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UCLA Public Law & Legal Theory Series

Title

All's Fair in Love and War: Military Justice in the Movies

Permalink

<https://escholarship.org/uc/item/6604p23h>

ISBN

978-3-7560-0735-6

Author

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Publication Date

2024

Stefan Machura [Ed.]

Law and War in Popular Culture

STAATSVERSTÄNDNISSE



Nomos

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Staatsverständnisse | Understanding the State

edited by

Rüdiger Voigt

Volume 182

Stefan Machura [Ed.]

Law and War in Popular Culture



Nomos

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-7560-0735-6 (Print)
978-3-7489-1829-5 (ePDF)



Online Version
Nomos eLibrary

1st Edition 2024

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Das Staatsverständnis hat sich im Laufe der Jahrhunderte immer wieder grundlegend gewandelt. Wir sind Zeugen einer Entwicklung, an deren Ende die Auflösung der uns bekannten Form des territorial definierten Nationalstaates zu stehen scheint. Denn die Globalisierung führt nicht nur zu ökonomischen und technischen Veränderungen, sondern sie hat vor allem auch Auswirkungen auf die Staatlichkeit. Ob die „Entgrenzung der Staatenwelt“ jemals zu einem Weltstaat führen wird, ist allerdings zweifelhaft. Umso interessanter sind die Theorien früherer und heutiger Staatsdenker, deren Modelle und Theorien, aber auch Utopien, uns Einblick in den Prozess der Entstehung und des Wandels von Staatsverständnissen geben.

Auf die Staatsideen von Platon und Aristoteles, auf denen alle Überlegungen über den Staat basieren, wird unter dem Leitthema „Wiederaneignung der Klassiker“ immer wieder zurückzukommen sein. Der Schwerpunkt der in der Reihe **Staatsverständnisse** veröffentlichten Arbeiten liegt allerdings auf den neuzeitlichen Ideen vom Staat. Dieses Spektrum reicht von dem Altmeister *Niccolò Machiavelli*, der wie kein Anderer den engen Zusammenhang zwischen Staatstheorie und Staatspraxis verkörpert, über *Thomas Hobbes*, den Vater des Leviathan, bis hin zu *Karl Marx*, den sicher einflussreichsten Staatsdenker der Neuzeit, und schließlich zu den zeitgenössischen Staatstheoretikern.

Nicht nur die Verfälschung der Marxschen Ideen zu einer marxistischen Ideologie, die einen repressiven Staatsapparat rechtfertigen sollte, macht deutlich, dass Theorie und Praxis des Staates nicht auf Dauer voneinander zu trennen sind. Auch die Verstrickung Carl Schmitts in die nationalsozialistischen Machenschaften, die heute sein Bild als führender Staatsdenker seiner Epoche trüben, weisen in diese Richtung. Auf eine Analyse moderner Staatspraxis kann daher in diesem Zusammenhang nicht verzichtet werden.

Was ergibt sich daraus für ein zeitgemäßes Verständnis des Staates im Sinne einer modernen Staatswissenschaft? Die Reihe **Staatsverständnisse** richtet sich mit dieser Fragestellung nicht nur an (politische) Philosophen und Philosophinnen, sondern auch an Geistes- und Sozialwissenschaftler bzw. -wissenschaftlerinnen. In den Beiträgen wird daher zum einen der Anschluss an den allgemeinen Diskurs hergestellt, zum anderen werden die wissenschaftlichen Erkenntnisse in klarer und aussagekräftiger Sprache – mit dem Mut zur Pointierung – vorgetragen. Auf diese Weise wird der Leser/die Leserin direkt mit dem Problem konfrontiert, den Staat zu verstehen.

Prof. Dr. Rüdiger Voigt

Editorial – Understanding the State

Throughout the course of history, our understanding of the state has fundamentally changed time and again. It appears as though we are witnessing a development which will culminate in the dissolution of the territorially defined nation state as we know it, for globalisation is not only leading to changes in the economy and technology, but also, and above all, affects statehood. It is doubtful, however, whether the erosion of borders worldwide will lead to a global state, but what is perhaps of greater interest are the ideas of state theorists, whose models, theories and utopias offer us an insight into how different understandings of the state have emerged and changed, processes which neither began with globalisation, nor will end with it.

When researchers concentrate on reappropriating traditional ideas about the state, it is inevitable that they will continuously return to those of Plato and Aristotle, upon which all reflections on the state are based. However, the works published in this series focus on more contemporary ideas about the state, whose spectrum ranges from those of the doyen *Niccolò Machiavelli*, who embodies the close connection between the theory and practice of the state more than any other thinker, to those of *Thomas Hobbes*, the creator of *Leviathan*, those of *Karl Marx*, who is without doubt the most influential modern state theorist, those of the Weimar state theorists *Carl Schmitt*, *Hans Kelsen* and *Hermann Heller*, and finally to those of contemporary theorists.

Not only does the corruption of Marx's ideas into a Marxist ideology intended to justify a repressive state underline the fact that state theory and practice cannot be permanently regarded as two separate entities, but so does Carl Schmitt's involvement in the manipulation conducted by the National Socialists, which today tarnishes his image as the leading state theorist of his era. Therefore, we cannot forego analysing modern state practice.

How does all this enable modern political science to develop a contemporary understanding of the state? This series of publications does not only address this question to (political) philosophers, but also, and above all, students of humanities and social sciences. The works it contains therefore acquaint the reader with the general debate, on the one hand, and present their research findings clearly and informatively, not to mention incisively and bluntly, on the other. In this way, the reader is ushered directly into the problem of understanding the state.

Prof. Dr. Rüdiger Voigt

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All's Fair in Love and War. Military Justice in the Movies

The title of this chapter is ironic: All is *not* fair, either in love or in war, particularly not in the administration of military justice. This chapter surveys military justice in English-language films (I will save fairness in love for another occasion). A consistent theme that runs through the cinematic representations of this subject is that military justice is inferior to civilian criminal justice.¹ In particular, military justice films often emphasise abuse of the following orders defence and tampering by superiors with the court martial process, especially by exercising command influence.

Pop culture media are designed to entertain mass audiences and turn a profit. At their best, movies and television tell captivating stories about strong and nuanced characters toward whom viewers feel empathy or antipathy. Normally these stories are intended to serve as light entertainment to be pleasurable consumed and quickly forgotten. But all of us who participate in popular culture studies believe that pop culture is much more than slick and forgettable mass entertainment. We believe that pop cultural representations are important and worthy of serious study. Such representations function both as a mirror and a lamp, meaning that they broadly reflect public opinion as well as constructing and reinforcing public opinion. In addition, pop culture is valuable because it highlights societal problems, including defects in the justice system and in the legal profession. And so it is with movies about military justice. These films focus on deep flaws inherent in military justice, including command influence and abuse of the following orders defence.²

Part 1 discusses the law of command influence and the following orders defence. Part 2 discusses movie representations of command influence and other forms of

1 In fact, the opposite is probably true. The American military justice system contains numerous safeguards for the accused that are absent in the civilian justice system. See *Asimow/Silbey* 2020, pp. 232-34.

2 Of course, these are not the only flaws inherent in military justice as it appears in the movies. *Billy Budd* (U.S. 1962, dir. Peter Ustinov), for example, concerns the injustice of court-martials administered by commanding officers on the spot and the application of military law with extreme severity. For a different analysis of military justice films, see *Khoday* 2018. Khoday's article emphasises films that positively represent military personnel who resist illegal or unwise orders and who expose wrongdoing by superior officers.

tampering by superior officers. Part 3 discusses films that focus on abuse of the following orders defence. Part 4 concludes.³

1. *The Law of Command Influence and the Following Orders Defence*

1.1. Command Influence

Command influence is an enduring problem of military justice. It refers to interference through the exercise of influence or other forms of tampering by superior officers with the witnesses, judges, or jury of a court-martial. In the field of military justice, a commander's power properly includes the discretion whether to convene a court-martial to consider serious forms of punishment for military offences or to accept a plea bargain adjudging some lesser punishment. It also includes the choice of military personnel to serve as prosecutors and jurors. Interference with the court martial process that goes beyond these powers is considered command influence.⁴

The Uniform Code of Military Justice (UCMJ), the U. S. statute that regulates the military justice system, firmly prohibits command influence. Under Article 37(a)(1) of the UCMJ,

“No court-martial convening authority, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.”⁵

3 The subject of military justice on television is beyond the scope of this chapter. However, it is worth noting that *JAG* (U.S., 1995-2005) was an important American television series about the military justice system. It ran a remarkable ten years and included 227 episodes (*Wikipedia*, *JAG*). It consistently portrayed the military justice system in a positive and patriotic way. Smith points to the pro-military perspective of the show. “Unlike some law shows and films in which negative stereotypes of civilian lawyers are emphasised to attract a larger audience, or lawyers are depicted as politically motivated, *JAG* played to a different audience – one that wanted to see the American military and its lawyers portrayed as just and fair.” (Smith 2009, p. 153). *NCIS* (U.S. 2003-) is a spinoff from *JAG* that has run for 21 years and is still going strong. It is a military police procedural. The title stands for Naval Criminal Investigative Service. See *Wikipedia*, *NCIS*.

4 See *Bedi* 2016, which summarises the history of the command influence problem in British and American military justice. Bedi argues that the military law's current protection against command influence is more robust than the comparable doctrines providing for oversight of misconduct by civilian prosecutors.

5 10 U.S. Code § 837(a)(1). This provision spells out additional detailed provisions preventing interference with witnesses or any form of coercion. It also prohibits a commanding officer in the preparation of a personnel report from taking account of the performance of a court-martial member or because of the zeal with which counsel represented any person in a court-martial proceeding. *Id.* § 837(b).

Nevertheless, prohibitions on the exercise of command influence often come into conflict with military culture. The court-martial convening authorities are not lawyers and sometimes resent the constraints imposed on them by the legalistic court-martial system. They have many opportunities to influence court-martials through choosing the jurors and covertly influencing witness testimony. As a result, American court-martial judges and military appellate courts have decided numerous cases dealing with cases of command influence. This body of law is generous to defendants. The government carries the burden of showing command influence did not exist. When it appears, the military judge must fashion an appropriate remedy that might involve a new trial or even dismissal of all charges.⁶ While blatant interference with courts-martial is probably infrequent, the reality is that there are many opportunities in the military justice system for the exercise of subtle forms of command influence.

An important change in U.S. military justice procedure occurred in 2023. Command officers no longer have power to convene a court-martial arising out of sexual violence or harassment. The prosecutorial decision is lodged in a new unit of the Judge Advocate General (JAG) Corps, the agency that provides both prosecutors and defence lawyers in the court-martial system.⁷ This change occurred out of concern that commanding officers tolerated sexual violence and intimidation among their troops as a lesser evil occurring because of gender desegregation in the military and they did not want to subject their troops to military discipline because of it.

1.2 The Following Orders Defence⁸

The legal issues relating to following orders can arise in three different contexts. First, a soldier might be prosecuted for refusing to follow orders from a superior officer (for example, for refusing an order to kill prisoners). The soldier could defend by arguing that the order was illegal and therefore it would have been illegal to follow it. Second, soldiers might be prosecuted for a crime (such as killing prisoners) and defend by claiming they were following orders to carry out the

6 See *United States v. Douglas*, 68 M.J. 349 (Ct.App. Armed Forces, 2010), which involved efforts by the defendant's commanding officer to intimidate the defendant and the witnesses.

7 Fact Sheet: President Biden To Sign Executive Order Implementing Bipartisan Military Justice Reforms (July 28, 2023), 2023 WL 4840631. The Executive Order stated: "The historic reforms announced today will better protect victims and ensure prosecutorial decisions are fully independent from the chain of the command. They follow decades of tireless efforts by survivors, advocates, and Members of Congress, to strengthen the military justice system's response to gender-based violence and build on recommendations from the Independent Review Commission on Sexual Assault in the Military..."

8 See *Khoday* 2018, pp. 388-391.

illegal acts. Third, superior offices could be prosecuted for giving illegal orders.⁹ This discussion will concentrate on the second issue – when a soldier claims the following orders defence.

The Nuremberg trials after World War II established that the accused German officials and military officers could not claim a following–orders defence to prosecution for genocide and other war crimes. In the *Einsatzgruppen Case*, the Nuremberg tribunal wrote:

“The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent...The fact that a soldier may not, without incurring unfavourable consequences, refuse to drill, salute, exercise, reconnoitre, and even go into battle, does not mean he must fulfil every demand put to him...The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offence.”¹⁰

Contrary to the implication from the Nuremberg decision, the following orders defence is alive and well.¹¹ Under the U. S. Manual for Courts–Martial: “It is a defence to any offence that the accused was acting pursuant to orders *unless* the accused *knew* the orders to be unlawful [a subjective standard] *or* a person of ordinary sense and understanding would have known the orders to be unlawful [an objective standard]”¹²

The following–orders defence is inherently problematic. Military discipline depends on soldiers following orders from superior officers.¹³ As the Manual states, “an order requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate. This inference does

9 See *Majesky* 2013, p.138. Majesky argues that the high-level officials who ordered torture of prisoners in military detention facilities during America's Iraq War should have been prosecuted as well as the low-level military personnel who carried out the orders. In *Rules of Engagement*, discussed in part 2.3, Col. Chiders is prosecuted for giving an illegal order to murder civilians. In *A Few Good Men*, discussed in part 3.1, Jessep and Kendrick are arrested at the end of the film, presumably for perjury and obstruction of justice as well as for giving illegal orders.

10 *Minow* 2007, pp. 17-18. Minow points out that while the Nuremberg tribunal disallowed the defence of following illegal orders, it permitted consideration of whether the defendant followed orders in considering the level of punishment.

11 For discussion of the history and the current status of the following orders defence in international law and U. S. military law, see *Bedi* 2014, pp. 2111-2127; *Hobel* 2011, pp. 578-592.

12 Manual for Courts–Martial, Rule 916(d), p. II-129 (emphasis added). See *United States v. Calley*, 48 C.M.R. 19 (1973), involving prosecution for war crimes resulting from the My Lai massacre during the Vietnamese War. The *Calley* case held that under the objective test, a person of common sense and understanding would know that an order to murder civilians was illegal. In international law, the objective standard is frequently stated as the order was not “manifestly unlawful” such as orders to commit genocide or crimes against humanity.

13 Art. 90 of the UCMJ provides that a person who wilfully disobeys a lawful command in time of war shall be punished by death or such other punishment as a court-martial may direct.

not apply to a patently illegal order, such as one that directs the commission of a crime.”¹⁴

Consequently, soldiers are very likely to follow orders from superior officers without challenging their legality. Military personnel are trained to follow orders unquestioningly and the consequences of refusing to follow an order in battle can be very serious. This situation is confusing to both officers and enlisted personnel alike. Telling soldiers they face punishment unless they disobey illegal orders means telling them to think for themselves and question authority. Yet, directing them to question the legality of their orders undermines their training and group discipline and risks the lives of all concerned.

The objective standard is equally troubling. Who is this person of “ordinary sense and understanding” who would have known the orders were illegal?¹⁵ Has that person had the same training as the defendant and undergone the same experiences and lived in the same military environment? Does that person of “ordinary sense and understanding” understand the full context of the order?

Psychological research indicates that it is doubtful that ordinary soldiers can resist following illegal orders. The famous Milgram experiments suggests that they are quite unlikely to do so. Milgram set up an experiment in which volunteers thought they were administering electric shocks to students who were supposed to be learning a list of words. They were told to turn up the voltage when the students made a mistake. Of course, the “students” were actors who were not actually receiving shocks. In the experiments, about two-thirds of the volunteers followed orders to turn up the voltage to the maximum despite screams of agony from the “students.” Milgram showed that ordinary people will follow morally repellent orders if the person giving the orders seems to be legitimate and authoritative and states that he will take responsibility if any of the “students” are harmed.¹⁶

Similarly, conformity studies show that most people are likely to go along with the group. Conformity appeals to those who want to avoid being ridiculed or rejected by peers. Conformity pressures increase in groups with cohesive ties built by affection or mutual dependence, as occurs in the military.¹⁷ Thus the realities of

14 Manual for Courts-Martial, pp. IV–24.

15 See *Bedi* 2014, pp. 2128–2131.

16 See *Minow* 2007, pp. 30–33. Milgram wrote: “Obedience is as basic an element in the structure of social life as one can point to. Some system of authority is a requirement of all communal living, and it is only the man dwelling in isolation who is not forced to respond, through defiance or submission, to the commands of others. Obedience, as a determinant of behaviour, is of particular relevance to our time. It has been reliably established that from 1933 ... 45 millions of innocent persons were systematically slaughtered on command. Gas chambers were built, death camps were guarded; daily quotas of corpses were produced with the same efficiency as the manufacture of appliances. These inhumane policies may have originated in the mind of a single person, but they could only be carried out on a massive scale if a very large number of persons obeyed orders.” (*Milgram* 1963, p. 371).

17 *Minow* 2007, pp. 33–35.

military life as well as psychological data suggest court-martial judges should be receptive when defendants assert the defence that they were obeying orders even when those orders were illegal.

2. *Command Influence in the Movies*

Numerous court-martial movies have centred on command influence and other forms of tampering by superior officers with the military justice process. This part discusses a number of these films.

2.1. Breaker Morant

Breaker Morant (Aus, dir. Bruce Beresford, 1980)¹⁸ provides a powerful account of command influence in military justice as well as disregard of the following orders defence (as discussed in Part 3.2). The Boer War (1899–1902) was a brutal struggle between the British, who wanted to gain control over South Africa and its mineral resources, and the Boers (Dutch settlers now called Afrikaners) who sought to expel the British. The British confined many Boers to concentration camps where the death rate from disease was extreme.

To combat the Boers' guerrilla tactics ("a new war for a new century") the British organise an elite unit made up mostly of Australians called the Bushveldt Carbineers. Lieutenant Harry "Breaker" Morant (Edward Woodward), Lieutenant Peter Handcock (Bryan Brown), and Lieutenant George Witton (Louis Fitz-Gerald) are members of the Carbineers. The Carbineers are lured into an ambush during which Morant's close friend and commanding officer, Captain Simon Hunt, is killed. Morant takes command of the unit and hunts down the Boers responsible for the ambush. In a fury, he orders the execution of a captive, Dennis Visser, who was wearing Hunt's uniform. At a later point, Morant orders the execution of Boer prisoners, including some who surrendered under a white flag. Witton participates in this execution. Morant also orders Handcock to kill Reverend Hesse, a German

18 The film *Breaker Morant* is based on historic facts, but there is extensive controversy among historians about many aspects of Morant's life and about numerous aspects of the case. Morant and Handcock have become Australian folk heroes and there have been efforts to obtain a posthumous pardon for them. On the other hand, many South Africans believe that Morant and Handcock's punishment was appropriate and other members of the Carbineers should have been punished as well. There is a thorough summary of the differing historic and popular opinions in *Wikipedia, Breaker Morant*. Further discussion of these issues is beyond the scope of this Chapter.

missionary, who had spoken to the prisoners against Morant's orders and probably would have reported their killing.

Lord Kitchener is the British commander in South Africa. He orders the court-martial of Morant, Handcock, and Witton. Kitchener seeks to placate Germany, which is considering whether to join the war on the side of the Boers and was particularly disturbed by the killing of Hesse. As "colonials with bad habits," Australians are convenient and expendable scapegoats. Even the Australian government supports Kitchener's decision. The country has just been admitted to the British Commonwealth and wants to shed "lingering impressions of a frontier colony, frontier behaviour."

Kitchener is quite clear in his plans for the trial:

KITCHENER: The Boer leaders must see in this court-martial the demonstration of our impartial justice. If these three Australians have to be [pauses shortly] sacrificed to help bring about a peace conference, small price to pay.

Kitchener appoints Major Charles Bolton as the prosecutor. Major J. F. Thomas (Jack Thompson) represents the three defendants. Thomas was an Australian solicitor who specialized in land titles and wills and had never tried a case. Understandably, his clients do not trust him and initially, he appears incompetent. But once the trial begins, Thomas does his thankless job with great skill and courage. He is a true lawyer hero, the one positive character in this sordid story.

Command influence reduces the trial to a formalistic ritual that provides only an illusion of fairness and justice.¹⁹ At a dinner party at the beginning of the film, the presiding judge, Lt. Col. H.C. Denny, expresses his contempt for Australians.

DENNY: It's a matter of discipline and tradition. Do you think this business could've happened with any contingent other than the Australians?"²⁰

Thomas is given inadequate time to prepare for the trial. The presiding judge's evidentiary rulings prevent his introducing relevant evidence. Numerous prosecution witnesses testify falsely. As discussed in Part 3.2, the presiding judge reacts with outrage when the defence seeks to show that Kitchener gave illegal orders.

The three Carbineers are sentenced to death. Defence lawyer Thomas rushes to Kitchener's office to seek a stay of execution that would enable him to seek a pardon or a commutation, but Kitchener is conveniently unavailable. At sunrise the next morning, a firing squad executes Morant and Handcock. Witton's sentence is commuted to life at hard labour.

¹⁹ Kershen 1997, pp. 109-111.

²⁰ Van Patten 2020, p. 112.

2.2. Paths of Glory

Stanley Kubrick's masterpiece *Paths of Glory* (U.S., 1957)²¹ is one of the greatest anti-war films of all time. It also tells a heart-wrenching story of command influence. The film cuts between a gorgeous chateau, where the officers make politicised war plans and throw gala dances, and the filthy trenches where the troops who must fight the ghastly war are barely surviving.

General Broulard (Adolph Menjou) bribes General Mireau (George Macready) with a promotion if his weakened regiment assaults an impregnable German position called the Ant Hill. Mireau in turn entrusts Colonel Dax (Kirk Douglas) with the hopeless task. The attack fails miserably. The German fire is so intense that many of the men never leave the trenches. Most of those that did were slaughtered. In frustration, Mireau orders French artillery to fire on his own positions, but the gunners refuse to execute the order.

Mireau's career is on the line and he must find scapegoats to blame for the disaster. He convenes a general court-martial. At first, Mireau wants to put one hundred men on trial, but grudgingly reduces the number of defendants to three. One soldier is chosen to cover up for his superior officer who had botched a patrol. One is chosen by lot. And a third is chosen because his superior officer considers him a social undesirable. The charge is cowardice in the face of the enemy and the punishment is death. Yet, it is obvious that these soldiers were not guilty of cowardice. They tried to advance, but the suicidal attack had no chance of success and they had to retreat (indeed they were ordered to do so). Colonel Dax (formerly the best criminal lawyer in France) volunteers to serve as defence counsel.

Virtually everything that could be wrong with a military trial occurs in the rushed court-martial the following day. Procedural niceties like a written indictment or a transcript are dispensed with. Mireau observes the trial to make sure the judges follow the script. The judge rules out evidence that might show that the men were not cowards (such as citations for bravery in the past). Nor can Dax introduce evidence of the impossibility of the assault or the incompetence of the generals. His impassioned closing falls on deaf ears.

DAX: The case made against these men is a mockery of all human justice. Gentlemen of the court, to find these men guilty would be a crime to haunt each of you to the day you die.

21 For in-depth treatment of *Paths of Glory* and of its star Kirk Douglas, see *Abrams/Lipiner*, 2024. Their chapter analogises the court martial to Nazi justice and the banality of evil as well as to the Dreyfus affair in France. *King and Country* (U.K., 1964, dir. Joseph Losey) is often compared to *Paths of Glory*. It is a grim story of the hasty court martial of a British soldier in World War I. He is tried, convicted of desertion, and shot as an example to the troops, even though he was obviously suffering from shell shock.

The fact that the trial takes place at all demonstrates how trials are important cultural rituals. The process might be a sham, but some sort of trial must take place in order to legitimate the outcome.

Underlying the soldiers' convictions is the theory of collective guilt. Mireau believes the regiment as a whole is guilty of cowardice since it didn't take the Ant Hill or die trying. Three sacrificial lambs must bear the guilt of all. This idea of collective guilt is repellent. Even in conditions of deathly combat, there is no room for collective guilt in a civilised justice system.

2.3 Rules of Engagement

In *Rules of Engagement* (U.S., 2000, dir. William Friedkin),²² high officials go beyond exercising command influence over a court martial and engage in outright obstruction of justice. The film concerns the court-martial of Colonel Terry Childers (Samuel L. Jackson), a decorated Marine officer, who leads a squad on a rescue operation in Yemen. A number of snipers in adjacent buildings, armed with automatic weapons, besiege the embassy with intense gunfire. In addition, a screaming mob is demonstrating outside the embassy. The squad manages to evacuate the terrified Ambassador Mourain (Ben Kingsley) and his family by helicopter. Mourain is extremely grateful to Childers for his professionalism under fire.

Childers returns to the roof of the embassy where his squad is taking heavy fire from the snipers. In addition, as we learn at the end of the film, Childers (alone among his men who are huddled below the parapet) can observe gunmen in the crowd of demonstrators below firing on the Marines. Several Marines are killed by gunfire coming either from the snipers or the demonstrators.

Childers orders his squad to “waste the motherfuckers,” meaning open fire on the civilians below. Captain Lee, Childers' second in command, at first refuses to follow the order, but Childers repeats it. Eighty-three people (including women and children) are killed and many others wounded. This creates an enormous international incident and threatens U.S. relations with moderate Arab regimes. Childers is prosecuted for murder for giving the fateful order. National Security Adviser Bill Sokal (Bruce Greenwood) needs Childers to be convicted in order to provide a scapegoat on whom the massacre can be blamed—a familiar theme in military justice movies. To convict Childers under the applicable rules of engagement, the

22 *High Crimes* (U.S. 2002, dir. Carl Franklin) is another rigged court martial story similar to *A Few Good Men* (discussed below under 3.1.) and *Rules of Engagement*. In *High Crimes*, an ex-marine is court-martialled for killing civilians in El Salvador. The case was brought to cover up blunders and wrongdoing by military officials.

prosecution must prove that the only fire was coming from the snipers, in which case Childers' order to fire on civilian demonstrators would have been illegal.

Sokal withholds the facts from discovery and destroys a surveillance videotape that would have shown fire coming from the crowd. Sokal forces Ambassador Mourain to testify against Childers. Mourain falsely states that the crowd was peaceful and that Childers charged into the situation, possessed by a murderous rage. He also testifies falsely that Childers forced him to leave the embassy when he wished to stay. Unlike the more hard-hitting narratives of *Breaker Morant*, *A Few Good Men*, and *Paths of Glory*, the movie ends implausibly with Sokal and Mourain disgraced and Childers vindicated.

2.4 Man in the Middle

Man in the Middle (U.S., 1964, dir. Guy Hamilton) involves extreme command influence as well as tampering with evidence and witnesses. The film is situated at a joint British and American outpost in India during World War II.²³ American Lieutenant Charles Winston (Keenan Wynn) shot and killed a British non-com, Sergeant Quinn, in front of numerous witnesses. This caused serious friction between the American and British contingents in India. The American General Kempton desperately wants Winston to be convicted and executed for murder to smooth over the rift.

Lieutenant Colonel Barney Adams (Robert Mitchum) is a career military officer with little legal knowledge. He is forced to defend Winston. Winston is a raving racist who killed Sergeant Quinn because Quinn was seeing Indian women and also because Winston believed Quinn was undermining his own authority. It is apparent that Winston is suffering from severe psychiatric illness.

General Kempton and Colonel Burton, the hospital commander, are concerned that Winston might escape the death penalty by asserting an insanity defence. They do everything possible to prevent Adams from raising that defence. Major Kaufman, a qualified psychiatrist at the base hospital, examined Winston and opined that he was legally insane. Burton orders Kaufman's report destroyed and ships him off to a distant base. Burton appointed a "lunacy board" consisting of himself, a surgeon, and a dentist (none of them experts in psychiatry), that found Winston was sane. And Kempton strongly implies that Adams' promotion depends on his presenting only a token defence of Winston.

23 The movie was named *The Winston Affair* in some markets, which was also the title of the novel by Howard Fast from which it was adapted. For an excellent and appreciative analysis of the novel and the film, see *Nevins* 1996.

Early in the film, it appears that Adams is going to play along with his superiors in order to protect his own career. Later, however, Adams inexplicably changes into a zealous and self-sacrificial defender of his detestable client. Adams persuades Kaufman to testify at the trial, but Kaufman dies in a jeep accident on his way to the hearing. Adams stumbles onto a carbon copy of Kaufman's report, but it is unsigned and cannot be authenticated, so the law officer rules that it cannot be admitted. At the trial, Burton testifies that he cannot authenticate the report even though he admits to having read it. Winston leaps to his feet and delivers an insane rant. And British Major Kensington, a psychiatrist who knew Winston, testifies that he was insane. Perhaps uniquely in the courtroom genre, we never learn the court martial's verdict.

2.5. The Conspirator

The Conspirator (U.S., 2011, dir. Robert Redford) involves a military commission formed to try civilians suspected of conspiracy in the assassination of Abraham Lincoln in 1865.²⁴ Secretary of War, Edwin Stanton (Kevin Kline), orders formation of the commission which consists of nine Union generals.

The defendant, Mary Surratt (Robin Wright), owns a boarding house in Washington frequented by the conspirators including the actual assassin, John Wilkes Booth, and several other men, including Mary Surratt's son John (who has not been found and was a likely conspirator). The defence lawyer, Frederick Aiken (James McAvoy), is a young Union veteran with little legal experience. Aiken detests his client Mary Surratt and is given only one day to prepare. He disregards his client's admonition not to attempt to shift blame to John Surratt. Still, Aiken does a noble job in a hopeless cause, thereby earning the utter contempt of his friends and the entire community.

The military commission is little more than a uniformed lynch mob that provides a ceremonial function. There are no procedural protections for the accused, such as a jury trial, disclosure of the government's evidence, a reasonable doubt standard

24 For discussion of the historical basis for the film and of the trial proceedings, see *Lederman* 2018; *Asimow/Bergman* 2021, pp. 400-403. One year after the actions of the military commission, the Supreme Court ruled that civilians are entitled to be tried by civilian courts rather than military commissions, so long as civil courts are functioning. *Ex Parte Milligan*, 71 U.S.2 (1866). Another devastatingly negative film about military commissions is *The Mauritanian* (U.S. 2021, dir. Kevin Macdonald). The film concerns U.S. military commissions at Guantanamo Bay, Cuba, formed to try detainees suspected of complicity in the bombing of the World Trade Center in 2001. The film concerns Mohamedou Ould Slahi who was detained from 2002 to 2016. He was subjected to torture and sexual abuse and was held without charges for many years. A civilian court issued a writ of habeas corpus that ordered him to be freed, but he was held another seven years pending appeal of that decision. The Guantanamo military commissions have been a total fiasco.

of proof, or any right of appeal. The judges reject Aiken's attempts to discredit prosecution witnesses. Defence witnesses change their stories as the result of pressure from the government. Stanton wants the commission to deliver a quick guilty verdict and a death sentence to appease the population's thirst for revenge. The commission obliges by finding Surratt guilty, but the generals vote to impose life in prison rather than the death penalty – until Stanton changes their minds. Aiken procures a writ of habeas corpus that requires the government to provide a new trial in a civilian court. But President Andrew Johnson suspends the writ and Surratt is hanged.

Due process is of little concern. As Stanton says to Senator Reverdy Johnson, who had persuaded the reluctant Aiken to take on Surratt's defence:

STANTON: This trial will do more to keep the peace than any paper treaty could. ... Because justice, swift and firm, will help deter the South from ever conspiring again. As well as discouraging the North from seeking revenge.

JOHNSON: What about the rule of law?

STANTON: My first responsibility is to ensure that this war stays won...

JOHNSON: Abandoning the Constitution is not the answer.

3. *The Following Orders Defence in the Movies*

Several courtroom movies involved lower-level military personnel who follow the illegal orders given by their superiors. Their attempts to rely on the following orders defence (discussed in Part 1.2) are unavailing.

3.1 A Few Good Men

*A Few Good Men*²⁵ (U.S., 1992, dir. Rob Reiner) was a commercially successful and well-reviewed film. It provides a springboard for discussing the following orders defence. The movie is set at the U. S. Marine base at Guantanamo Bay, Cuba. In the film, Private Willie Santiago is an unhappy Marine desperate to transfer out of Guantanamo. Santiago observes Corporal Harold Dawson (Wolfgang Bodison) unlawfully fire a shot over the fence line into Cuban territory. Ignoring the chain of command, Santiago offers to disclose the identity of the shooter to anyone who might transfer him.

Soon thereafter, Dawson and Private Lowden Downey (James Marshall) subject Santiago to a "Code Red" hazing procedure and accidentally kill him. Dawson and Downey are charged with murder. Their defence is that their superior officer,

25 See discussion in *Khoday* 2018, pp. 402-404.

Lieutenant Jonathan Kendrick (Kiefer Sutherland) had ordered them to administer the Code Red. Code Red hazing was illegal because the Marines had officially abolished it.

Lieutenant Daniel Kaffee (Tom Cruise) is a brash neophyte in the Navy Judge Advocate General (JAG) Corps. His father was a famous military and trial lawyer who became Attorney General of the U.S. Kaffee has plea-bargained 44 cases and tried none of them. He cares more about the base softball team than about his clients. His superiors appoint him to represent Dawson and Downey, hoping that he will quietly make two more plea deals.²⁶ The prosecutor Captain Jack Ross (Kevin Bacon) offers Kaffee a favourable plea bargain in hopes the embarrassing case will go away, but Dawson and Downey turn it down.

Kaffee's team includes a seasoned JAG lawyer, Sam Weinberg (Kevin Pollak) and a zealous but rather inept lawyer working in Internal Affairs, Lieutenant Commander Joanne Galloway (Demi Moore). Kaffee, Weinberg and Galloway travel to Cuba to meet with Kendrick and Colonel Nathan Jessep (Jack Nicholson), the base commander. Jessep claims that he ordered that no harm come to Santiago, and Kendrick states he dutifully passed that order on to his men. Jessep also declares that he ordered that Santiago be transferred out on the first available military flight, which unfortunately was not scheduled to depart until the morning after he died. Dawson and Downey tell Kaffee that Kendrick ordered them to execute a Code Red on Santiago.

Ross offers evidence suggesting that Dawson and Downey attacked Santiago with intent to kill. Prosecution witnesses testify that the defendants forced a poisoned rag down Santiago's throat. Santiago's threat to report Dawson for the fence line shooting provided the defendants with a motive to kill Santiago, and the two men ignored Kendrick's order not to harm Santiago.

Kaffee's only hope is to put Jessep on the stand and induce him to admit he ordered the Code Red. Jessep is arrogant and insulting, but he unconvincingly loses his temper when Kaffee confronts him with inconsistencies in his story. Kaffee directly accuses Jessep of ordering the Code Red and destroying the records of a redeye flight that could have safely transferred Santiago out of Guantanamo the night that he was killed.

26 It is evident that this appointment was a sign of command influence. Kaffee was clearly unqualified to take on a case of such importance.

When Kaffee demands the truth, Jessep snarls:

- JESSEP: You can't handle the truth... Santiago's death, while tragic, probably saved lives. And my existence, while grotesque and incomprehensible to you, saved lives. ...You want me on that wall, you need me on that wall... I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom that I provide, and then questions the manner in which I provide it...
- KAFFEE: Did you order the Code Red?
- JESSEP: You're goddamn right I did.

This startling and implausible admission causes prosecutor Ross to order that Jessep be arrested. Kendrick is next.²⁷ Dawson and Downey are found not guilty of murder. However, they are convicted of the “general offence,” meaning engaging in conduct unbecoming a Marine, and they are dishonourably discharged.

The murder trial in *A Few Good Men* raises questions about when a soldier should be held responsible for following an illegal order issued by his superior. If Dawson and Downey had refused to administer a Code Red to Santiago, they would certainly have been punished for disobeying Kendrick's order. In theory, they could have defended by arguing that the Code Red was illegal under U. S. law because the Marines had banned Code Reds. However, they would have taken an enormous risk in refusing to follow Kendrick's order, given the stern disciplinary practices at Guantanamo and Kendrick's punishment of Dawson for failing to follow his orders in a prior case.²⁸

However, Dawson and Downey did follow Kendrick's order. The question is whether they have a following orders defence to the charges against them. As previously discussed in Part 1.2, the accused in a court-martial proceeding can assert as a defence that the accused was acting pursuant to orders, unless the accused knew the orders to be unlawful *or* a person of ordinary sense and understanding would have known the orders were unlawful. The defence lawyers' debate whether the following orders defence should apply.

- WEINBERG: An argument that didn't work for Calley at My Lai, an argument that didn't work for the Nazis at Nuremberg.
- KAFFEE: Do you really think that's the same as two teenage Marines executing a routine order they never believed would result in harm? These guys aren't the Nazis.

27 For discussion of the culpability of the superior officer who issues an illegal order to subordinates, see *Mohamed* 2022.

28 Kendrick had ordered that Carter Bell be confined to barracks without food for seven days as discipline. Dawson disregarded the order by bringing Bell food. As a result, Kendrick gave Dawson a poor performance evaluation for refusing to follow an order. Kendrick made clear that he believed all superior orders had to be followed, regardless of the situation.

Later Weinberg and Kaffee renew their debate.

KAFFEE: They were following an order, Sam.
WEINBERG: An illegal order.
KAFFEE: You think Dawson and Downey knew it was an illegal order?
WEINBERG: It doesn't matter what they knew. Any decent human being would have refused to.
KAFFEE: They're not permitted to question orders.
WEINBERG: Then what's the secret? Huh? What are the magic words? I give orders every day and nobody follows them.
KAFFEE: We have softball games and marching bands. They work at a place where you have to wear camouflage or you might get shot.

And in his opening statement Kaffee strongly asserts the following orders defence:

KAFFEE: [I]f you're a Marine, assigned to Rifle Security Company Windward, Guantanamo Bay Cuba, and you're given an order, you follow it or you pack your bags. Make no mistake about it. Harold Dawson and Loudon Downey are sitting before you today because they did their job.

At the end of the film, Dawson accepts blame for his conduct. He tells Downey, "We were supposed to fight for people who couldn't fight for themselves. We were supposed to fight for Willie."

Nevertheless, this defence should have been accepted. Dawson and Downey were probably never told that the Marines had banned Code Reds, since these were commonly administered at Guantanamo as a disciplinary tactic. By the same token, a person of ordinary sense and understanding would not have known the order to be unlawful. The overriding fact is that the Marine Corps teaches unquestioning and immediate submission to orders. The Nuremberg precedent seems inapplicable since Kendrick ordered Dawson and Downey to "teach Santiago a lesson." This order relates to Marine Corps discipline, not manifestly illegal activities like the slaughter of civilians or the abuse of prisoners of war.

As a result, Dawson and Downey should not have been convicted of any offence, including the so-called "general offence." They should not, therefore, have been dishonourably discharged from the Marines. The jury's decision seems to be a compromise (not guilty of murder, but guilty of the "general offence"), but the same legal principles apply to all offences.

Under the circumstances of tight Marine Corps discipline – and Dawson's previous problems with Kendrick for not following orders in the Carter Bell case – it seems unfair and unrealistic to punish the two Marines. Had they defied Kendrick's order (which after all came straight from Jessep), they would have been severely disciplined. They would never have an opportunity to assert the defence that the

order was illegal because they would never have been prosecuted, just informally punished.

3.2. Breaker Morant

As already discussed under the topic of command influence (Part 2.1), *Breaker Morant* is a classic indictment of military justice. It also provides a good account of the abuse of the following-orders defence. Morant, Handcock and Witton are accused of killing prisoners. Major Thomas' defence is that Kitchener and his subordinates, including Captain Hunt, had issued unwritten orders to take no Boer prisoners.²⁹

The court-martial judges are outraged at the suggestion that Kitchener and Hunt might have issued illegal orders to take no prisoners, and they reject the argument out of hand. To Thomas' request that Kitchener be made to appear at the court-martial to testify as to whether such orders had been issued, the presiding judge replies:

PRESIDING JUDGE: You are impertinent, Major Thomas. Are you suggesting that the most senior soldier in the British army, a man venerated throughout the world, would be capable of issuing an order of such barbarity?

At an earlier point, the court sustains objections to Thomas's questions to a witness, Captain Donald Robertson, on the subject of killing prisoners because the answer might incriminate the witness. Thomas has no way to prove that illegal orders were ever issued. Hunt is dead and Kitchener refuses to testify. Witnesses declare they never heard of such orders. Kitchener's aide, Colonel Hamilton, falsely denies that any such orders were issued or that he had so instructed Captain Hunt. Yet Kitchener's unwritten orders to "take no prisoners" were widely circulated in the Transvaal area and execution of prisoners was common. Indeed, defence witness Captain Taylor (an intelligence officer with the Carbineers) is asked "Did you know of any orders to shoot Boer prisoners?" He replies, "there was ... an understanding."³⁰

Under military law in effect at the time of the Boer War, the following-orders defence was generally accepted, regardless of the legality of the orders. Under modern law, as discussed in Part 1.2, the defence would be more doubtful because the following-orders defence cannot be asserted if a person of ordinary sense and understanding would have known the orders to be unlawful. However, under the

29 Kitchener had issued orders permitting the execution of prisoners "wearing khaki," but the presiding judge ruled that order applied only to prisoners who were intending to impersonate British troops. Visser was wearing Captain Hunt's uniform, but probably just to keep warm, not to impersonate a British soldier. See *Van Patten* 2020, p. 120.

30 *Van Patten* 2020, p. 124.

brutal conditions of guerilla fighting in the Transvaal, a reasonable person might well have believed the orders to take no prisoners were legal.

MORANT: As for rules, we didn't carry military manuals around with us. We were out there on the veldt, fighting the Boer the way he fought us. I'll tell you what rule we applied, sir. We applied rule 303. We caught them and we shot them under Rule 303 [referring to the caliber of their Enfield rifles].

Moreover, a reasonable person might have considered the orders to be lawful because the Carbineers had no way to confine or otherwise care for prisoners captured in the remote areas of the Transvaal where combat took place or to transport them to an area where they could be cared for.³¹

In any case, the killing of Boer prisoners was relatively common, but only Morant and Handcock were executed for it. At a minimum, the judges should have taken the novelty and harshness of guerilla warfare into account in determining the severity of the punishment meted out to Morant and Handcock. As Thomas argues in his closing:

THOMAS: The tragedy of war is that these horrors are committed by normal men in abnormal situations. Situations in which the ebb and flow of everyday life have departed and have been replaced by a constant round of fear and anger and blood and death. Soldiers at war are not to be judged by civilian rules, as the prosecution is attempting to do. Even though they commit acts, which, calmly viewed afterwards, could only be seen as un-Christian and brutal. And if in every war, particularly guerilla war, all the men who committed reprisals were to be charged and tried as murderers, court-martials like this one would be in permanent session, would they not? I say that we cannot hope to judge such matters unless we ourselves have been submitted to the same pressures, the same provocations as these men whose actions are on trial.

4. Conclusion

The military justice movies discussed in this chapter tell a consistent story of injustice arising out of risks that are inherent in the military justice system. So long as military justice is administered by military rather than civilian courts, these problems will continue to recur. Military trials, especially during war, are always part of the war. Superior officers must produce convictions because they need scapegoats to maintain authority or to carry out other tactical objectives. Hence, the non-lawyers in command have reason to exercise command influence or otherwise

31 Kirschke 2008, p. 52.

tamper with the trials. Similarly, superior officers sometimes issue illegal orders because war is brutal, and the end justifies the means. As the saying goes, “all’s fair in love and war” and soldiers at the bottom of the pyramid must sometimes take the blame. Although modern military law strongly prohibits command influence and offers a robust following orders defence, these flaws in the military justice system are inescapable. The movies discussed in this chapter are a timely reminder of this tragic fact.

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