

The Court-Martial of Captain Levy: Medical Ethics v. Military Law

Columbia, South Carolina. The court-martial of Captain Howard B. Levy rested on a large area of agreement between the defendant and the Army. The Army said that Levy, a young dermatologist, refused an order to train members of the Special Forces in dermatology; Levy is proud of his refusal. The Army said that Levy told enlisted men that the war in Vietnam is wrong and that Negro soldiers should not fight in it; Levy says that this is so. The Army said that Levy called the Green Berets "liars and thieves and killers of peasants and murderers of women and children"; Levy says "They are." The Army said that Levy wrote a letter to a career sergeant in Vietnam—a white man married to a West Indian Negro—saying, "The same people who suppress Negroes and poor whites here are doing it all over again and you're helping them. Why?"; Levy says "It was a damned good letter." The chasm between the government and the defense on the ethical and constitutional issue raised by the case—Captain Levy's right to speak and act as he did—is enormous. But there is no question that the government has the right man.

Levy's educational biography would make the proverbial "Jewish mother" proud. Son of a Brooklyn salesman, he went to New Utrecht High School and New York University. He took his medical training at the Downstate Medical Center, interned at Maimonides Hospital, and returned to NYU for a residency that included work at University Hospital, Manhattan Veterans Hospital, and Bellevue.

His political biography is another matter, a tale of simultaneously increasing involvement and alienation that mirrors the experience of much of his generation. His early political views, as he now recollects them, were conventional, bordering on conservative. But he became affected by what he saw in the hospitals, the poverty that afflicted his welfare patients, the class and racial conflicts that he saw reflected

in the medical system under which they were treated. He began to read in the field of politics, to sample the political offerings of the left. Gradually he became more active: he began to write letters to editors and congressmen; he picketed with welfare workers during a strike in New York City. Levy was commissioned a reserve officer in the Army Medical Corps, under the Berry Plan, in 1962 and was deferred for the duration of his residency. By that time he was profoundly opposed to American policy in Vietnam. He would have preferred to become a conscientious objector, but he is not a pacifist and the law provides no relief for opponents of individual wars. He convinced himself that standing armies are necessary and that, since they are necessary, they need doctors. In July 1965 he entered active service and was sent directly to Fort Jackson.

For Howard Levy, the "doctor's draft" was a draft to the stockade. He was assigned to Fort Jackson without even the 6-week orientation course customarily offered drafted physicians at Fort Sam Houston in Texas, Fort Sam being overcrowded because of an influx of June graduates. Levy had considerable difficulty with both the forms and substance of Army life. He refused to join the officers' club on the grounds that he did not like golf, tennis, swimming—or officers—and was rewarded for this aberrant behavior by a security investigation that eventually contributed heavily to his court martial. He never mastered the salute, the proper wearing of the uniform, or a number of minor base regulations. He had difficulty responding to the concept of rank, including his own, and said what he thought about the war and civil rights to anyone, from patients to enlisted men to officers, with whom he came in contact in or outside the dermatology clinic of which he was chief, in or out of uniform. He lived off the base and spent his spare time working in a civil rights project, a voter-registration

drive; for a time he published a civil rights newspaper. His friends were drawn from the small population of Negro and white political activists in Columbia and surrounding towns.

At some point during his stay there this improbable candidate acquired responsibility for providing medical training to members of the Special Forces called "aidmen." According to testimony by a number of Army physicians, Fort Jackson's participation in the medical program was somewhat desultory; physicians being asked to supply training in their specialties were never instructed how to proceed or told what should be covered. A number of aspiring Green Berets would simply show up for 5-day stretches in the various clinics and then disappear. For a while Levy accepted the teaching function: "I would talk to them, tell them what I was doing, and try to get them to recognize certain simple, basic conditions and to learn what to do about them," Levy said in an interview with *Science* last week. "Then, gradually, I began to realize the implications of what I was doing. Finally, I just stopped."

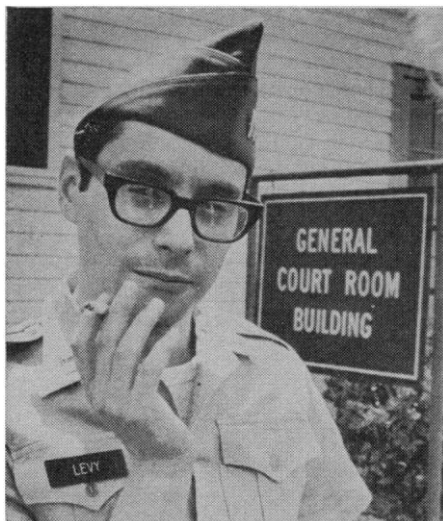
Levy's unilateral strike against the Special Forces came in due course to the attention of the commander of the hospital, Colonel Henry F. Fancy. Fancy, a career officer, knew that Levy was considered a "security risk." He called him in, pointing out that he—Fancy—had a job to do that required Levy's participation. Levy said he would not train the aidmen, that it violated his ethical principles to do so. When Levy continued to refuse, Fancy issued him a written order; when he failed to respond to that, Fancy began to initiate punishment. Originally, Fancy testified at the trial, he contemplated only a mild rebuke, an administrative reprimand. Later, evidently influenced by further contact with intelligence officers and by his conviction that Levy was, as he described him, a "pinko," he elevated the charges to the court-martial level.

Originally, two charges were preferred: disobeying a lawful order and attempting to promote "disloyalty and disaffection among the troops" by statements about the war to various enlisted men. Another charge based on speech was added later: "making intemperate, defamatory, provoking and disloyal statements" to Special Forces personnel while in uniform. Still later, during the course of a preliminary

hearing, the government added two more charges based on the letter to the sergeant in which Levy had argued against participation in the war. These charges were that writing such a letter was "conduct unbecoming an officer and a gentleman" and that it represented an attempt to "interfere with, impair and influence the loyalty, morale and discipline of the military forces." Additional charges raised the stakes again, increasing possible penalties to a prison sentence of 11 years.

In the final minutes of the trial, which ended 3 June, the charges based on the letter were thrown out because of a technical error in their formulation that occurred when the court attempted to find him guilty of a lesser offense than that written in the initial charge. But Levy was convicted on the first three charges and sentenced to 3 years at hard labor. He was handcuffed by the executive officer of the hospital, a deputy of Colonel Fancy, and taken to the stockade. There is no bail in military law, and the initial attempts by his lawyers to obtain a "commandant's parole," by which he could remain free pending appeals first to military and later to civilian courts, were unsuccessful. His chief defense counsel, Charles Morgan, Jr., of the American Civil Liberties Union (ACLU), estimates that the appeals may run almost for the duration of the sentence. If the lawyers fail in efforts to win a parole from Secretary of the Army Stanley Resor, Levy will spend the next 3 years in confinement—either in the stockade, or in the Fort Jackson hospital to which he was moved later in the day of his arrest, or in Leavenworth. Pending initial review by the base commander, Levy is still treated as an officer. The "hard labor" aspect of the sentence will not take effect until he is officially stripped of his rank.

The court-martial, while it lasted, was many things—a money-maker for Columbia motels, an event in the life of the "peace movement," an agony for the captain's parents. It was a "little Nuremberg," briefly, when the presiding law officer, Colonel Earl V. Brown, permitted the defense to argue that, under the Nuremberg precedent, Levy's disobedience was lawful because the order he was commanded to obey committed him to participation in "war crimes." Brown ruled that no "pattern" or "policy" of war crimes committed by the Green Berets was



Captain Howard Levy outside Fort Jackson courtroom during a recess of his court-martial at the South Carolina base.

shown, and that therefore it could not be used as a defense; he nevertheless established the precedent that the Nuremberg test could be used in American courts. It was a maze for the civilian lawyers, a perpetual Catch-22, at moments such as Brown's ruling that the truth of Levy's statements was irrelevant to his defense.

The trial brought into the open an undercurrent of anti-Semitism. The Army was seemingly at pains not to develop a Dreyfus, sending a Jewish captain from Fort Gordon, Richard Shusterman, to prosecute the Jewish captain from Fort Jackson. The South Carolina papers were not so discreet, one of them suggesting that a New York group endorsing Levy was dominated by Jews, and wondering "if they would likewise admire a refusal to 'cooperate with our government's war' if U.S. forces were dispatched to Israel instead of Vietnam." Both sides received anti-Semitic mail.

Issues for Doctors

But, with all their attendant barbarisms, the proceedings against Captain Levy raised some major ethical and constitutional questions. Some of these—the freedom to speak out on matters of conscience, the conflict between civilian freedom and military law—have relevance universally. But the violent juxtaposition of military and medical traditions that characterized the trial also opened new questions of particular significance for physicians.

The basic constitutional question, apart from the free speech issue, is

whether a physician has a right to refuse an order that violates his ethical principles. The ethical precepts of a physician are not protected by existing law as are some aspects, for example, of religious belief. As a result, "medical ethics" were ruled out by Colonel Brown as a defense against Levy's refusal to obey the order. But the question did come into litigation for the first time during the trial, and it is a major point on which the ACLU will base Levy's appeal.

The substantive issue is the role of medicine in military service. Traditionally the military has kept separate its wounding and its healing functions, a separation rooted in both sociology and pragmatism. What is meat for the military—command, obedience, reliance on authority, willingness to kill—is not easily reconcilable with the healing arts. Within the Army organization, physicians, both draftees and career officers, have special status. Doctors may attain high rank but they do not command men; draftees do not go through a basic branch course such as armor or infantry as even other professionals, such as lawyers, are required to do; regulations provide that, if the officers of a unit become unable to exercise command, the highest-ranking enlisted man takes precedence over the medical officer. The Army has not necessarily learned to love its doctors, but it has at least devised ways to accommodate to the traditions of their profession. On the battlefield, medics have noncombatant status certified by international law. In theory, medical installations have also been protected from bombardment or attack.

The Special Forces program for which Levy was asked to provide training violates these traditions. Special Forces aidmen are not medics in the conventional sense; each is a member of a 12-man detachment, called an A-team, trained to conduct guerilla warfare or counterinsurgency operations behind enemy lines. The mission of the teams, according to Army *Manual FM 31-21, Special Forces Operations*, is to "develop, organize, equip, train, and direct indigenous forces in the conduct of guerilla warfare and to advise, train and assist host country forces in counterinsurgency operations." Each team has two medical aidmen, both of whom are "cross-trained" in another speciality such as intelligence or demolition; the aidmen take regular turns on combat patrols.

NEWS IN BRIEF

● STUDY SKEPTICAL OF SPACE

MIRROR: The scientific merit of a reflecting satellite is not worth its cost to the public and its nuisance to science, a special study group of the National Academy of Sciences' Space Science Board has concluded. The Academy was asked to conduct the study after criticism was raised over National Aeronautics and Space Administration consideration of such a satellite (*Science*, 20 January). Following receipt of the report, Donald F. Hornig, presidential science adviser, said that the government no longer has plans for the project. The report, prepared by the Board's Committee on Potential Contamination and Interference from Satellites, stated that there is no overwhelming evidence that scientific damage would result from a single reflector system. But the committee recommended that if the project is ever considered in the future, the ability to destroy the satellite by signal from the ground must be part of the design, and detailed studies of its effects on ecology, biology, and astronomy should be conducted first.

● BIOLOGISTS POSTPONE GREEK

MEETING: An international Advanced Study Institute in Molecular Biology, which had been scheduled to take place on the Greek island of Spetsai in July, has been postponed until next summer. The organizing committee, which includes members from the United States, France, and Great Britain, gave no formal reason for the postponement. However, a U.S. member said that many of the scientists felt that the military government established by the 21 April army coup represents "a considerable barrier to holding a meeting dealing with science in a tradition of free and open discussion." The U.S. biologist also said the general hope of the committee is that a constitutional government will be re-established in Greece before next summer. The Study Institute was to have been sponsored by NATO and the Greek government.

● PHS INCREASES FELLOWSHIP

STIPENDS: The stipend levels for postdoctoral fellows and stipend ceilings for postdoctoral trainees have been increased \$1000 by the Public Health Service, effective 1 July. The increase brings the stipends to a level of from

\$6000 to \$7000, depending upon the recipients' experience. The increase was recommended by a PHS Special Task Force on Training Stipend Policies and follows a general governmental change. In March, the National Science Foundation raised its stipends by \$1000 for most of its postdoctoral and NATO fellowships.

● EDUCATION RECEIVES MOST PRIVATE GIFTS:

Educational activities received grants of \$418 million from the nation's major foundations last year, leading all other categories, while support for the physical sciences declined sharply, according to a report of the Russell Sage Foundation. Aid to the physical sciences dropped from \$18 million in 1962 to less than \$5 million last year. The report suggests that this decline is due to "presently immense government programs" which are judged to almost "blanket" the science field. The report is contained in the new *Foundation Directory* which is compiled by the Foundation Library Center of New York City. More than 17,000 foundations with total 1966 grants of \$1.2 billion were surveyed for the report. The greatest increase in grants was in international activities which rose from \$33 million in 1960 to \$170 million in 1966. Grants in other categories are: welfare, \$196 million; health, \$167 million; sciences, \$120 million; religion, \$107 million; and humanities, \$67 million.

● TECHNOLOGY TRANSFER: The problem of deriving more economically useful technology from federally sponsored R&D programs is examined in a recent report by the Science Policy Research Division of the Legislative Reference Service. In the report, which is titled *Policy Planning for Technology Transfer*, the term "technology transfer" is defined as the use of knowledge to serve a purpose other than the one for which the R&D was undertaken. The report recommends that dissemination of information be centralized so that an industrial user need contact only one agency for access to all technology in a given field. The report, prepared for the Subcommittee on Science and Technology of the Senate Small Business Committee, is available from the Government Printing Office, Washington, D.C., for 50 cents.

One function of the aidmen in Vietnam is to care for members of their own detachment and of the units of Vietnamese irregulars they direct. It is not a matter of mere solicitude. "During combat," the manual states, "the guerillas are more likely to take . . . personal risks . . . knowing that if they are wounded they will be given proper medical treatment." In unconventional warfare, it continues, "the health of the guerilla assumes an ever greater significance. . . . A rigorous program of preventive medicine, to include personal hygiene and field sanitation, must be initiated. . . . The maintenance of a balanced diet may be a problem and have a direct effect on the health and stamina of guerilla personnel."

An additional function of the aidmen is even more political—supplying medical care to the local population as a means of winning their allegiance. This objective is no secret. Colonel Richard Coppedge, an Army physician who was one of the initiators of the program, testified that it was central to the concept of guerilla warfare. "Guerilla warfare is a social struggle," he told the court, "and it requires use of social instruments such as medicine." The field manual is equally frank, describing medical service as an operation "initiated primarily for its psychological effects." For Coppedge, however, it is not just a matter of the military using medicine; it is also, he testified, a "peculiarly American approach," a matter of "medicine using the military," attaching itself to military units in remote areas where services are poor or nonexistent, a kind of medical missionaryism. (Ironically, Coppedge told the court that Levy was precisely the kind of physician the Special Forces need, because "he is interested in society," and an Army psychiatrist said that Special Forces men have a great deal in common emotionally with civil-rights activists.)

Whether medicine thus practised is capable of influencing the "hearts and minds of the people" is an open question. It is medicine with strings, penicillin with bayonets; it is the paradox that bothered Howard Levy: in his words, "Kill, kill! Cure, cure!" Presumably the recipients are also aware of the paradox and ready to turn it to their own purposes: one theorist on guerilla warfare recently wrote that, in some areas of Vietnam, the Viet Cong are so secure that they encourage their followers to make use of the free med-

ical and social services offered by the Americans.

The medical impact of guerilla medicine is equally uncertain. Aidmen are trained in medical matters for 37 weeks. They are shipped off to isolated areas where they have only limited and sporadic contact with more fully trained medical authorities. They are armed with a battery of drugs and equipment for minor surgery. Exactly what happens in the field was impossible to learn from conflicting testimony at the trial. There was testimony that the aidmen were restrained and that they were reckless; that they were shoddy and that they were competent; that they did "a little bit of good," that they did "a lot of good," and that they did harm. There was testimony that they functioned without visible connection with higher authorities, and testimony that they were fairly well supervised; that they practised recognizable standards of medical ethics, and that they did not; that they helped to create administrative structures for public health in the provinces, and that they contributed to destruction of those structures. But there was no conflict about the central point: that medicine was being subordinated to political and military objectives, or about its practical implications—that aidmen could be ordered to offer treatment as a bribe for information or cooperation; that they could be ordered to abandon patients and move on.

This was the system in which Howard Levy refused to participate. He is opposed to the political use of medicine, as well as to the particular politics that it is being used to support in Vietnam. From a medical point of view, he is concerned about possible long-term hazards: "Medically, I think they do more harm than good," he commented to *Science*. "They go into a village, set up a station, hand out drugs indiscriminately. Penicillin will cure a lot of things but there are conditions it doesn't affect, and it has dangerous implications in the long run, both for individuals and for its effect on the development of drug-resistant strains. Physicians should be concerned with this changing medical ecology. The Special Forces have access to the whole pharmacopeia," he concluded. "They use drugs, such as Chloromycetin, that I hesitate to use myself."

Levy is not alone in his opposition to the program. Army physicians testified that it ran into considerable opposition when first established in the

1950's, partly because of opposition in the regular Army to the unconventional Special Forces in general, partly on the ethical and practical grounds raised by Levy. His position was supported, at the trial, by several other drafted physicians from the Fort Jackson hospital, support for which they consciously

risked the displeasure of the same officer who court-martialed Levy. In addition the Fort Jackson courtroom was for 1 day turned into a remarkable ethical-intellectual forum as the defense brought out well-known representatives of American medicine and public health to testify in the captain's

Lloyd Berkner Dies at 62

Lloyd V. Berkner, 62, a leader in shaping U.S. science policy over the past two decades, died on 4 June in Washington, D.C.

Berkner was stricken with a heart attack while attending a meeting of the Council of the National Academy of Sciences, of which he was treasurer.

He served as adviser or organizer for a number of U.S. scientific programs, and was active in promoting U.S. participation in international endeavors.

In 1950 he suggested the International Geophysical Year and became the principal administrator of the U.S. part of the program during its operation in 1957 and 1958.

He was asked by Secretary of State Dean Acheson to set up the first military assistance program under NATO in 1949, and was largely responsible in 1950 for the assignment of scientific attachés to American embassies abroad.

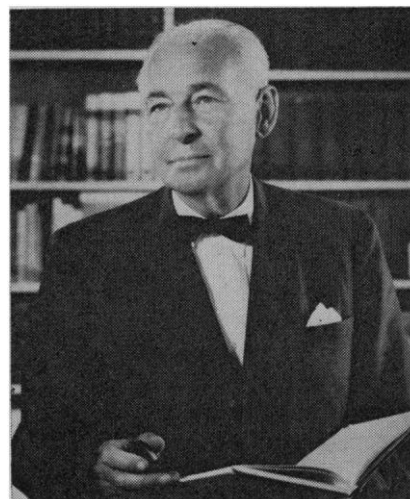
Berkner was a champion of open international exchange of scientific information and often criticized the government for its excessive secrecy in matters of science.

As chairman of the Academy's Space Science Board from 1958 to 1962, he was instrumental in developing U.S. space research programs.

Born in Milwaukee, Wisconsin, Berkner received a bachelor's degree in electrical engineering from the University of Minnesota, his only degree.

Following graduation, he went to Antarctica as a radio technician with Admiral Richard Byrd's expedition. He was also the radio man on the first air flight over the South Pole.

He came to Washington as an engineer for the National Bureau of Standards and later served as physicist in the Carnegie Institution's



research program in terrestrial magnetism.

From 1951 to 1960, Berkner was head of Associated Universities, Inc., formed by nine universities to operate the Brookhaven National Laboratory for the Atomic Energy Commission.

He became president of the Graduate Research Center of the Southwest in 1960, retiring in 1965 because of a heart attack, but continuing until recently as chairman of its board of trustees. The center (renamed Southwest Center for Advanced Studies, in January) was created to encourage the expansion of graduate education in the universities of the Southwest.

Berkner was president of the International Council of Scientific Unions from 1955 to 1958. His chief fields of scientific work were radio wave propagation, the structure of the upper atmosphere, and solar disturbances.

Berkner's home was in Fort Lauderdale, Florida. Funeral services were held at the Fort Myer (Virginia) Chapel; burial was in Arlington National Cemetery.—J.A.

favor: Jean Mayer and Victor Sidel of Harvard, Louis Lasagna of Johns Hopkins, and Benjamin Spock of Western Reserve.

The core of their testimony was that, first, as a physician, Levy's primary duty is to his own interpretation of the ethical codes that govern medicine; that, second, the historic separation of military from medical functions had practical as well as ethical roots; and that, third, they would have grave doubts about training Special Forces themselves, as long as the program implied the paramountcy of military-political judgments. "Even if the Special Forces aidmen do a little bit of good?" they were asked by defense counsel Alan Levine. "The risk to the independence and status of medicine rarely comes from people who want to hurt medicine," Mayer replied. "The long-term advantages of independence so far outweigh the immediate gains that I would not do it. Anything that makes medicine backslide into an agent of any ideology is bad for medicine." "There are situations," according to Sidel, "in which the short-term effects may be good but may lead to deleterious consequences. You can't just run in without a thought for the long-term implications." Saying the Special Forces "do some good" is "trying to make the ends justify the means," Lasagna said. "I just don't believe the gains are worth the losses to the ethical core of medicine or to the realistic supplying of medical care on the battlefield." Like Mayer, he argued that the political use of medicine by the Special Forces jeop-

ardized the entire tradition of the non-combatant status of medicine. The four agreed with Levy that a physician is responsible for even the secondary ethical implications of his acts: that he must not only act ethically himself but also anticipate that those to whom he teaches medicine will act ethically as well.

The prosecution took a turn at ethics, too. William DeMaria of Duke University endorsed the Special Forces program, arguing that he would not be responsible for what aidmen did after he had trained them; he testified that there are occasions on which military orders should take precedence over medical ethics. Another prosecution witness, North Carolina practitioner Amos Johnson, a former head of the American Academy of General Practice, was asked, on cross-examination, whether he thought the training of medics who were also combatants raised any ethical issues. "Let me ask you a question," Johnson responded. "Do they operate under the Geneva convention?" Told to assume that they did not, Johnson replied, "Then it doesn't bug me at all." (The practice of marking Green Beret aidmen with the red cross varies in Vietnam; some carry marked ID cards, and others do not; none evidently carries any external symbol.) "If I were the enemy," Johnson continued, "and my medical care wasn't too good, I'd rather have this person shoot me, because if he doesn't kill me then a few minutes later, if he captures me, he may be using his medical skill to save my life."

The Army also took the paradoxical tack of trying to make Levy look like a reactionary, implying that he was against the training of paramedical health personnel to serve as physicians' assistants. Neither Levy nor those who testified for him are opposed to such training. But "in civilian programs, paramedical personnel are always agents of the doctors," Mayer pointed out. "They are not, for example, ward captains."

How can a military court plausibly adjudicate these issues? For the defense it was a question of individual responsibility. For the government it was a question of military order. In the context of Fort Jackson, where formations of trainees were marching outside the courtroom, running, shouting, firing their weapons, and going through bayonet drill, such an assertion of individuality seemed improbable, and the questions of conscience on which it was based seemed remote. To the ten combat officers who court-martialed him, Howard Levy was simply a disobedient and seditious officer. To those who observed him out of khaki he seemed an intense political activist, a sober physician, and above all a quintessential civilian. The most unsettling thing about Howard Levy's trial was the fact that a system over which he had no control, whose purposes were not his purposes, and whose values were not his values had sufficient power to put him in jail for committing crimes that to him were the opposite of crimes.

—ELINOR LANGER

Nuclear Energy: New Study Assails British Program

London. A new and scathingly critical report* on the management of Britain's nuclear power program makes the whole undertaking look like a technological Crimean War.

Britain gained an early and impressive world lead in the production of electricity by nuclear power stations,

but, according to the monograph's author, Duncan Burn, two principal blunders were made: (i) premature concentration of development efforts on one type of reactor, and (ii) a decision to go ahead on a large program of building nuclear power plants in a period when the favored design was not competitive with fossil-fuel plants.

Burn is an economist with experience as a civil servant and as industrial cor-

respondent for the *Times*. Now an economic consultant, Burn from 1962 to 1965 was director of the economic development office of the Heavy Electrical Generator Manufacturers. The Institute of Economic Affairs, which published the report, is a private research and education trust which specializes in the study of markets and pricing systems. A number of its publications give technical support to arguments for the defense of private enterprise from public intervention.

The British nuclear power program has been criticized before, but Burn's broadside has special impact just now. Nuclear power scored a "breakthrough" in the United States last year when orders were placed for 22 plants, rated at a total 17,000 megawatts (electrical).

* Duncan Burn, *The Political Economy of Nuclear Energy* (Institute of Economic Affairs), 21 shillings.