because the practice of medicine necessarily entails the freedom to follow one's understanding of the dictates of medical ethics, any interference with Levy's ability to make ethically informed medical decisions would constitute an assignment to nonmedical duties. The defense medical ethics witnesses had laid the foundation for such an argument by contending that a doctor denied the ability to follow his conscience and training regarding medical ethics "would stop . . . in his tracks within an hour of getting up in the morning."<sup>457</sup> Yet the defense never explicitly drew the connection from this testimony to the *Orloff* argument.

*Orloff*, a cold-war-era decision, was certainly a two-edged sword. It upheld the Army's right to draft and retain, without commissioning as

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454. Recently, however, the Department of Defense has accepted precisely that sort of claim made by military doctors who have refused to perform abortions. According to a Department spokesperson, the military "cannot force doctors who cite the Hippocratic oath to perform the procedure." *Morning Edition: Abortions Still Not Performed at Overseas Bases* (National Public Radio broadcast, June 14, 1993).

455. 345 U.S. 83 (1953).

456. *Id.* at 87-88.

457. Record at 2339 (testimony of Dr. Benjamin Spock).

an officer, a doctor who had refused to sign a loyalty certificate and to answer questions regarding membership in various "subversive" organizations. While Justice Jackson's majority opinion stated that the government had a legal obligation "to assign Orloff to duties falling within 'medical and allied specialist categories,'" it also proclaimed that the military was a specialized, largely self-regulating community entitled to enormous deference and minimal scrutiny in its assignments of duty.<sup>458</sup> Indeed, *Orloff* would eventually serve as a foundation for the Supreme Court's characterization of the military as a "society apart from civilian society," upon which it buttressed its decision in *Parker v. Levy*.<sup>459</sup>

#### *D. Hearts and Minds*

Who cared about the defense? That wasn't what this was all about. I mean, the part that I was concerned about, I thought we won.

Howard Levy<sup>460</sup>

Bereft of defenses, Morgan attempted to recast the case as one in which the local command had acted rashly and set in motion a chain of uncontrolled events that would result in tragedy for Levy, the Army, and the nation, unless the court-martial acted heroically and stopped its progression. Everyone recognized, he argued, that Levy did not belong in the Army.<sup>461</sup> The process leading toward conviction should never have begun, because Levy should never have been at Fort Jackson. Once begun, the process should never have culminated in a court-martial. Morgan told the court-martial: "I think, looking back on it, that each of you knows that . . . there are procedures all the way along the line to stop this case from coming here. And that in this rather terrifying comedy of errors, we wind up now in a case . . . that has grown to monumental proportions."<sup>462</sup>

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458. *Orloff*, 345 U.S. at 92-95.

459. *Parker v. Levy*, 417 U.S. at 744. When the defense eventually did draw on *Orloff* in the Middle District of Pennsylvania habeas proceedings, the focus of the case had so shifted that the defense only hinted at the argument described above and focused, instead, on Justice Black's statement in his dissenting opinion that the military could not treat Dr. Orloff as a "pariah" because he exercised his constitutional rights. District Court Habeas Brief, *supra* note 68, at 159-63.

460. Interview with Dr. Howard Levy, *supra* note 25.

461. Record at 2569.

462. *Id.*

Morgan insisted that to convict Levy would be to punish him for "words, political beliefs and opinions."<sup>463</sup> Such a conviction not only would make an unnecessary martyr, it would tarnish the image of the military and harm the nation. Morgan explained: "I've felt ever since December, when we got into this case, that it wasn't just Howard Levy who was on trial, and it's proved to be pretty true, I think."<sup>464</sup>

Morgan invited the court-martial to transform the story into one about their own heroism and dedication to country and the Army.<sup>465</sup> He told them that someone had to stop the chain of events that had spun out of control and that only they could.<sup>466</sup> Asking them to write the story's end, he said: "I know that you know that you have an opportunity for greatness, and there's a call for that greatness."<sup>467</sup>

It is not clear what impact Morgan's closing argument had on the court-martial. On June 2, 1967, the panel found Levy guilty of the order charge and the two speech charges that did not relate to the Hancock letter.<sup>468</sup> They convicted him of the lesser included offenses of writing to Hancock "with culpable negligence," rather than with the intent to impair his performance.<sup>469</sup> Believing that the court-martial finding was tantamount to an acquittal on the letter charges, the prosecution moved to dismiss those charges.<sup>470</sup> The following day, the court-martial imposed a three-year sentence.<sup>471</sup>

Within the Fort Jackson courtroom, a particular construction of the case prevailed. The war escaped condemnation and was safely restored to its place as a backdrop, rather than as a matter for legal dispute. According to that construction, bad things sometimes happened in Vietnam, but such is the nature of war. Besides, we had a civilizing influence on an otherwise primitive people. The allegiances of Army officers were deemed to take precedence over the oaths of doctors. And

463. *Id.* at 2566.

464. *Id.* at 2575.

465. This genre of closing argument casting the jury as the hero may be one of the standard scripts in the defense attorney's narrative quiver. For a detailed analysis of a closing argument built upon a narrative of jury heroism, see Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

466. Record at 2574.

467. *Id.* at 2586.

468. *Id.* at 2617.

469. *Id.* at 2618.

470. *Id.* at 2619.

471. *Id.* at 2634. For a discussion of the sentence, see Telephone Interview with Col. Earl V. Brown, *supra* note 45 (noting that the three-year sentence did not reveal much about the jury's reaction to Levy and to Morgan's argument, and expressing surprise that the convening authority did not reduce the sentence).

military discipline was restored. The prosecution's vision of the case by and large prevailed. Law Officer Brown and the court-martial agreed that despite some interesting detours, the case had been about Levy and his acts of defiance.

Outside the courtroom, the meanings gleaned from the case were much more varied. Within the medical community and, particularly, the military, the case had an immediate impact. The case helped to crystallize a medical resistance movement. Galvanized by the case, medical students signed and circulated pledges not to serve in the military.<sup>472</sup> Others in the medical community who were not confronted with the immediate issue of the draft also seized on the case to help create opposition to the war. Opponents of the war within the medical community report having felt challenged by Levy's act to consider whether they should be doing more.<sup>473</sup> Although they always remained a minority within the medical community,<sup>474</sup> the medical resistance

472. See *Student Dissent on Vietnam*, 278 *NEW ENG. J. MED.* 282 (1968) (containing "A Pledge of Nonparticipation" and reporting that in the New York City area, at least 90 medical students had signed the pledge not to serve in Vietnam); *The Doctors' Dilemma*, *THE NATION*, May 29, 1967, at 676-77; *The Draft: Protest, Debate, Renewal*, *NEWSWEEK*, May 22, 1967, at 25; *Physicians Urge Draft Revision*, *BALTIMORE SUN*, May 18, 1967, at 1; *Spock on a Visit Backs Capt. Levy*, *N.Y. TIMES*, Nov. 12, 1967, at 5; Statement of Arthur Kaufman, *LIBERATION*, Aug. 1967, at 22 ("Let us serve notice to the Army and to the administration that if they think Doctor Levy's non-cooperation is an isolated affair, they haven't seen anything yet."). Ironically, while Levy initially supported medical draft resistance, he ultimately advocated that doctors enter the military and work from within to end the war and reform the military. For an expression of the former view, see Letter from Dr. Howard B. Levy to Charles Morgan, Jr. (Dec. 16, 1967), in *Levy Litigation Files*, *supra* note 27. For expressions of the latter view, see Smithson, *supra* note 46; Dr. Reuben Barr, *What Ever Happened to Captain Levy*, *HOSP. PHYSICIAN*, May 1970, at 65, 139-40.

473. Telephone Interview with Dr. Benjamin Spock (May 11, 1993) (recalling his admiration for Levy's courage and describing Levy as more courageous than he, although also noting a feeling of foreboding that he might end up imprisoned after visiting Levy following Levy's confinement); see also Dr. Arthur S. Blank, Jr., *The Army and Dr. Levy*, *LIBERATION*, Aug. 1967, at 20.

474. In response to Levy's court-martial, the American Medical Association's House of Delegates unanimously approved a resolution declaring:

There is no conflict between the ethics of the medical profession and the oath which officers must take when sworn into the Armed Services. This oath, applicable to medical and other officers, provides that all officers shall support and defend the Constitution of the United States against all enemies, foreign and domestic, that they will bear true faith and allegiance to the Constitution of the United States and that they take such obligation freely and without any mental reservation or purpose of evasion. There is nothing in this oath which conflicts in any way with the ethics of the medical profession.

*AMERICAN MEDICAL ASSOCIATION, HOUSE OF DELEGATES, Resolution 89* (June 18, 1967), *quoted in United States v. Levy*, 39 C.M.R. 672, 677 n.3 (1968); see also Donald

remained a voice of opposition to the war and the locus of a counter-interpretation of the *Levy* case.

*Levy's* impact within the military was powerful and immediate. News of the court-martial prompted expressions of support from other soldiers.<sup>475</sup> *Levy* recalls that he was greatly surprised at the large number of GIs who flashed him a peace sign or a clenched fist salute at the time of the court-martial.<sup>476</sup> During the court-martial, five Fort Jackson GIs invoked *Levy's* stand on the Green Berets and refused to carry their weapons.<sup>477</sup> According to Army documents, three Fort Jackson enlisted men refused orders to go to Vietnam.<sup>478</sup> Fort Jackson

Janson, *Doctors Urged to Combat Government Planning*, N.Y. TIMES, June 21, 1967 at A24 (discussing House of Delegates vote and describing it as a "rejection of the contention of Dr. Howard B. Levy that the physician's Hippocratic Oath might conflict with orders from military superiors"); Telephone Interview with Dr. Benjamin Spock, *supra* note 473 (guessing that perhaps as much as 90% of the profession either did not notice the *Levy* case or considered *Levy* "very deviant" and believed that he was using ethics as an excuse for being uncooperative, and adding that the AMA "felt responsibility for making it clear that *Levy* didn't speak for them"). For other indications of support for Dr. *Levy* within the medical community in addition to materials previously cited, see *We Support Capt. Howard Levy, M.D.*, N.Y. TIMES, May 7, 1967, at D4 (advertisement sponsored by the New York Medical Committee to End the War in Vietnam, signed by 672 doctors, nurses, medical students, and other health professionals); *Captain Levy Backed by Pickets Here*, N.Y. TIMES, May 28, 1967, at A5; Letter from Dr. Lytt I. Gardner, National Chairman, the Physicians Forum, to Charles Morgan, Jr. (May 12, 1967), in *Levy* Litigation Files, *supra* note 27 (noting resolution of the organization supporting *Levy*). Doctors and medical students also organized the Committee for Howard *Levy, M.D.*, which circulated petitions in support of *Levy*. See Committee for Howard *Levy, M.D.*, materials, in *Levy* Litigation Files, *supra* note 27.

475. Six soldiers from Fort Sill, Oklahoma, telegraphed their support for *Levy*. See *Soldiers Support Levy*, THE BOND, June 23, 1967, at 3. This was followed by other statements of support. See *Another GI Speaks Out*, THE BOND, July 21, 1967, at 1 (statement of Pvt. Richard Perrin); *Levy Gets New Backing*, THE BOND, July 7, 1967, at 1 (soldiers from Fort Sheridan, Ill.).

476. Interview with Dr. Howard B. *Levy*, *supra* note 25.

477. Letter from Howard *Levy* to Charles Morgan, Jr. (July 14, 1967), in *Levy* Litigation Files, *supra* note 27 (letter from jail abstracting conversation from Col. Herbert Meeting, Jr., Fort Jackson Staff Judge Advocate, in which Meeting told *Levy* about the five GIs, how they were put in the stockade and were persuaded to end their protest after *Levy's* conviction).

478. Memorandum to Secretary of the Army from Brig. Gen. Kenneth J. Hodson (June 5, 1967), in JAG Files, *supra* note 77 (noting in discussion a paper prepared for meeting between the Secretaries of the Army and Defense regarding the issue of post-trial confinement and other issues relating to the *Levy* case which stated that "[a]t the present time three enlisted men at Fort Jackson are in pre-trial confinement for refusing to obey orders to depart for Vietnam"); Col. Waldemar Solf, Talking Paper 2 (June 8, 1967), in JAG Files, *supra* note 77.

soon became the target of the first GI coffeehouse.<sup>479</sup> As an early resister, Levy became a part of the folklore of the GI movement.<sup>480</sup> Often, the specifics of the case were lost, replaced by the image of Levy as someone who had stood up to the Army, said no to the war, and had willingly faced punishment rather than abandon his convictions.<sup>481</sup> Once released from prison<sup>482</sup> Levy became a frequent speaker both at

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479. Fred Gardner, *Hollywood Confidential: I*, 3 VIETNAM GENERATION 50, 50 (1991). The idea of the GI coffeehouse was to provide a place off base, where GIs could talk about the war and their other concerns, and where a GI movement could naturally grow. *Id.* at 51-52; Interview with Dr. Howard B. Levy, *supra* note 25.

480. Conversation with Skip DeLano (July 20, 1993).

481. For a typical example of a garbled account of the case, see Citizens Commission of Inquiry, *Introduction to THE DELLUMS COMMITTEE HEARINGS ON WAR CRIMES IN VIETNAM*, at vii (The Citizens' Commission of Inquiry ed., 1972). Levy recalls that when he was transferred from Fort Jackson to the United States Disciplinary Barracks at Fort Leavenworth, he arrived too late for officers' mess and was brought in to be fed while the enlisted prisoners were eating (even at the disciplinary barracks, the privileges of rank inhered). As he entered the room, he received a standing ovation from the enlisted prisoners, many undoubtedly supporters of the war who were applauding Levy not for the substance of his position but for standing up to the Army. Interview with Dr. Howard B. Levy, *supra* note 25; see also Letter from Dr. Howard B. Levy to Charles Morgan, Jr. (Dec. 15, 1967), in Levy Litigation Files, *supra* note 27 (describing reception at Leavenworth as "tumultuous" and stating that "we've got about 1400 sympathizers here.").

482. After Levy's conviction and sentencing, the issue of bail pending appeal became a critical part of Levy's case. The *Manual for Courts-Martial* vests broad discretion in the Commanding Officer to either hold or release the prisoner pending appeal. M.C.M., *supra* note 138, ¶ 21(d). The Acting Commander, Brig. Gen. E.B. Roberts, denied Levy's requests for release pending further review. Letter from Brig. Gen. E.B. Roberts to Charles Morgan, Jr. (June 3, 1967), in JAG Files, *supra* note 77; Letter from Brig. Gen. E.B. Roberts to Charles Morgan, Jr. (June 12, 1967), in JAG Files, *supra* note 77; see also Memorandum from Brig. Gen. Kenneth J. Hodson, Acting the Judge Advocate General, to the U.S. Army Chief of Staff (June 15, 1967), in JAG Files, *supra* note 77. Secretary of the Army Stanley Resor similarly denied Levy's request for release pending appeal. Letter from Alfred B. Fitt, General Counsel of the Army, to Charles Morgan, Jr. (June 15, 1967), in JAG Files, *supra* note 77.

In making his decision, Gen. Roberts relied partly on an FBI report that an unnamed informant had learned from Levy's girlfriend that Levy expected to be convicted and intended to flee to a communist country from whence he would "denounce the United States by every means available to him." FBI Memorandum Titled "Howard B. Levy" (May 31, 1967), in JAG Files, *supra* note 77. The informant stated further than Levy would eventually seek to return to the U.S. The report misidentified Levy's girlfriend, Trina Sahli, as "Tina or Nina (last name unknown)." *Id.* The Defense Department and the Army felt some discomfort in relying on this confidential report. A memo in the litigation files states: "Vance [probably Deputy Secretary of Defense Cyrus Vance] read news story & called Rezor [sic] & said we can win w/o stooping to that confidential informer," and that the Army decided to "play[] down" the FBI report. Memorandum from Philip M. Surrey [?] (June 29, 1967) (signature illegible), in JAG Files, *supra* note



GI protests and within the larger antiwar community.<sup>483</sup> That these groups sought him as a speaker suggests that many did not accept the construction of the case that prevailed at Fort Jackson. Indeed, the existence of a GI movement stood as a rejection of that interpretation.

That Dr. Levy served just shy of twenty-six months in prison is testament to the coercive power of the law. That his case inspired acts of resistance by soldiers, medical students, and others, that it helped some soldiers and civilians alike to see the potential for a GI antiwar movement, and that it was yet another instance demonstrating that one

77; see also Draft of District Court Brief, in JAG Files, *supra* note 77 (noting that the sentence "The information as to intent to flee would of itself warrant the restraint imposed" was to be "deleted per Gen. Fuller's direction"). Nevertheless, the affidavit submitted by Gen. Roberts to the district court recited the content of the FBI report. See Affidavit of Brig. Gen. E.B. Roberts (June 26, 1967), in JAG Files, *supra* note 77.

Levy unsuccessfully sought relief from Gen. Roberts' adverse decision both within the military justice system and the federal courts. See *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967); *Levy v. Resor*, Civ. No. 67-442 (D.S.C. July 5, 1967), *aff'd*, 384 F.2d 689 (4th Cir. 1967) (per curiam), *cert. denied*, 389 U.S. 1049 (1968).

On August 2, 1969, Justice Douglas, who had dissented from the denial of certiorari in Levy's bail case, granted Levy's motion for bail pending appeal in his federal habeas proceeding. *Levy v. Parker*, 396 U.S. 1204 (1969). At the time of his release Levy had nine days left to serve on his sentence.

When Judge J. Robert Elliot ordered Lt. William Calley, Jr., released on bond pending his appeal, he noted Levy's release as precedent for his action. Without any sense of irony the Judge stated: "The only difference which I can observe in the position of Lt. Calley as compared to that of Captain Levy is that Captain Levy was convicted for refusal to perform a military duty, whereas Lieutenant Calley's conviction arose from his willing service in the armed forces." See Wayne King, *Calley Free on \$1000 Bond by Order of Civilian Judge*, N.Y. TIMES, Feb. 28, 1974, at A1, A17.

483. See Interview with Dr. Howard B. Levy, *supra* note 25; Short & Seidenberg, *supra* note 24, at 67-69; Smithson, *supra* note 46. Levy's antiwar activities were reported both in the GI press and in his Army Intelligence files. For a sampling, see *GI's United March for Peace*, BRAGG BRIEFS, Nov. 1969, at 1, 6; *November Moratorium—New Twist*, AS YOU WERE, Nov. 1969, at 1, 2 ("Published Underground Of, By, and For G.I.'s At The Fort Ord Military Complex."); Levy Army Intelligence File, *supra* note 25, at 2-4 (speech in Monterey, Cal., in conjunction with November Moratorium); *id.* at 241-43 (speech given at cocktail party sponsored by the ACLU in Moorestown, N.J., Oct. 1970); *id.* at 244-45 (demonstration at Fort Gordon—Augusta, Ga., area, July 11, 1970); *id.* at 251-52 (demonstration sponsored by GI's and WAC's United Against the War, Fort McClellan/Anniston, Ala., May 16, 1970); *id.* at 290-91 (demonstration at University of South Carolina protesting the closing of the UFO Coffee House [GI Coffee House in Columbia/Fort Jackson area], Jan. 18, 1970); *id.* at 295-97 (speech to University of Kentucky medical students, Jan. 19, 1970); *id.* at 378-81 (demonstration sponsored by GI's United Against the War in Vietnam at Fort Bragg/Fayettesville, N.C., area, Oct. 11, 1969); *id.* at 384-85 (speeches at Duke University and University of North Carolina, Oct. 10, 1969).

could find a powerful critique of the war even within law's language, is testament to the limits of that coercive power.

#### CONCLUSION

I stood before the judge that day as he refused me  
bail.

I knew that I would spend my time awaiting trial in  
jail.

I said, "There is no justice," as they led me out the door.

The judge said: "This isn't a court of justice, son.

This is a court of law."

Billy Bragg<sup>484</sup>

I remember once I was with [Justice Oliver Wendell Holmes]; it was a Saturday when the Court was to confer. . . . When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: . . . "That is not my job. My job is to play the game according to the rules."

Judge Learned Hand<sup>485</sup>

I thought we were going to lose, before the court-martial, at the court-martial, and after the court-martial . . . . [E]ven in those days, I had very little faith in this legal system.

Howard Levy<sup>486</sup>

By the time the Supreme Court decided *Parker v. Levy* in 1974, the U.S. was no longer in Vietnam in a combat role. The war was similarly no longer actively in the case. Hidden beneath exchanges in the Justices' opinions about the changing or enduring nature of the military and of moral proscriptions, lay a debate about the war and the manner in which it was fought. The opinions also hid a battle over the symbols with which

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484. BILLY BRAGG, *Rotting on Remand, on WORKERS PLAYTIME* (Elektra Records 1988).

485. LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 306-07* (Irving Dilliard ed., 3d ed. 1960). Judge Hand added: "I have never forgotten that. I have tried to follow, though oftentimes I found that I didn't know what the rules were." *Id.* at 307.

486. Interview with Dr. Howard B. Levy, *supra* note 25.

best to debate these questions that were permitted brief expression in what in other times would have been an obscure makeshift courtroom in South Carolina. The racial imagery, the competing constructions of the Vietnamese and of black soldiers, which had so occupied the stage at trial, and which, in so doing, had doubtless distracted attention from the debate about the war, also had blended into the background, obscured by the Court's debate. In place of a discussion of whether there were any constraints on the manner in which Americans would make war, there were formal, technical arguments about the extension of the vagueness and overbreadth doctrines to the military. A case that had been overflowing with political heat now imparted the relative coolness of a constitutional debate over two statutory provisions that would not touch most Americans.<sup>487</sup> It masked its political origins.<sup>488</sup>

James Gibson and others have noted that few Americans during the mid- and late 1970s wanted to talk about the Vietnam War.<sup>489</sup> There was, instead, a collective evasion. Viewed in this context, *Parker v. Levy*'s suppression of the war and failure to confront the issues related to how it was fought are unremarkable.

But the courts' evasions in the *Levy* case, and in other cases relating to the war, were not the cultural or psychological products of the mid-1970s. From the first, these courts were unwilling to wrestle with the legality of the war in any of its aspects. As Anthony D'Amato and Robert O'Neil noted in 1972: "Few controversies in our history have so clearly warranted resolution of conflicting constitutional claims at the highest level. Yet few major issues—perhaps none—have been so persistently avoided, postponed and deferred by the courts than the Indochina War."<sup>490</sup> The United States Supreme Court repeatedly avoided deciding cases putting into question the legality of the war.<sup>491</sup>

487. Of course, the issue of soldiers' rights, which remained in the case, was no less political, but it was not at the center of most Americans' political concerns.

488. If the politics of such an overtly political case are so easily buried, one wonders how much more effectively courts mask the more subtle politics of more mundane cases.

489. GIBSON, *supra* note 192, at 3-11; Fuchs, *supra* note 185.

490. ANTHONY A. D'AMATO & ROBERT M. O'NEIL, *THE JUDICIARY AND VIETNAM* 3 (1972). See generally BANNAN & BANNAN, *supra* note 439; ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 141-53 (1982); LAWRENCE R. VELVEL, *UNDECLARED WAR AND CIVIL DISOBEDIENCE: THE AMERICAN SYSTEM IN CRISIS* 113-80 (1970).

491. See, e.g., *DaCosta v. Laird*, 405 U.S. 979 (1972); *Orlando v. Laird*, 404 U.S. 869 (1971); *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Mora v. McNamara*, 389 U.S. 934 (1967); *Mitchell v. United States*, 386 U.S. 972 (1967).

Generally, lower federal courts were no more receptive to these issues.<sup>492</sup> The courts' performance in the face of the crisis created by

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492. For examples of courts declaring these questions nonjusticiable or finding no standing to raise them, see *Velvel v. Nixon*, 415 F.2d 236, 237-39 (10th Cir. 1969), *aff'g* 287 F. Supp. 846 (D. Kan. 1968); *United States v. Battaglia*, 410 F.2d 279, 284 (7th Cir. 1969); *Simmons v. United States*, 406 F.2d 456, 460 (5th Cir. 1969); *Ashton v. United States*, 404 F.2d 95, 97 (8th Cir. 1968), *cert. denied*, 394 U.S. 960 (1969); *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir. 1967), *aff'g* 252 F. Supp. 819 (D.D.C. 1966); *United States v. Mitchell*, 369 F.2d 323, 324 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge panel), *aff'd*, 411 U.S. 911 (1973); *Davi v. Laird*, 318 F. Supp. 478 (W.D. Va. 1970); *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968); *Medeiros v. United States*, 294 F. Supp. 198 (D. Mass. 1968). Ultimately, the United States Courts of Appeal for the First and Second Circuits both addressed the issue of the war's legality, and each rejected claims that the war was illegal. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *aff'g* *Orlando v. Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970) and *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970). Judge William Sweigert of the Northern District of California, while not reaching the ultimate question of the war's legality, also held that the issue was justiciable and that several reservists had standing to raise it. *Mottola v. Nixon*, 318 F. Supp. 538, 553-54 (N.D. Cal. 1970) (denying the government's motion to dismiss), *rev'd*, 464 F.2d 178, 183 (9th Cir. 1972). Similarly, Judge Orrin Judd, who had ruled in the government's favor in *Berk*, granted Congresswoman Elizabeth Holtzman's and several airforce servicemen's request for a declaratory judgment that the continued bombing of Cambodia during the summer of 1973 was unauthorized by Congress and therefore illegal, and for an order enjoining the bombing. *Holtzman v. Schlesinger*, 361 F. Supp. 553, 566 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973) (holding that the issue was a nonjusticiable political question and that, at any rate, the bombing was authorized by Congress and that plaintiffs lacked standing), *cert. denied*, 416 U.S. 936 (1974). On *Holtzman*, see WALKER, *supra* note 131, at 287. One other court that did hear testimony about the war was the Wisconsin court that tried Karlton Armstrong for the 1970 bombing of the Army Math Research Center at the University of Wisconsin, in which Dr. Robert Fassnacht was unintentionally killed and five other people were injured. Pursuant to a plea agreement, Armstrong pleaded guilty to second degree murder, arson, and possession of explosives. At his sentencing hearing, the defense called 41 witnesses, including several Vietnam veterans and prominent figures in the antiwar movement, in an effort to put the war on trial and provide a context for Armstrong's acts. See RON CHRISTENSON, *POLITICAL TRIALS: GORDIAN KNOTS IN THE LAW* 147-63 (1986) ("The Wisconsin Bomber: Trial of a Frustrated Dissenter").

That judicial evasion was not always the equivalent of judicial neutrality is perhaps most clearly demonstrated in the first *Mitchell* decision. Judge Timbers, in rejecting as irrelevant *Mitchell's* challenges to the war, remarked on "the sickening spectacle of a 22 year old citizen of the United States seizing the sanctuary of a nation dedicated to freedom of speech to assert such tommyrot and . . . the transparency of his motives for doing so." *United States v. Mitchell*, 246 F. Supp. 874, 899 (D. Conn. 1965); see also *id.* at 907-08 ("Remarks of District Court at Time of Sentencing Mitchell on September 15, 1965," noting with satisfaction that "[t]he so-called 'cause' which Mr. Mitchell espouses apparently has fallen on deaf ears" and has instead "galvanized determination on the part of upright loyal citizens of this country to rally to the support of their government in a

the war prompted Robert Cover to write "A Polemic Against the American Judiciary."<sup>493</sup> Cover compared the contemporary judiciary to judges who enforced the fugitive slave law during the 1850s. He concluded that by enforcing the selective service law against resisters and by refusing to hear, and to help craft, innovative challenges to the war, the judiciary had become an "accomplice[] in that which the Executive perpetrates."<sup>494</sup>

This pattern of evasion makes the willingness of the *Levy* court-martial to permit ventilation of issues related to the war all the more striking, irrespective of the restrictions, both legal and practical, that were placed on the discussion. Yet the restrictions were real. *Levy's* price for litigating the war at his court-martial was a significant loss of control over his own arguments.

Good legal explanations lay behind the *Levy* case's narrowing on appeal and on habeas review. The transformation of the Nuremberg question into a factual issue and the limits on the courts' jurisdiction in the habeas proceeding meant that tools were available to end the discussion of the war begun at the court-martial. Moreover, the defense played an active role in refocusing the case. While never abandoning its arguments about the war itself, the defense shifted its emphasis to questions of servicemen's rights and to the argument that the court-martial had been instigated to punish *Levy* for his political views and civil rights activities.<sup>495</sup> Yet the tools were also available for a court that was

time of need"). In response to this tone, the U.S. Court of Appeals for the Second Circuit, which vacated the conviction and ordered a new trial, suggested that Mitchell's retrial be assigned to a different judge. *United States v. Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966). For a discussion of the Mitchell case, see BANNAN & BANNAN, *supra* note 439, at 23-39.

493. Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003, 1003 (1968) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (1856)). Cover returned to this theme in a 1984 lecture. See ROBERT COVER, *The Folktales of Justice: Tales of Jurisdiction*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 173, 195-201 (Martha Minow et al. eds., 1993). In his article Cover described the Supreme Court's decision in the *Levy* case as "the final and most grotesque instance of this averting of the eyes." *Id.* at 198 n.74.

494. Cover, *supra* note 493, at 1008 n.31. *But cf.* BASKIR & STRAUSS, *supra* note 43, at 73-82 (describing pockets of resistance by federal judges, along with their clerks and some prosecutors and jurors, to strict enforcement of the selective service laws in the mid-1960s and growing resistance as the war continued).

495. The shift in emphasis is manifest in the District Court Habeas Brief and accompanying affidavits ("Exhibit C"). The bulk of the 272-page brief, including, but not restricted to, the first 158 pages, was dedicated to arguing that the prosecution was politically and racially motivated, and all of Exhibit C's 148 pages were intended to set the factual foundation for that argument. See District Court Habeas Brief, *supra* note 68.

willing to hear argument, especially regarding the medical ethics defense.<sup>496</sup> Instead, the evasion continued.

That the courts once again failed to engage the legality of the war raises, in turn, a number of questions for anyone interested in the recent history of American law and legal institutions. First, could the courts have been adequate fora for the resolution of these issues, or was their evasion inevitable given political, institutional, or constitutional constraints?

Second, how did lawyers and non-lawyers perceive the courts' repeated unwillingness to confront the central legal issues posed by the war? Did the growing number of the war's opponents view these decisions as a failure of law and the legal system? Did they regard the oft-repeated litany of rationales for nondecision—sovereign immunity, the political question doctrine, and lack of standing—in the face of the tragic choices confronting part of a generation of young men and the horrors unleashed on the Vietnamese as an unacceptable elevation of law over justice, or, worse still, as a cowardly or result-oriented deformation of the law?<sup>497</sup> Or did they see these decisions in terms of institutional competence and the separation of powers? How widely shared was Cover's vision of a crisis of judicial morality and of legal legitimacy? We know that during the lifetime of the Levy case, critics from both the left<sup>498</sup> and the right<sup>499</sup> bitterly challenged the authority and fairness of

496. Rather than drawing arguments from *Orloff v. Willoughby*, see *supra* text accompanying notes 455-59, Levy's lawyers invoked *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Doe v. Bolton*, 410 U.S. 179 (1973), to emphasize the Supreme Court's recognition of the sanctity of the doctor-patient relationship. They also invoked *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Clay v. United States*, 403 U.S. 698 (1971), *Gillette v. United States*, 401 U.S. 437 (1971), *Stanley v. Georgia*, 394 U.S. 557 (1969), and *Sherbert v. Verner*, 374 U.S. 398 (1963), for the proposition that the Constitution protects the privacy and conscience of individuals and should therefore protect Levy's ethical beliefs from sanction. See Brief of Appellee at 55-62, *Parker v. Levy*, 417 U.S. 733 (1974) (No. 73-206).

497. E.P. Thompson has noted that:

Most men have a strong sense of justice, at least with regard to their own interest. If law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.

E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 263 (1975).

498. See, e.g., *LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS* (Robert Lefcourt ed., 1971); Edgar Z. Friedenberg, *The Side Effects of Legal Process, in THE RULE OF LAW* 37, 37-53 (Robert Paul Wolff ed., 1971); Robert Paul Wolff, *Introduction to THE RULE OF LAW, supra*, at 7, 7-12; Howard Zinn, *The*

the courts. To what extent did the courts' refusal to confront the questions posed by the war contribute to a crisis of legal legitimacy, and how extensive was that crisis?

Further, while Levy was unwillingly dragooned by the Army's legal system, others, like the Catonsville Nine and the other participants in the "Ultra Resistance" willingly invited prosecution in order to challenge the legality of the war.<sup>500</sup> Given the courts' rather consistent rejection of defenses grounded in the illegality of the war, what expectations led some people to choose law and the courts as the forum in which to debate the war? More generally, what hold did law talk and legal form have on the war's opponents? Why did other opponents of the war embrace legal form and language to challenge the war, as did at least two groups of GI dissenters who staged war crime trials of the military "brass"?<sup>501</sup>

Finally, if for many people, the failure of courts to confront the central legal issues raised by the war eroded the legitimacy of legal institutions, what were the sources of those institutions' resilience? How did the courts weather the crisis, and what has become of their scars?

*Conspiracy of Law*, in *THE RULE OF LAW*, *supra*, at 15, 15-36.

499. See, e.g., Fred E. Inbau, "Playing God": 5 to 4, 57 *J. CRIM. L. & CRIMINOLOGY* 377 (1966). The 1968 Richard Nixon presidential campaign's invocation of "law and order" and attack on the purported permissiveness of the Warren Court represented a similar attack from the right.

500. For discussions of the largely Catholic "Ultra Resistance," see generally BANNAN & BANNAN, *supra* note 439, at 124-50; STEVEN E. BARKAN, *PROTESTERS ON TRIAL: CRIMINAL JUSTICE IN THE SOUTHERN CIVIL RIGHTS AND VIETNAM ANTIWAR MOVEMENTS* 119-31 (1985); FERBER & LYND, *supra* note 199, at 201-21; Francine Du Plessix Gray, *The Ultra-Resistance*, in *TRIALS OF THE RESISTANCE* 125-61 (1970). Other instances of litigants choosing the courts as a forum for challenges to the war include the *Massachusetts* and *Holzman* cases cited *supra* note 471.

501. *Union GIs Put Military on Trial: Seattle—The Verdict Is Guilty, the Sentence: Death*, *THE BOND*, Feb. 18, 1970, at 1, reprinted in *ABOVEGROUND*, Mar. 1970, at 19 ("GIs from Fort Lewis and McChord Air Force Base held a trial of the Brass and its war in Vietnam before an audience of 1,500 at the University of Washington tonight. A jury of twelve active-duty soldiers found the military 'guilty' on charges of genocide, crimes against humanity and violations of soldiers' rights."); *GIs and Supporters Turn Armed Forces Day Around: GI Jury Tries Brass—Union Chairman Prosecutes*, *THE BOND*, June 17, 1970, at 1 (describing May 16 trial at the University of Illinois before a jury of 13 active-duty servicemen); see also *Georgia Group Plans War Crimes Tribunal*, *THE BOND*, Apr. 22, 1970, at 6 (describing a joint GI/civilian plan to hold a war crime tribunal in Columbus, Georgia (Fort Benning) in May); Copy of photograph captioned "Dr. Howard Levy testifying at People's Tribunal, Columbus, GA," (May 17, 1970), in *Levy Army Intelligence File*, *supra* note 25, at 19. For a discussion of this impulse toward a utopian exercise of jurisdiction, see COVER, *supra* note 493, at 195-201 (discussing the Stockholm/Copenhagen "International War Crimes Tribunal" organized by Bertrand Russell and Jean Paul Sartre).

## APPENDIX I

## Specification to Charge I

In that Captain Howard B. Levy, U.S. Army, Headquarters & Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, having received a lawful command from Colonel Henry F. Fancy, his superior officer, to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with *Special Forces AidMen (Airborne), 8-R-F16, Dermatology Training*, did, at the United States Army Hospital, Fort Jackson, South Carolina, on or about 11 October 1966 to 25 November 1966, willfully disobey the same.

## Specification to Charge II

In that Captain Howard B. Levy, U.S. Army, Headquarters & Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special forces personnel are liars and thieves and killers of peasants and murderers of women and children", or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

## Specification to Additional Charge I

In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at the United States Army Hospital, Fort Jackson, South Carolina, at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of



the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,'" or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight," or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander had given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his immediate supervision and control, as follows: "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army.

#### Specification to Additional Charge II

In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to impair and interfere with the performance of duty of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy

to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

Dear Geoffrey:

Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. . . . . I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, "The Battle of DienBienPhu." I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those "people back in the States" who actively opposes our efforts there & would refuse to serve there if I were so assigned . . . .

The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional mistakes or 2) does the U. S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition . . . .

Communism worse than a U.S. oriented government? . . .  
Are the North Viet Nameese worse off than the South Viet Nameese? I doubt it . . . .

Geoffrey who are you fighting for? Do you know? Have you thought about it? You're [sic] real battle is back here in the U. S. but why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again all over the world and your [sic] helping them. Why? You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard the Viet Nameese? A dead woman is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam, equals a destroyed life in Harlem. For what cause? Democracy, Diem, Trujillo, Batista, Chang Kai Shek, Franco, Tshombe - Bullshit? . . .

I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not VietNameese. At least the Viet Cong have that on their side . . . .  
. . . Geoffrey these people may not be sophisticated (American Style) but their [sic] grown men and women who have a right to live and choose their own government. You know they're

even allowed to make a mistake—at least let them make it—don't make it for them . . . ., or words to that effect.

### Specification to Additional Charge III

In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to interfere with, impair, and influence the loyalty, morale, and discipline of the military forces of the United States, did at or near Columbia, South Carolina, on or about September 1965, advise, counsel, urge and attempt to cause insubordination, disloyalty and refusal of duty by a member of the military forces of the United States by communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States military forces then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing statements to the following effect: (1) advocating opposition to the United States involvement in the Viet Nam war; (2) describing United States foreign policy as a "diabolical evil" designed more to protect selfish American business interests than to contain the threat and aggression of world Communism; (3) characterizing the United States position and policy in Viet Nam as a suppression of Negroes and poor whites; (4) praising Communists, and Communist countries, including North Viet Nam and the Viet Cong as being better than the United States and United States oriented countries; (5) declaring that he (Levy) would refuse to serve in Viet Nam, and that he has actively opposed the United States involvement in Viet Nam; (6) encouraging Sergeant First Class Geoffrey Hancock, Jr., to give up his involvement and commitment as a United States serviceman fighting in Viet Nam, and to return to the United States to fight for the cause of the suppressed Negroes and poor whites; (7) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr., for fighting with the United States Army in Viet Nam; (8) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr.'s motive for being in Viet Nam, stating that Sergeant Hancock does not have the best interests of the Viet Nameese people at heart, in violation of Title 18, Section 2387 United States Code, June 25, 1948, Chapter 645, 62 Statutes 811, amended May 24, 1949, Chapter 139, Section 46, 63 Statutes 96, a Statute of the United States of America.

## APPENDIX II

## The Geoffrey Hancock Letter

1041 Marion Street  
Columbia, South Carolina  
9-10-65

Dear Geoffrey,

Let me begin by introducing myself. My name is Howard Levy. I'm an Army Dermatologist at Fort Jackson, S.C. I'm a friend of Bill Treanor with whom I've worked during this summer on the SCLC civil rights drive in my spare time.

I've read your letters to Bill and have been especially interested in your views on Viet Nam since I too have had a deep seated interest in the situation there. I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book "The Battle of Dienbienphu." I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those "people back in the states" who actually opposes our efforts there and would refuse to serve there if I were so assigned. I would like to outline some of the reasons for my stance.

Bill has informed me that you are well acquainted with the history of Viet Nam so that I will not cover old ground. I think you would agree that from the time we backed Diem that we have politically not been very astute. The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess I opt for the second proposition.

I do not believe that you can realistically judge the Viet Nam war as an isolated incident. It must be viewed in the context of the recent history of our foreign policy—at least from the start of the Cold War.

Basically there are two aims to our foreign policy—one stated by our State Department and the other unstated. 1) The stated part—to contain "Communism" and 2) the unstated part—to support "stable" governments so that our foreign investors may profit. It should be noted that our definition of "Communism" is very, very broad. So broad in fact as to become practically worthless. The record is clear—the U.S. has helped suppress every left liberal revolt that you could name if there was available in the country a "more acceptable" right wing figure who could be more easily manipulated. You see, unfortunately for our government, left liberal governments often have the interests of their countrymen at

heart and this runs counter to our interests. For example the Alliance for Progress has been almost a total failure—largely because every time a Latin American government tried to implement a true land reform program (part of the Alliance for Progress program) we have found some reason to balk and not approve the project. This isn't surprising since either U.S. companies own or control much of the land in these countries. Yet without land reform nothing will work in Latin America.

Of course our propaganda mills, the newspapers and the mass media, cover up our sins. Invariably Communists are found to take the blame. Do you really believe that the Dominican Republic was in danger of a Communist overthrow. Responsible noncommunist critics in Latin America don't. Juan Bosch said "those 56 communists couldn't run a first class hotel let alone a country." He was being generous to the U.S. because later events prove that there weren't even 56 Communists in the country at the time. The same is true in the Congo. Is Tshombe a great patriot? Few in the Congo think so. Yet we support him. Could it be because he can be "counted on"? I think so.

Let's attack it from another, more radical, approach. What if the majority of a people decide that Communism is good for them? Do we, does anybody, have a right to deny them this choice. We might disagree emotionally and might try to prove that our way is better but by any stretch of any moral principal can we deny them the choice. Is Communism worse than a U.S. oriented government? The fastest growing economy in Latin America is Cuba. Everybody reads and writes in Cuba. Everybody has medical care. Was this true with the previously American backed governments? Not on your life. Is it true in other American backed governments in Latin America? Far East? Near East? Where? The only true examples are Europe and Japan and here only because it served as a bulwark against the Communists. To get closer to home (your home and I hope it's temporary) are the North Vietnamese worse off than the South Vietnamese? I doubt it. If they are why do so many back the Viet Cong? Guerrilla terrorism? Unlikely. The truth is that the North has instituted land reform, schools and medical facilities (as best as they could in a still very poor country). Why hasn't it happened in the South and why do you insist that it will happen. It hasn't in any of our other colonies. It didn't even happen in the U.S. until the Negro got off his ass and has made it happen. Do you really think that the big business-military complex in the U.S. are big-hearted. They never have been. In the early 1900's labor men and women fought and died for what they obviously deserved—enough food to live. And it's still happening. Ask Bill about unions and labor conditions in the South. Well these same companies have vastly more influence on our foreign policy and their effective.

Geoffrey, who are you fighting for? Do you know? Have you thought about it? You're real battle is back here in the U.S. but why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again all over the world and your helping them. Why? You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard the Vietnamese? A dead woman is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy? Diem, Trujillo, Batista, Chiang Kai-Shek, Franco, Tshombe—Bullshit?

As I mentioned earlier I don't contest your position that we can win. The question is win what. If we must destroy a whole people to win than I don't understand the true context of the word. Who are we winning for? The government in Saigon? Which one? It may change before you receive this letter. I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a Vietnamese. At least the Viet Cong have that on their side. Or do you take the position that you are the noble white father helping these poor ignorant people? How uplifting it must seem to you. Unhappily it's an illusion. These people know more about America and her generosity than you or I—thanks to American puppets in Saigon. You're no different than the governor of Alabama telling the Negroes that he has their best interests at heart. Even if it were true, and it's not, it would be a contemptible argument because it's so damn condescending. Geoffrey these people may not be sophisticated (American style), but their grown men and women who have a right to live and choose their own government. You know—they're even allowed to make a mistake—at least let them make it—don't make it for them.

I've enclosed an article you might find interesting—maybe it will help explain some of the “morale back home.”

I would appreciate your views on some of the points I have raised. In any event, let me wish you good luck and safe conduct in your present situation.

Yours truly,  
Howard Levy