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The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America

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The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America

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I. INTRODUCTION

Jonathan Cilley and William Graves fought their duel in the early afternoon of February 23, 1838.¹ The two faced off near the Anacostia River bridge leading out of Washington, D.C., having

1. LORENZO SABINE, *NOTES ON DUELS AND DUELLING* 97-101 (1856) (quoting a report from the committee of the United States House of Representatives assigned to investigate the Cilley-Graves duel). Sabine's book contains the entire report of the House Committee assigned to investigate the duel, *id.* at 91-108, as well as excerpts from the subsequent Senate debate over the proposed anti-dueling bill for the District of Columbia, *id.* at 381-91. For a more recent historical account of the duel that also draws on Sabine's account, see STEVEN STOWE, *INTIMACY AND POWER IN THE OLD SOUTH: RITUAL IN THE LIVES OF THE PLANTERS* 38-48 (1987).

agreed in advance to duel with rifles at a distance of eighty paces.² Shortly before three o'clock, they stood opposite one another, and at the signal, they exchanged shots, Cilley firing first.³ Both men missed. The men who accompanied them to the duel—their seconds—tried to work out the disagreement that led the men to the dueling-ground, but to no avail.⁴ For a second time, both stood and exchanged fire; for a second time, both missed. Now, Cilley was ready to end the duel, but by this time Graves was enraged and insisted on another exchange.⁵ The two men's seconds backed away again, the signal was given again, and the men exchanged fire once more. This time, Cilley dropped to the ground, shot dead.⁶

The duel and its result quickly attracted national attention, for the two duelists were not just gentlemen skirmishing over a private slight, but United States Congressmen—Cilley from Maine, Graves from Kentucky.⁷ So were six of the witnesses at the duel.⁸ The outcry grew when Graves and the other Congressmen were not immediately expelled from Congress, but instead merely made the subject of an investigation.⁹

As word of the duel and its outcome spread, Congress was bombarded with petitions demanding that it pass a law banning dueling in the District of Columbia, even though dueling was already illegal under the common law.¹⁰ Within two weeks of Cilley's death, Senator Samuel Prentiss of Maine put before the Senate a bill "[T]o prohibit the giving or accepting within the District of Columbia of a challenge to fight a duel."¹¹ The bill would make send-

2. SABINE, *supra* note 1, at 97.

3. *Id.*

4. *Id.*

5. *Id.* at 97-98.

6. *Id.* at 98-100.

7. Despite their elected offices, Cilley and Graves were not dueling over direct political differences, but a fairly trivial slight, which occurred when Cilley refused to accept a letter from a newspaper publisher that Graves was merely carrying. See STOWE, *supra* note 1, at 40-41.

8. The House report identified the men as Reps. Crittenden and Menefee of Kentucky; Wise of Virginia; Duncan of Ohio; Bynum of North Carolina; and Jones of Wisconsin. SABINE, *supra* note 1, at 89.

9. Graves was later censured by the House, but it refused to expel him, and none of the other Congressmen present at the duel were punished for their role. See DON C. SEITZ, *FAMOUS AMERICAN DUELS 277-78* (1929).

10. See, e.g., CONG. GLOBE, 25th Cong., 2d Sess. 231 (1838) (petition of citizens of Rockingham, Vermont, calling on Congress to pass a law suppressing dueling); CONG. GLOBE, 25th Cong., 2d Sess. 233 (1838) (petition of citizens of Sullivan County, New York, calling on Congress to expel Congressmen involved with the Cilley-Graves duel).

11. CONG. GLOBE, 25th Cong., 2d Sess. 206 (1838).

ing a challenge a felony punishable by five years imprisonment, and would make killing an opponent in a duel murder.¹²

On the Senate floor, however, the bill met a mixed response. Senators from Northern states, where dueling had largely died out, strongly supported the ban.¹³ Southern senators, however, representing the region where dueling still flourished, voiced doubts. A few simply did not believe dueling should be outlawed. Arkansas Senator Ambrose Sevier argued that dueling was often necessary, and that "nine out of every ten [duels] were fought for causes that could not be got over any other way."¹⁴

Even Senators who professed to abhor dueling argued that the law would do little good. Anti-dueling laws were on the books in all states, but often ignored. Public opinion supported dueling, and until this changed the law would be a dead letter. "What community, . . ." asked Missouri Sen. Lewis Linn, "would pronounce a man either a murder[er] or a felon, who might chance to kill another in a fair fight?"¹⁵ William Preston of South Carolina agreed, pointing out that the reason the common law had not stopped dueling was "a state of public opinion . . . which was averse to the stern execution of the law applicable to dueling."¹⁶ Seeking a middle ground, a few Senators suggested weakening the proposed law's penalties, arguing that a less punitive measure stood a better chance of being enforced; but their proposals were not accepted.¹⁷

The last Senator to speak on the bill was Henry Clay of Kentucky, who acknowledged that the law would likely have little effect. Dueling was illegal everywhere, yet it was not the law that decided whether men dueled, but public sentiment.¹⁸ In the North, where public opinion opposed dueling, men did not duel; in the South, where dueling was the norm, men dueled, or else risked "having the finger of scorn pointed at them."¹⁹ Clay nonetheless supported the bill, chiefly because he hoped it might alter the "state

12. *Id.*

13. *See, e.g.,* SABINE, *supra* note 1, at 384-85 (statements of Senators from Vermont and Connecticut in strong support of the anti-dueling bill).

14. *Id.* at 389.

15. *Id.* at 384-85.

16. *Id.* at 387.

17. *Id.* at 386. One alternative punishment favored by several Senators was a permanent ban from public office for any person convicted of dueling, a proposal modeled after several state laws that, Senators claimed, had helped deter dueling. *See id.* For skepticism on whether such state laws were effective, *see infra* text accompanying notes 194-197.

18. SABINE, *supra* note 1, at 390.

19. *Id.*

of the public mind" on dueling.²⁰ But, he concluded, only when "public opinion was renovated, and chastened by reason, religion, and humanity, [would] the practice of dueling be . . . discountenanced."²¹

In the end, the Bill to suppress dueling in the District of Columbia passed the Senate by a vote of 34-1.²² Though it died in the House that year, it was introduced again the next year and became law in February, 1839.²³ In retrospect, the law appears to have done little to end dueling.²⁴

The Cilley-Graves duel and the ensuing debate over anti-dueling laws attracted only brief attention during the 1830s, and both the duel and the resulting law were soon forgotten. But the duel and the debate can illuminate legal and social issues still of profound interest. Dueling was against the common law, but two Congressmen dueling without worry they would be punished for their acts.²⁵ Lawmakers claimed to oppose dueling, but stated that laws would do no good in the face of determined public opinion. In modern terms, the debate over anti-dueling laws embodied the tensions between law and social norms.

II. SOCIAL NORMS AND DUELING

The story of dueling and attempts to suppress it can easily become a parable—a tale from which we draw a lesson.²⁶ To some hearing the tale, the lesson might be the need to stand fast in the face of public opinion; for others, the weakness of the law in the face of determined men. More recently, however, a group of legal

20. *Id.*

21. *Id.*

22. *See id.* at 391. The one Senator voting "No" was Sevier of Arkansas. *Id.*

23. CONG. GLOBE, 25th Cong., 3d Sess., 181-82 (1839).

24. JOYCE APPELBY, *INHERITING THE REVOLUTION: THE FIRST GENERATION AFTER THE REVOLUTION* 45 (2000).

25. Actually, many of the nation's politicians dueling. Among the many who dueling in this era were not only Cilley and Graves, but two future presidents, Andrew Jackson and Abraham Lincoln, and two founding fathers, Vice-President Aaron Burr and former Secretary of the Treasury Alexander Hamilton, in a famous 1804 duel, and two other vice-presidents, William Crawford and Henry Clay. *See* ROBERT BALDICK, *THE DUEL: A HISTORY OF DUELING* 120-24 (1965); WILLIAM OLIVER STEVENS, *PISTOLS AT TEN PACES: THE STORY OF THE CODE OF HONOR IN AMERICA* 37, 47 (1940). In 1817, the Attorney General of the United States, William Wirt, challenged his predecessor, William Pinckney, to a duel, which was averted only after Pinckney apologized for any perceived slight. *See* ANDREW BURSTEIN, *AMERICA'S JUBILEE: HOW IN 1826 A GENERATION REMEMBERED FIFTY YEARS OF INDEPENDENCE* 47-48 (2001).

26. *See, e.g.,* STOWE, *supra* note 1, at 48-49 (using the Cilley-Graves duel to interpret the social meanings of the duel).

scholars has drawn a particular lesson about law and social change from dueling, laws against it, and its eventual demise.²⁷ To borrow their terminology, the rise of anti-dueling legislation and the end of dueling illustrates how over time law can change “social norms.”²⁸

These scholars note that at the beginning of the nineteenth century, “public prejudice” demanded that a gentleman either defend his honor in a duel or else sacrifice the respect of his peers.²⁹ Yet at the end of that same century, the vast majority of people would have been horrified were a gentleman to engage in a duel to defend his honor.³⁰ The “social norm” about dueling—the consensus about what a gentleman ought to do to defend his honor and the consensus about what refusing a duel would mean—had changed.

Pinning down a definition of “social norm” is not an easy task. Legal scholars studying social norms have advanced a series of related definitions.³¹ To simplify,³² most scholars seem to agree that a social norm is a “social regularity,” a behavior that is in fact widely adopted in society.³³ What distinguishes these social regularities as social norms is that they are not only what people do, but what society holds that people should do.³⁴ The particular actions constituting a social norm have larger cultural or social meanings, which lead other members of society to approve or disapprove of

27. See *infra* notes 41-49 and accompanying text.

28. Scholars studying social norms are not a monolithic group, but Professor Lawrence Lessig has dubbed the group of social norms scholars based at the University of Chicago the “New Chicago School.” Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998). For other useful surveys of the new social norms literature, see ERIC POSNER, LAW AND SOCIAL NORMS 11-35 (2000); Richard H. McAdams, *Accounting for Norms*, 1997 WISC. L. REV. 625, 631-36; Eric Posner, *Efficient Norms*, in 2 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 19 (Peter Newman ed., 1999); Mark Tushnet, “Everything Old is New Again”: *Early Reflections on the “New Chicago School,”* 1998 WIS. L. REV. 579, 579-81; and Jeffrey Rosen, *The Social Police*, NEW YORKER, Oct. 20 & 27, 1997, at 170 (presenting an informed journalistic account). A foundation work of the law and social norms literature is ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

29. The most influential statement of this parable is Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968-72 (1995).

30. See *id.*

31. See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 587 (1998) (“I place ‘social’ before ‘norm’ to indicate a consensus in a community concerning what people ought to do.”); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (stating that the new norms literature defines norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”); see also POSNER, *supra* note 28, at 11-35.

32. Readers should be aware that social norms scholarship remains a contentious field and any rough generalization about “what scholars who study social norms think” is just that—a generalization.

33. McAdams, *supra* note 31, at 340.

34. See Lessig, *supra* note 28, at 662.

them.³⁵ The meanings attached to a social norm cause members of society to feel obliged to conform to social norms, either because the meaning has become internalized or because to do otherwise would risk sanction from other members of society.³⁶ The legal scholar Lawrence Lessig summarized well the workings of social norms when he wrote:

Social norms regulate . . . They frown on the racist's joke; they tell the stranger to tip a waiter at a highway diner; they are unsure about whether a man should hold a door open for a woman. Norms constrain the individual's behavior, but not through the centralized enforcement of a state. If they constrain, they constrain because of the enforcement of a community.³⁷

For the purposes of this Note, it suffices to say that dueling fits within several of the definitions offered for a social norm. Dueling was prevalent in pre-Civil War Southern upper-class society.³⁸ Participating in a duel communicated to others—it *meant*—that the duelists were men of honor.³⁹ Duelists felt compelled by internal and external pressures to duel.⁴⁰

Dueling and the legal campaign against it are particularly interesting to scholars who seek not merely to understand social norms, but to change them.⁴¹ Some scholars believe that attention to social norms can yield valuable new ways to combat undesirable social practices. They target behaviors that are harmful, from

35. See *id.* at 680 (“The cost (whether internal or external) of deviating from a social norm is not constituted by the mere deviation from a certain behavior; it is a cost in part constituted by the meaning of deviating from a certain behavior.”). For more complete discussions of the complexity of social meaning, see generally Lessig, *supra* note 29; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

36. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 134 (1996) (referring to norms as simply “non-legal sanctions”); see also Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998) (referring to social norms as informal systems of external social control).

37. Lessig, *supra* note 28, at 662.

38. See *infra* text accompanying notes 134-61.

39. See *infra* text accompanying notes 141-51.

40. See, e.g., JOHN HOPE FRANKLIN, *THE MILITANT SOUTH 1800-1861*, at 48-49 (1956) (discussing intense social pressures on men to duel); STOWE, *supra* note 1, at 15-23 (discussing connections between honor, dueling, and self-esteem).

41. See, e.g., Cooter, *supra* note 31, at 586 (analyzing how law can change social norms); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000) (stating that, while some believe law is a “relatively ineffective instrument for changing social norms,” the real problem is “the primitive state of our understanding of how law and norms interact”); Lessig, *supra* note 28, at 661 (“The new school identifies alternatives as additional tools for a more effective activism . . . [t]he hope of the new [Chicago School] is that the state can do more.”); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996) (“[N]orm management is an important strategy for accomplishing the objectives of the law.”).

smoking to date rape to white collar crime, and look for legal sanctions that will not merely punish perpetrators after the fact, but which will attach unfavorable meanings to the targeted activity, and so enlist social pressures to alter the behavior.⁴²

In search of such properly crafted laws, these scholars have looked to the anti-dueling laws passed in nineteenth-century America. Dueling has rapidly become an exemplar of the kind of undesirable social norm that can be altered through careful legal planning.⁴³ In this telling, anti-dueling laws gained their greatest force not from the fines or imprisonment they threatened.⁴⁴ Rather, they deterred dueling because they threatened a duelist's honor.⁴⁵

One punishment anti-dueling laws meted out was to bar duelists from elective office.⁴⁶ Such a punishment promised to deter dueling in two ways. First, it offered gentlemen who only duelled in response to social pressures a way to defect from the prevailing norm.⁴⁷ Faced with a duel, these men could refuse by arguing that a gentleman's first duty was to occupy the positions of leadership the law denied duelists.⁴⁸ Second, the laws provided a powerful disincentive even to men who had internalized the dueling norm, for a bar from public office would be a stain on their honor.⁴⁹ Rather than accept such shame, these men too might avoid dueling.

There is a strange feature about the recent attention paid to anti-dueling laws. Most scholars acknowledge that the laws, however cleverly designed, did not eliminate dueling.⁵⁰ Despite this, they still recommend anti-dueling laws as a model for laws that aim not merely to punish wrongdoing, but to change the social norms about undesirable activities.⁵¹

42. See, e.g., Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 701 (1999) (suggesting that laws designed to shame date rapists could draw on the lessons of anti-dueling laws); Dan Kahan & Eric Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368-72 (1999).

43. See Lessig, *supra* note 29, at 968-71.

44. See *id.* at 971-73.

45. See *id.*

46. See *infra* text accompanying notes 164-83.

47. See Lessig, *supra* note 29, at 972-73.

48. See *id.*

49. This second use of disfranchisement, as a shaming penalty for duelists, is not suggested by Lessig, but by Karen Baker, see Baker, *supra* note 42, at 701, but I think it consistent with Lessig's general point. On shaming sanctions generally, see Dan M. Kahan, *What Do Shaming Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

50. See Lessig, *supra* note 29, at 970. But see Tushnet, *supra* note 28, at 579 (citing anti-dueling laws as a successful program to end dueling); Rosen, *supra* note 28, at 178 (same).

51. See Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 839 (2000) (describing dueling as "an example of suboptimality much beloved in the legal literature of

It is these kinds of laws, designed not merely to penalize wrongdoers, but to hold them up for disapproval, shame or ridicule, that appeal to contemporary scholars.⁵² Thus, anti-smoking campaigns are proposed that do not merely ban smoking but which communicate social disapproval of the practice.⁵³ Date rapists and white-collar criminals should, scholars suggest, face "shame" sanctions.⁵⁴ In this vision, laws targeted at the "social meanings" that attach to social norms are levers by which lawmakers can move the world.

This Note approaches anti-dueling laws within the contemporary debates over social norms. The Note's primary goal is simply to examine how anti-dueling laws actually affected dueling in pre-Civil War America, as a case study in how laws can affect social norms. Dueling has existed in some legally tolerated or even encouraged form in many western societies for most of the past millennium.⁵⁵ Duels were commonplace in Renaissance Italy and in Germany and Austria-Hungary in the early twentieth century.⁵⁶ America is no exception; duels can be found in the historical record from the 1620s to the early twentieth century.⁵⁷ Yet today the duel as a socially accepted, formal combat for honor has almost disappeared, and its decline coincided with the development of a series of laws designed to shame duelists and render this "affair of honor" a dishonorable practice. This coincidence, however, does not answer the question of whether the laws actually ended dueling.

This Note examines anti-dueling laws, and the end of dueling in the nineteenth-century United States. Section III examines the legal prohibitions laid on dueling in the common law, statutes, and state constitutions in England and America. Section IV focuses on the antebellum South, and asks whether these legal rules and proscriptions had any significant effect on the practice of dueling. Section V discusses the reasons why dueling ended in the years after 1860, and suggests a few lessons that scholars can learn from this historical example.

norms"); Tushnet, *supra* note 28, at 583 (describing the example of anti-dueling laws as "an example commonly offered to explain the attractions of the New Chicago School's approach").

52. See Baker, *supra* note 42, at 701.

53. See *infra* text accompanying notes 319-22.

54. See Baker, *supra* note 42, at 693-706 (date rape); Kahan & Posner, *supra* note 42, at 380-83 (white-collar crime).

55. See V. G. KIERNAN, *THE DUEL IN EUROPEAN HISTORY: HONOUR AND THE REIGN OF ARISTOCRACY passim* (1988).

56. See *id.*

57. See *infra* Parts III, IV.

III. DUELING AND THE LAW

Dueling was an established custom in Europe since the sixteenth century.⁵⁸ It was chiefly the province of upper-class men, usually aristocrats who sought in the duel to demonstrate their personal bravery, skill, and honor.⁵⁹ Because the duel was preeminently a forum where an individual demonstrated his own qualities to his peers, it was the antithesis of the legal process. In a duel, a man defended his own honor; the law, in contrast, placed judgment in the hands of others.⁶⁰ Perhaps because of this, dueling has always been at odds with the law.⁶¹

Dueling had been illegal under the Common Law since before England settled her American colonies.⁶² Unlike continental European legal codes, which classified dueling as an offense separate from murder and which generally meted out light punishment to duelists,⁶³ the common law slotted dueling into well-established categories of criminal law.⁶⁴ A would-be duelist, who merely challenged another to duel, was held to have committed incitement; duelists who fought, but both of whom survived, would be tried for assault; and in the case of a duel where one combatant died, the survivor was held guilty of either manslaughter or murder.⁶⁵ While not universally obeyed, the laws were frequently enforced. In seventeenth- and eighteenth-century England, duelists were haled before Courts and, sometimes, convicted and imprisoned.⁶⁶

Nevertheless, by no means were all duelists punished. Aristocrats frequently avoided being charged with any crimes related to their duels, while even when charges were leveled at duelists, Eng-

58. See KIERNAN, *supra* note 55, ch. 1.

59. See Julian Pitt-Rivers, *Honor*, 6 INT'L ENCYCLOPEDIA SOC. SCI. 503, 503-10 (1968). The duel was a signal to observers that the duelists were worthy of honor, and contemporary scholars have argued that social norms have important "signaling" functions. See POSNER, *supra* note 28, at 18-22.

60. Pitt-Rivers, *supra* note 59, at 509.

61. See *id.*

62. See IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *145, *199 (1768); 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 99-102 (1883).

63. See UTE FREVERT, MEN OF HONOR: A SOCIAL AND CULTURAL HISTORY OF THE DUEL 31 (1995).

64. See STEPHEN, *supra* note 62, at 100-02.

65. See IV BLACKSTONE, *supra* note 62, at *199; STEPHEN, *supra* note 62, at 100.

66. See STEPHEN, *supra* note 62, at 100.

lish juries or judges were sometimes unwilling to convict the combatants.⁶⁷

In eighteenth-century England, anti-dueling laws were at war with popular sentiment. As Blackstone himself admitted, one reason dueling survived was because too many people believed that a duel was the only way for a gentleman to affirm his honor.⁶⁸ Even in the face of legal sanction, Blackstone wrote, desire for honor and fear for their reputations would drive many men to the dueling-grounds: "[For] it requires such a degree of passive valour, to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be [e]ntirely effectual to eradicate this unhappy custom."⁶⁹ This summed up the dilemma of laws prohibiting dueling: while sometimes enforced, the laws were alone insufficient to eliminate the practice so long as the people enforcing the laws did not abhor dueling.

When the English began to settle North America, they brought with them the common law and its prohibitions against dueling.⁷⁰ Especially considering how popular dueling became in the nineteenth-century, it is surprising to realize that only a handful of duels took place in English America between 1620 and 1760, and that in these rare instances duelists were usually punished. In 1652, for instance, a Virginia settler, Richard Dunham, challenged a fellow colonist to a duel.⁷¹ For this breach of the peace Dunham received a public whipping.⁷²

In the years after 1700, such rough justice was no longer enough to suppress dueling. The more settled nature of colonial life, and the more regular contacts between the colonies and England, led a few Americans to ape the practices of the British aristocracy, including dueling. In Boston, socially prominent young men fought duels in 1718 and 1728.⁷³ In response, Massachusetts' House of

67. See, e.g., KIERNAN, *supra* note 55, at 167-68; see also STEPHEN, *supra* note 62, at 100 (discussing a 1688 case where an English jury wanted to find a particularly ruthless duelist guilty of murder, but was thwarted by sympathetic judges who changed the charge to manslaughter).

68. IV BLACKSTONE, *supra* note 62, at *199.

69. *Id.*

70. See ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA 179* (1930); Evarts B. Greene, *The Code of Honor in Colonial and Revolutionary Times*, XXVI PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 370-71 (1927).

71. See SCOTT, *supra* note 70, at 179.

72. See *id.*

73. See SEITZ, *supra* note 9, at 48-51; Greene, *supra* note 70, at 371-73. The 1718 duel, in which no one was hurt, was between a British Army captain, Thomas Smart, and the governor's

Delegates passed statutes setting harsher punishments for duelists.⁷⁴ The 1718 statute provided that, even in a duel in which no one was injured, the duelists were still liable for a £100 fine and six months' imprisonment.⁷⁵

This law did not work as well as the legislature may have hoped, for in 1728 Boston saw another duel in which one combatant died.⁷⁶ In response, the colony's House adopted a new kind of law, one that aimed not only to punish duelists but also to cut the link between dueling and honor. The law was an early attempt to change dueling's social meaning. It provided that, if a man either made a challenge for a duel or accepted a challenge, even if the duel was never held, he was to be "carried publicly in a cart to the gallows, with a rope about his neck, and sit on the gallows for one hour," exposed to public ridicule.⁷⁷ Following this he would be imprisoned for a year.⁷⁸ Were the duel to prove fatal, the surviving duelist was to be executed for "willful murder."⁷⁹ Then, in a punishment designed to drive home the ignominy of dueling, his body would be treated as the body of a suicide: buried without a coffin with a stake through his heart.⁸⁰ The legislature's twofold message was clear: duelists would be treated like suicides both because they deserved as little respect as did suicides, and also because in important respects dueling was suicidal.⁸¹ These harsh prohibitions, however, were never enforced.⁸²

Despite such laws, dueling began to gain favor in British North America in the 1760s.⁸³ A variety of changes in colonial soci-

private secretary, John Boydell. *See id.* The 1728 duel was between scions of two of the city's most prominent families, Henry Phillips and Benjamin Woodbridge. *See id.* Woodbridge was killed in the duel, but Phillips was spirited out of the city before he could be punished. *See id.*

74. *See* Greene, *supra* note 70, at 373 (quoting 2 ACTS AND RESOLVES OF THE MASSACHUSETTS HOUSE OF REPRESENTATIVES 135).

75. *See id.* (quoting 2 ACTS AND RESOLVES OF THE MASSACHUSETTS HOUSE OF REPRESENTATIVES 517-18).

76. *See id.* at 374-75.

77. *Id.* at 375 (quoting 2 ACTS AND RESOLVES OF THE MASSACHUSETTS HOUSE OF REPRESENTATIVES 517-18).

78. *See id.*

79. *Id.*

80. *See id.*

81. *See id.* Suicide was considered a particularly heinous crime in early modern England, as it appeared to take the prerogative of giving life and death from God. Thus, equating dueling and suicide was a harsh judgment and permanent stain on one's memory. *See* MICHAEL MACDONALD & TERENCE R. MURPHY, *SLEEPLESS SOULS: SUICIDE IN EARLY MODERN ENGLAND* 19, 128-54 (1990); STEPHEN, *supra* note 62, at 105.

82. *See* Greene, *supra* note 70, at 375.

83. *See* Bruce C. Baird, *The Social Origins of Dueling in Virginia*, in *LETHAL IMAGINATION: VIOLENCE AND BRUTALITY IN AMERICAN HISTORY* 88-90 (Michael Bellesiles ed., 1999).

ety contributed to the new acceptability of the duel. For one, large numbers of settlers from a new immigrant group, the Scotch-Irish, arrived in the New World and settled in the backcountry that stretched from Pennsylvania to North Carolina.⁸⁴ Coming to America from the wild and lawless borderlands of Great Britain and Ireland, the Scotch-Irish brought with them the belief that private violence was an acceptable way to settle disputes outside the courts.⁸⁵ The acceptance of private violence could only have encouraged dueling.⁸⁶ The 1760s also saw the beginning of the conflicts that would end in the American Revolution. As elites fought over the future of the English colonies, older habits of cooperation began to break down.⁸⁷ Further contributing to the rise of dueling was the fact that many of the disputants in colonial politics had, unlike previous generations, been educated in England, where some had learned dueling as one way the English aristocracy settled conflicts outside the courts.⁸⁸

The greatest spur to dueling in America, however, was the Revolution itself. The War brought to America British and French armies officered by aristocrats with traditions of dueling.⁸⁹ At the same time, it created a new and as yet undefined role for many American gentlemen—that of officer in the Colonial army.⁹⁰ Newly-minted American officers found it necessary to communicate to both their fellow officers and subordinates that they were gentlemen deserving of respect.⁹¹ One place to publicly demonstrate their gentility and status was in a duel.⁹² In 1778, two generals in the new United States Army fought a duel, and a year later one writer complained that dueling had become “in vogue” with officers of the Continental Army.⁹³

84. *See id.* at 92-95. *See generally* DAVID HACKETT FISHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN NORTH AMERICA* 623-29 (1989) (discussing the Scotch-Irish diaspora and the new settlers' notions of socially acceptable violence).

85. *See* FISHER, *supra* note 84, at 769.

86. That is not to say that the immigration caused dueling, just to point out that dueling could flourish better in a society that tolerated high levels of violence. *See id.* at 766-71.

87. *See, e.g.*, Baird, *supra* note 83, at 95-97 (discussing a rising level of violence as basic conflicts over the colonists' political loyalties came to the fore in the 1760s).

88. *See id.* at 101-02.

89. *See* KIERNAN, *supra* note 55, at 112-15.

90. *See* CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-1783*, at 207-10 (1979).

91. *See id.*

92. *See* STEVENS, *supra* note 25, at 14-16.

93. ROYSTER, *supra* note 90, at 209; *see also* BEN C. TRUMAN, *THE FIELD OF HONOR: A COMPLETE AND COMPREHENSIVE HISTORY OF DUELING IN ALL COUNTRIES* 260 (1884); Greene,

With the new craze for dueling came new legal attempts to halt it. The first Articles of War passed by the Continental Congress in 1775 adopted the British Army code's ban against dueling.⁹⁴ That measure, however, was apparently ineffectual, for within a year the Congress found it necessary to pass a stronger measure. The revised Article VII of the new nation's Code of War was designed not only to ban dueling but also to protect the honor of those who refused to duel. The statute stated that:

We hereby acquit and discharge all officers and soldiers from any disgrace or Opinion of Disadvantage which might arise from their having refused to accept of challenges, as they will only have acted in obedience to Our Orders, and done their duty as good soldiers, who subject themselves to Discipline.⁹⁵

Yet even in the 1770s dueling had its defenders. Article VII passed the Continental Congress only over the strenuous objection of South Carolina delegate Edmund Rutledge, who argued that dueling, far from being injurious to the military, was "a measure that tended to make officers Gentlemen."⁹⁶ Nor is it clear that changes in the Articles of War significantly affected dueling.⁹⁷

The problem, as contemporaries well knew, was that dueling had become a prime means to publicly demonstrate one's status as a gentleman. To end dueling, the law would have to render dueling dishonorable. In 1779, Thomas Jefferson proposed such a law in Virginia while he was in the process of preparing a revised legal code for his home state. Jefferson's proposed law provided that dueling be outlawed, and whoever killed an opponent be guilty of murder.⁹⁸ But like Massachusetts lawmakers of 50 years before, he also wanted the law to counter the public acclaim sought by duelists.⁹⁹ He provided that, if the killer had been the one who instigated the duel, his body was to be left on the gallows after death, exposed for all to see.¹⁰⁰ The future president even entertained the idea that the deceased duelist's estates should be confiscated, as

supra note 70, at 379 (noting that dueling in the Continental Army was more widespread than once thought).

94. See Greene, *supra* note 70, at 379.

95. *Id.* at 377 (quoting the *Articles of War*).

96. *Id.* at 378.

97. See ROYSTER, *supra* note 90, at 209 (noting the popularity of dueling in the Continental Army throughout the Revolutionary War).

98. See Greene, *supra* note 70, at 385.

99. See *id.* (stating that Jefferson's law "reminds one of the Massachusetts law of 1728 in pursuing the offender after death").

100. The law read: "Whoever committeth murder by way of duel, shall suffer death by hanging; and if he were the challenger, his body, after death, shall be gibbeted." *Id.* Ever the perfectionist, Jefferson made sure the law included misdemeanor punishments for anyone who took the duelist's body from the gibbet. See *id.*

was the law with suicides in England; for, Jefferson reasoned, was not the unsuccessful duelist "equally guilty with a suicide"?¹⁰¹ His law aimed to both punish the duelist and destroy his reputation.

Jefferson's proposed law never passed, however, and for at least the next twenty years dueling would become an acceptable custom in both the North and the South.¹⁰² There were important differences between the kinds of duels that predominated in those regions. To be sure, men from both regions dueled for "honor" and to maintain their standing in the eyes of others. In the North, however, duels were usually fought over political issues, between men who claimed positions of political leadership.¹⁰³ In the South, duels were fought over politics, but also over personal slights, between men who saw the duel as a way to maintain their standing in society.¹⁰⁴

Dueling in the North cannot be understood apart from the political dynamics of the early republic.¹⁰⁵ In the first few decades of the United States, there were no mass political parties holding the loyalties of voters across states or regions.¹⁰⁶ A voter might claim some personal tie to, say, Alexander Hamilton, but he would think it nonsensical to describe himself as a follower of the Federalist Party.¹⁰⁷ Ties between politicians and their followers were thus intensely personal, linked to the character of the politician.¹⁰⁸ In an era of venomous personal politics, invective flowed freely and in-

101. *Id.*

102. See STEVENS, *supra* note 25, at 19.

103. For the most insightful analysis of dueling in the early Republic, see Joanne B. Freeman, *Dueling as Politics: Reinterpreting the Burr-Hamilton Duel*, 53 WM. & MARY Q. 289, 294-95 (1996) [hereinafter Freeman, *Dueling as Politics*]. My understanding of the North's political duel is deeply indebted to Freeman's work. See *id.*; see also Joanne B. Freeman, *Grappling with the Character Issue*, 28 REVS. AM. HIST. 518 (2000) [hereinafter Freeman, *Grappling with the Character Issue*]; Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1982-86 (1999) [hereinafter Freeman, *Election of 1800*].

104. See EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 9-33 (1984); BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* 349-61 (1982).

105. See Freeman, *Dueling as Politics*, *supra* note 103, at 293. So important was the political duel's communicative function that the leading scholar of the institution described the duel as constituting a "grammar of political combat." *Id.*

106. See Freeman, *Election of 1800*, *supra* note 103, at 1983-86.

107. Indeed, in the popular discourse loyalty to a "party" was equated with loyalty to a "faction," and loyalty to a particular group was seen as the antithesis of loyalty to the nation. This explains why in his farewell address in 1797, George Washington warned his countrymen against the "dangers of parties." George Washington, *Farewell Address*, reprinted in GEORGE WASHINGTON: WRITINGS 969 (John Rhodehamer ed., Library of America 1997).

108. See Freeman, *Dueling as Politics*, *supra* note 103, at 294-95.

sults to one's honor were easy to find.¹⁰⁹ It was in this context that the political duel flourished in the North.

By participating in a duel, specifically a duel with a political opponent, a politician displayed to his followers that he valued his principles more than his life.¹¹⁰ The duel thus served to cement the personal ties that were so important to politics in the early Republic.¹¹¹ Refusing to participate in a duel sent the opposite message: that the politician valued his own skin more than the principles he professed, and was not worthy of political or personal loyalty.¹¹² Lest this seem to make politics a real blood sport, one should remember that most "affairs of honor" were resolved before a duel, and in most duels no one died.¹¹³

The early Republic's political duel is captured in the famous 1804 duel between Aaron Burr, then Vice-President of the United States, and former Secretary of the Treasury Alexander Hamilton.¹¹⁴ Their duel was over a comment made in a political campaign, specifically a report that Hamilton had called the Vice-President "a dangerous man, and one that ought not to be trusted."¹¹⁵

The Burr-Hamilton duel was fought, furthermore, solely to preserve the men's political standing. On the night before the duel, Hamilton wrote a brief letter to family and friends, trying to justify the duel.¹¹⁶ There were, he admitted, many good reasons not to duel: he had a wife and children, was deeply in debt, bore Burr no personal ill-will and, not the least, dueling was condemned by both the law of New York and his Christian religion.¹¹⁷ Yet however many reasons there might be to refuse the duel, Hamilton wrote, he

109. See APPLEBY, *supra* note 24, at 43.

110. See THOMAS FLEMING, *DUEL: ALEXANDER HAMILTON, AARON BURR, AND THE FUTURE OF AMERICA* 7 (1999).

111. See Freeman, *Grappling with the Character Issue*, *supra* note 103, at 518-19.

112. See *id.*

113. Scholars' estimates of deaths in actual duels range from a 20% fatality rate to below 10%. See FLEMING, *supra* note 110, at 8; KENNETH S. GREENBERG, *MASTERS AND STATESMEN: THE POLITICAL CULTURE OF AMERICAN SLAVERY* 32 (1985).

114. For a detailed account of the Burr-Hamilton duel, see JOSEPH ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 20-48 (2000); see also FLEMING, *supra* note 110, *passim* (1999); Freeman, *Dueling as Politics*, *supra* note 103, at 289-96; W.J. RORABAUGH, *The Political Duel in the Early Republic: Burr v. Hamilton*, 15 *J. EARLY REPUBLIC* 1, 1-6 (1995).

115. FLEMING, *supra* note 110, at 275 (quoting *American Citizen* (Albany, NY), June 4, 1804).

116. See Freeman, *supra* note 103, at 291-92.

117. The story of Hamilton's last letter has been recounted in several essays. See Freeman, *Dueling as Politics*, *supra* note 103, at 291-92; see also ROBERT AXELROD, *An Evolutionary Approach to Norms*, in *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* 44-45 (1997).

felt a pressing necessity "not to decline the call."¹¹⁸ To refuse the challenge would have cost Hamilton the political support on which his ambitions depended.¹¹⁹ "[M]y ability to be in the future useful, whether in resisting mischief or effecting good, in those crises of our public affairs," he wrote, "would probably be inseparable from a conformity with public prejudice in this particular."¹²⁰ And so Hamilton went to the dueling-ground, was shot through the side by Burr, and died the next day.¹²¹

Despite the "public prejudices" demanding dueling, however, dueling would have a relatively brief career in the North. In part, this was due to the Burr-Hamilton duel.¹²² Before 1804, many Northerners had at least tolerated dueling.¹²³ Hamilton's death, however, sparked a backlash against the practice, perhaps because of his relative youth, the widow and small children he left behind, or his public image as Washington's gallant aide-de-camp.¹²⁴ And as public sentiment turned against dueling, so did the law. After the duel, New York officials dusted off their state's long-neglected anti-dueling laws and brought charges against Burr and Hamilton's seconds, the men who arranged the duel. The seconds lost their voting rights as punishment for their roles.¹²⁵ Burr, who fled New York and New Jersey in fear of a murder indictment, would never again be a force in the young nation's politics.¹²⁶

In the years following the duel, Northern public opinion turned permanently against dueling, and the practice nearly disappeared in the North. The last major duel in Massachusetts, for instance, was fought in 1806.¹²⁷

While public outrage over Hamilton's death was one factor in dueling's decline, deeper social changes also worked to turn public opinion decisively against dueling. In politics, dueling was rendered

118. Freeman, *Dueling as Politics*, *supra* note 103, at 293.

119. *Id.*

120. *Id.* Hamilton's worry was not an idle one. Years later, John Quincy Adams speculated that if Hamilton had "decline[d] to meet Colonel Burr, some doubt at least of his personal intrepidity would be entertained by men of military mind. He could no longer expect to be the favorite candidate for the chief military command." FLEMING, *supra* note 110, at 304 (quoting JOHN QUINCY ADAMS, DOCUMENTS RELATING TO NEW ENGLAND FEDERALISM 169).

121. ELLIS, *supra* note 114, at 30.

122. See FLEMING, *supra* note 110; Freeman, *Dueling as Politics*, *supra* note 103, at 296.

123. See generally Freeman, *Dueling as Politics*, *supra* note 103.

124. See Rorabaugh, *supra* note 114, at 19-20.

125. See FLEMING, *supra* note 110, at 370.

126. Rorabaugh, *supra* note 114, at 18-19.

127. See MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 42 (1980).

superfluous by the growth of strong national political parties, whose leaders no longer needed to keep the personal loyalty of party members. Men now gave their allegiance not to individuals, but to a party.¹²⁸ The growth in the North of a mobile, commercial society also worked against dueling.¹²⁹ People who succeeded in this new society valued its openness and opportunities, and consequently looked down on such "aristocratic" pretensions as dueling.¹³⁰ In such a society it was easier to enforce anti-dueling laws, but also less necessary.

IV. DUELING AND ANTI-DUELING IN THE ANTEBELLUM SOUTH

A. *The South's "Affair of Honor"*

In the South, dueling did not fade away. On the contrary, in the early 1800s the duel developed into one of the central rituals of the planter elite that dominated Southern society.¹³¹ This did not mean dueling was legalized. Even as it was gaining favor, Southern states passed an array of new anti-dueling laws.¹³² These laws not only punished duelists, but were carefully designed both to dishonor duelists and to interrupt the steps leading to a duel.¹³³ Because Southern duels were so carefully choreographed, and carried such meaning for both participants and observers, it is useful to sketch out the rituals that attended a duel.

As historians have noted, the duel was not merely pitched combat between two opponents, but one element of a well-understood ritual, the "affair of honor."¹³⁴ It had its own set of rules, the *code duello*.¹³⁵ The law itself took cognizance of the care-

128. See Freeman, *Dueling as Politics*, *supra* note 103, at 316.

129. See GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 344-45 (1992).

130. See *id.*

131. See STOWE, *supra* note 1, at 5.

132. See David Roberts Lewis, *Dissent to Dueling: Arguments Against the Code Duello in America* 25-51 (1984) (unpublished M.A. thesis, Vanderbilt University) (on file at the Vanderbilt University Library), for an excellent overview of the legal acts passed against dueling in the United States. See also *infra* text accompanying notes 142-62.

133. See Lewis, *supra* note 132.

134. See STOWE, *supra* note 1, at 5-49; JOHN LYDE WILSON, *THE CODE OF HONOR, OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELLING* (1838) (printed as an addendum to JACK K. WILLIAMS, *DUELING IN THE OLD SOUTH* (1980)). See generally AYERS, *supra* note 104, at 9-33 (examining the duel and its place as a central "social drama" of the South); GREENBERG, *supra* note 113, at 23-41 (same); WYATT-BROWN, *supra* note 104, at 349-61 (1982) (same).

135. See WILSON, *supra* note 134, at 87.

ful formality of a duel, distinguishing between a duel and an "af-fray," the latter being a clash springing up when two (or more) men quarreled and decided to fight then and there.¹³⁶

The affair most often began with some incident between two men in which one felt insulted by (or chose to take offense at) the words or deeds of the other.¹³⁷ This was followed by an exchange of letters, in which the man who took insult demanded the other either explain why his slight was not an insult, or apologize for the comment or incident.¹³⁸ If these letters did not produce an apology or satisfactory explanation, each man would then appoint "seconds," friends charged with arranging the duel.¹³⁹ Only after all these steps transpired—insult, exchange, challenge, acceptance, arrangement—would the duel itself take place. In most instances, the affair never reached the dueling stage, as the two men involved reached an understanding and resolved their disagreement without combat.¹⁴⁰

Woven into the "affair of honor" was the concept that underlay and motivated duels: honor, or rather a particularly Southern version thereof.¹⁴¹ The concept of honor has little resonance for modern Americans,¹⁴² but to antebellum Southerners it was a central feature of their civilization.¹⁴³ In the culture of the old South, a white man's honor was measured not by what he thought of him-

136. See *Payne v. State*, 391 So. 2d 140, 143-44 (Ala. Crim. App. 1980) ("A duel, as the term is ordinarily understood . . . is the fighting together of two persons by previous concert with deadly weapons to settle some antecedent quarrel, and has none of the elements of sudden heat and passion."); BLACK'S LAW DICTIONARY 62 (6th ed. 1990); IV BLACKSTONE, *supra* note 62, at *145.

137. See, e.g., *Commonwealth v. Hart*, 29 Ky. 119 (1831) (discussing a case in which the challenger accused an opponent of associating with "a negro"); *State v. Farrier*, 8 N.C. 487, 488 (1821) (a challenge that began when one combatant told the other, "I would as soon vote for Jim, the barber, as you"). On the mechanics of a duel, see WILSON, *supra* note 134, at 91-92. Wilson's work was widely read in the South and accepted as a good account of the duel. See GREENBERG, *supra* note 113, at 82; STOWE, *supra* note 1, at 6.

138. See WILSON, *supra* note 134, at 91-95.

139. See *id.* at 93. Wilson also urged seconds to do what they could to head off the duel. See *id.*

140. See STOWE, *supra* note 1, at 10.

141. See AYERS, *supra* note 104, at 12-14; see also WYATT-BROWN, *supra* note 104, at 363-64, *passim*.

142. That said, many Southerners still are deeply influenced by inherited notions of honor and insult. See generally FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE 1-12, *passim* (1995) (examining the heritage of violence in one Southern family); RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 4-12 (1996) (comparing modern-day Southerners' and Northerners' responses to insults and slights).

143. See AYERS, *supra* note 104, at 9-33.

self, but by what others thought of him.¹⁴⁴ As one anthropologist explains it, in a society with such a view of honor "the being and truth about a person are identical with the being and truth that others acknowledge in him."¹⁴⁵ Thus the need for Southern men to participate in the "affair of honor," even when morally opposed to dueling. The point of a duel was not to reaffirm one's self-worth, but to demonstrate that worth to others.¹⁴⁶

Honor was not a quality that could be repaired through the legal system.¹⁴⁷ For a man to turn to the legal system to repair his honor, perhaps by filing a libel or slander suit, was akin to a man admitting that he was unable to protect himself.¹⁴⁸ It was an admission of both weakness and cowardice.¹⁴⁹ A libel suit also carried the message that the plaintiff was one who thought his honor could be repaired by monetary damages.¹⁵⁰ The Southern attitude toward honor, personal transgressions, private violence, and the law is probably best summarized by a famous piece of advice given to Andrew Jackson by his mother. As he recalled it, she advised Jackson: "Never tell a lie, nor take what is not your own, nor sue anybody for slander, assault and battery. *Always settle them cases yourself.*"¹⁵¹

The duel, then, was the product of a culture where a gentleman's worth needed constantly to be communicated to others. Its rituals were designed to demonstrate that the duelists were both gentlemen. No surprise, then, that duels were most often fought between men who were in the public eye and whose exact social status was often in question: journalists and lawyers.¹⁵² Men in such professions were particularly likely to suffer if they lost public favor. They were also, however, likely to benefit if they won their

144. See *id.* at 13.

145. *Id.* (quoting Pierre Bourdieu, *The Sentiment of Honor in Kabyle Society*, in HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY 212 (J. G. Peristiany ed., 1966)).

146. In this sense, dueling fits well with Eric Posner's notion that an important function of social norms is to signal to others that the participant is of a good type, deserving trust in transactions. See POSNER, *supra* note 28, at 19-22; see also Warren F. Schwartz et al., *The Duel: Can these Gentlemen be Acting Efficiently?*, 13 J. LEGAL STUD. 320, 321-53 (1984).

147. See, e.g., F. D. SRYGLEY, SEVENTY YEARS IN DIXIE: RECOLLECTIONS OF AND SAYINGS OF T. W. CASKEY AND OTHERS 310 (1893) ("Questions affecting personal character were rarely referred to courts of law. . . . To carry a personal grievance into a court of law degraded the plaintiff in the estimation of his peers and put the whole case below the notice of society."), quoted in WILLIAMS, *supra* note 134, at 25; see also text accompanying notes 60-61.

148. See *id.*

149. See GREENBERG, *supra* note 113, at 39; HINDUS, *supra* note 127, at 43 ("At bottom, it was these [legal] proceedings that were objectionable.").

150. See GREENBERG, *supra* note 113, at 39.

151. Charles Synor, *The Southerner and the Laws*, 6 J. S. HIST. 12 (1940).

152. See AYERS, *supra* note 104, at 17.

duels and so gained attention. Indeed, some men entered into duels precisely to establish their claim to the status of a gentleman.¹⁵³

So inflexible was the equation of dueling with honor that many a man personally opposed to dueling still engaged in duels. One Mississippi congressman explained that he would have to respond to a challenge, for if he turned it down "life will be rendered valueless to him, both in his own eyes and in the eyes of the community."¹⁵⁴ Another commentator explained why one reluctant duelist entered a fray: "[T]o have declined would have disgraced him here [and] destroyed his just weight [and] influence."¹⁵⁵ The Virginia statesman John Randolph reconciled his conscience with the demands of public opinion in his famous 1826 duel with Henry Clay by accepting a challenge but then resolving not to fire at his opponent.¹⁵⁶

The only sure way for a gentleman to refuse to duel and keep his honor was if he had a long-established reputation for piety.¹⁵⁷ Late-found religion was not enough; one had to have publicly demonstrated a deep religious faith well before the challenge was issued. Such public profession of faith would serve to shield one from the claim that he was refusing to duel simply out of fear.¹⁵⁸

Other than this, a Southern gentleman, once challenged, faced the choice of either entering the duel or risking expulsion from polite society.¹⁵⁹ Many southerners condemned dueling, and

153. See *id.* at 16-17; WOOD, *supra* note 128, at 345 ("Sometimes it appeared that in America's fluid society would-be gentlemen were using challenges as a means of establishing their status or their dignity.").

154. GREENBERG, *supra* note 113, at 37 (quoting Mississippi congressman and avid duelist S. S. Prentiss).

155. *Id.* (regarding an 1845 duel).

156. See KENNETH S. GREENBERG, HONOR & SLAVERY 59 (1996). When Randolph got to the dueling-ground, he changed his mind. See *id.* at 60-62.

157. Thus, United States Senator Barnwell Rhett was able to refuse a challenge by reminding his would-be opponent that "[f]or twenty years I have been a member of the Church of Christ. The Senator knows it; everyone knows it. I cannot and I will not dishonor my religious profession." See TRUMAN, *supra* note 93, at 16.

158. There are instances where gentlemen refused to duel and still managed to maintain their honor, see *id.* at 434-47, but the instances where this occurred appear to have been unusual, for instance when a challenged duelist had killed a previous opponent, see *id.* at 438, or when the challenger was clearly far below the challenged's social status, see WOOD, *supra* note 128, at 345.

159. The great social cost of refusing a duel, the relatively small chance an "affair of honor" would result in death, and the reputational benefits of a duel, have led some scholars to ask whether Southern gentlemen were acting "efficiently" in engaging in dueling. See Schwartz et al., *supra* note 146, at 321-53. Asking whether it was rational for individuals to duel is not the same, however, as asking whether dueling as an institution was rational or beneficial. For one author's speculations on whether dueling was ever efficient, see Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1736-40 (1996).

regretted the practice's position in their region.¹⁶⁰ When the time came for action, however, the vast majority of them hewed to the pro-dueling norm.¹⁶¹

B. The South's Anti-Dueling Laws

1. The Law as Written

Beginning around 1800, Southern states passed an array of laws designed not merely to punish dueling, but to sever the link between dueling and social approval. It is important to remember that dueling was always illegal in the South; under the common law, duelists could be held for charges ranging from incitement to murder, depending on how far the duel progressed.¹⁶² The new laws went beyond meting out punishment. As one contemporary commentator perceptively noted, they "were intended to apply to the most common causes of duels, and to turn these very causes into strong motives against practicing such combats, or any of their antecedent methods."¹⁶³

The earliest laws sought to cut the tie between dueling and honor by banning duelists from the mark of public favor—public office.¹⁶⁴ It was an old idea; both Massachusetts and Connecticut had disqualified duelists from holding political office since before the Revolution.¹⁶⁵ In the South, such provisions became common in the years around 1800. In 1799, Kentucky banned duelists from

160. Thus, Southerners would condemn dueling in the abstract and even, in rare instances, join anti-dueling societies allegedly devoted to stamping out the practice. See WILLIAMS, *supra* note 134, at 66. The societies, however, apparently did little good. The English writer Harriett Martineau, traveling through the south in the 1830s, spoke of the Anti-Dueling Society formed in New Orleans: "A Court of Honor was instituted [by the society] for the restraint of [dueling]; of course, without effectual result. Its functioning degenerated into choosing weapons for combatants, so that it ended by sanctioning, instead of repressing, dueling." HARRIET MARTINEAU, 3 SOCIETY IN AMERICA 56 (1837), *quoted in* WILLIAMS, *supra* note 134, at 65.

161. Because Southerners dueled regularly and ostracized men who refused a challenge from a fellow gentleman, it makes sense to speak of the South's pro-dueling social norm, even though many professed to be horrified at dueling.

162. See generally Baird, *supra* note 83.

163. Robert Reid Howison, *Duelling in Virginia*, 4 WM. & MARY Q. 215, 222-23 (1924). This is drawn from Howison's (1820-1906) unpublished memoirs; he was a witness to many duels and related to several famous duelists.

164. See GREENBERG, *supra* note 113, at 15 (discussing punishments: "There are similarities among the stake through the heart, the gibbet, and the disqualification from office: all are ways of dishonoring a person in a culture of honor").

165. See Greene, *supra* note 70, at 387.

holding public office,¹⁶⁶ followed by North Carolina in 1802,¹⁶⁷ Tennessee in 1809,¹⁶⁸ and Virginia in 1810.¹⁶⁹ Two years later South Carolina enacted a similar law which not only barred duelists and their seconds from holding public office, but banned them from practicing law, medicine, "or any other trade or calling whatsoever."¹⁷⁰ Similar laws soon appeared on the books in Illinois (1815),¹⁷¹ Georgia (1816),¹⁷² Alabama (1819),¹⁷³ and eventually Mississippi (1822),¹⁷⁴ and the District of Columbia.¹⁷⁵ Mississippi¹⁷⁶ and Kentucky¹⁷⁷ were among the states that also placed prohibitions in their state constitutions allowing duelists to be barred from public office.

In their attempts to put roadblocks in the path to the duel, lawmakers did not neglect to criminalize the conduct of seconds, who arranged duels and ensured that they were carried out according to the "code of honor."¹⁷⁸ A duel was, after all, not merely a fight between two combatants, but a carefully arranged ritual that required the assistance of many "stage-managers."¹⁷⁹ Under the common law, when one combatant died in a duel, all the seconds, on either side, were guilty of murder.¹⁸⁰ Several states included seconds in their statutes, and Georgia's statute covered not only duelists but also anyone "consenting to be a second in a duel to be fought with sword, or pistol or other deadly weapon."¹⁸¹ Mississippi's 1839 anti-dueling law not only forbid duelists and seconds

166. See J. Winston Coleman, Jr., *The Code Duello in Ante-Bellum Kentucky*, 30 *FILSON CLUB HIST. Q.* 125, 127 (1956).

167. See FRANKLIN, *supra* note 40, at 58 (citing N.C. CODE §§ 203-11 (1855)).

168. See TENN. CODE § 5 (1809).

169. See 1 VA. CODE REV. § 8 (1819), *quoted in* Chaffin v. Lynch, 1 S.E. 803, 806 (Va. 1887).

170. FRANKLIN, *supra* note 40, at 58 (quoting 5 S.C. STAT. AT LARGE 671-72 (1839)); *see also* Yancey v. State, 29 S.C.L. (2 Speers) 246 (S.C. App. L. 1843).

171. See Lewis, *supra* note 132, at 36.

172. See Harris v. Georgia, 58 Ga. 332, 332 (1877) (citing LAMAR'S DIGEST 593 (1816)).

173. See Lewis, *supra* note 132, at 39.

174. Mississippi only passed its anti-dueling law in 1822, as one proposed in 1817 failed to pass the legislature by a vote of 37-6. See Wilmuth S. Rutledge, *Dueling in Antebellum Mississippi*, 26 *J. MISS. HIST.* 183 (1964).

175. APPLEBY, *supra* note 24, at 45.

176. See MISS. CONST. of 1835, art. VI, § 2 (banning "the evil practice of dueling").

177. See KY. CONST. of 1850, art. VIII, § 1 (requiring an officeholder to swear an oath that he has never participated in a duel).

178. See, for example, WILSON, *supra* note 134, at 89-90, for an account of the many tasks seconds had to perform to ensure that an "honorable" duel took place.

179. See *id.*

180. See IV BLACKSTONE, *supra* note 62, at *199.

181. GA. CODE (LAMAR'S DIGEST) 517 (1816), *cited in* Harris v. Georgia, 58 Ga. 332, 332 (1877).

from holding public office, but placed the same penalties on attending surgeons.¹⁸² Exceeding all of these statutes in scope, Alabama's 1819 law fined and excluded from public office not only duellists and seconds but "every person or persons directly or indirectly concerned therein."¹⁸³

From the first, these laws faced problems in being enforced.¹⁸⁴ When Tennessee updated its anti-dueling law in 1817, for instance, the new law's preamble explained the change by stating that the earlier laws were "found by experience to be ineffectual to prevent a practice so generally condemned by the more thinking part of society."¹⁸⁵ Yet the new law, too, had little effect on dueling; the top ranks of Tennessee politics continued to be filled by men who had engaged in duels, including Tennessee's foremost politician of the era, Andrew Jackson.¹⁸⁶ Why did these laws fail? In some cases, the laws themselves were sops to vocal minorities opposed to dueling, and their passage did not signal any change in the majority's actual tolerance of the practice.¹⁸⁷ A prime example is South Carolina's anti-dueling law. The legislature adopted it in 1812, following a campaign led by the evangelist Philip Moser, who also authored the state's first statute that made it illegal to kill a slave.¹⁸⁸ The legislature was at best, however, lukewarm about the law, and South Carolina's political elite never intended it to be enforced.¹⁸⁹ It was signed into law by a governor who was himself a veteran duelist.¹⁹⁰ A decade later, South Carolinians twice elected as governor John Lyle Wilson, author of the classic guide to the

182. See Rutledge, *supra* note 174, at 185.

183. *Smith v. State*, 1 Stew. 506, 506 (Ala. 1828) (quoting the Alabama Act of 1819); see also *State ex rel. v. Du Bose*, 13 S.W. 1088, 1090 (Tenn. 1890) (noting that the Tennessee Constitution of 1835 punishes not only duellists but an "aider or abettor" in duels as well).

184. See FRANKLIN, *supra* note 40, at 59; JACK KENNY WILLIAMS, *VOGUES IN VILLANY: CRIME AND RETRIBUTION IN ANTEBELLUM SOUTH CAROLINA* 38 (1957).

185. TENN. CODE § 84 (1817), quoted in Lewis, *supra* note 132, at 31.

186. See James W. McKee, Jr., *Dueling*, in *TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE* 264-65 (Carroll Van West ed., 1999).

187. See, e.g., *Dueling*, 7 PA. L.J. 45, 47 (1847) ("Most of the state constitutions which have been framed or remodeled within the last twenty years contain clauses declaring the severest penalties against *fighting duels*. In the legislatures of perhaps every one of these states are to be found men who have been so engaged.").

188. See WILLIAMS, *supra* note 134, at 66.

189. See *Yancey v. State*, 29 S.C.L. (2 Speers) 246, 249 (S.C. App. L. 1843) ("The Act of 1812 . . . of course encountered many covert prejudices, and the pens most skillful in the preparation of Acts of the Legislature were withheld from the noble and philanthropic service which was then tendered to them. The work was left to be perfected by a physician unskilled in the law, but his heart bled for suffering humanity.").

190. See WILLIAMS, *supra* note 184, at 37 ("The duelling laws . . . had no obvious loopholes. They needed none, for they simply were not enforced.").

code duello, *The Code of Honor*.¹⁹¹ South Carolina was not alone in hypocrisy; the governor who signed into law Georgia's anti-dueling statute, for instance, was also a duelist.¹⁹²

Even assuming some of the laws were sincere attempts to at least express dissatisfaction with dueling,¹⁹³ the lawmakers who passed them lacked the will to enforce them. Legislatures that required anti-dueling oaths frequently exempted newly elected duelists from the oath. Mississippi granted an amnesty to one newly elected delegate in 1838 and granted amnesty to fifteen more new legislators in 1858,¹⁹⁴ while Alabama's legislature issued similar exemptions in 1841, 1846, and 1848.¹⁹⁵ Another tactic was simply to change the date after which an oath would become effective, so that an old duel would not prevent a legislator from taking his seat.¹⁹⁶ In Kentucky, something of a prodigy in this area, the legislature changed the effective date of its anti-dueling oath no fewer than 15 times between 1821 and 1848.¹⁹⁷

These examples expose a deeper problem with attempts to change social norms by legal means: how can legal institutions which depend heavily on public support, enforce laws that strike at widely shared values? As Alexander Hamilton noted in his apologia, success in politics often means adjusting to public prejudices.¹⁹⁸ Passing laws against dueling was one thing, for it fit with the discomfort many in the South felt about dueling.¹⁹⁹ Enforcing these laws, however, would strike directly at the belief that it was sometimes necessary for men to duel to maintain their honor. Thus, no surprise that politicians dependent on public favor did not rush to put such laws into effect.

The more interesting legal attacks on dueling were not those that directly challenged the institution. In addition to the punish-

191. WILSON, *supra* note 134, at 89.

192. See STEVENS, *supra* note 25, at 38 (stating that Georgia's law "was dead in the water from the minute the ink of the Governor's signature was dry").

193. It appears, for instance, that several of the Southern Senators who voted for the District of Columbia's anti-dueling law in 1838 did so not because they expected it would be strictly enforced, but because it would express disapproval and might sway public opinion. See text accompanying notes 15-21. Among those voting in favor of the law, for instance, was Henry Clay, an experienced duelist. See TRUMAN, *supra* note 93, at 77.

194. See Rutledge, *supra* note 174, at 190.

195. See WILLIAMS, *supra* note 134, at 66-68.

196. See Lewis, *supra* note 132, at 34.

197. See *id.*

198. See *supra* text accompanying notes 118-20.

199. See FRANKLIN, *supra* note 40, at 59-60; Synor, *supra* note 151, at 17. See generally Lewis, *supra* note 132.

ments that attempted to expel duelists from public office, and so mark their duels as dishonorable, antebellum lawmakers proposed a range of laws intended to interrupt the steps that led to a public combat.²⁰⁰ They broadened libel laws considerably to give an insulted party redress apart from the "affair of honor." Mississippi and Virginia expanded their libel laws to make illegal any statement likely to lead to violence.²⁰¹ Virginia's act, first passed as part of the 1810 Anti-Dueling Act, made actionable "all words which from their usual construction and common acceptance are considered as insults, and lead to violence and breach of the peace."²⁰² So stringent was Virginia's law that, unlike ordinary libel laws, it sometimes punished "fighting words" even when they were true.²⁰³ Some laws were also changed to protect men who refused to duel. In 1832, Florida made it an offense to call a man a coward for refusing to duel.²⁰⁴

The evidence suggests that these laws did not succeed any better than those which attempted to ban duelists from public life.²⁰⁵ Dueling did not noticeably decline in the years after these laws were passed, nor did the prejudice against bringing libel suits disappear.²⁰⁶ In the rare cases where suits were brought, juries proved unwilling to convict one gentlemen for libeling another, apparently agreeing with the general view that a gentleman should defend his honor outside of the courtroom.²⁰⁷ In the state with the most stringent libel law, Virginia, only a handful of statutory libel cases were reported before 1865.²⁰⁸

200. An idea they may have derived from Blackstone, who wrote that dueling would not end "till a method be found of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable." IV BLACKSTONE, *supra* note 62, at *199.

201. See John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 82-84 (1950). Mississippi's statute, in particular, was clearly designed to deter fighting words, so much so that it was later held no action could be brought against a corporation under the law, as a corporation was unable to participate in personal violence. See *id.* at 83.

202. VA. ACTS ch. 10, § 8 (1810), *quoted in* Wade, *supra* note 201, at 83.

203. See *Moseley v. Moss*, 47 Va. (6 Gratt.) 534, 540 (1850) (holding that truth was not an absolute defense under Virginia's "statutory libel" laws, though it was under common law libel).

204. Herbert J. Doherty, *The Code Duello in Florida*, 29 FLA. HIST. Q. 243, 245 (1951).

205. *But see* WILLIAMS, *supra* note 134, at 70-71 (arguing that the rise in libel suits in South Carolina after the passage of that state's anti-dueling law in 1812 is a sign the law channeled some disputes into the legal system).

206. See GREENBERG, *supra* note 113, at 14-15.

207. See Rorabaugh, *supra* note 114, at 16.

208. See Wade, *supra* note 201, at 83-84 nn.131-54 (discussing Virginia statutory libel law). In contrast, after the 1880s, when dueling had largely disappeared, the number of reported libel cases appears to have risen. See *id.*

The insult was, however, only the first step to the duel.²⁰⁹ The laws were designed to interrupt every step leading to a duel. Challenges to dueling were often criminalized in the same statutes that prohibited dueling itself.²¹⁰ Alabama's 1819 anti-dueling provision forbid "sending, giving, accepting, or conveying any such challenge," and not only banned the challenger from public office, but sentenced him to three months in jail and a \$2,000 fine.²¹¹ Making a challenge was similarly banned by the anti-dueling acts adopted in Georgia,²¹² Kentucky,²¹³ North Carolina,²¹⁴ South Carolina,²¹⁵ and Tennessee.²¹⁶

To summarize, by the 1820s every Southern state had adopted laws or Constitutional provisions intended not merely to punish duelists but to strike at the internal and external pressures that led so many men to duel. The laws made illegal insults likely to provoke violent reactions. They forbade men from issuing challenges to duels. They banned seconds from even carrying challenges, much less arranging duels. For convicted duelists, the law promised not only criminal punishment but official ostracism—exclusion from public office—a ban that would tarnish any duelist's claim to be a "gentleman." If the laws had worked as designed, conflict would have been avoided or channeled into the judicial system. Dueling would have been transformed from a social drama in which duelists displayed and confirmed their "honor," to a profoundly dishonorable custom, engagement in which would permanently damage the honor of any Southern gentleman.

209. See STOWE, *supra* note 1, at 13-14.

210. Some courts also held that making a challenge was illegal under the Common Law. See *Brown v. Commonwealth*, 4 Va. (1 Rand.) 516 (1826).

211. See *Smith v. State*, 1 Stew. 506 (Ala. 1828) (holding, apparently against the language of the statute, that Alabama's anti-dueling act of 1819 criminalized challenges only when actually followed by a duel).

212. See GA. CODE (LAMAR'S DIGEST) 593 (1816), *quoted in Harris v. Georgia*, 58 Ga. 332, 333 (1877).

213. See *Moody v. Commonwealth*, 61 Ky. (1 Met.) 1, 3 (1862).

214. See *State v. Farrier*, 8 N.C. (1 Hawks) 487, 489 (1821) (noting that sending a challenge was illegal under both the Common Law and North Carolina's 1802 anti-dueling statute).

215. See *State v. Strickland*, 11 S.C.L. (2 Nott & McC.) 181, 183 (1819) ("[T]he law makes every challenge to fight a duel . . . penal").

216. See *Smith v. State*, 9 Tenn. (1 Yer.) 228, 232 (1829) (citing the Tennessee Act of 1809 which bans not only dueling but "bearing a challenge for that purpose.").

2. The Laws as Enforced

The laws designed to prohibit dueling rarely worked. Their enforcement relied too heavily on men deeply embedded in the very social practices the laws sought to overturn. Seldom were dueling or even murder charges brought against duelists.²¹⁷ When they were, Southern judges and juries, drawn from the populace and presumably sharing the beliefs of the wider society, were unwilling to enforce the harshest of the anti-dueling laws.²¹⁸ Duelists appeared largely immune from prosecution.²¹⁹

Reluctance to enforce the laws took a variety of forms. In more than one instance, state supreme courts gutted anti-dueling statutes by reading them so narrowly as to make them unenforceable. In *Smith v. State*, Alabama's Supreme Court held that the state's anti-dueling law only banned challenges when followed by an actual duel—thus holding that simply issuing a challenge was not illegal under the law.²²⁰ The South Carolina Supreme Court relied on the privilege against self-incrimination to hold in 1819 that seconds in duels could not be compelled to testify about a duel. Given the private nature of duels, this holding made it extremely difficult to prosecute duelists.²²¹ In a particularly creative reading

217. In the antebellum South, there were only a small number of reported cases in which criminal charges were leveled for either dueling or homicide in connection with a duel. One study found a total of only seventeen published appellate cases dealing with antidueling laws in the states of Alabama, Arkansas, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia, in the years before 1860. Schwartz et al., *supra* note 146, at 327 n.23.

218. See WILLIAMS, *supra* note 134, at 66-67 (regarding general unwillingness to enforce anti-dueling laws); see also ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 30, 37 (2000) (examining the background of judges and jurors in Mississippi).

219. In the rare instances where duelists were punished, it appears most were fined for their actions. See WILLIAMS, *supra* note 184, at 37. Intriguingly, out of the small number of published appellate cases, in several the laws were invoked either against men who either were not gentlemen, see, e.g., *Commonwealth v. Dudley*, 33 Va. (6 Leigh) 613, 613 (1835) (concerning the indictment of a "common laborer" for aiding and abetting in a duel), or who acted in utter ignorance of the *code duello* when making a challenge, see, e.g., *Ivey v. State*, 12 Ala. 276, 276 (1847) (prosecution under anti-dueling laws of an individual who told the other party he had "half a minute" to prepare for a duel); *Commonwealth v. Tibbs*, 31 Ky. (1 Dana) 524, 524 (1833) (defendant charged with dueling when he told another party, "I will fight you a duel with a pistol or a rifle, from one step to a hundred yards"); *Strickland*, 11 S.C.L. at 181 (defendant charged with violating dueling laws after urging another to "go into the old field to fight a duel"). These suggest that even when enforced, anti-dueling laws may have been disproportionately enforced against non-elites.

220. See *Smith v. State*, 1 Stew. 506, 507 (Ala. 1828).

221. Duels were publicized, but they were not open to the public. See *State v. Edwards*, 11 S.C.L. (2 Nott & McCord) 13, 15 (1819). *Edwards* was a test case of the anti-dueling laws; as one

of the law, in 1860 California's Supreme Court held that the state legislature, in passing an anti-dueling law that set a punishment of five years' imprisonment for a duelist who killed his antagonist, had thereby superseded the state's murder law.²²² In other words, the court held that by passing the anti-dueling statute the California legislature had declared that killing a man in a duel was *not* murder.²²³

Juries presented an even bigger stumbling-block to the enforcement of anti-dueling laws.²²⁴ Drawn to be representative of the larger community, a jury would, one assumes, always be a weak link in enforcing any punitive legislation aimed at altering a broadly held social norm.²²⁵ The accused was to be punished for engaging in activity that was expected of members of society. Dueling was an especially tough issue in this regard, for even men who disapproved of dueling often felt compelled to duel.²²⁶

Even in instances where the authorities investigated the duel and a grand jury issued indictments against duelists and seconds, petit juries would only rarely convict accused duelists at trial.²²⁷ In acquitting duelists, the petit jury gave voice to the general opinion that, however pernicious dueling was, it should not be a criminal offense.²²⁸ It was this refusal by juries to convict duelists

historian has written, once the judge in the case refused to require seconds to testify, "the dueling laws became moot." WILLIAMS, *supra* note 134, at 68. The law was altered in 1823 to give seconds immunity while testifying. See HINDUS, *supra* note 127, at 44.

222. See *People ex rel. Terry v. Bartlett*, 14 Cal. 652, 653 (1860) (holding that under California law a duelist, in this case former state Chief Justice David Terry, who killed an opponent was not guilty of murder but the separate offense of violating the state's anti-dueling law).

223. See *id.* California was settled by many Southerners in the 1840s and 1850s, saw quite a few duels, and was the site of one of the most famous duels in the nation: the 1859 duel where David S. Terry, the Kentucky-born Chief Justice of the California Supreme Court, killed United States Senator David Broderick. Terry did not hear *People ex rel. Terry*, but his position might help explain why California's Supreme Court held as it did. See *id.*; STEVENS, *supra* note 25, at 228-44.

224. Both case law and secondary works abound with tales of men indicted for a dueling-related crime, only to be quickly acquitted by a jury at trial. See, e.g., Coleman, *supra* note 166, at 133 (following a fatal Kentucky duel in 1829, the surviving duelist was acquitted by a jury that deliberated less than five minutes); Howison, *supra* note 163, at 230 (following a fatal duel in Virginia, a warrant was issued and the surviving duelist arrested, but "on hearing the evidence [the jury] promptly acquitted him"). Southerners' refusal to convict duelists was also cited by Northern critics of the institution. See Lewis, *supra* note 132, at 46.

225. Juries were not perfectly representative of Southern white society, but in at least some instances petit juries were drawn from broad cross-sections of the dominant society. See GROSS, *supra* note 220, at 37; see also HINDUS, *supra* note 127, at 89-91 (noting that the jury trial was "the only stage from arrest to punishment in which public opinion is directly involved").

226. See *supra* text accompanying notes 154-56.

227. See *infra* text accompanying notes 231-35.

228. See WILLIAMS, *supra* note 184, at 38.

that lay behind some states' adoption of an anti-dueling oath for legislators and voters.²²⁹ In *Dwight v. Rice*, an 1850 case, the Supreme Court of Louisiana justified that state's oath by pointing out that it was the only way to tame duelists, as juries would never punish them.²³⁰

It is tempting to see such activities as a nineteenth-century instance of jury nullification, occasions where jurors expressed their disagreement with a law by refusing to convict those charged with violating it.²³¹ In fact, the situation was complicated considerably by the fact that, even as petit juries were proving themselves unwilling to convict men accused of dueling, grand juries were often willing to indict them for the offense. In South Carolina, grand juries indicted several duelists for murder.²³² South Carolina law, however, allowed petit juries to find that a homicide was either "felonious, justifiable, or excusable," and when dealing with duelists, they usually chose the latter two categories.²³³ In Vicksburg, Mississippi, during the antebellum era, grand jurors returned forty indictments charging men with dueling or aiding in a duel.²³⁴ Only two of those indicted in Vicksburg ever came to trial, however, and both were speedily acquitted.²³⁵ The grand and petit jurors' actions here recapitulated Southerners' ambiguous relationship with dueling, signaling disapproval of the practice while avoiding punishing individual duelists.

Only in a few instances did it appear that the anti-dueling laws had any real deterrent effect at all. The one Southern state where the laws may have had a noticeable effect on dueling was Virginia. Virginia's stringent anti-dueling laws, which banned du-

229. See *Dwight v. Rice*, 5 La. Ann. 580, 581 (1850).

230. The court in *Rice* contended that the state's 1845 constitution, which prohibited duelists from voting, had helped deter the practice. *Id.* at 581-82. As occurred elsewhere, however, Louisiana later weakened the prohibition. When it passed a new constitution in 1852, the new charter limited the prohibition to those who had dueled "after the adoption of this Constitution." LA. CONST. of 1852, § 126.

231. Due to uncertainty about the historical roots of jury nullification, the parallel should not be pressed. See Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 257 (1996); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 498-505 (1985).

232. See WILLIAMS, *supra* note 184, at 38.

233. *Id.* Even in South Carolina, however, duelists were occasionally convicted for dueling. See HINDUS, *supra* note 127, at 44-45 (noting that, while some duelists were convicted of crimes, most were never even indicted).

234. See CHRISTOPHER WALDREP, *ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH, 1817-1880*, at 190 n.75 (1998). This is probably not representative of dueling in all the old South; Vicksburg was a major center of dueling in the 1840s. See WILLIAMS, *supra* note 134, at 8.

235. See WALDREP, *supra* note 234, at 190 n.75.

elists from public office and outlawed fighting words, were credited by some as discouraging dueling in the state, though it is clear the law did not end the practice of dueling.²³⁶ The law's exact effect, though, is not certain; while some claimed the law discouraged duelists, many prominent Virginia gentlemen dueled long after the law's passage,²³⁷ and dueling in Virginia did not disappear until 1880s.²³⁸

In Tennessee, an unusual campaign against dueling also served to briefly suppress the institution. Dueling came under attack in the late 1820s, not from legislators but from the Tennessee Supreme Court. In an 1829 case, *Smith v. State*, the court relied on the common law to disbar Calvin Smith, a Tennessee attorney who had killed an opponent while dueling in Kentucky.²³⁹ In its opinion, the court warned if any attorney "violates the laws made to suppress dueling, we will strike him from the rolls of the Court."²⁴⁰ For a few years, this appeared to have some effect, discouraging attorneys from dueling.²⁴¹ In the long run, however, its effects were limited; dueling in Tennessee continued until after the Civil War.²⁴²

236. See Howison, *supra* note 163, at 223 (stating that the Virginia's anti-dueling law was a "powerful deterrent" against the practice, but also noting that "notwithstanding all these obstacles of human law, duels . . . have continued in Virginia."). In 1841, one judge of the Supreme Court of Virginia stated that the law had "repressed" dueling, though it is unclear whether he meant that it had eliminated dueling or merely discouraged it. *Brooks v. Calloway*, 39 Va. 477, 471 (1841). There is reason for skepticism about the law's deterrent effect. See *infra* notes 237-38.

237. In 1826, some years after Virginia passed its anti-dueling measure, the state's Senator, John Randolph fought a duel against Senator Henry Clay. See GREENBERG, *supra* note 156, at 58-61. Randolph's behavior in the duel illustrates how the laws may have affected the behavior of Virginia gentlemen who nonetheless did not obey the laws. At first, he resolved not to fire at Clay, in part as a way to "honor" the laws of Virginia (which, of course, outlawed dueling altogether). See *id.* Once facing Clay, however, Randolph decided he would fire after all. See *id.* at 60-61. While the anti-dueling law influenced Randolph's behavior, he apparently felt no compunction to follow it to the letter.

238. See, e.g., Howison, *supra* note 163, at 239-40 (discussing duels fought in Richmond in the 1840s and 1850s); STEVENS, *supra* note 25, at 14-16 (noting duels that occurred in Virginia in the 1850s); *supra* text accompanying notes 287-97 (recounting an outbreak of dueling in Virginia in the 1880s).

239. *Smith v. State*, 9 Tenn. (1 Yer.) 228, 229 (1829). In relying on the common law, the court was able to invoke its own authority to disbar Smith, and thus sidestep the problems facing other legal institutions that challenged dueling. *Id.* at 230-31.

240. *Id.* at 234.

241. See TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890*, ch. 2 (1999) (discussing the career of John Catron, the Tennessee Supreme Court Justice who wrote the opinion in *Smith*). Catron seems to have believed *Smith* ended dueling in Tennessee, but dueling continued until the Civil War. See McKee, *supra* note 186, at 265-65.

242. See *id.*

While anti-dueling laws did not eliminate dueling, they helped shape the duel. Many duelists took pains to avoid *publicly* breaking the law.²⁴³ They either kept their duels quiet or, even more common, dueled beyond the reach of their home state's laws.²⁴⁴ Crossing state borders was a favorite tactic.²⁴⁵ Under common law and many statutes, a state's jurisdiction did not extend to acts committed beyond its borders, so by leaving their state, duelists ensured they would be immune from home state prosecution.²⁴⁶ In America, this produced a series of famous dueling-grounds located near a state border, ranging from Bladensburg Heights, across the Maryland line from Washington, D.C., to Cumberland Island, Georgia, a favorite dueling-ground for Floridians.²⁴⁷ Before the American Indian expulsions, Georgians dueled in that state's then-sovereign Cherokee territory.²⁴⁸

This custom of border crossing might also have had a second, unintended effect: by forcing duelists to travel to a dueling ground, the laws gave seconds more time to negotiate a peaceful ending to what would otherwise have been a violent encounter. This was the case when, in 1842, Abraham Lincoln became embroiled in a quarrel with a political rival, James Shields.²⁴⁹ Lincoln and Shields were both from Springfield, Illinois, but following tradition they resolved to duel out of state, settling on an island in the Mississippi River that belonged to Missouri.²⁵⁰ The long travel time to this island, however, allowed both men's seconds to arrange a peaceful solution to the affair—a solution that might never have been reached had the two dueled in their hometown.²⁵¹

Illinois and its duels are worth a second look, for it is the one state where the law appeared to have stamped out dueling.²⁵² While

243. See FRANKLIN, *supra* note 40, at 47.

244. See *id.*

245. *Id.*

246. See *Yancey v. State*, 29 S.C.L. (2 Speers) 246, 248 (S.C. App. L. 1843) (stating that while dueling out-of-state cannot be punished in South Carolina, making a challenge while in-state does violate the common law); *Warren v. State*, 14 Tex. 406, 408 (1855) (holding that Texas' anti-dueling act does not reach individuals who duel out of state); see also Howison, *supra* note 163, at 237. *But see Warren*, 14 Tex. at 408 (commenting that Mississippi's anti-dueling act does contain a provision applying to out-of-state duels).

247. See FRANKLIN, *supra* note 40, at 47; WILLIAMS, *supra* note 134, at 69-70.

248. See FRANKLIN, *supra* note 40, at 47.

249. See DOUGLAS L. WILSON, HONOR'S VOICE: THE TRANSFORMATION OF ABRAHAM LINCOLN 265-92 (1998) for a detailed account of this "affair of honor." My thanks to my colleague Tom Fusonie for this reference.

250. *Id.* at 280.

251. *Id.* at 281-82.

252. See Lewis, *supra* note 132, at 37.

not a "Southern" state, Illinois was settled in large part by southern emigrants (witness the Lincolns, who moved there from Kentucky). With such founders, the state might have been expected to see quite a few duels, as did other states settled by Southerners such as California and Texas. Illinois, however, claimed to have had no duels after 1820.²⁵³ This state of affairs owed its existence less to the state's anti-dueling laws, however, than to the disastrous end of Illinois's first well-publicized duel.

In 1815, Illinois passed an anti-dueling law that was similar to those passed elsewhere. It required officeholders to pledge they had never dueled, but at the same time issued an amnesty to anyone who had dueled before the new law was passed.²⁵⁴ From this, it might appear that Illinois was about to follow its Southern counterparts, in legislating against dueling while tolerating the practice. Four years later, however, two men in Belleville, Illinois, Alonze Stuart and William Bennett, fought the state's first duel, over an errant horse.²⁵⁵ The men's seconds, not taking the affair too seriously, planned to turn it into a "mock duel" by loading both duelists' guns with powder but no shot.²⁵⁶ At the duel, however, when the signal was given, Bennett fired and Stuart fell dead with a bullet through the heart.²⁵⁷ At Bennett's trial, a witness testified that she saw him place a bullet in his pistol when his seconds were not looking.²⁵⁸ Evidently, Bennett had learned of the prank and resolved to kill his unarmed opponent. He was convicted of murder and hanged in 1821.²⁵⁹ According to one observer, the duel and its aftermath made dueling "discreditable and unpopular, and laid the foundation for that abhorrence of the practice which had ever been felt and expressed by the people of Illinois."²⁶⁰

Illinois' example points to the complex relationship between social norms and the law. Its laws were no different from those of Southern states, and many of its early settlers grew up in the Southern culture that accepted dueling. Before dueling could win acceptance in the new territory, however, the Bennett-Stuart duel

253. See TRUMAN, *supra* note 93, at 78. The Lincoln-Shields affair, which failed to escalate into a duel, occurred after the events discussed here, suggesting that some remnants of the "affair of honor" remained. See *supra* text accompanying notes 249-51.

254. See Lewis, *supra* note 132, at 36.

255. See BALDICK, *supra* note 25, at 124-25.

256. *Id.* at 124.

257. *Id.*

258. *Id.*

259. *Id.* at 124-25.

260. SABINE, *supra* note 1, at 289.

intervened to give the practice a particular meaning. Bennett's behavior was anything but "honorable," and his combat with Stuart was, according to the jury, merely a disguised murder. Nor was hanging a "gentlemanly" end. More than any legislative enactment, the Bennett-Stuart duel convinced people in Illinois that dueling was murder and turned public opinion decisively against the practice.

The Bennett-Stuart duel also suggests how a particular social meaning might be established.²⁶¹ We can speculate that some social norms or social meanings that would otherwise be firmly established can be cut off, if attacked early or at a strategic moment.²⁶² In the Southern states, dueling communicated that the duelist was a man of honor. In Illinois, though, before the duel had time to take root, it became associated with cold-blooded murder.²⁶³ This is not to say that all social norms are amenable to such manipulation.²⁶⁴ Indeed, dueling's long career suggests the exact opposite—once the duel was established in Southern culture, it would take a cataclysm to uproot it.

261. There is already substantial literature speculating how norms develop and acquire particular meanings. See, e.g., POSNER, *supra* note 28, at 29-32; McAdams, *supra* note 31, at 352-355; Picker, *supra* note 50, at 1225.

262. Considering that Illinois was settled by both Southerners and Northerners, this might be an example where two social norms, the North's anti-dueling norm and the South's pro-dueling norm, were competing for dominance until the Bennett-Stuart duel "tipped" opinion in favor of the anti-dueling norm. See Picker, *supra* note 50, 1227-28, *passim* (modeling how in some instances norms may compete).

263. There are similarities here to the Burr-Hamilton duel. There, however, we can speculate that social norms in the North may already have been "tipping," due to the slow growth of political parties and a more egalitarian social order. See *supra* text accompanying notes 122-28. The South's norms were unaffected by such developments, and its norm regarding dueling may have proven more robust and less amenable to such tipping.

264. A few scholars eager to alter social norms have, it seems, paid insufficient attention to the fact that some norms are remarkably resistant to change, see, e.g., Sunstein, *supra* note 41, at 907-09 (claiming that "existing social conditions are often more fragile than might be supposed"), and have devoted the bulk of their efforts to studying the "norm entrepreneurs" who played successful roles in altering norms, see David A. Skeel, Jr., *Shaming in Corporate Law* 11 (Feb. 2001) (unpublished manuscript, on file with author). Recently, however, Robert Ellickson has noted that norm entrepreneurs are most likely to be successful if the challenged norm has already been undermined by exogenous factors, *id.* (quoting Robert Ellickson, *The Evolution of Social Norms, A Perspective from the Legal Community* 29-32 (2000) (unpublished paper)), a point that anticipates the ones made in this Note, see *infra* Part V.C.

V. THE END OF THE AFFAIR

A. *The Civil War and the Demise of Dueling*

Despite all legal attempts to stamp it out, dueling remained a part of Southern life on the eve of the Civil War.²⁶⁵ Not only did it continue to flourish in the Deep South, in its old haunts such as Charleston,²⁶⁶ but dueling also appeared in areas that attracted large numbers of Southern transplants, such as California.²⁶⁷ Some students of dueling even contended that dueling increased in the 1850s, as the growing rift between the North and South encouraged Southerners to embrace such distinctively Southern practices as the duel.²⁶⁸ Yet, within a decade, the duel was a dying or dead institution.²⁶⁹ Why?

Clearly, the Civil War killed the duel.²⁷⁰ During the war itself, Southern men still dueled, though perhaps at a less frenetic pace than during the 1850s.²⁷¹ Officers in both the Confederate Army and Navy fought several well-known duels.²⁷² But after the war, the duel rapidly faded. In South Carolina, for instance, only a handful of duels were fought after 1865, and only one of those was fatal.²⁷³ Kentucky's last duel took place in 1866.²⁷⁴ Recognizing the link between the Civil War and dueling's decline does not, however, explain exactly how the disastrous conflict ended dueling.

Dueling ended in part because the war and its aftermath served to give a new meaning to dueling. The sheer carnage of the

265. See Coleman, *supra* note 166, at 138 (antebellum Kentucky); Doherty, *supra* note 204, at 243 (antebellum Florida); James T. Moore, *The Death of the Duel: The Code Duello in Readjuster Virginia, 1879-1883*, 83 VA. MAG. HIST. BIOG. 259 (1975) (discussing the duel's continued vitality in pre-Civil War Virginia). Out of one article's sample of twenty-five "representative duels" fought in the century between the Revolution and the Civil War, four (16%) took place in the 1850s. See Schwartz et al., *supra* note 146, at 352-55.

266. Several famous duels were fought in Charleston in the 1850s. See FRANKLIN, *supra* note 40, at 57; ROSSER H. TAYLOR, ANTE-BELLUM SOUTH CAROLINA: A SOCIAL AND CULTURAL HISTORY 47 (1942).

267. See STEVENS, *supra* note 25, at 245.

268. *Id.* at 245. But see WILLIAMS, *supra* note 134, at 78-80 (suggesting that dueling in the South declined somewhat after 1830, though also speaking of the duel's persistence in the antebellum era).

269. See *infra* text accompanying notes 277-96.

270. See AYERS, *supra* note 104, at 271; WILLIAMS, *supra* note 184, at 37.

271. See STEVENS, *supra* note 25, at 246-47.

272. *Id.*

273. *Id.* at 252-53.

274. See Coleman, *supra* note 166, at 138-39.

war destroyed the romantic notions attached to arranged combat.²⁷⁵ By the end of the war, nearly one million of the South's adult white males had served in the Confederate Army.²⁷⁶ Over a quarter of them had died in the war, including many of its putative aristocrats.²⁷⁷ The war itself had appeared to many Confederate soldiers as a struggle of honor, and losing the war likely made such staged combat appear both futile and a reminder of losses past.²⁷⁸ After surviving such slaughter, the returning soldiers must have found little to attract them to the duel.²⁷⁹ Moreover, the society that appeared after the Civil War and Reconstruction, more urbanized and commercial, more open to ambitious businessmen, was also less hospitable to dueling than was the Old South.²⁸⁰ A society without an aristocracy is not one where dueling is likely to flourish. It was not that the South's culture of honor had disappeared; rather, the duel was no longer a symbol of that culture. As one Southern professor put it in 1883, "[dueling] is no longer an honorable way of killing."²⁸¹

The end of Southern dueling did not mark the end of Southern violence.²⁸² After the war, as before, Southerners were more likely to commit murder than their Northern counterparts.²⁸³ Theirs remained a culture suffused with notions of honor and respect, in which mild personal slights produced disproportionately violent responses.²⁸⁴ But such violence was no longer released in the

275. See AYERS, *supra* note 104, at 271-72. Mass war seems to render absurd the pretensions of the individual duel. In similar fashion, World War I ended dueling in Germany, another society that, in its prewar era, had nurtured a romantic cult of dueling. See FREVERT, *supra* note 63, at 201-02; KEVIN MCALEER, *DUELING: THE CULT OF HONOR IN FIN-DE-SIECLE GERMANY 18* (1994).

276. See JAMES M. MCPHERSON, *THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 306-07 n.41 (1988).

277. See *id.* at 854 (estimating Southern deaths at above 260,000); *id.* at 330 (noting that officers had a higher death rate than enlisted men, and that senior officers had a higher rate overall, as, for example, Confederate generals were 50% more likely to be killed than enlisted Southern men).

278. See JAMES M. MCPHERSON, *FOR CAUSE AND COMRADE: WHY MEN FOUGHT IN THE CIVIL WAR* 168-70 (1997) (discussing the links many Southerners made between the war and honor).

279. See AYERS, *supra* note 104, at 271.

280. See EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH* 3-25 (1992) (presenting an overview of the South after the Civil War). The culture was also more like the open one that developed in the North after 1800 and which contributed to the end of Northern dueling. See *supra* note 128 and accompanying text.

281. AYERS, *supra* note 104, at 268 (citation omitted).

282. See generally BUTTERFIELD, *supra* note 142; Dov Cohen & Joe Vandello, *Meanings of Violence*, 27 J. LEGAL STUD. 567 (1998).

283. See AYERS, *supra* note 104, at 276.

284. See Cohen & Vandello, *supra* note 282, at 567.

duel.²⁸⁵ In the postwar South, as one scholar put it, "aggrieved men [just] shot each other on sight."²⁸⁶

Only one state saw a revival of dueling after 1870, and that single outbreak shows how thoroughly dueling had lost its role in Southern culture.²⁸⁷ From 1879 to 1883 Virginia was riven by an extraordinary dispute over the state debt.²⁸⁸ Two factions, "funders" and "readjusters," fought pitched battles in the state's legislature and press over how the debt should be settled.²⁸⁹ For now obscure reasons, participants regarded it as less an ordinary political dispute than a battle over the soul of the State.²⁹⁰ This conflict produced ten challenges and six duels.²⁹¹

This time, however, the duel appeared to the public not as drama but as farce. Law enforcement was no longer willing to turn a blind eye to duels. When several would-be duelists attempted to meet and duel in private, they found themselves forced to run from the Richmond and Washington police.²⁹² Once caught, the duelists were required by local judges to post large bonds to guarantee their peaceful behavior, effectively preventing the duel.²⁹³ Prominent public figures no longer felt obliged to follow the *code duello*. When United States Senator William Mahone was challenged by former Confederate General Jubal Early, Mahone simply refused to fight.²⁹⁴ While the antebellum public might have regarded Mahone as a coward, Virginians in the 1880s did not seem to care about the dispute, and Mahone suffered no damage to his social standing or electoral prospects for having declined to duel.²⁹⁵

Most telling, even the duelists themselves no longer had faith in the duel's role as a ritual affirmation of honor. When the funder George D. Wise challenged readjuster Congressman Ambler Smith to a duel, Smith announced that his choice of weapons would be not the traditional dueling pistols but double-barreled shotguns.²⁹⁶ Smith valued the duel not as an arena to publicly display his honor, but as an opportunity to kill his opponent. The duel

285. See C. VANN WOODWARD, *THE ORIGINS OF THE NEW SOUTH* 161 (1951).

286. AYERS, *supra* note 104, at 268.

287. Moore, *supra* note 265, at 259.

288. See *id.* at 259-61.

289. *Id.* at 262.

290. *Id.* at 264.

291. *Id.* at 260.

292. *Id.* at 265, 266, 270.

293. See *id.* at 265, 270.

294. See *id.* at 270-71.

295. See *id.*

296. *Id.* at 272.

(thankfully) never took place, and this last vogue for dueling was soon over.²⁹⁷

The Virginia controversy brought home a fundamental shift in attitudes: the social meaning of dueling had changed. It was, to the general public, no longer a combat for honor but an archaism. With a new social meaning attached to it, the practice of dueling disappeared almost completely, helped along by the new willingness of legal institutions to enforce laws against duelists. By 1883 it was clear the authorities would arrests duelists, the public was indifferent to it, and even the duelists themselves no longer believed in it. After that year, there was never again a major duel in the South.²⁹³

B. *Dueling in Modern American Law*

Today, dueling as a legal issue no longer exists. The few anti-dueling statutes and provisions that remain on the books are recognized anachronisms,²⁹⁹ and anti-dueling laws have been invoked in only a handful of cases since the turn of the twentieth century.³⁰⁰ When they are invoked, it is generally by prosecutors seeking to lay an additional charge against a defendant already charged with murder or assault.³⁰¹ Since the 1920s, courts have rejected al-

297. *See id.* at 273.

298. *See id.* at 275-76.

299. For example, Tennessee's Constitution still prohibits duelists from holding public office, TENN. CONST. art. 9, § 3, while anyone who wants to join the Kentucky bar is still required to pledge they have "not fought a duel with deadly weapons" nor have "sent or accepted a challenge to fight a duel," KY. CONST. § 228.

300. There appear to be fewer than a dozen reported cases since 1900 in which a defendant was charged with violating anti-dueling laws or with committing homicide in a legally cognizable duel, and many of these cases occurred early in the century. *See Payne v. State*, 391 So. 2d 140, 144 (Ala. Crim. App. 1980) (stating that anti-dueling laws are now anachronisms in Alabama); *People v. Morales*, 247 P. 221 (Cal. App. 1926) (upholding a conviction for fighting a duel); *Bundrick v. State*, 54 S.E. 683, 684-85 (Ga. 1906) (upholding homicide conviction when two individuals, who had planned to meet later for a duel, met earlier, fought, and one was killed); *Ward v. Commonwealth*, 116 S.W. 786, 787 (Ky. 1909) (reversing conviction for violating anti-dueling statute); *Baker v. Supreme Lodge, K.P.*, 60 So. 333 (Miss. 1913) (rejecting an insurance company's contention that insured died in a "duel," not murder, where the insured's policy would have been invalidated had he died in a duel); *Davis v. Modern Woodmen of America*, 73 S.W. 923 (Mo. App. 1903) (rejecting an insurance company's contention that insured died in a "duel," not murder, where the insured's policy would have been invalidated had he died in a duel); *State v. Romero*, 801 P.2d 681, 684-85 (N.M. Ct. App. 1990) (stating that duels no longer occur); *State v. Fritz*, 45 S.E. 957, 958 (N.C. 1903) (upholding a conviction for challenging another to a duel); *Commonwealth v. Gaynor*, 648 A.2d 295, 298 n.5 (Pa. 1994) (criticizing a lower court for characterizing a shooting spree as a "duel"); *Griffin v. State*, 274 S.W. 611, 612-13 (Tex. Crim. App. 1925) (holding a duel is a combat "arranged with some formality" and overturning a dueling conviction); *Daughtry v. State*, 113 S.W. 14 (Tex. Crim. App. 1908) (reversing conviction for sending a challenge under state anti-dueling statute).

301. *See, e.g., Payne*, 391 So. 2d at 144; *Romero*, 801 P.2d at 685; *Griffin*, 274 S.W. at 612.

most all attempts to charge defendants with violating anti-dueling laws, recognizing that dueling was not, after all, merely planned combat, but a complex social ritual that depended on both participants and observers to give it meaning.³⁰² Absent the shared social understandings that structured the "affair of honor," there is no true duel. As early as 1909, in *Ward v. Commonwealth*, the Kentucky Court of Appeals recognized that not every fight, even if agreed to, is a duel.³⁰³ A duel, the court held, is not just an affray but "a combat with deadly weapons, fought according to the terms of precedent agreement and under certain or prescribed rules . . . prescribing the utmost formality and decorum."³⁰⁴

Such formal combats simply no longer occur in American culture.³⁰⁵ The last reported case in which charges of dueling were brought against a defendant was a 1990 New Mexico case, *State v. Romero*, in which a trial court convicted Romero of dueling after he and a neighbor quarreled, both left to retrieve weapons, and then shot one another.³⁰⁶ The New Mexico Court of Appeals threw out Romero's conviction on the dueling charge, reasoning that he could not have violated the state's anti-dueling laws because formal duels no longer occur. "[T]his form of combat," the court held, "is long since dead."³⁰⁷

C. Anti-Dueling Laws and the Management of Social Norms

Dueling may be dead in the law, but it lives on in the imagination of scholars seeking ways to manage social norms.³⁰⁸ As noted above, most of these scholars recognize that, historically, anti-dueling laws did not eliminate dueling.³⁰⁹ Nonetheless, they are attracted to such laws because they see in them a technique by which laws might alter social norms. Anti-dueling laws did not just aim to punish duelists, they sought, through a range of methods ranging

302. See *supra* Part IV.A.

303. See *Ward*, 116 S.W. at 787 (rejecting an attempt to charge a defendant with engaging in a duel).

304. See *id.*

305. See *supra* text accompanying notes 286-97

306. *Romero*, 801 P.2d at 682.

307. *Id.* at 684; see also *Payne v. State*, 391 So. 2d 140, 144 (Ala. Crim. App. 1980) (speaking of the "extinction" of the duel in Alabama); *Commonwealth v. Gaynor*, 648 A.2d 295, 298 (Pa. 1994) (criticizing a lower court for, in dicta, describing a gunfight as a "duel").

308. See *supra* Part II.

309. See *supra* note 50 and accompanying text.

from legislative bars to public humiliation,³¹⁰ to change the social norm about, and the social meanings attached to, dueling.³¹¹

Modern-day fans of anti-dueling laws have, however, paid much less attention to why those laws failed.³¹² Between 1800 and 1860, all Southern states passed laws and constitutional provisions meticulously and cleverly designed to end dueling, by penalizing and shaming men who did duel, by providing social support to men who did not wish to duel, and by disrupting the chain of events that carried men from a slight to a duel.³¹³ Yet despite these efforts, dueling did not die out, and in many parts of the South continued to flourish. Why did these laws fail, and what does this tell us about modern attempts to manage social norms and social meanings?

The most direct cause of the laws' failure was the refusal of state legal actors to enforce them. Even with anti-dueling laws on the books, most legislators would not bar duelists from public office, and most judges and jurors would not convict duelists for dueling-related offenses.³¹⁴ In refusing to enforce the laws, these officials were guided by understandings of dueling suffused throughout their society.³¹⁵ Judges and jurors were, understandably, unwilling to punish men for dueling when they themselves thought that dueling was sometimes necessary to maintain one's honor. The South's anti-dueling laws had targeted a social norm, but it was a social norm shared by the men asked to enforce the law. As a result, it becomes evident why the anti-dueling laws would not be effectively enforced until the social norm itself had changed.³¹⁶

The failure of anti-dueling laws may hold lessons for those who propose to use the law to manage social norms. Any lesson drawn from a single example should be taken with a grain of salt; but it is still worthwhile to close with two admittedly speculative

310. See *supra* Part IV.B.1.

311. See Lessig, *supra* note 28, at 681-82.

312. At least one scholar has, however, speculated on the lag between the passage of anti-dueling laws and the end of dueling. See Posner, *supra* note 159, at 1736-40.

313. See *supra* part IV.B.1.

314. See *supra* text accompanying notes 217-35.

315. Dan M. Kahan has recently dealt with the similar problem of legal institutions that refuse to enforce laws against certain fairly popular social norms. See generally Kahan, *supra* note 41. Kahan advocates in such instances the use of mild sanctions ("gentle nudges") to alter "sticky" norms. The examples Kahan gives of norms that prove resistant to legal manipulation, however, are contested norms such as date rape or drunk driving, for which there is already considerable societal disapproval. *Id.* at 607, 609. Dueling in the South was different; while some expressed dislike of the duel, it was a norm widely tolerated throughout society, resisting legal attempts to either "nudge" or "shove" out of popularity..

316. See *supra* Part V.A.

suggestions about what can be learned from the career of anti-dueling laws.

First, the failure of anti-dueling laws illustrates the difficulties facing those who advocate a large role for the "expressive function" of law.³¹⁷ Some laws, scholars have suggested, can change social norms not merely by penalizing targeted behaviors but by expressing society's disapproval of that behavior.³¹⁸ Expressive laws work by making public this shared consensus. Richard McAdams has suggested that anti-smoking laws may well work chiefly through their expressive function.³¹⁹ Anti-smoking ordinances passed in the 1980s, he points out, were rarely enforced. They worked, he proposes, not by punishing smokers directly but by communicating a new social consensus about smoking.³²⁰ In effect, the laws told opponents of smoking that society was on their side. This emboldened them to speak out, while also letting smokers know that many others did not like breathing their second-hand smoke, leading smokers to curb their own behavior.³²¹ The law helped change smokers' and nonsmokers' behavior by publicly expressing an already-forming consensus.³²²

The example of anti-dueling laws, however, demonstrates one limit of this approach. Exactly what a law "expresses" is not always readily apparent. The problem is not that some laws are not expressive, for, of course, there are many laws that, because of their contentious nature, technical subjects, or legislative history, express no societal consensus at all.³²³ The problem with "expressive law" is that many laws' meanings are revealed not in their text but as they take on life through enforcement.

On the surface, anti-dueling laws' general tone, and the penalties they prescribed, made it appear that there existed in the South a consensus that condemned duelists. The law as actually enforced, however, expressed a far different consensus. Courts' willingness to acquit duelists, and legislatures' willingness to seat

317. See Cooter, *supra* note 31, at 593-94 (proposing that, under certain circumstances, such expressive laws can "tip" a society from one social norm to another); Sunstein, *supra* note 41, at 964 (suggesting that expressive laws may have some effect). It should be noted that all proponents of such "expressive" laws recognize that the laws would work only on certain norms and would in most cases have only modest effects.

318. See McAdams, *supra* note 31, at 402-06. See generally, Cooter, *supra* note 31; Sunstein, *supra* note 41.

319. See McAdams, *supra* note 31, at 404-05.

320. See *id.* at 405-06.

321. See *id.*

322. See *id.* at 402-07.

323. *Id.* at 403.

duelists in contravention to the law, expressed a more complex view of dueling, one that saw the institution as regrettable but held that the individual duelist was not to be stigmatized.³²⁴ The consensus anti-dueling laws expressed was to be found not in the statute but in how the statute was enforced (or ignored) by legislators, judges, and juries.³²⁵

The disjunction between the laws' text and their enforcement brings us to a second conclusion: laws aimed at changing a social norm will likely succeed only if a significant percentage of the population has already rejected the disfavored norm. This is so not merely because of the weight of numbers, but because in a democratic society legal institutions will, albeit to varying degrees, reflect the beliefs and habits of the citizens. The more strongly citizens have internalized a particular social norm, the less likely it is that they will work through their legal institutions effectively to alter that social norm, even if there are laws on the books against it.³²⁶

The example of the antebellum South illustrates how social norms can themselves limit the effectiveness of legal institutions and so blunt attempts to alter those norms.³²⁷ Before the Civil War, the anti-dueling laws went largely unenforced because they attacked a social norm that most members of Southern society tolerated or actively supported.³²⁸ These members of Southern society,

324. See *supra* Part IV.B.

325. In a different context, Dan Kahan has pointed out that, in a society like our own where interest groups wield disproportionate power, mere passage of a law, even one intended to be "expressive," will not signal that there is, in fact, a consensus over the issue. See Kahan, *supra* note 41, at 614 (noting that "[c]itizens are likely to form [the impression that the law represents widespread social consensus] only if they observe their associates complying with, enforcing, or speaking well of the law").

326. In its broadest form, the proposition that legal change alone can rarely work major social changes is hardly novel. In the social norms literature, for instance, proponents of "expressive law" see such laws as acting not to transform social norms but rather to "tip" already changing social norms, often by using the law to let members of society know that the social norm is, indeed, changing. See, e.g., McAdams, *supra* note 31, at 397-401. More generally, social scientists have long pointed out the limited power of legal institutions to work social change. For a good summary of this view, see generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

That being said, the point that deep-rooted social norms can often resist and undercut legal attempts to alter them is worth making, in large part because some of the more ambitious proponents of norm management have embraced social norms precisely because they believe they are amenable to management and alteration. See *supra* note 41 and accompanying text.

327. The problem of how laws can change a genuinely dominant social norm has received little attention. But see generally Kahan, *supra* note 41 (claiming that laws that give "gentle nudges" may be the best way to change social norms that enjoy significant, though not universal, social support).

328. See *supra* Part IV.B.

unsurprisingly, refused to enforce laws that challenged their own deeply held beliefs. Following the Civil War, the social norm changed, as most members of the public concluded that dueling was not a badge of honor, and therefore abandoned dueling.³²⁹ This new social norm concerning dueling was a necessary precondition for strong enforcement of the anti-dueling laws.³³⁰

VI. CONCLUSION

In recent years, new interest has grown in "social norms," the informal social regularities that society generally agrees its members should follow. Legal scholars have not only paid new attention to social norms, but have looked for ways in which law can adjust social norms in order to meet policy goals, or can enlist social norms to more effectively deter or encourage behaviors. As an example of the kind of laws that can effectively manage social norms, these scholars have pointed to the antebellum South's anti-dueling laws, which proposed to eliminate dueling not only by punishing duelists but by changing the social norms concerning duelists and dueling. These laws sought, by means such as banning duelists from public office, to sever the link between dueling and honor and so alter the prevailing social norm. Few believe that the anti-dueling laws actually had a significant effect on dueling; rather, they admire the way the laws targeted social norms and see in them an example for how modern-day laws can effectively alter social norms.

The actual historical record, however, provides a different perspective on attempts to use laws to change social norms. While the South's laws were carefully crafted to change Southerners' perceptions of dueling, and to sever the link between dueling and the South's pervasive culture of honor, they failed. The legislators, judges, and jurors charged with enforcing the laws themselves shared the South's social consensus that dueling was sometimes necessary to maintain one's honor. As a result, they were unwilling consistently to punish or stigmatize men for dueling. Dueling was ended not by laws but by the sweeping social and political impact of the Civil War.

If history is a guide, many modern-day attempts to use laws to transform deep-rooted social norms may similarly be doomed to

329. *See supra* Part V.A.

330. *See supra* Part V.A.

failure. Even if laws targeting such entrenched social norms are passed, they will then have to be enforced by legal actors who share the consensus concerning the existing social norm. As a result, resistance to the laws is a likely outcome. Far from the law changing social norms, the example of anti-dueling laws suggests that in such cases social norms must change before the laws will be enforced.

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