

Acting under orders

Even in times of uncivilised warfare, natural law matters—as shown so vividly in *Breaker Morant* and other classic movies, writes Mark Pawlowski

In the film *Breaker Morant* (1980), based on an actual historical event, three Australian soldiers are accused of murdering enemy prisoners during the Boer War. The film charts the circumstances of the incident and subsequent court-martial leading to the eventual verdict and subsequent fate of the three men.

Lord Kitchener, the commander-in-chief of British and colonial forces at the time, created the Bushveldt Carbineers as a special unit within the British Army in South Africa. The Carbineers were to use the commando tactics deployed by the Boer guerrillas. When Lieutenants Harry Morant, Peter Handcock and George Witton executed Boer prisoners and a German missionary, Lord Kitchener ordered their arrest and convened a court-martial in February 1902.

They were tried on three capital counts. Counts 1 and 2 charged all three with the murder of Boers taken as prisoners of war. One, named Visser, was captured in a raid wearing a British khaki uniform. Six others, their names unknown, were taken into custody under a white flag of surrender. Count 3 charged Lieutenants Morant and Handcock with the murder of a German missionary who had witnessed the six Boers' surrender, for which the verdict was not guilty. The court-martial found all three guilty of the other murders and sentenced them to death. Lord Kitchener commuted Witton's sentence to penal servitude for life. Morant and Handcock died by firing squad on the morning of 27 February 1902.

No more gentleman's rules

The three soldiers based their defence on the orders and conduct of their superior officers. They were told that Boer prisoners caught wearing British khaki were to be shot (count 1). They were also informed that, upon further instructions from Pretoria, the gentleman's rules of war about taking prisoners were over. The Carbineers were to take no prisoners (count 2). In terms of count 3, the decision to kill the German missionary had no basis in superior commands. He was, however, a Boer sympathiser who had enticed Morant's superior officer and friend into a deadly ambush. To this extent, he was executed as part of the enemy.

The film asks us to reflect on whether the defence of acting under orders is simply an

attempt to pass blame and accountability to a higher echelon. But should not blame be about our own choices and actions? If you are 'under orders' does that mean your actions are always lawful? The film tells us that natural law still matters even in times of uncivilised warfare.

We must retain our belief in a common humanity and not tolerate war crimes for a greater supposed good. In his excellent article, 'Breaker Morant', *Oklahoma City University Law Review*, 22 (1977) 107, Drew L Kershen makes the point well that 'precisely when the Transvaal is being transformed into a legal and moral desert is the time when we must remind soldiers to disobey courageously'.

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Positivist v natural law

The jurisprudential debate between positivist jurists and natural lawyers is also illustrated most vividly in *Judgment at Nuremberg* (1961). Four Nazi judges are placed on trial at Nuremberg before a panel of three American judges. Three of the accused have no remorse, but the fourth, Ernst Janning (played by Burt Lancaster) is different. Janning was a legal scholar who hated Hitler, but had stayed on the bench under the Third Reich. US judge Dan Haywood (Spencer Tracy) is forced to grapple with a number of complex jurisprudential issues. Does the American tribunal have jurisdiction over the defendants? Should it succumb to political pressure and give lighter sentences? Is it ever right for a judge to carry out an immoral law? Or is a judge bound to administer the laws of his country, regardless of whether they are right or wrong? The simple answer given by Judge Haywood is that we should be 'doing something right when doing it right matters most'.



Another film that tackles the positivist v natural law debate is *A Few Good Men*, (1992). Here, two young marines appear before a general court-martial accused of the murder of a fellow marine. A young military lawyer (played by Tom Cruise) is assigned to act as defence counsel. The defence of the two marines, as in *Breaker Morant*, is simply that they were obeying orders (a code red) from their commanding officer, Colonel Jessup (played by Jack Nicholson). The ending is significant because, although Jessup admits under cross-examination that he gave the code red, the two accused are still dishonourably discharged. Like *Breaker Morant* and *Judgment at Nuremberg*, the legal outcome is essentially the same and a triumph for natural law theorists.

The lawyer as hero

Major Thomas, who is appointed to defend the three soldiers in *Breaker Morant*, is portrayed in the film as the hick lawyer who has never appeared before a court-martial. He is a small-town solicitor in Australia whose practice has involved mostly conveyancing. Not surprisingly, the three accused have no confidence in him initially. Once in the courtroom, however, he is transformed and finds his voice. As with so many of these films, Thomas is portrayed as the zealous advocate, fighting for due process at every stage of the proceedings. Above all, like Atticus Finch in *To Kill a Mockingbird* (1962), he is a lawyer of integrity. Even though he does not win, he is one of our screen lawyer heroes. **NLJ**

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