

# Is Nuremberg Coming Back to Haunt Us?

Mylai has reopened the question of responsibility for war crimes. So far the charges are against individual "lawbreakers," rather than against the policymakers.

by JAMES B. RESTON, JR.

*"If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to invoke against ourselves."*

—Associate Justice Robert Jackson, chief prosecutor at the Nuremberg Trials.

This statement has come back to haunt us. At Mylai on March 16, 1968, Charlie Company, First Battalion, Twentieth Infantry, Eleventh Brigade, conducted an operation that has raised fundamental questions about the important principles of international conduct that we as a people articulated at the close of World War II. Can we face the problems of command responsibility, policy responsibility, and cultural responsibility? If we can, where then does the blame stop? Who or what should be on trial?

Massacres are not unprecedented in war: There is some doubt that modern war can be waged without them. But the Mylai investigation has brought the matter into the realm of law, and law progresses by precedent.

Perhaps the most pertinent precedent occurred on February 16, 1945. Early on that morning, a company of Japanese troops arrived in the Philippine village of Taal in Batangas Province, and mounted machine guns. The officers questioned the villagers about

the guerrillas operating in the area. When they got no answers, they fired into the hutches, and set them on fire. Later, villagers were herded into a ravine and more than 200 were killed with grenades and machine guns. The same pattern was followed in the adjacent villages of San José, Rosario, Cuenca, and Bauan.

The context of these massacres is important. Four months earlier, the combined units of the Third Amphibious Force and the U.S. Seventh Fleet landed at Leyte Harbor on the Philippine island south of Luzon. After a beachhead was established, Gen. Douglas MacArthur waded ashore with his famous comment, "By the grace of Almighty God our forces stand once again on Philippine soil." Later in the day, in a radio broadcast, he appealed to the Philippine people:

"As the lines of battle roll forward to bring you within the zones of operations, rise and strike. For your homes and hearths, strike. For future generations of your sons and daughters, strike. In the home of your sacred dead, strike. Let no arm be faint. Let every arm be steel. The guidance of Divine God points the way. Follow in his name to the Holy Grail of righteous victory."

And strike they did. The American invasion sparked the coordination of guerrilla activities throughout the Phil-

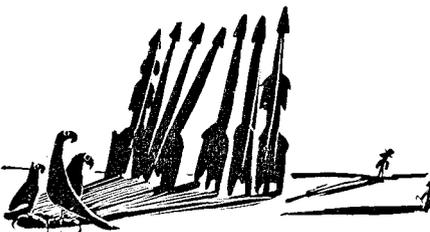
ippine Islands. By the time the Americans landed on Luzon (January 20, 1945) the guerrillas were strongest in Batangas Province, the southwestern tip of that island. In the mountains outside Taal, two divisions of American-supplied guerrillas were taking shape. This force launched attacks on Japanese posts and supply areas, sabotaged bridges and rail lines, and thus presented the supreme commander of the already disintegrating Japanese forces in the Philippines, General Tomoyuki Yamashita, with a formidable problem.

Shortly after the Luzon landings began General Yamashita had issued orders to "suppress" or "mop up" the guerrilla activity in the islands. (It was this order that formed the basis for his prosecution as a war criminal a year later.) In Batangas, however, this was not easily done. The mountainous jungle was the natural habitat for a growing guerrilla movement, and the landings of American forces outside Manila in January put them between Batangas and General Yamashita, who had fled to the northern town of Baguio. This virtually cut Yamashita's communications with the Batangas command.

Nonetheless, having been told that the suppression of the guerrillas in his area was behind schedule, the commander of a Batangas battalion, Colonel Fujishige, in an attempt to shut off civilian cooperation with the guerrillas, began a campaign of suppression that led to massacre, rape, and torture. An American prosecutor was to repeat the refrain at a trial a year later: "They were massacred—shall we say suppressed!"

The relevance of the Batangas Province massacres by the Japanese in January, February, and March 1945 to the

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—Micossi

Mylai massacres by Americans twenty-three years later lies not so much in the similarity of the atrocities, but rather in the war crimes trials that followed the Japanese actions and the principles that evolved from those trials. For not only the perpetrators were tried for these massacres, but also General Yamashita himself. As the first major Japanese figure to be tried after the American victory on September 2, 1945, General Yamashita was not charged for ordering the Batangas massacres or even knowing about them, but simply for failing to control the troops under his command.

"The Accused," said the indictment, "a general of the Imperial Japanese Army, between 9 October '44 and 2 Sept. '45, at Manila and other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the U.S. and of its allies and dependencies, particularly the Philippines, and he (the Accused) thereby violated the laws of war."

General Yamashita's trial began in late October 1945, barely a month and a half after V-J Day. The prosecution launched its case by parading scores of witnesses who testified to their mistreatment by Japanese troops, particularly in Manila and in Batangas. *The New York Times* reported that "The court continued to hear stories of so many atrocities that people just sat dazed in their seats." But this technique (also used at the Bertrand Russell war crimes trial held in Stockholm in 1967 to protest American bombing in Vietnam) was to be expected after the opening statement of the U.S. prosecutor, Major Kerr:

"I am frank to say, Sir, that this case will not be an easy one to hear, nor a pleasant one to try. We Americans are a Christian nation; we are even a sentimental nation. It certainly shocks each one of us to confront the truly horrible acts of beings in the form and shape of man that we must present to the commission in this proceeding. . . . [We do not] select instances on the basis that they are the most horrible, the most nauseating, that might be presented to the commission. If we bring before the commission a witness in a stretcher, permanently mutilated, physically ruined for life, it is not because we are endeavoring to impress the commission through the use of shocking evidence; it is simply because the witness has a story of factual information which the commission should hear, and because that witness . . . is a

competent and desirable exhibit of the ruthlessness of those who conquered the Philippines."

After several weeks of gruesome tales from Philippine civilians, the trial moved to cross-examine the principals themselves. Colonel Fujishige, the commander in Batangas, was questioned about the killing of women and children and readily admitted giving orders to kill all persons who opposed the Japanese. "There were many instances," he said, "where women bearing arms inflicted considerable damage to my forces. When I was in an automobile, a child threw a hand grenade at me. . . . I told my troops that if they were attacked by armed women and children that of necessity . . . they must be combatted."

Technically, Colonel Fujishige was on safe legal ground. The Hague Convention No. IV of 1907, which served as a main legal precedent for the Yamashita, Tokyo, and Nuremberg trials—as it will in the Mylai trials—supports him: "The inhabitants of a territory (says Article 2) which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops . . . shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war."

The concept of command responsibility, which grew out of the Yamashita case, carries culpability beyond complicity in atrocities. The prosecutor contended only that the accused must have known about atrocities because they were so widespread, just as the American high command in Vietnam must have suspected atrocities there. However, to the prosecution in 1945, it was immaterial if Yamashita knew how his orders were being carried out.

"These orders from Yamashita to 'mop up,' 'suppress' the guerrillas," said Major Kerr, "obviously resulted, in the Batangas area, in the mass killings which followed some time later.

Of course, these orders did not say 'massacre all civilians.' He unleashed the fury of his men upon the helpless population, and, apparently, according to the record, made no subsequent effort to see what was happening or to take steps to see to it that the obvious results would not occur—not a direct order, but contributing, necessarily, naturally, and directly to the ultimate result.

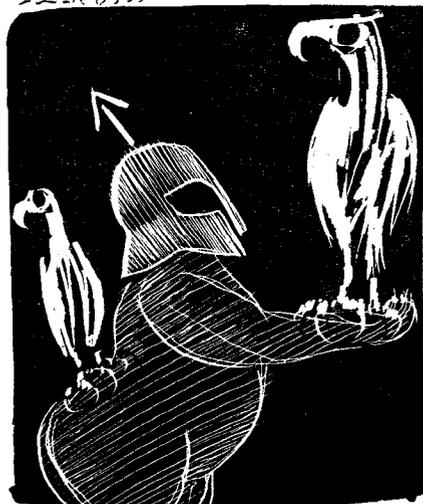
"We maintain, Sir, that if the Accused saw fit to issue a general order to suppress guerrillas under circumstances as they existed, according to his own testimony, he owed a definite absolute duty furthermore to see to it that they did not open wide the gates of hatred of his men, leading them to wreak vengeance upon the civilian population. Obviously he did not do that. That is part of his responsibility."

The defense argued that General Yamashita's communications had been cut. The Americans were between him and his Batangas command. His forces were disintegrating. And the guerrillas had exhausted the patience of the Japanese.

Major Kerr: "The defense cries that Yamashita was too far away from the scene of the battle, too far removed from the actual perpetrators, justly to be charged and punished for crimes of those under him. Yet his very government, his entire nation may legally be held responsible—even farther removed from the perpetrators and from the scene of the crime. We say it is in accordance with all the established principles of responsibility in the field of international relations that the commanding officer as an individual be held responsible."

The prosecution not only bore down on Yamashita's responsibility for his troops, it also argued that their actions were an inevitable result of the kind of war the General had waged. Major Kerr: "The Defense saw fit to refer to the victims of the Japanese as the victims of war. Victims of war! Is this warfare? We have another explanation for it. We say they were victims of Yamashita! They are victims of the type of warfare that was conducted by Yamashita, by the troops under him."

On December 7, 1945, four years after Pearl Harbor, General Yamashita was sentenced to hang. Two-and-a-half months later, after the failure of an appeal to the Philippine and U.S. Supreme Courts, in the town of Los



Baños, fifty miles from Batangas Province, that sentence was carried out. In subsequent trials sixteen soldiers were tried for their parts in the Taal massacre. Six, including Colonel Fujishige, were hanged; one was shot; two were given life sentences; one was sentenced to thirty years, another to twenty-five years, and a third to twenty years. Four were acquitted. The two platoon leaders, Second Lieutenants Fukuoka and Hosaka, received the lightest sentences, twenty-five and twenty years, respectively. The company commander, Warrant Officer Kobayashi, received a life sentence. The stiffer penalties were reserved for the higher staff officers.

"General Yamashita's record was a blot on the military profession," General MacArthur said shortly before the execution. "Revolting as this may be in itself, it pales before the sinister and far-reaching implication thereby attached to the profession of arms. *The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. . . . When he violates this sacred trust, he not only profanes his entire cult, but threatens the very fabric of international society.*"

In one of the last interviews with Yamashita before his death, the subject of MacArthur was raised, and Yamashita was to say, "After all, it could have been him."

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Since the investigation implicating fourteen higher-ranking officers in the Mylai incident, some commentators have argued that the U.S. Army is applying the principles of Nuremberg to itself. However, the Mylai charges do *not* squarely meet the question of war crimes in Vietnam; it would be closer

to the truth to say that the Mylai investigation evades the real responsibility. The charges so far are against the instruments of the Pentagon policy in Vietnam, rather than against the policymakers. Nuremberg concentrated on the latter.

War crimes were defined at Nuremberg and Tokyo as follows:

1) CLASS A: CRIMES AGAINST THE PEACE: Namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing. [The planning of aggressive war was considered the "supreme crime" in the postwar trials.]

2) CLASS B: CRIMES AGAINST HUMANITY: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, of persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

3) CLASS C: WAR CRIMES: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation of slave labor or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

If he is found guilty, Lt. William L. Calley would, by the standards of the

Nuremberg, Tokyo, and Yamashita trials, be a low-grade, Class C war criminal. But if Lieutenant Calley is on trial for brutality, so is the search and destroy policy on trial for brutalizing him. In *Casualties of War*, Daniel Lang describes the effect of that policy on American troops:

Day after day, out on patrol, we'd come to a narrow dirt path leading through some shabby village, and the elders would welcome us and the children come running with smiles on their faces, waiting for candy we'd give them. But at the other end of the path, just as we were leaving the village behind, the enemy would open up on us, and there was bitterness among us that the villagers hadn't given us warning. All that many of us could think at such times was that we were fools to be ready to die for a people who defecated in public, whose food was dirtier than anything in our garbage cans back home. Thinking like that—well, as I say, it could change some fellows. It could keep them from believing that life was so valuable—anyone's life, I mean, even their own. I'm not saying that every fellow who roughed up a civilian liked himself for it . . . he'd start defending what he'd done many hours ago by saying that, after all, it was no worse than what Charlie was doing.

The brutality of the war, however, and the criteria of culpability under the Nuremberg and Yamashita precedents are not limited to the policy of search and destroy. The Mylai area had, according to Maj. Gen. William Peers, who was in charge of the Pentagon's investigation, traditionally been "under Communist domination." It was therefore subject to intense bombardment from the air.

By the end of 1967, said Jonathan Schell, the author of two books on Vietnam, "the destruction of society in Quangngai Province was not something we were in danger of doing. It was something that was nearing its completion. About 70 per cent, by my estimation, of the villages in that province had been destroyed." Most of this destruction, Schell explained, had been done by American aerial bombardment, prompted by reports of village cooperation with the Vietcong.

Most Americans are aware of the impersonal slaughter that takes place from the Vietnamese stratosphere, but many are unaware of its systematic intensity, or of other elements of random brutality:

*The TPQ program* (night bombings)  
—Every province in I Corps including Quangngai is authorized five to twelve radar-guided bombings per night. These tactical bomber strikes are based on the scantiest intelligence of



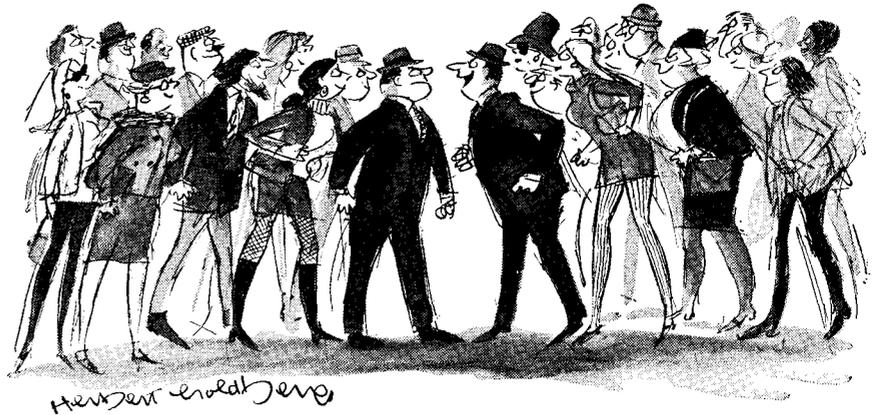
"If you don't want to rub elbows, what do you want to do?"

enemy activity at a specific map coordinate. A former intelligence agent who worked in this program said enemy hospitals were second only to fixed supply installations when selecting target priorities for TPQ strikes. Destroying enemy hospitals was stressed as a high priority in our Cambodian operations by Vice President Agnew in a recent television interview. And yet the American public was so outraged when several mortar rounds hit our hospital at Camranh Bay early in 1969.

*Operation Thor.* In a twenty-four-hour period in the spring of 1968, sixty B-52 strikes, the largest number of these "arc light" strikes in the entire war, cut a three-kilometer-wide swath across South Vietnam below the DMZ. No attempt was made to determine what villages lay along this patch. Such are the dimensions of "military necessity" in Vietnam.

*Relocation.* In the spring of 1967, American reconnaissance planes flew over a ninety-square-kilometer area of the central highlands which was inhabited by the nomadic Montagnards and known as a regrouping area for VC infiltration into the coastal area around Nhatrang and Tuyhoa. The purpose of this mission was to identify every inhabited place. Shortly after the flights, troops of the American Fourth Division moved into the area, rounded up some 4,000 Montagnards, and took them to a newly built village called Edapenang. The Montagnards were relocated so that they could not serve the enemy as bearers and food production personnel, and so the jungle could be opened for unrestricted bombing raids and big operations like Dakto and Hill 875, where American forces sustained 1,654 casualties. Through cultural ignorance we provided water from wells rather than the stream water that Montagnards were used to, built individual family housing rather than the customary long houses, and moved people during their planting season so that they had to be fed for eighteen months. As a result, the population of Edapenang dropped from 4,000 to 1,000. Edapenang was the pet project of the Fourth Division commander in 1967-68, General Peers.

*Phoenix program.* The emphasis of this operation, which has been incorrectly reported as assassination, is on "bringing in" VC cadres from villages. One device used toward this end is the "metal trace detection kit," a CIA machine in which ultraviolet light is supposed to detect "tissue aberrations" either on a trigger finger or on the shoulder where a rifle butt would be placed. In 1968 the kit was taken into hamlets in I Corps area, villagers rounded up, a poncho set up like an old-time camera, and each villager



"My therapy group can lick your therapy group."

forced to submit his body to the test. By an ex-intelligence agent's testimony, all the villagers' hands looked splotchy, and as a consequence the Vietnamese commander ordered them all taken out and tortured with the water treatment until they provided information. The machine required an expert to determine any significant tissue aberrations; there was none on the scene when the agent observed the use of the kit; nonetheless, villagers were tortured on the basis of amateur interpretations. When the American agent protested to his commander, the superior shrugged it off. "Oh, what the hell," he said, "it's their show."

It is the high-technology warfare that the United States is waging in Vietnam, not the face-to-face "gratuitous brutality," in Hannah Arendt's term, of Company C that causes the wholesale killing of Vietnamese civilians. It is therefore not surprising that Col. Oran K. Henderson, now charged with making false statements and false swearing, testified to the Pentagon in 1969 that he had seen the bodies of only one woman and two children in Mylai and believed they had been killed by artillery, or that Col. Thon That Kien, the Quangngai Province chief, also tried to convince himself that stray artillery fire had killed all those civilians. Civilian death by artillery or air strike in a free fire-zone is an accident of war; killing civilians with an M-16 is a crime if anyone should dare to press charges.

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Where does the culpability for Mylai stop—with Calley, with Westmoreland, with McNamara, with Johnson and Nixon, or with the whole American people? The Hague Conventions of 1899 and 1907 were based on a brand of warfare that could imagine a Lieutenant Calley but not a B-52. And the postwar trials of the Axis figures were careful to avoid charges against the enemy that were applicable also to ourselves. If the Allies had been van-

quished in that war, any war trials would surely have centered on the area of aerial bombardment and high-technology weaponry, particularly the saturation bombing of Japanese and German cities and the use of the atomic bomb. Dr. Richard Falk, the international law professor at Princeton, has pointed out the irony that the day the United States signed the charter for the International Military Tribunal at Nuremberg, August 8, 1945, was the day it dropped the atomic bomb on Nagasaki. With this gap left unplugged in the annals of war crimes proceedings, the policy of high-technology warfare has developed in Vietnam without touching the conscience of America.

The Defense Department admits no responsibility. The Peers report devotes an entire chapter to the Pentagon directives and troop information pamphlets regarding the Hague and Geneva conventions and a soldier's duty to respect the Vietnamese and their customs, concerning the need to "handle an enemy captive firmly, promptly, but humanely" and to protect him against "violence, insults, curiosity, and reprisals of any kind." But any Vietnam veteran will tell you that the cards on the treatment of POWs and civilians are handed to the incoming soldier with the same bureaucratic unconcern as are his new fatigues, scrip, and salt tablets.

What is significant, therefore, is not the paper policy but the practice. Which will be more important for the combat soldier: the Nine Rules for humane treatment of the Vietnamese on a card in his wallet, or a pep talk about taking revenge on the gooks the night before an operation into Pinkville?

The fundamental question of the Calley trial relates to the Yamashita trial: Does the kind of war that we are fighting in Vietnam make Mylais inevitable? No Vietnam veteran is shocked by Mylai. He knows that there was

(Continued on page 61)

## Nuremberg

Continued from page 17

more killing at Mylai than elsewhere but that it was not unique in our search and destroy operations. The circle of responsibility goes beyond Calley and his company. (Not that the criminal responsibility need be larger. A crime must have its direct perpetrators.) The political, moral, and command liability will remain unanswered in the trials of those now charged.

The relevant area of consideration is the new concept of justice that the United States introduced at Nuremberg: crimes against humanity. The sheer weight of death and devastation in Vietnam now transcends all political discussion. One million Vietnamese civilians, according to Senator Edward Kennedy, have become casualties of war since 1965. For those crimes no man—not Calley, not Westmoreland, not Johnson or Nixon—stands alone in the dock, but the whole American nation. The technology that is the American wonder at home is the American horror in Vietnam. The American people have approved of its use in both places.

In 1947 the philosopher Karl Jaspers approached the question of German guilt in a way that is pertinent to the question of American responsibility today. He talked of four areas of guilt: criminal, political, moral, and metaphysical. Under his definition, an orgy of accusation about individuals who were responsible for our war policy will not satisfy justice, though those individuals share a higher political liability than General Yamashita.

Jaspers wrote, "We are responsible for our [the Nazi] regime, for the acts

of the regime, for the start of the war in this world-historical situation, and for the leaders we allowed to rise among us."

This is the political responsibility that all Americans share. The metaphysical responsibility comes when injustices are committed in our presence with our knowledge. The acceptance of this responsibility, Jaspers says, can lead to a transformation of human consciousness where pride is broken and arrogance is impossible.

"Because of the great diversity in what we believed all these years," Jaspers said to the defeated German people, "what we took to be true, what to us was the meaning of life, the way of transformation must also be different now for every individual. We are all being transformed. But we do not all follow the same path to the new ground of common truth, which we seek and which reunites us. In such a disaster everyone may let himself be made over for rebirth, without fear of dishonor. What we must painfully renounce is not alike for all—so little alike that one man's renunciation may impress another as a gain. We are divided along different lines of disappointment."

**T**he Vietnam War is transforming Americans also, but it is not clear what we will become as a result. Will we allow this country to revel in more vainglorious causes or seek to reclaim our original ideals? Mylai could lead to a new maturity in our recognition that Americans are humans like everyone else, capable of nobility, but also capable of bestiality, and that when our technology places upon us the highest responsibility in the world we must work toward a climate where the nobler instincts can flourish once again.

## Schools Make News

Continued from page 55

subsequent national student strike. Generally, the reports document what was already known or surmised:

- *On Strike... Shut It Down*, a report released last month by the Urban Research Corporation (5464 South Shore Drive, Chicago, Ill.), observes that the scope of the strike was unprecedented; protests escalated sharply after Kent State; most were peaceful, often consisting of mourning the dead and developing political activity against the war; large numbers of smaller schools and moderate students, who never before had protested, joined the strike; and the deaths at Jackson State made little or no impression on an essentially white student strike. The report is useful chiefly because it provides a factual compilation of events in the first two weeks in May at 760 campuses across the nation.

- A second study conducted by Knight Newspapers for the Detroit *Free Press* reports that no sniper fired at the Ohio National Guard, that the Guardsmen fired without orders, and that they were not surrounded by demonstrators and could have elected other courses of action than shooting into the crowd. These findings were confirmed in a federal investigation by Assistant Attorney General Jerris Leonard, who stated there was "insufficient evidence" to lend credence to the sniper reports, as charged by the Ohio National Guard.

- Acting on President Nixon's order, eight White House staff members under thirty toured U.S. campuses in May. Reportedly, they were "stunned by the depth of student hostility toward the administration and the rapid erosion of respect for the government." President Nixon subsequently appointed a nine-man commission, headed by former Pennsylvania Governor William Scranton, to help prevent further confrontations on the campus. The commission will examine the "principal causes of campus violence" this spring and the "reasons for the breakdown in the expression of orderly dissent," and will report back to the President in September, presumably in time to allay university tensions in the fall. A *New York Times* editorial immediately dubbed the commission "redundant," "a summer rerun." The *Times* noted that "studies have followed studies. . . . Existing laws are adequate to deal with youths on and off the campus, who substitute violence for dissent. The need now is to act on what is already known."



"You told me to call you Monday. It's Monday."