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British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the later Eighteenth Century

PERHAPS nothing more characterizes the popular notion of British military discipline in the eighteenth century than the image of some hapless wretch undergoing a flogging sentence resulting from a capricious decision by haughty officers completely indifferent to his fate. It is taken as received wisdom that the ordinary soldier was subjected to a severe and exacting code of discipline in which the most trivial offence was invariably punished by a savage whipping. The system was allegedly brutal, tempered by neither humanity nor any pretence at justice. It is hardly surprising that this should be the commonly accepted view, for courts martial and military law were denigrated and disparaged in the eighteenth century by Britain's most prominent legal commentators. Blackstone found military law to be '... built upon no settled principles'. It was 'entirely arbitrary in its decisions ... in truth and reality, no law, but something indulged rather than allowed ...'.¹ Common soldiers were ridiculed for being 'bloody-backs', called 'slaves', and sneered at as men who had lost their rights as Englishmen. Concurrently it was simply assumed that civilian justice was superior.

But are such views valid? Historians have paid almost no attention to the development of British military law and only recently has any attempt been made to assess military justice and the practice of courts martial during the eighteenth century.² The focus of attention has very naturally been on general courts martial, the proceedings of which are readily available.³ The inferior courts, the regimental courts martial, have eluded any real scrutiny from a supposed paucity of evidence.⁴

1. A. F. Tytler, *An Essay on Military Law, and the Practice of Courts Martial* (Edinburgh, 1800), p. 15.

2. Arthur N. Gilbert, 'The Regimental Courts Martial in the Eighteenth Century British Army', *Albion*, viii (1976), 50-66; 'Military and Civilian Justice in Eighteenth-Century England: An Assessment', *Journal of British Studies*, xvii (1978), 41-65; 'British Military Justice during the American Revolution', *The Eighteenth Century*, xx (1979), 24-38; 'The Changing Face of British Military Justice 1757-1783', *Military Affairs*, xlix (1985), 80-84. A further article 'Law and Honour Among Eighteenth Century British Army Officers', *Historical Journal*, xix (1976), 75-87, deals with the trial of a particular type of offence at general courts-martial. See also Sylvia F. Frey, 'Courts and Cats: British Military Justice in the Eighteenth Century', *Military Affairs*, xliii (1979), 5-11, parts of which are reproduced in a further discussion of 'Crimes and Courts' in *The British Soldier in America* (Austin, Texas, 1981), pp. 71-93. F. B. Wiener, *Civilians Under Military Justice* (Chicago, 1967) has much useful information on the development of British military law in the eighteenth century.

3. P[ublic] R[ecord] O[ffice], WO 71.

4. A. N. Gilbert, 'The Regimental Courts Martial', 50.

It was, however, the latter which were by far the most important tribunals in dispensing military justice to the common soldier, the number of soldiers tried by general courts martial being very small. Moreover, the fact that the regimental court martial represented but a part of the process of discipline has been all but ignored. For good reason then, regimental courts martial, minor punishments and the use of 'manual correction' deserve a closer look.

Unlike the proceedings of general courts martial which were required by law to be recorded and then deposited with the Judge Advocate General's Office, those of regimental courts martial were taken down solely at the discretion of the regiment. By the second half of the eighteenth century however this practice appears to have been well established, it was '... generally done, though there is no regulation or order for it'.¹ But, while the records of general courts martial proceedings survived intact, eventually to be handed on to the Public Record Office, those of regimental trials faced a more precarious fate in the hands of a succession of regimental clerks. As with other regimental books and records most have certainly been lost, and we are therefore fortunate that at least one very fine collection of eighteenth-century regimental courts martial proceedings, together with a confirmation record of sentences, has survived from the 1st Regiment of Foot Guards.² The extant proceedings of trials held by the regiment are not complete for any one year, but over the period 1747–1800 do provide a record of over one thousand cases involving non-commissioned officers and private soldiers. The proceedings, with their occasional comments by the commanding officer and various other notations, provide firsthand evidence not only of the general conduct of regimental trials and the apportioning of punishment, but also of the daily life of the common soldier. Occasional records from some of the 'marching' regiments of the line have also survived. 'Punishment books', such as that of the 44th Regiment of Foot are a much more restricted source, confining themselves to a terse description of the culprit's offence, together with the decision and sentence of the court.³

Eighteenth-century authors have left little information on the conduct of courts martial, particularly on that of regimental trials, which even more than general courts martial proceeded on the basis of 'that general principle of secrecy, with which the affairs of an army should

1. John Williamson, *Elements of Military Arrangement, and the Discipline of War; Adapted to the Practice of the British Infantry* (3rd ed., London, 1791), ii. 145–6.

2. G[renadier] G[uards], Wellington Barracks, London, R-534 to R-547 contain regimental courts martial proceedings from 1747 to 1801; R-558 and 559 are confirmation books of regimental trials from 1771 to 1801. See Appendix, *infra*, pp. 885–6 for an example of the proceedings.

I am indebted to the Lieutenant Colonel Commanding the Grenadier Guards for his permission to publish material from the regimental archives, and to the Honorary Archivist of the regiment for his interest and courteous assistance.

3. P[ublic] A[rchives] of C[anada], Ottawa, MG 23, K6(2), Punishment Book of the 44th Regiment of Foot, 1779–1784.

be conducted'.¹ When First Lieutenant Stephen Payne Adye of the Royal Artillery, then Deputy Judge Advocate General in North America, published his treatise on courts martial in 1769, he believed he was the first to address himself to such matters, 'though something on that Subject was wanting for the Guidance of Officers, who may be employed on that Duty'.² Adye was not quite correct about the uniqueness of his contribution, but he was not far wrong.³ His treatise seems quickly to have become the principal authority on courts martial and the theory of military law, and as such was an important step forward.⁴ For the remainder of the eighteenth century, and for some years after, Adye's treatise retained its importance, and is still regarded today as the standard eighteenth-century explanation of military law as then practised in the British army. Unfortunately, useful and informative as Adye was and is for the historian, his work is of very limited assistance in reconstructing the actual procedures of courts martial, especially at the regimental level – in fact the existence of regimental trials is something Adye almost completely ignores. He was more concerned to establish the historic precedents for the practice of military law as he knew it (and specifically for general courts martial); he gave only the broadest outline of actual procedure in military courts.

A far more useful source than Adye is an almost unknown work by another officer, John Williamson, whose *Elements of Military Arrangement* first appeared in 1782, reaching a third edition in 1791.⁵ In the words of a contemporary, this work was 'the most useful for officers of any hitherto published in this country'. On the subject of military law, Captain Thomas Reide referred the readers of his own treatise on the duties of infantry officers to Williamson, where they would, he said, '... get more information respecting military courts, than in any other performance extant'.⁶ Although only a part of a larger work on military duties, tactics and discipline, Williamson's discussion of military law, courts martial and punishments was comparable

1. Williamson, *Elements*, ii. 105.

2. Stephen Payne Adye, *A Treatise on Courts Martial* (New York, 1769), p. iv.

3. In 1717 Bruce's *The Institutions of Military Law* appeared. Bennett Cuthbertson, *A System for the Compleat Interior Management and Oeconomy of a Battalion of Infantry* (Dublin, 1768), also included some remarks on courts martial and military punishments. Earlier writers of military treatises, such as the Earl of Orrery and Sir James Turner had also touched on military law and the practice of courts martial.

4. Adye's treatise went through many editions, the first appearing in 1769, and an eighth edition in 1810. Williamson's remarks in the *Elements of Military Arrangement*, make it clear that Adye was regarded as a standard work, and that the first appearance of Adye's treatise led to changes in the procedures used at general courts martial (Williamson, *Elements*, ii. 104.).

5. Williamson's work appears to have been ignored by nineteenth-century writers on military law, and has also escaped the notice of current scholars. The first edition (1782) had little beyond what Adye had already written on military law, but in subsequent editions Williamson added a great deal more, not necessarily in agreement with Adye. For this article the third edition (1791) is referred to throughout.

6. Thomas Reide, *A Treatise on the Duty of Infantry Officers and the Present System of British Military Discipline* (London, 1795), pp. 4, 93.

in length to Adye's work. For the historian, Williamson's *Elements* is a most valuable source, dealing in detail with the actual practice of the army. Williamson's contribution stands somewhere between Adye's attempt to set down an explanation of the proper sphere and practice of military law, and those writers who followed in the nineteenth century when concern focused far more sharply on the precise details of conducting trials, the problems of evaluating evidence, reaching decisions and passing sentences. Drawing on Williamson, to a lesser extent on Adye, and on various nineteenth-century writers we can understand a great deal more from the surviving trial proceedings and punishment records of the eighteenth century.

In the eighteenth century the principal tenets of the British army's disciplinary code, the basis of the army's military law, were to be found in Parliament's annual Mutiny Act and in the monarch's Articles of War,¹ further supplemented by occasional orders and regulations issued under royal authority. In addition, both officers and men were subject to the unwritten law or 'custom of war' as practised in the British service.² The basic features of the disciplinary code were thus the same for each regiment, horse or foot, but the precise details were left to regimental practice. For immediate purposes the soldier's daily conduct was regulated by his regiment's own standing orders and those orders issued each day through the regimental adjutant. Orders given out at regimental level established the tenor of discipline which affected the common soldier, and this depended as much on the spirit of enforcement as upon the orders themselves. The Mutiny Act, after 1717, recognized the legality of the monarch's Articles of War and by authorizing the use of the death sentence by general courts martial in time of peace for certain offences (particularly those of mutiny and desertion) sought to keep the Crown's standing army 'in their Duty' by enabling 'an exact Discipline to be observed'.³ The main points of that discipline as it related to the common soldier in the later eighteenth century

1. Both the Articles of War and the Mutiny Act had undergone considerable change since the late seventeenth century. Although the mutiny acts, since the first in 1689, authorized the calling of courts martial (in fact general courts martial as established by the articles of war) for the purpose of punishing mutiny and desertion, it was not until 1717 that Parliament actually recognized the Crown's legal right to make articles of war – though in practice the army had long been disciplined through such articles. Only from 1748 did the Mutiny Act expressly limit punishments extending to life and limb to those enumerated in the Mutiny Act itself, though once again the practice had preceded statutory recognition. From a short, temporary enactment of only ten sections dealing specifically with the suppression of mutiny and desertion, the Mutiny Act had become by the mid-eighteenth century an annual bill of some length which dealt not only with mutiny and desertion but also with 'the better Payment of the Army and their Quarters'. As to the custom of courts martial themselves, both the general and the regimental court were firmly established practice well before 1700.

2. Williamson, *Elements*, i. 4.

3. *An Act for Punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters* (London, 1760).

were elaborated in only five of the twenty sections which together made up the Articles of War. Starting with profanities and irregular behaviour these sections covered transgressions involving disrespect for the royal family or the commanding general, mutinous behaviour, desertion, the deliberate loss or damage of arms, ammunition, accoutrements and clothing, dereliction of duty, misbehaviour in the field, plundering and giving information or assistance to the enemy.¹ Orders given out at the regimental level translated these points into very specific admonitions and also added further ones according to regimental practice, the temperament of the officer commanding, and the immediate circumstances. This was in accord with the final section of the Articles of War, the 'Devil's Article', by which courts martial could take cognizance of 'all Disorders and Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline', though they were not specifically mentioned in the Articles.² A soldier could thus be punished for such offences as running into debt, concealing venereal disease, marrying, working or acting as a servant without permission, being improperly dressed or sleeping on the guard bed with his hat on. As occasion arose he might be made liable for other very specific misdemeanours which could be punished under the general head of 'disobedience of orders'.

In practice the army's disciplinary code and system of military justice allowed the commissioned officers considerable latitude in handling their non-commissioned officers and private men. One of the principal difficulties which has obstructed deeper understanding of eighteenth-century military discipline, the role of courts martial and the use of corporal punishments, has been a failure to recognize a simple fact: that courts martial and the lash were hardly the sole means of enforcing discipline. In fact, verbal reprimands, 'manual correction', and the use of 'minor punishments' on a graduated scale, set by custom or laid down in regimental orders, emerge from the army's surviving records as the daily basis of its discipline. The rigour and frequency of such methods did much to create the atmosphere of regimental life for the common soldier, and it is well that this should be recognized, for the tone of discipline could vary sharply from one regiment to another. It is unfortunate then that the full impact of such methods can never be fairly assessed, for want of the right sort of evidence.

1. *Rules and Articles for the Better Government of His Majesty's Horse and Foot Guards, and all other His Majesty's Forces in Great Britain and Ireland, Dominions beyond the Seas, and Foreign Parts, from the 24th Day of March 1778* (London, 1778), sections i, ii, vi, xiii and xiv. A regimental order of the 19th Regiment of Foot, 1 Aug. 1764, specified that these particular sections from the *Rules and Articles* were to be read to the men every two months, and also the final section, number xx (N[ational] A[rmy] M[useum], 6807-160, Abstract of standing orders of the 19th Regiment of Foot, 1763-1770).

2. *Rules and Articles*, 1778, section xx.

Verbal reprimands and summary beatings using the rattan in 'manual correction' appear to have been common:¹ but how common? References are scanty and fragmentary – and of course no regimental records were kept of such things. Contemporary critics of the army are not always reliable indicators, and while such things are vividly recalled in the reminiscences of some old soldiers, others made not even a mention of them.² In any case it may be wondered how the harshness of a reprimand or the severity of a blow delivered while at 'the drill' can be measured, the more so when witnesses at courts martial, for whatever reasons, would disagree completely on such matters. Records of the 'minor punishments', as handed out by company officers, were certainly kept by some regiments, yet it seems unlikely that anything significant has survived. In their place one must rely on the authority of treatises on discipline, scattered references in order books and regimental standing orders, and chance remarks made in the course of courts martial proceedings. The idea that 'much may be done by admonition' and that every effort should be made to correct misbehaviour without resorting to the lash found favour not only with the writers of military treatises, but also with commanding officers. Regimental orders frequently enjoined both officers and non-commissioned officers to stop and to reprove immediately any man whom they saw being negligent in his duty or general deportment.³ Certain punishments, such as the fettering of a miscreant to a log or a shell, or forcing him to wear distinctive and demeaning dress, were aimed at 'publicly shaming Soldiers, into good behaviour' by exposing them to the ridicule of their fellows.⁴ Additional guard duty, piquets, fatigues and 'the Drill' were common correctives for a wide range of misdemeanours from negligence in dress and inattention on parade to absence without

1. For example: NAM, 6807–160, 19th Regiment, R[egimental] O[rder], 2 April 1767; *Regimental Standing Orders; to be observed in the Twenty-Fourth Regiment of Foot: issued by Lieut. Col. Richard England, Dublin Barracks, Nov 20th 1787* (Dublin, 1787), pp. 17–18; GG R-536, Hewett, R[egimental] C[ourt] M[artial], 28 June 1750 and R-546, Allan, Blake and Barrett, RCM, 30 Sept. 1790.

2. James Aytoun (reminiscing in 1829) about his time as a private soldier in the 1780s and 1790s has much to say about beatings and floggings, but Roger Lamb (writing twenty years earlier) says very little. William Pell's account (based on a daily journal kept in the 1780s) has nothing on such matters. See James Aytoun, *Redcoats in the Caribbean* (Blackburn, 1984); Roger Lamb, *Memoir of His Own Life* (Dublin, 1811) and GG R-1151, 'A Narrative of the Life of Serjeant Will^m Pell First Foot Guards (written by himself), From his first Inlisting, Jan^y 18th 1779'.

3. Cuthbertson, *op. cit.*, pp. 143–154; Reide, *op. cit.*, p. 10; NAM, 7512-104, Standing Orders, 15th Light Dragoons, c. 1776, p. 2; 6807-239, Standing Orders, 13th Light Dragoons, p. 8; 6912-14-31, Standing Orders, 37th Regiment of Foot, c. 1775; 7712-48, Standing Orders, 96th Regiment of Foot, 1763; *Standing Orders to be Observed in the 47th (or Lancashire) Regiment, by Order of Lieutenant Col. Paulus Aemilius Irving* (Limerick, 1785), p. 17; *Regimental Standing Orders issued by the Field Officers and to be observed by the 70th (or Surry) Regiment of Foot* (Kilkenny, 1788), p. 11; *Standing Orders, Regulations, Exercise, Evolutions, etc. of the Twenty Second Regiment of Light Dragoons. Raised in the year MDCCLXXIX, and Commanded by The Right Honourable John, Lord Sheffield* (n.p., 1779), pp. 50–1.

4. Cuthbertson, *op. cit.*, pp. 151–2.

leave. Confinement to barracks, usually combined with menial fatigue work, drill or the discomfort of being chained to a log or bombshell, were also used: known as the 'Black Strap' at Gibraltar and in Minorca, and as 'Billing-up' in the Foot Guards. Incarceration in the 'Black Hole' was a harsher confinement which isolated the prisoner and subjected him to a rigid diet of bread and water.¹ Fines, pay stoppages and the denial of privileges such as furlough or lying out of barracks, were all employed to bring the delinquent to heel.

Acting in summary fashion company officers and non-commissioned officers dealt with many errant soldiers on the spot. Reprimands, the rattan and the assignment of 'minor punishments' were all used to ensure the subordination and prompt obedience of the common soldier. When such methods failed, or if an offence was felt to require a more severe example, resort could be made to a regimental court martial. By their nature, immediate decisions on disciplinary measures could be arbitrary, but custom, and often specific regimental orders, had also established graduated scales of punishment whose severity increased with the gravity, or the repetition, of an offence. First- and second-time offenders might be punished by the 'Black Hole', or by assignment to 'the Drill', but the persistent delinquent would ultimately be brought to face a regimental court martial.

Although it is not always the case, existing records make it clear that a number of reprimands and minor punishments were likely to precede the more drastic step of ordering a court martial. This was certainly the preferred progression of affairs which Captain Cuthbertson and others urged, though in practice this did not preclude frequent orders to try immediately by court martial, without exception, anyone found guilty of a specific act. More important however was the discretionary power of regimental officers. If a reprimand was not sufficient, or the behaviour of a soldier thought extremely bad, the offender could be seized and confined. Once in confinement any further punishment would be decided by his officers. Here regimental custom and the orders of the officer commanding could vary. Company officers were either allowed to act with complete discretion, ordering the immediate release of the prisoner, holding him for a court martial or assigning a minor punishment, or the commanding officer retained these decisions for himself, though likely to act on the reports of the officers

1. *Regimental Standing Orders ... Twenty Fourth Regiment ...*, p. 27; *Regimental Standing Orders for the 70th (or Surry) Regiment of Foot. Issued by Lieut. Col. Richard St. George, Island of Jersey, 14th Jan^y 1786* (Jersey, 1786), pp. 53-4; *Standing Orders ... Twenty Second Regiment of Light Dragoons*, p. 40; NAM, 6807-160, 19th Regiment, R.O. 13 Jan. 1770; 6912-14-31, Standing Orders, 37th Regiment and 7512-104, Standing Orders, 15th Light Dragoons, p. 20; PAC, MG 18, L-8, 51st Regiment of Foot, R.O. 23 May 1771. The standing orders of the 31st Regiment of Foot refer to confinement in the 'Bread and Water House', NAM 6807-154, R.O. 15 Nov. 1753.

directly involved.¹ The object, however, seems always to have been the same: to avoid unnecessary courts martial and to prevent long (and needless) confinements.² Typical were the standing orders of Campbell's 35th Regiment of Foot which required officers ordering a confinement 'strictly to enquire' into each case to determine 'if it will bear prosecution or not, that courts martial may not be ordered upon frivolous matters'.³

Regimental courts martial were convened on the authority of the commanding officer of the regiment and were to consist of five commissioned officers (from the regiment) or, if such were not available, then three would suffice. They were to come to a verdict and decide upon a sentence by a 'majority of voices', and the commanding officer was required to confirm the sentence before it was put into execution.⁴ Beyond these cursory instructions the Articles of War said nothing on the actual procedure to be followed. Nor did Adye's work offer much more, and he was careful to point out that his remarks were confined to the conduct of general courts martial. On the subject of regimental courts he said only that they should 'be equally careful to avoid acting contrary to the Articles of War or the known and established laws of the realm', because their proceedings were liable to examination by a general court martial in the event of an appeal, and because all military courts of judicature were subject to the censure of the civil courts of law, who were deemed to be their superiors.⁵ It might be inferred from Adye's remarks that the proceedings of the regimental courts were to follow those of the general courts. That this was probably the practice seems to be confirmed by Williamson, who at least left no doubt as to his own opinion. His readers were told that the proceedings of a regimental trial 'must in every respect conform to the rules laid down for those of a General Court Martial'.⁶ This he followed up with several pages specifically on the conduct of regimental courts martial.

In the words of the Articles of War, regimental courts martial were assembled 'for the enquiring into such Disputes, or Criminal Matters, as may come before them and for the inflicting corporal Punishment for small offences'.⁷ No attempt was made to be more specific, to

1. *Regimental Standing Orders ... Twenty Fourth Regiment ...*, pp. 26-7; *Standing Orders ... 47th (or Lancashire) Regiment*, p. 3; NAM, 6912-14-31, *Standing Orders*, 37th Regiment; 6807-160, 19th Regiment, R.O. 6 Dec. 1766 and 8 Oct. 1767; PAC, MG 18, L-8, 51st Regiment, R.O. 5 and 6 Aug. 1771 and 2 July 1772; GG RO-4, *Regimental Order*, 12 Aug. 1769; RO-3, *Regimental Order*, 26 Sept. 1759 and RO-6, *Regimental Order*, 17 May 1776.

2. GG RO-4, *Regimental Orders*, 25 July 1767 and 9 July 1776.

3. *Standing Orders for the XXXV Regiment; Given by Major General Campbell, 1769* (Boston, 1769), p. 21.

4. *Rules and Articles*, 1778, section xv, articles xii and xiii.

5. Adye, pp. 48-9.

6. Williamson, *Elements*, ii. 142.

7. *Rules and Articles*, 1778, section xv, article xii.

distinguish clearly between the cognizance of a regimental court and that of a general court martial. In practice the army's regimental courts, although 'subordinate' and without the power to inflict any punishment extending to 'life and limb', tried all offences which the general courts were competent to hear.¹ Regimental officers sat in judgement on a profusion of troubles affecting the common soldiers and non-commissioned officers of their regiment. Commonly they dealt with cases of petty theft (including the selling or pawning of necessaries), misbehaviour on duty, unauthorized absence, abuse of superiors and general misconduct. Quarrels between messmates, between husband and wife, soldier and whore, and between soldier and landlord, could all find their way into regimental courts. Officers of the 1st Guards heard evidence that James Neale had encouraged another soldier, Robert Maliday, 'to listen to the infamous Insinuations made by an Old Man'. On another occasion they were asked to decide if George Burgis and John Goter had eaten more than their share of a mess dinner, leaving their messmate, Thomas Giddens, with nothing.² Although regimental courts, 'strictly speaking', were 'open to none but the officers and soldiers of the regiment',³ civilians also appeared, to seek redress for injuries done by soldiers, and to give evidence. The men who sat as members on regimental courts were all commissioned officers, all gentlemen. Their attendance was counted as a duty and they appeared in full regimentals, with sash and gorget. They sat as both judge and jury, while the regiment's senior non-commissioned officer, the sergeant-major, usually acted as prosecutor (unless someone came forward as 'accuser or informant'). The eldest of the officers served as president and the youngest member of the court was customarily given the task of recording the proceedings.⁴ The selection of officers to compose a court martial was done from a duty roster. The 1st Regiment of Foot Guards selected its court members by ordering the attendance of those officers then for guard (if the court was held before guard mounting), or those just coming off guard (if held after guard mounting). In the latter case the court was made up of officers who had been on duty for the past twenty-four hours, with but little sleep.⁵ Unlike those officers called to serve on general courts martial, officers on regimental courts were not sworn, nor were the witnesses examined under oath.⁶ Trials were usually held in the morning and in that respect

1. Williamson, *Elements*, ii. 142-3.

2. GG R-545, Neale, RCM, 5 Oct. 1778 and R-538, Burgis and Goter, RCM, 13 Apr. 1752.

3. Williamson, *Elements*, ii. 130. Williamson stated that general courts martial were open to all persons, civil and military - in practice this was also true of regimental courts.

4. *Ibid.*, pp. 143-4. Some of the trial proceedings of the 1st Foot Guards were written by the president, others were done by several different officers in turn.

5. GG RO-5, Regimental Order, 3 Oct. 1770; RO-6, Regimental Orders, 12 and 28 Oct., 6 and 12 Nov. 1774 and 6 Mar. 1776.

6. This was not altered until 1805. See Thomas F. Simmons, *Remarks on the Constitution and Practice of Courts Martial* (London, 1835), pp. 65, 171-2.

seem to have followed the practice of general courts martial, which were only to sit between the hours of eight in the morning and three in the afternoon, 'except in cases which require an immediate Example'.¹

The surviving records of regimental court martial proceedings in the 1st Foot Guards vary greatly in length and quality of detail, a reflection of both the diverse nature of the trials and also of the industry of the officers who recorded them. How much was set down, whether a few terse lines or several pages, was left to the discretion of each court. While many of the extant proceedings offer little of what was actually said, others, if not literally verbatim accounts, do give the impression of closely paraphrasing the testimony heard, not infrequently reproducing many of the expressions, turns of phrase and actual remarks made during the trial. Some courts clearly went to far greater trouble than others to record their proceedings, on rare occasions including copies of relevant orders and correspondence, even exchanges between members of the court and witnesses. The proceedings of regimental courts martial lacked many of the formalities to which general courts martial were supposed to adhere. Terse reporting aside, trials could be brusque affairs involving little more than a charge, a confirmation of that charge, a response by the prisoner and the sentence of the court. Others were considerably longer, the court taking time to hear and examine a number of witnesses, in rare instances even adjourning until further witnesses could appear, or be written to for information. Prior to commencing its proceedings the court was given a list, prepared by the adjutant, of the prisoners (with the charges against them) who were to appear before them. For the most part regimental justice was swift: few of those appearing would have been in detention for any length of time, and some for only a matter of hours. Most trials were of individual culprits but it was not unusual for two or more men to be tried at the same time if involved together in an offence.

The proceedings began with a statement of the charge, the form of which was not standard. No reference was made to any particular article or section of the Articles of War which had been broken, though this was commonly done in the court's final 'opinion' or sentence. Often a specific act or lapse of duty was mentioned, such as missing a guard or sleeping out of quarters on a particular occasion, but frequently the charge was expressed in more general terms. Edward Hodson was charged with 'missing the Monthly Inspection on Sunday the 7th March; Guard the 8th and making away with Two Shirts'; Joseph Sherwood was brought to trial 'for laying two nights out of the Savoy Barracks and missing his Guard the 7th inst. and being frequently Guilty of absenting himself from the Regiment'; Thomas Mills was tried for 'Repeated Neglects of Duty' and Richard Leggatt was to

1. *Rules and Articles*, 1778, section xv, article ix.

answer 'for Scandulous Behaviour in the Streets'.¹ Charges such as 'Neglect of Duty' or 'Abusing' a superior were not precisely defined offences. 'Insolence' to an officer, for example, might be the result of drunken swearing, an awkward reply which was taken as impertinent, or some remark occasioned by mistaken identity, the accused not having realized that he was being addressed by an officer (as in the case of officers wearing civilian clothes in place of their regimentals, or the incident occurring after nightfall). There does not appear to have been any plea of guilt or innocence entered by the defendant. Instead the charge was usually followed by a statement, commonly by a non-commissioned officer, which was taken to 'prove' or 'confirm' the charge – and some proceedings record little more than the fact that 'Serjeant Coker proves the Charge'.² The prisoner could then present his 'defence'. This he did himself, without assistance, in the same manner as then practised in the civil courts. Generally soldiers simply acknowledged their guilt, made expressions of regret, entered pleas for mercy or made promises of better behaviour. Excuses such as drunkenness or sickness might be offered, but rarely anything actually to refute a charge, although defendants might occasionally deny being at fault, or might try to blame another soldier. The officers who were recording what was said set down at least some of the detail of many soldiers' defences, but others were recorded simply as having 'nothing' or 'nothing material' to say. A few proceedings dismiss the defence offered as 'frivolous'. In the case of Corporal Ingram's trial it was recorded that 'The Prisoner having nothing to Say in his Defence, made a Frivolous excuse'. That such an impression of soldiers' defences was common among officers seems to be indicated in the case of Samuel Walker who was actually pardoned by his commanding officer 'for not attempting to offer any frivolous excuses, for not attending his Duty'.³ Very little of what was recorded constituted a 'defence' at all, while the simple-minded statements of some displayed a total ignorance of military discipline, even revealing further negligence and 'unsoldierlike behaviour'.

There were very few acquittals for men charged with lapses of duty, absences, misconduct or abuse of a superior. The evidence was usually quite straightforward and frequently acknowledged by the defendant; men were not often brought to trial on mere suspicion, save in cases of theft (where the rate of acquittal was also much higher). In most cases the commission of the fault was hardly in dispute; but, if a soldier could not refute a charge, he could at least endeavour to show extenuating circumstances. Such an indulgence was permitted even though

1. GG R-545, Hodson, RCM, 11 Mar. 1784; R-544, Sherwood, RCM, 9 June 1772; R-588, Mills, RCM, 15 Apr. 1783 and R-543, Legatt, RCM, 14 June 1759.

2. GG R-544, Barlow, RCM, 29 Oct. 1774.

3. GG R-541, Walker, RCM, 22 Apr. 1754.

the prisoner had admitted his guilt. If he could, the defendant might produce a further 'evidence' to speak on his behalf, another soldier, a civilian, or the further testimony of the non-commissioned officer who had substantiated the charge against him. Most commonly, however, a 'character' would be called for, usually from a non-commissioned officer of the prisoner's company (who might also be the 'informant' at the trial), less frequently from a company officer. The 'character' ascribed to the prisoner was often crucial to the final outcome of the trial, determining whether or not he would be pardoned, or have part of his punishment remitted. A non-commissioned officer from each of the companies which had men on trial could be required to attend for the very purpose of giving a 'character'.

Those who appeared before the court, including the 'informant', might be questioned by the members of the court, but only a few examples of such exchanges with witnesses survive in the records of the 1st Foot Guards. Soldiers' claims of extenuating circumstances were not necessarily investigated and their requests for a witness, or for a 'character', might be ignored if such witnesses were not at hand. But similarly a case could be dismissed if no informant appeared to prosecute. Williamson claimed (with particular reference to general courts martial) that the same 'laws of evidence' prevailed at courts martial as in the ordinary courts of law. It was the custom of both to procure two or more witnesses, 'if they are to be had', to convict a prisoner. If this proved too difficult, then 'one good and credible witness, and, on some occasions, strong presumptive proof, have been deemed sufficient towards the condemnation of a criminal, though he absolutely deny the facts alledged against him'.¹ Regimental courts were inconsistent. There were no established rules of evidence, in lieu of which they usually adopted the simple expedient of 'one good and credible witness', or failing that 'strong presumptive proof'. Occasionally, however, they had qualms about the evidence and decided upon an acquittal. All courts martial accepted hearsay as evidence, as well as the opinion of witnesses with regard to the prisoner's conduct. Military courts did not refuse witnesses on the grounds of incompetence (i.e. 'disqualification', as practised in civil courts), excepting such as were proved insane.² It was therefore quite possible for a member of the court to give evidence. At regimental trials members themselves might offer evidence for the prosecution, or could be asked to speak on behalf of the prisoner. The credibility of any witness, or of his (or her) opinion, was of course left to the discretion of the court. Having heard the prosecution, the prisoner's defence, and any other 'evidences' who might come forward, and having cleared the court, the members proceeded to judgment. A verdict of guilty or not guilty was decided

1. Williamson, *Elements*, ii. 121.

2. *Ibid.*, 122-3, 125.

by a 'majority of voices', the youngest member stating his opinion first. The same procedure was followed in allotting punishment, although there were conflicting opinions as to whether all members of the court should be allowed to vote on the sentence, or only those who had found the prisoner guilty. The usual practice (which Williamson considered to be 'not consonant with equity') appears to have admitted only the votes of those members who had found the prisoner guilty, those who voted for an acquittal being excluded.¹

In cases involving corporal punishment it 'not infrequently' happened that the members disagreed on the number of lashes to be awarded. When voting on the sentence produced no clear majority the president, 'by the custom of the army', cast the deciding vote.² Alternatively there was another method (described by Simmons in 1830) by which,

... the aggregate quantity of lashes awarded by all the members collectively is divided by the number of members constituting the court, to determine the number of lashes to be inserted as the punishment, all fractions of fifty being discarded in favour of the prisoner.³

Having arrived at a sentence the members could then be canvassed for their opinion on whether or not a pardon or a partial remission of the sentence should be recommended to the commanding officer. Finally the proceedings would be written up, together with the court's decision and sentence, and any recommendation for a pardon. From 1752 onwards regimental courts of the 1st Foot Guards usually made specific reference in their sentence to the article and section of the Articles of War which had been transgressed. Where this was not done, the offender was simply declared to be guilty of disobedience of orders. When complete, the whole was signed by the president and sent to the commanding officer for confirmation.

Since 1736, in order to check any improper proceedings and sentences, the Articles of War had required the commanding officer's confirmation of all regimental courts martial. The commanding officer could reduce a sentence, even offering a complete pardon, but he could not make a sentence heavier. He could also require a court to sit again to revise their findings, but he could not force them to change their opinion, though he might draw their attention to what he considered to be errors. Usually the commanding officer abided by the decision

1. *Ibid.*, 131-3. On the evidence of Simmons, writing in 1830, the prevailing practice seems to have changed in the nineteenth century. According to Simmons the usual procedure was to take the vote of all members on both the judgment and the sentence. Simmons claimed his remarks on this matter to have been based on some thirty years of experience in the army. See Simmons, p. 243.

2. Williamson, *Elements*, ii. 134.

3. Simmons, p. 243.

of the regimental court, including any recommendation for a pardon, even if he was not in agreement with it.¹ After affixing his signature of approval to the proceedings, he handed the matter over to the adjutant, who was then to see the appropriate measures taken. Those prisoners who had been acquitted were now told of the court's decision and released, those found guilty were brought to public punishment before their fellow soldiers. The charge and sentence, and often the proceedings of the court, were read aloud by the adjutant before punishment was inflicted. For private soldiers punishment was almost invariably a flogging with the cat-of-nine tails. Any pardon or remission would be announced only at the last minute, a dramatic gesture also used by the civil authorities in reprieves from the hangman.²

Dr Charles Lucas,³ in bringing to public notice the case of a soldier whom he felt had been unjustly treated by the military courts, told his readers that he had '... learned to look upon Courts Martial, with a very jealous, suspicious eye'. For '... Courts Martial have often exceeded the bounds of law, and violated the principles of justice and humanity. Which makes it most necessary to hold a watchful eye upon their conduct, and to restrict them within the bounds of justice and moderation'.⁴ Although a 'nonsensical demagogue' in the eyes of authority,⁵ Lucas was nonetheless expressing a view of military law and courts martial which probably enjoyed wide acceptance. Britain's foremost legal writers viewed the military, their laws and courts martial with an undisguised disdain, while at the local level, whenever discipline seemed to be harshly administered, it might soon be known. Many civilians lived in close proximity to soldiers. When 'in quarters' (i.e. in billets) regimental courts martial assembled in the dining-room of a convenient inn or alehouse.⁶ Civilians might themselves appear at regimental trials as plaintiffs or as witnesses. When punishment was required, it was often done in full public view, if not always of choice, frequently of necessity.⁷ Ordinary people had opportunities to know

1. GG R-545, Randall, Stileman and Guppy, RCM, 16 July 1781 and Colebrook, RCM, 24 Oct. 1782; R-546, Craddock, RCM, 29 Jan. 1785 and Heywood, RCM, 27 Dec. 1786.

2. The procedure of confirmation and execution of the sentence is based on the trial proceedings of the 1st Foot Guards.

3. Dr Charles Lucas was a Dublin apothecary who rose from obscurity to become an outspoken and controversial critic of public affairs. From 1761 until his death in 1771 he represented the City of Dublin in the Irish Parliament. In 1768 he opposed the scheme for augmenting the army in Ireland, partly because he favoured an Irish militia, but chiefly because he believed that 'Standing Parliaments and standing armies have ever proved the most dangerous enemies to civil liberty'. An ardent Protestant and Irish patriot, he was popular with the people but not a favourite of those in authority. Townshend called him 'the Wilkes of Ireland'. *Dictionary of National Biography*, xii. 231-4.

4. Dr Charles Lucas, *A Mirror for Courts-Martial: in which the Complaints, Trial, Sentence and Punishment of David Blakeney are Represented and Examined with Candor* (Dublin, 1768), pp. 6, 12.

5. *Dictionary of National Biography* (Oxford, 1968), xii. 231-4, quoting a letter from Lord Townshend.

6. Charles James, *The Regimental Companion* (4th ed., London, 1803), ii. 17.

7. For example, PRO WO1/987, Freeman to Secretary at War, 14 Jan. 1764.

about soldiers and how they were treated: any ill treatment was certain to be noticed.

Those who criticized the conduct of courts martial (in regard to the trials of common soldiers) claimed that the denial of a trial by peers was a serious violation of rights. Quite disregarding the reality of trial by peers in the civil courts, critics such as Dr Lucas were certain that the difference in military rank, combined with the social distance, between the commissioned officers who sat as judges and those of humble rank and origin who appeared before them as defendants, produced a situation pregnant with mischief. Commissioned officers were not suitable judges, 'especially of those of the inferior class, who are necessarily made subject to the absolute, not to say despotic, command of their superiors'. Officers were '... often the prosecutors and judges of those soldiers, who are so much their inferiors, that it is not held unlawful or unjust for an Officer to kick, cuff or cudgel a Soldier, while the soldier is punishable with Death, that resists or raises his hand against his superior officer ...'. The soldier had '... no challenge to any of the Judges, though his bitterest enemy were of the number ...', while '... his Judges, thus circumstanced, are the executioners of their own sentence ...'.¹ The fact that army officers were likely to be ignorant of proper legal proceedings made justice seem even more remote:

... There is no class of men in the state, so likely to be unacquainted with the liberties and rights of the subject or the laws on which they are founded, and by which they are defended and secured, as the gentlemen of the army: For, though it must be confessed, there are many most accomplished men amongst them; yet, in general, they are the last, that are called upon, in the ministration of justice, they rarely read any law book, beyond the Articles of War; they are hardly ever called to attend courts of judicature, as jurors or other civil officers, and the principal requisite qualifications for their sphere, are obeying and commanding well, in their turn.²

The result of all this was supposed to be proceedings of a harsh, arbitrary nature which disregarded the normal restraints of law, too often producing a capricious, if not cruel, sentence quite unsuited to the crime.

When Lieutenant Adye wrote his treatise on military law he was well aware of such criticism.³ Upholding the 'consequence' of courts martial was a concern of many of those military gentlemen who addressed themselves to the immediate problems of discipline and the general improvement of their profession.⁴ They were particularly concerned over the conduct of regimental courts martial, the frequency of which 'too plainly indicates a defect in the management of them'.⁵

1. Lucas, pp. 6, 13.

2. *Ibid.*, p. 6.

3. Adye, preface.

4. Cuthbertson, p. 144. See also Williamson, *Elements*, ii. 128-9 and James, ii. 22.

5. James, ii. 22.

Too often regimental courts were asked to try trivial offences which could have been corrected without resort to a trial. As a remedy Cuthbertson had urged the army to adopt the Prussian practice of having one officer from the prisoner's own company examine the circumstances of the offence in order to report to the commanding officer whether or not there was 'matter enough in it' to warrant the assembly of a regimental court.¹ Other problems were more serious. The presence of very young and inexperienced subalterns as members of courts martial, the result of assigning all officers to court martial duty without discrimination, was another 'defect' of which regimental courts were often accused. Young gentlemen, perhaps only fourteen years of age, without 'a sufficient knowledge of the law of their country, nor experience in military affairs', could hardly be considered as competent judges.² The 'absurdity' of ordering immature officers on court martial duty was made worse by the army's insistence that the youngest member of the court be the first to give his opinion.³ The 'various ill-judged and ill-timed remarks among the junior parts of the army'⁴ which resulted did little to enhance the solemnity, or equity, of regimental court martial proceedings. In the absence of any general regulations on the subject, the regiments were free to act on their own. The youngest and newest officers might be ordered to attend all courts martial for a period of six, or perhaps twelve months before actually sitting as members themselves, but such orders were not necessarily attended to, nor were the results all that may have been hoped for. Regimental courts were still publicly censured in orders for carelessness and the youngest members warned that 'any Levity or Inattention' would be reprimanded by the president of the court and reported to the commanding officer.⁵ Officers were chided for failing to appear for court martial duty, for being late, and for leaving before the proceedings were finished.

If regimental officers seemed ignorant even of military law it was hardly surprising. Officers sat in judgement as members of courts martial with only an incidental knowledge of legal procedure, acquired largely in the course of that very duty. They learned on the spot, yet at regimental courts martial there was no judge-advocate or his equivalent to advise on points of law or procedure.⁶ Apart from Adye's

1. Cuthbertson, pp. 143-4.

2. James, ii. 23-4.

3. Williamson, *Elements*, ii. 144.

4. James, ii. 21.

5. NAM, 6807-160, 19th Regiment, R.O. 28 Sept. 1765.

6. Williamson considered this to be a serious defect in the conduct of regimental trials. He felt that someone should be present to act in the capacity of the Judge Advocate (as at general courts martial) and recommended the regimental adjutants as the most suitable choice. (Williamson, *Elements*, ii. 143). But Simmons, writing fifty years later, doubted if general courts martial (which were served by lawyers acting as deputies Judge Advocate) were any less likely to commit irregularities than when military men only were present. (Simmons, pp. 76-7.)

treatise, and later Williamson's, there was no corpus of explanatory works published on military law. In fact there was no written law regarding courts martial save for the very few provisions laid down in the Mutiny Act and in the Articles of War. It was a matter of dispute how far the procedures of the civil courts were to be followed by their military counterparts. By 1780, on the authority of Adye it seemed 'to be pretty generally embraced' that where the Mutiny Act and the Articles of War were silent, 'the manner of proceeding of courts martial should be regulated by that of the other established courts of judicature.'¹ According to this view the Mutiny Act and the Articles of War made reference only to points of procedure in which the military courts were to differ from the practice of the civil courts of law. But not everyone agreed. Williamson argued that as courts martial served a very particular purpose in the army, they must rely on their own procedures, if need be, different from those of the civil courts. Courts martial were to act according to the Articles of War, which served the army as its statutes, and the 'Custom of War', which served as its common law. Those points not explained in the Mutiny Act and the Articles of War were to be decided by the 'Custom of War', not by the practice of the civil courts.² The less erudite, less astute and less interested officer, should he apply himself to the thorny problems of military and civil law, was doubtless left in some confusion. Captain Cuthbertson, a former adjutant of the 5th Regiment of Foot, was probably quite representative: without further comment he declared that the proceedings of regimental courts martial were to be 'entirely governed by the Articles of War, and the Custom of the Army', while at the same time he acknowledged that they must conform 'as near as possible' with 'what the Civil Law allows'. How exactly this was to be done he did not say.³

It was readily admitted by those who defended the army and military law, that 'irregularity' frequently occurred in the proceedings of the military courts. There were many 'informalities, particularly as to the admission of evidence, and the manner of eliciting it . . .'.⁴ With neither the members nor the witnesses being sworn for regimental courts martial there was much scope for abuse. Captain Cuthbertson thought that without any oath being taken it was 'very difficult' to ascertain the truth from witnesses. Consequently their examination required 'the greatest nicety, and coolness'.⁵ The absence of any oath for the members of regimental courts was claimed to open the door to a great deal of mischief, allowing officers to conduct the proceedings in any

1. Williamson, *Elements*, ii. 107-8.

2. *Ibid.*, pp. 128-9.

3. Cuthbertson, pp. 144-5.

4. Simmons, p. 76.

5. Cuthbertson, p. 145.

manner that suited them.¹ Regimental courts of enquiry quite improperly passed sentences as if sitting as courts martial; soldiers could be charged with one offence, yet be found guilty and punished for another.² Regimental courts regularly tried offences which strictly speaking fell within the provenance of general courts martial, as it was '... customary to modify the charge, so as to avoid the express offence declared cognizable by a superior court, and by those means, to bring it within the jurisdiction of an inferior court martial . . .'. A case which amounted to mutiny was charged as 'disorderly conduct, to the prejudice of good order and military discipline'; desertion was similarly charged as absence without leave, or simply neglect of duty.³ The so called 'Devil's Clause' in the Articles of War which allowed general or regimental courts to try and punish at their discretion 'all Crimes not capital, and all Disorders and Neglects, which Officers and Soldiers may be guilty of to the Prejudice of good Order and Military Discipline, though not specified in the said Rules and Articles', was taken as open licence. By custom, stealing from other soldiers was constantly tried under this clause by courts martial of every description.⁴ Courts martial were instituted to try offences by soldiers 'against the rules and discipline of war',⁵ and presumably could not try soldiers for common law felonies (committed in Britain), yet soldiers regularly appeared before regimental courts charged with theft from local civilians. The extant court proceedings of the 1st Foot Guards offer very few instances of a court deciding a case to be outside its cognizance, while on several occasions a defendant's well-founded objections to being tried by a regimental court seem to have been completely ignored.⁶

The punishment records of the 44th Regiment⁷ reveal a practice of sentencing which seems to be erratic and inconsistent, not to say capricious. Even making allowance for difference of degree the punishments awarded for a given offence could vary enormously. Men found guilty of one night's absence from barracks, quarters or camp received anything from 100 up to 500 lashes. Theft from civilians might get as little as 50 or as much as 900 lashes. Close comparison of individual cases shows the same erratic pattern. Three grenadiers, David Hinds, William Cockrell and William Johnston were tried on suspicion of burglary and for being absent from camp overnight. They were acquitted of the burglary, but were sentenced to 300 lashes each, presumably for being absent overnight. All three were then pardoned. Another soldier, James Dignan, however, got drunk and also stayed out over-

1. Lucas, pp. 20-3.

2. GG R-537, Wooton, RCM, 20 May 1751.

3. Simmons, p. 51.

4. *Ibid.*, pp. 290-1.

5. Williamson, *Elements*, ii. 102.

6. GG R-544, Hamerton, RCM, 23 Dec. 1774.

7. PAC, MG 23, K6(2), Punishment Book of the 44th Regiment of Foot, 1779-1784.

night. He was sentenced to 100 lashes and received his full punishment. Patrick O'Neal received a sentence of 200 lashes for a night out of barracks and Andrew Crumbie was similarly treated for being absent at tattoo, not returning until two in the morning. The average sentence, the proportion of acquittals and of pardons, seems to have varied considerably, not only for the various types of offences which could be committed, but also depending on which officer sat as president of the court. Those presided over by Lord Belhaven gave the fewest acquittals, the least number of pardons and on average by far the highest number of lashes (386.3). At the other extreme were Lieutenant Goff's courts, where private soldiers stood their best chance of a pardon, or failing that a very light sentence. Goff's courts on average awarded sentences of only 146 lashes.

Pardons and partial remittances were also important factors in the dispensing of regimental justice. Nearly one-third of all those in the 44th Regiment awarded corporal punishment were completely pardoned; only half of those awarded corporal punishment received the sentence in full.¹ Although such clemency was usually granted to soldiers of proven good character, and for extenuating circumstances, pardons too could seem erratic. Two soldiers, George Healy and John Harcourt, were sentenced to 900 lashes each for robbing a merchant's storehouse. Healy received all 900 lashes, but Harcourt got off with only 50, as he 'Confessed and was pardoned the remainder of his punishment'. What was true of the regimental courts martial of the 44th Regiment was also true of those held by the 1st Foot Guards, where the court proceedings can also be examined. Some decisions seem to have been grossly unfair, men committing the same offence were not necessarily treated in the same way; what appear to have been plausible excuses, even unavoidable accidents, do not seem to have been examined, the court proceeding to pass severe sentences without any recommendation of remittance for mitigating circumstances.² One must of course be cautious in drawing conclusions, since the gestures and expressions of those present, all of which would bring a much fuller understanding of the proceedings, have long vanished, not to mention possible omissions in the records themselves. Nonetheless what does remain often presents a picture of summary trials and arbitrary sentences.

For the defenders of military law, the behaviour of courts martial was excusable on the 'plea of necessity alone'. The requirements of discipline were quite sufficient to pardon those particulars which were 'tinctured with severity'. To curb the licentiousness of armies it had '... ever been found necessary to govern the military by more severe

1. See Appendix, *infra*, p. 882.

2. GG R-544, Barlow, RCM, 29 Oct. 1774 and R-545, Blott, RCM, 19 Dec. 1777. For comparison of sentences see R-558, cases heard at trials held on 3 Oct. and 4 Nov. 1783.

laws than the civil part of the community, and to enforce those laws in a more expeditious and summary, perhaps it may be said in a more arbitrary manner . . .'. From the need for the prompt punishment of offenders, grew 'the necessity of a more summary method of proceeding in the trial of offenders'.¹ But does this offer a complete explanation of what can often be made to appear as very uneven and unjust treatment? Do the apparently arbitrary decisions of regimental courts martial represent nothing more than the caprice of indifferent superiors acting from 'necessity alone'? To see the proceedings and sentences of regimental courts martial solely as the product of a capricious and arbitrary system of military justice is to see them in isolation. Although discipline and prompt obedience to orders were military goals which courts martial strove to enforce, the means by which they were pursued were not unique to the army. It might indeed be asked where the everyday pattern of civil society ended and a strictly military procedure, for the sake of discipline and obedience, began. The manner in which regimental courts martial dispensed justice to the common soldier was strikingly similar to the practice of the civil courts.

The conduct of both military and civil judges was rooted in what Douglas Hay has described as 'a formalistic administration of law that was nevertheless based on ethical or practical judgements rather than on a fixed, "rational" set of rules'.² Although the rules (i.e. the letter of the law) were to be obeyed when convicting, other factors could be taken into consideration when pardoning. The free use of pardons and partial remittances by regimental courts was directly paralleled in the civil legal system. Frequent pardons, decided largely on the prisoner's character, were an integral part of both military and civil justice. As in criminal cases before the civil courts, the establishing of a good character was a most important step towards inducing a pardon. When tried by a court martial, the bad soldier, the chronic 'old offender', could expect severe treatment even for rather minor offences. The new recruit and the soldier who could obtain a good testimonial from his non-commissioned officers stood a good chance of clemency, or at least a lenient sentence. To those who criticized the latitude of the regimental courts, such unrestrained discretion on the part of military officers seemed likely to produce only mischief. Yet in the hands of sensible and experienced officers, that informality and absence of rigid rules which was so often criticized, did allow a flexibility which was of great use in handling a very mixed group of characters: the chronic drunkards, the insensitive brutes and the honest soldiers gone astray by misadventure. The army's use of corporal punishment (flogging) took full account of the unsavoury and unruly

1. Williamson, *Elements*, ii. 154-5, 183.

2. Douglas Hay, Peter Linebaugh, *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (New York, 1975), p. 40.

men who enlisted. Concurrently the free use of pardons acknowledged that there were also men of better character and generally good behaviour.

What of the severity of regimental courts martial? Were their decisions as closely tied to the necessities of military discipline as suggested by Williamson? It would seem not. Eighteenth-century officers, such as Williamson, could see that military law and courts martial were pursuing goals which were not the same as those sought by the civil courts, but their ideas lacked the clarity and precision they were to receive in the hands of later writers in the nineteenth century. The decisions made by eighteenth-century regimental courts martial (like those of the 44th Regiment in the early 1780s) clearly reflected interests that did not stem from concern over military discipline alone.¹ Gentlemen were always gentlemen, whether in 'coloured clothes' or scarlet regimentals, and all were agreed on the importance of protecting property. Theft was a crime against property which military officers deemed to deserve very severe punishment – on average more severe than that of abusing, or even striking, a non-commissioned officer, being drunk on duty, leaving a guard without orders, or completely missing duty. The theft of civilian property in particular was dealt with most harshly: more severely than with offences declared capital under military law (which regimental courts not infrequently tried). Indeed the gentlemen of the 44th Regiment considered insolence to a commissioned officer to be the only offence worthy of a graver punishment.

The inequities of a society divided by class were nowhere seen more clearly than in the army's choice of punishments for its different ranks. Although the capital punishments under military law could be claimed to be the same for all ranks, the 'inferior punishments' were certainly not. While the other ranks were subject to corporal punishment commissioned officers were exempt. It was a distinction which Williamson thought perfectly sensible, 'peculiarly adapted to the respective ranks'. For 'what would be an adequate punishment for an offence in one rank, might be extremely inadequate in another'. His reasoning however was not argued on the requirements of military discipline, but rather on the existence of that sharp social cleavage which separated the gentlemen who served as commissioned officers from their social inferiors who served as private soldiers and non-commissioned officers. The commissioned officer, because he was a gentleman, was a man of honour and sensibility. Even a few strokes of the lash would be 'a most irreparable injury, as depriving him of his honour, and rendering him unfit for the society of gentlemen'.² By contrast his lowly inferior, the common soldier, having neither honour nor sensibility, could suffer

1. See Appendix, *infra*, p. 884.

2. Williamson, *Elements*, ii. 164.

a public whipping with no more hurt than the physical pain; presumably there would be no social stigma. The exemption of those common soldiers who attained non-commissioned rank was based solely on expediency – the need to invest their military rank with sufficient authority ‘to carry a command’ over the private men. Their exemption had nothing to do with any fine distinctions of social status in the military hierarchy – at least not from the point of view of their superiors, the commissioned gentlemen of the army.¹ Once reduced from non-commissioned rank, former serjeants and corporals were subject to the cat-of-nine-tails equally with the private soldiers. The army was very careful to break its non-commissioned officers first, before flogging them, but there were to be no mistaken ideas as to their true social status.

The army’s reliance on corporal punishments to keep discipline in the other ranks was firmly rooted in the commissioned gentlemen’s view of the common soldier, his general character and likely behaviour. But what, one might wonder did the common soldier think? There seem always to have been at least a few soldiers who not only complained of unfair treatment but even took action to have it corrected. It was not unknown for men to appeal from the indiscriminate use of ‘manual correction’, or some summary punishment, to the decision of a regimental court martial. Despite the many difficulties and hazards of appealing to a general court martial this too was attempted, if rarely (but occasionally with success).² There was also the litigious soldier, the disputatious man, who took his complaints outside the army to the civil courts.³ Court martial decisions could be scrutinized by the civil courts and regimental officers prosecuted for vindictive and unlawful behaviour. There was a little more than mere hyperbole and nationalistic pride to General Burgoyne’s claim that the English recruit would not readily submit to a harsh and summary system of discipline enforced by ‘the indiscriminate use of the stick’, that he had first to be divested ‘of all the favourite ideas of his country, implanted in childhood, and fostered by the laws of liberty, custom, ease and plenty’.⁴ Yet physical beatings in one form or another were too prevalent at all levels of society for it to be believed that the common soldier had a peculiar revulsion to the idea of a beating or a flogging. Those who became

1. *Ibid.*, p. 170.

2. See Gilbert, ‘The Regimental Courts Martial’.

3. In 1765, for example, a complaint by a soldier named Barwis, formerly a sergeant in the 1st Regiment of Foot Guards was heard by a special jury sitting before Lord Camden, Chief Justice of the Common Pleas. Barwis was awarded £70 damages for what was claimed to be an unlawful and malicious reduction to the ranks by his commanding officer following a regimental court martial which had sentenced him to a one-month suspension only. The case was subsequently overturned on other grounds, but Barwis’ attempt was not unique: others brought similar cases before the civil courts and won their damages. See *Barwis v. Keppel*, 2 Wils. K.B. 314–8.

4. Edward B. De Fonblanque, *Political and Military Episodes in the Latter Half of the Eighteenth Century*... (London, 1876), p. 17.

hardened offenders, making frequent appearances before regimental courts martial and at the halberds, seem often to have developed a callous indifference to the prospect of a whipping, even to a defiant and prideful contempt for such punishment.¹ Most revealing however is the fact that when soldiers themselves were permitted by their captains to hold their own 'troop or company courts martial', they commonly awarded beatings to those found guilty. Moreover, their 'mode of investigation' was similar to that of the regimental court martial, with a serjeant sitting as president, his court consisting of one corporal and three privates.²

It seems fair to conclude that the common soldier was unlikely to feel that the army's use of corporal punishment was particularly cruel or unusual. He pinned a certain faith to some form of judicial proceedings, however rough, and by imitating or indeed even himself appealing to a regimental court martial seems to have endorsed the form of trial, if not to some extent the punishments, employed by his superiors.

Hendon

G. A. STEPPLER

1. For example GG R-542, Ashly, RCM, 11 Dec. 1759 and R-543; Spencer, RCM, 13 Apr. 1759.

2. James, ii. 28; GG R-544, Toumay, RCM, 25 Feb. 1772.

Appendix

THE PUNISHMENT RECORDS OF THE 44TH REGIMENT OF FOOT, 1778-1784.

I. *The Allotment of Punishment, Pardons, Remittances, etc.*

Rank	No. of Cases	Acquittals	Guilty	Corporal Punishment					Other Punishment			
				Per cent of guilty awarded corporal punishment	Per cent of those awarded Corp:pun:	Per cent of part of sentence remitted	Per cent receiving full sentence	Per cent of those awarded corp. pun: actually receive: any	Per cent awarded other punish:	Per cent pardoned	Detail for NCOs	Suspension
Sergeants	21	2 (10%)	19 (90%)	None	—	—	—	—	100% (19)	21% (4)	32% (6)	68% (13)
Corporals	54	9 (17%)	45 (83%)	29% (13)	31% (4)	38% (5)	31% (4)	69% (9)	100% (45)*	13% (6)	7% (3)	93% (42)
Privates	323	39 (12%)	284 (88%)	99% (280)	27% (78)	24% (68)	49% (138)	72% (202)	1% (4)	NONE	—	—

Remarks: *Of the 45 cases in which corporals were found guilty and awarded punishment, 13 involved both a reduction and corporal punishment. Of the 13 cases awarded corporal punishment, 4 were pardoned the corporal punishment but not their reduction to the ranks. One suspension and 5 reductions were pardoned from the 32 cases sentenced to suspension or reduction only.

2. Punishments allotted by Regimental Courts Martial, arranged by their Presidents

President	No. of Cases	Acquittals	Guilty	Pardons	Remitted in Part	Received in Full	Average No. of Lashes		Proportion Remitted of total Lashes Awarded
							in Original Sentences	Actually Executed	
Capt. Lord Belhaven	35	1	34	5 (14.7%)	10	19	386.3	317.8	30.2%
Capt. Campbell	40	3	37	13 (35.1%)	6	18	283.8	270.4	38.2%
Lieut. Atkinson	45	3	42	9 (21.4%)	18	15	291.6	228.3	38.5%
Capt. Norton	51	4	47	14 (29.7%)	9	24	233	216.7	34.7%
Lieut. Brown	44	10	34	9 (26.4%)	7	18	190.9	166.7	36.5%
Lieut. Goff	28	3	25	11 (44%)	5	9	146	166.1	36.3%

Remarks: Only those who sat as President in more than twenty cases are included in the table. Each officer dealt with a full range of cases: the disparity between the original sentences imposed by Lord Belhaven's courts and those of Lt Goff, was not the result of Belhaven having to deal with an unusually large number of very serious crimes. The very large number of pardons recommended by Lt Goff's courts resulted in the average number of lashes awarded in the original sentences being lower than the number actually inflicted. Half of the men coming before Lt Goff's courts could expect an acquittal or a pardon. The large number of acquittals (22.7%) at Lt Brown's courts was unique: possibly he was much more particular as to the type of evidence he felt necessary to convict the accused.

3. *The Relative Frequency of Cases heard by Regimental Courts Martial.*

	<i>Per cent of Total</i>
Theft and robbery (including making away with one's own necessaries)*	36.2
Misbehaviour on Duty, including missing duty	26.8
Absent without leave	14.4
Misconduct toward military superiors	12.4
General misconduct, rioting, and abusing civilians	6
Misconduct while in hospital	4

* (Theft and robbery alone, excluding making away with one's own necessaries . . . 24.8)

4. *Scale of Corporal Punishments Awarded by Regimental Courts Martial.*

Nature of the Offence	No. of Cases	Average No. of Lashes	
		In original Sentence	Actually Inflicted
Insolence to commissioned officers	7	533.3	493.7
Theft from civilians	28	389.6	320.2
Absence from quarters	19	357.8	304.4
Misbehaviour whilst standing sentry	14	346.1	255
Theft from other soldiers and army	46	288.3	243.3
Abusing civilians	7	266.7	200
Making away with one's own clothing	34	248.3	190
Striking an NCO	9	244.4	187.1
(Abuse <i>and</i> striking an NCO)	30	185.2	166.4
Absenting oneself while on guard	10	220	208.3
Absent without leave from barracks or quarters for one night	24	216.7	196.4
Drunk on duty	12	200	175
Drunk and unfit to go on duty	19	186.8	155
Abuse and insolence to an NCO	21	158.5	156.6

5. *Trial Proceedings from a Regimental Court Martial held by the 1st Regiment of Foot Guards in 1773* (From the archives of the Grenadier Guards, R-544)

Proceedings of a Regimental Court Martial held at
the Orderly Room Scotland Yard 14th January 1773

Lt. Col. Haselar, President

Capt. Madan		Members		Capt. Ayscough
Capt. De Burgh				En ^{sn} Strickland

David Francis of LColo Deakin's Company Confined by Maj: Gen! Salters order for making away with a Pair of New Shoes, and destroying his Regimentals, and other Necessarys

Serjeant Thweat informs the Court that the Prisoner had a New P Shoes about a Week ago, and sold them for a Shilling. and has totally destroy'd his Old Regimental Cloathing. and his other Necessarys

The Prisoner acknowledges having sold his Shoes, and says that he is out of his Senses at times, and Serj: Thweat says that his behaviour was very odd whilst he was a Recruit at the Drill

M: Keate Surgeon's Mate says that on Sunday last by Gen! Salter's order he Visited the Prisoner in the Savoy that he found no Marks in him of Insanity; nor does he see any at Present.

The Court are Unanimous in believing that the Prisoner is not always in his Senses from the Account above given by Serj: Thweat, and therefore cannot Allot him any Punishment

James Elliot of LColo Wollaston's Company Confined by MGen! Salters order for Missing Two Guards, and one Field day, Making away with Two Shirts, his Regimental Hat, and one P Shoes, and making a practice of it

Serj: Dickeson; proves the several Charges

The Prisoner says in his defence that he was Confined in Prison on suspicion of Theft. that during that Time he had no pay, which was the reason of Selling his Shirts and further says that he left his Regimental Hat at his lodgings with his Regimentals; and Alledges Sickness, as an Excuse for Neglecting his duty

The Court find the Prisoner Guilty of the Charge and so sentence him to receive One Hundred Lashes

Henry Stonill of MGen! Sherards Company Confined by MGen! Salter's order for neglect of Duty and laying out of Quarters from the 31st Dec^r 1772 till the 11th Jan^r 1773 and making away with his new Regimental Hat

Serj: Sutherland fully proves the Charge

The Prisoner says ~~he lost~~ (*sic*) his Hat was stole which was the reason of Absenting himself – and says its his first Offence. desires his Character may [be] enquired into.

Serj: Sutherland says the Prisoner has behaved well during the time he has been in the Company. and has heard a good Character of him from Serj: Smith of the same Company, who being Sick could not Attend

The Court find the Prisoner Guilty of the Charge and do sentence him to receive One hundred Lashes but on Account of his good Character do Recommend him to the Commanding Officer for Mercy.

Drummer Brinnion of the King's Company Confined by MGenl Salter's order for (*sic*) being suspected of Stealing The Lace of W^m Crawford's Hat, of MGenl Sherard's Company

W^m Crawford informs the Court that the Prisoner lodges in the same room with him. that he got up early on Monday Morning and went out, that when himself got up he miss'd his Hat: and that nobody comes into the room but the Prisoner and himself

The Prisoner says in his defence that he knows nothing at all of the Hatt, and totally denies the Charge – and calls on the Serj^t of the Company for his Character as to Honesty

Serj^t Houghton says he never heard of any dishonesty of the Prisoner

There being no proof of the Prisoner's Guilt. the Court do there Acquit Him

..... (signed) Rob^t Haselar Capt.

[The proceedings were approved by Major General Salter as the lieutenant colonel commanding the regiment]