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Southern Violence-Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective

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Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective

*Richard Maxwell Brown**

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I. INTRODUCTION

Certain scholars offer a new approach to interpreting American violence. Their point is that America's enormous amount of violence has been, in reality, mainly southern violence—that is, if the southern contribution, especially homicide, is removed from the national statistics on violence, American violence narrows to the relatively low levels of such comparable countries as Canada and Australia.¹

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1. E.g., R. GASTIL, *CULTURAL REGIONS OF THE UNITED STATES* 116 (1975); J. Reed, *Below the Smith and Wesson Line: Reflections on Southern Violence* 2 (Apr. 21, 1977) (unpublished paper delivered at the University of Alabama in Birmingham as part of the Hugo L. Black Symposium in History, "Violence in the South"). For a careful discussion of American violence in worldwide comparative perspective that draws upon two studies, one by Ted Robert Gurr and the other by Ivo K. Feierabend, Rosalind L. Feierabend and Betty A. Nesvold, see Graham & Gurr, *Conclusion*, in *THE HISTORY OF VIOLENCE IN AMERICA* 798-801 (H. Graham & T. Gurr eds. 1969). Although these authorities make important qualifications, the point remains that from the 1940's through the 1960's America was one of the most violent nations in the world and was the most violent among its peer group of Canada, Australia, and the modern democracies of Northern and Western Europe. Comparable scholarly studies have not been made for the nineteenth or early twentieth centuries, but if such studies were made, the pattern of American leadership probably would be the same. For a worldwide comparative

Raymond D. Gastil has rated all the contiguous forty-eight states in terms of an "index of southernness," providing six categories of states according to most or least southern in terms of the presence of people of southern origin and the existence of southern cultural traits.² In Gastil's classification the two most-southern categories of states with their Deep South nucleus are counterpointed by a category at the opposite end of the spectrum, the ten least-southern states—the six New England states plus Wisconsin, Minnesota, and the Dakotas. In the middle of Gastil's categories are states that have significant quotients of southernness.³ With regard to the crucial factor of homicide, Gastil found that "state homicide rates grade into one another in rough approximation to the extent to which Southerners have moved into mixed [North-South] states." Gastil also notes that "[w]hile differences in standard demographic or economic variables . . . account for a good deal of the variance among sections of the country in murder rates, *there is a significant remainder* that may be related to 'Southernness' alone."⁴ In recent years it has been fashionable to speak of the Americanization of the South,⁵ but Gastil, and also sociologist John Shelton Reed, imply that, at least with regard to violence, there has been a southernization of America and that this trend has been basic to America's traditionally high homicide rate. The works of Gastil and Reed raise the possibility that southern violence has not been merely an age-old regional problem of the South, but a national nemesis as well.

The provocative Gastil-Reed hypothesis is most persuasive with regard to personal violence. If we grant this point that the homicide rate, state-by-state, tends to reflect the index of southernness, then it is all the more important to consider, historically and legally, the salient fact that for at least a century the South has been the national leader in homicide. Statistical compilations on this score go back a hundred years, and from then until the present, the pattern has been unvarying: the South has been the most murderous section in the country. As early as 1878, the South's homicide rate was far in the lead,⁶ and by 1920-1924 the pattern had not

perspective documenting American leadership in homicide alone, see H. BREARLEY, *HOMICIDE IN THE UNITED STATES* 27-28 (1932) (dealing mainly with the 1920's).

2. R. GASTIL, *supra* note 1, at 109.

3. *Id.*

4. *Id.* at 116 (emphasis added). A critique of Gastil's thesis is found in Loftin & Hill, *Regional Subculture and Homicide: An Examination of the Gastil-Hackney Thesis*, 39 AM. SOC. REV. 714 (1974).

5. See, e.g., J. EGERTON, *THE AMERICANIZATION OF DIXIE* (1974).

6. See H. REDFIELD, *HOMICIDE, NORTH AND SOUTH: BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERSON IN SEVERAL PARTS OF THE UNITED STATES* 9-14 (1880).

changed.⁷ In that five-year period the seven most homicidal states were southern, and the South as a whole was two and one-half times as homicidal as the rest of the nation.⁸ As recently as 1969 the figures revealed that of the top fifteen most homicidal states of the contiguous forty-eight, all but three were southern or border states.⁹ In 1973 all the ex-Confederate states but two—Virginia and Arkansas—exceeded the national rate for murder.¹⁰ In 1976, according to Federal Bureau of Investigation figures, the six states leading America in murder and non-negligent manslaughter were all southern.¹¹

II. THE CAUSES OF SOUTHERN VIOLENCE

Why has the South been so violent? Leading authorities are in agreement as to the general causes of southern violence. One scholar's research disclosed the large number of killings in the South that arose from personal difficulties—these were homicides to preserve "self-respect" or to vindicate personal honor.¹² This finding by H. C. Brearley, the Clemson University sociologist, supports the conclusions of the most reflective authorities on the cultural and historical origins of southern mayhem and extremism. John Hope Franklin in his study of the "militant South" from 1800 to 1861 concluded that "[v]iolence was inextricably woven into the most fundamental aspects of life in the South and constituted an important phase of the total experience of its people."¹³ The violence-prone "man of the South was the product of his experiences as a frontiersman, Indian fighter, slaveholder, self-sufficient yeoman, poor white, and Negro. He gladly fought, even if only to preserve his

7. See Brearley, *The Pattern of Violence*, in *CULTURE IN THE SOUTH* 678 (W. Couch ed. 1934).

8. *Id.*

9. See H. LUNDSGAARDE, *MURDER IN SPACE CITY: A CULTURAL ANALYSIS OF HOUSTON HOMICIDE PATTERNS* 217-18 (1977).

10. See C. DEGLER, *PLACE OVER TIME* 25 (1977).

11. See U.S. DEP'T OF JUSTICE, *CRIME IN THE UNITED STATES 1976*, at 44-53 (FBI Uniform Crime Reports 1977). The six states were Alabama, Georgia, Louisiana, Mississippi, Texas, and South Carolina. Other studies showing southern leadership in homicide include R. GASTIL, *supra* note 1, at 108 (for 1964-1965); C. WOODWARD, *ORIGINS OF THE NEW SOUTH* 158-59 (1951) (for 1890); Lottier, *Distribution of Criminal Offenses in Sectional Regions*, 29 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 329 (1938) (for 1934-1935). One should note, however, that although the South has been the most homicidal section of the nation, at least in recent times, it has not been, on the whole, the most criminal part of the United States. The studies by Lottier, *supra*, and Reed, *supra* note 1, support Sheldon Hackney's finding that in the South, compared to the North, "there are high rates of homicide and assault, moderate rates of crime against property, and low rates of suicide." Hackney, *Southern Violence*, in *THE HISTORY OF VIOLENCE IN AMERICA*, *supra* note 1, at 507.

12. Brearley, *supra* note 7, at 684-85.

13. J. FRANKLIN, *THE MILITANT SOUTH: 1800-1861*, at 12-13 (1964).

reputation as a fighter."¹⁴ The late Charles S. Sydnor made an even more subtle point when he discussed "The Southerner and the Laws"¹⁵ in his presidential address to the Southern Historical Association in 1939.¹⁶ Sydnor's message was that, although by the ordinary meaning of the term, southerners were indeed a very lawless people, upon closer consideration this was not really true. Indeed, Sydnor underscored the broad view of law held by southerners. They did not restrict their conception of the law to the statutes and the decisions of the courts. Instead, they maintained a lawful reverence not only for the Constitution but also for the Bible and unwritten laws, especially those concerning matters of personal honor, the family, and the institution of slavery. Thus, southerners might act extralegally, but not, by their lights, illegally.¹⁷

In contrast to the situation in the "commercial, industrial, and urban areas" of the North, "ruralness, slavery, [and] the plantation system" in the South nurtured "a strong unwritten code [that] operated . . . to restrict the power of ordinary law and to enlarge the area of life in which" men acted "without reference to legal guidance" of the strict sort.¹⁸ Giving us an insight that is supported by the legal history research of Michael S. Hindus,¹⁹ Sydnor wrote that the planter of the Old South

simply went through life under the assumption that a relatively large number of his deeds had to be performed out past the margin of written law in what might be called a state of nature. To northern eyes this condition looked like an approach to anarchy and chaos; but planters thought their actions were no more lawless than the operation of a court of equity.²⁰

The power of the unwritten law to motivate the behavior of southerners persisted well into the twentieth century,²¹ and for our own time, Reed has analyzed recent opinion polls to show that, in the realm of individual behavior, southerners retain a value system and behavioral patterns that make them more tolerant of violence and "the use of force" than other Americans.²²

Personal violence—with its ultimate expression in homi-

14. *Id.* at 13. See also Vandiver, *The Southerner as Extremist*, in *THE IDEA OF THE SOUTH* 12 (F. Vandiver ed. 1964).

15. Sydnor, *The Southerner and the Laws*, in *THE PURSUIT OF SOUTHERN HISTORY* 62 (G. Tindall ed. 1964).

16. *Id.*

17. *Id.*

18. *Id.* at 65.

19. Hindus, *The Contours of Crime and Justice in Massachusetts and South Carolina, 1767-1878*, 21 *AM. J. LEGAL HIST.* 237 (1977).

20. Sydnor, *supra* note 15, at 68.

21. See Brearley, *supra* note 7, at 684.

22. J. REED, *THE ENDURING SOUTH* 45-56 (1972). See also J. Reed, *supra* note 1, at 8-10.

cide—therefore has been culturally sanctioned in the South longer and in greater magnitude than any other part of our country. Yet, to say that the cultural context has historically made southerners more homicidal than other Americans should not divert us from a point made long ago that despite the presence of an abnormally large number of manslayers, “law-abiding, peaceably-disposed citizens are very largely in the majority” in the South.²³ Thus, a major theme is the confrontation between the law-abiding, peaceably disposed, on the one hand, and the homicidal, on the other. This confrontation continues in the contemporary South, but it came most starkly to the forefront in the late nineteenth century, the period when New South idealism about a more civil society was contradicted, tragically, by the persistence of the antebellum “tradition of violence.”²⁴ “If anything,” wrote C. Vann Woodward, violence was “more characteristic of the new society than of the old,” and in place of the code duello of the pre-Civil War time, “gunplay, knifing, manslaughter, and murder were the bloody accompaniments of the march of Progress” of the New South in the years after Reconstruction.²⁵

The period from the 1870's through the 1890's was the most violent in our national history, and it was also the period when the South's historic affliction of violence was at its highest—the time when lynchings reached their peak and when homicide also was very widespread. The South's post-Civil War crimson tide of killing was brought to the attention of both the region and the nation in an impassioned book, *Homicide, North and South: Being a Comparative View of Crime Against the Person in Several Parts of the United States*,²⁶ appearing in 1880 under the authorship of Horace V. Redfield. A newspaper correspondent who had spent much time in the South, Redfield was a friendly critic who believed that there was “more good than evil in the South,” but who had been struck “with the frequency of homicide” in Dixie.²⁷ At the outset, Redfield offered his shocking but carefully made estimate that between the end of the Civil War and 1880 there had been 40,000 homicides in the southern states.²⁸ The main purpose of his book was to supply a statistical comparison of homicide in the North and the South, but he was not oblivious to a cross-national perspective. Consequently, he found that in certain rural regions of the North the homicide rate

23. H. REDFIELD, *supra* note 6, at 206.

24. C. WOODWARD, *supra* note 11, at 158.

25. *Id.*

26. H. REDFIELD, *supra* note 6.

27. *Id.* at 3-5.

28. *Id.* at 11.

was comparable to the impressively low rate of less than one killing per hundred thousand inhabitants in England and Wales, while in the South the homicide rate was four to fifteen times higher than anywhere else in the civilized world.²⁹

Redfield found the root of the problem in the resolution of personal difficulties with deadly weapons and in the street fights and barroom affrays that occurred forty times more often in the South than in, for example, New England.³⁰ The problem of the ubiquitous killing encounters was compounded and exacerbated by the equally widespread phenomenon of unpunished murder, a feature that was so deeply embedded in southern society as to be in reality a system supported by all classes, men of family, position, and standing, and even the church. One authority cited by Redfield noted that "time and time again [he had] seen the verdict of justifiable homicide brought in in cases [that in] New England and the North, would be considered cold-blooded murder."³¹ "The law," he concluded, "is recognized only as a shield to protect [the killer] from the consequences of the law."³² With self-defense as a spurious but all powerful plea to complacent jurymen, the entire system was too often little more than "a cloak for murder."³³ Under such conditions murders averaged one a day in the state of Mississippi, and throughout the region men who walked the streets and boasted "of having killed their man" were found "in every town and neighborhood."³⁴

The following scenario of the unpunished murderer of the South was typical:

The murderer "kills a man in a street-fight" or a bar-room brawl.

He is arrested.

The "examining magistrate fixes his bail usually from \$100 to \$3,000, which he promptly gives."

"The case is continued through a few terms of court."

"The grass grows over the grave of the slain. It is watered by the tears of the widow and the orphans."

"Public interest dies out, [and] some of the witnesses move off."

"There are a few more continuances to give other witnesses a chance to move around and see the country."

The defense witness who can testify, falsely, to having heard the deceased "make threats" to the killer "never moves away. He is not of a roving mind."

"Finally a trial is reached. Major A. and Colonel B. and General C. appear for the defendant. A jury is selected. If there is a murderer or two, or half dozen on it, all the better. There is a 'fellow-feeling,' especially in the region of the neck."

29. *Id.* at 4, 9-10.

30. *Id.* at 17.

31. *Id.* at 57-58.

32. *Id.* at 61.

33. *Id.* at 122.

34. *Id.* at 162-63.

"The witnesses are examined. It is proved that the deceased was seen to 'reach around behind him as if to draw a pistol,' or that he started home presumably to get his shot-gun. The defendant had his with him. The case is argued. Authorities are cited. The defendant is acquitted."³⁵

Redfield's bitter sketch of unpunished murder was not fanciful, but rather, a quite accurate reflection of the post-Civil War state of southern justice badly skewed toward the condition of legalized murder. Redfield's scenario and, in general, his critique of the deficiencies of southern justice were sound enough. They reflected real problems that, at least in some cases, jurists like Chief Justice George Washington Stone of Alabama strove mightily to combat from the bench.³⁶

The illegitimate claim of self-defense to justify or excuse a homicide and the community's acceptance of the killer were not the only problems. Another major problem was the common practice of carrying concealed weapons, especially guns. In a majority of southern states there were laws against this practice, but these laws too often were a dead letter, unobserved and unenforced, despite the efforts of certain judges to support them.³⁷ Well-meaning judicial actions were often nullified by the many examples of men at the very highest level of society who persisted in carrying concealed firearms in defiance of the requirements, legal or otherwise, of prudent behavior. Thus, Redfield wrote of a Governor of Tennessee who, while speaking heatedly against his opponent from an election campaign platform, startled the crowd when he drew from his pocket, but did not use, a hidden pistol. There also was the example of the Speaker of the House of Representatives in Louisiana whose concealed pistol dropped from his pocket and fired accidentally as it hit the floor of the legislative chamber.³⁸

The South's historic subculture of violence and community tolerance of killing in personal disputes were powerful factors of inertia in preserving the homicidal tendency of the section. These factors were very difficult for the system of formal law to overcome, but in dealing with such matters as the trial plea of self-defense to excuse a homicide and the custom of carrying concealed weapons, Redfield's treatment of southern homicide touched upon elements that were well within the scope of the formal law composed of the statutes, the penal codes, the courts, the juries, the judges, and their opinions.

35. *Id.* at 163.

36. For a discussion of Justice Stone, see Parts IV & V *infra*.

37. H. REDFIELD, *supra* note 6, at 194-95.

38. *Id.* at 195.

III. THE INFLUENCE OF THE DOCTRINES OF SELF-DEFENSE AND THE DUTY TO RETREAT

Going back at least to the thirteenth century, English common law "was extremely severe as to homicide."³⁹ "[T]he right to kill in self-defense was slowly established, and is a doctrine of modern rather than of medieval law."⁴⁰ Thus, Blackstone's presumption against the accused killer who claimed self-defense stemmed not only from the common law tradition but also from Blackstone's fear that "the right to defend might be mistaken as the right to kill."⁴¹

But under the new American conditions, especially the boisterous life of the frontier and the militant society of the antebellum South, the traditional English common law restraints on homicide began to give way. A legal case in point was *Grainger v. State*.⁴² This 1830 Tennessee case "became notorious . . . [for having] introduced new doctrines into the law of homicide in self-defense, whereby a man . . . could justify himself in killing [an] unarmed assailant with a deadly weapon."⁴³ The *Grainger* opinion was written by Judge John Catron of the Tennessee Supreme Court, better known later as Taney's colleague on the United States Supreme Court. Catron's opinion reversed Grainger's lower court capital conviction. For half a century thereafter, careless wording in the opinion by Catron became the basis for a gigantic loophole through which a guilty killer could be acquitted by pleading self-defense. The wholesale abuse of the case found its pretext in Judge Catron's failure to insert after the words "thought himself so"⁴⁴ the qualifying phrase "upon sufficient grounds." Judge Catron's unmodified words allowed future defendants, by citing *Grainger* as precedent, to es-

39. R. MORELAND, *THE LAW OF HOMICIDE* 259-61 (1952).

40. Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567 (1903).

41. F. BAUM & J. BAUM, *LAW OF SELF-DEFENSE* 6 (1970).

42. 13 Tenn. (5 Yer.) 459 (1830). This was the "timid hunter" case in which the hunter, Grainger, "a timid, cowardly man," was drawn into a quarrel with the bully, Broach. In his review of the facts, Judge Catron made much of Grainger's timidity and cowardice. In fear of his life, Grainger fled from the pursuing Broach until he reached the wall of a cabin and could flee no further. He shot and killed the unarmed Broach as the latter advanced. Grainger had obeyed the traditional common law duty to retreat before taking life in self-defense, the court concluded. The legal significance of the case stems from the wording of Catron's decision. See text accompanying note 44 *infra*.

43. Ingersoll, *John Catron*, in 4 GREAT AMERICAN LAWYERS 241, 260 (W. Lewis ed. 1908-1909).

44. Judge Catron's complete thought appears as follows:

If the jury had believed that Grainger was in danger of great bodily harm from Broach, or thought himself so, then the killing would have been in self defence [*sic*]. But if he thought Broach intended to commit a battery upon him, less violent, to prevent which he killed Broach, it was manslaughter.

13 Tenn. (5 Yer.) at 462.

tablish self-defense by proving only the killer's fearful state of mind, without also proving the actual grounds to support this fear. Thus, Dean Ingersoll observed that until about 1880 throughout the South and Southwest, the gallows were cheated of their rightful victims "hundreds of times."⁴⁵

With an impact similar to the *Grainger* case, but narrower in geographical scope, the 1856 Mississippi case of *Ex parte Wray*⁴⁶ also gave a big edge to the defense in homicide cases. A personal dispute and combat⁴⁷ between the killer, Jacob K. Wray, and his victim resulted in the trial of Wray for murder. Wray, clearly guilty, claimed self-defense to excuse his homicide, an argument that ultimately was accepted by the Mississippi Supreme Court. The innovative quality of the supreme court's decision made it important, for the court in upholding Wray's innocence gave the mantle of legality to killing in a personal and mutual rencontre.⁴⁸ The Mississippi court in effect gave judicial approval to street-fight killing. The *Wray* court blatantly expanded the common law doctrine of self-defense. The previous rigorous requirement that defendants demonstrate the necessity of the killing was annihilated. In the *Wray* decision the key issue was seen as mutuality—let the blows and the bullets fall where they may. The *Wray* decision may well have contributed to the high incidence of homicide in Mississippi in the 1870's that Redfield noted.

As the old common law wilted in the hothouse legal environment of such cases as *Grainger* and *Wray*, a special and crucial aspect of the traditional common law of homicide, the duty to retreat to the wall, also yielded to the combative culture of America in general and the South in particular. The ancient English common law doctrine held that it was the obligation of one who was attacked and who was in reasonable fear of death or grievous bodily harm to retreat "to the wall" before killing in self-defense. Thus, the law of

45. Ingersoll, *supra* note 43, at 260. Ingersoll, then Dean of Law at the University of Tennessee, was a knowledgeable authority on Catron and the impact of his opinions as a Tennessee Supreme Court judge. The encouragement to homicide resulting from Catron's opinion in the *Grainger* case was not only unintentional but also ironic, for it contradicted two other significant state supreme court opinions by Catron that discouraged violence and disorder in antebellum Tennessee life. Catron's opinions in *Smith v. State*, 9 Tenn. (1 Yer.) 228 (1829), and *State v. Smith*, 10 Tenn. (2 Yer.) 272 (1829), limited the roles of dueling and gambling. See also Gatell, *John Catron*, in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969*, at 737-49 (L. Friedman & F. Israel eds. 1969).

46. 30 Miss. 673 (1856).

47. Schoolmaster Clarke S. Brown had expelled the younger brother of Jacob K. Wray from the Pontotoc, Mississippi, male academy. The vengeful Wray began the fight in which he killed Brown by accosting and striking him. When Brown fought back with a whipstock, Wray slew Brown with a bowie knife.

48. 30 Miss. at 674.

self-defense did not apply unless one observed the duty to retreat; this was the English doctrine held by Blackstone and his predecessors in the common law tradition. But in the United States, in a gradual legal revolution that began in the early nineteenth century, a majority of states came to hold the opposite—that a person in a place where he had a right to be could stand, defend himself, and kill his assailant in self-defense, provided certain conditions freeing him from fault were met. This is the stand-one's-ground rule, under which there is no duty to retreat.⁴⁹

By the end of the nineteenth century, the stand-one's-ground doctrine had become the rule in a majority of southern states, and it also dominated the states of the central and western United States. The traditional duty-to-retreat doctrine was mainly restricted to the eastern one-third of the nation and, in the South, to the Carolinas and Alabama.⁵⁰ As the Indiana Supreme Court noted in 1877, the duty to retreat had been "greatly modified in this country [with] a much narrower application than formerly [because] the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed"⁵¹ The United States Supreme Court gave its approval to the stand-one's-ground doctrine in 1895 in *Beard v. United States*,⁵² and the 1907 edition of a standard authority, Wharton's *The Law of Homicide*, stated that the duty to retreat was "inapplicable to American conditions."⁵³

49. Among many discussions of the waning of the legal duty to retreat and the waxing of the stand-one's-ground doctrine is R. MORELAND, *supra* note 39, at 261-68. The classic statement of the duty to retreat in the English common law tradition was made by Sir Edward Coke, who held that some homicides were "no felony" and, thus, blameless. For example: "A [is] assaulted by B, and they fight together, and before any mortal blow is given, A giveth back until he cometh to a hedge, wall, or other strait, beyond which he cannot pass, and then, in his own defense and for safeguard of his own life, killeth the other" F. BAUM & J. BAUM, *supra* note 41, at 38 (quoting E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 55 (1797)).

50. Beale, *supra* note 40, at 576 n.3.

51. *Runyan v. State*, 57 Ind. 80, 84 (1877).

52. 158 U.S. 550 (1895). Beard's conviction for homicide in the United States District Court for the Western District of Arkansas was reversed by the Supreme Court on the ground, stated by Justice Harlan, that Beard had been entitled to stand his ground and had no duty to retreat. *Id.* at 564.

53. F. WHARTON, *THE LAW OF HOMICIDE* 355 (3d ed. F. Bowlby 1907). Wharton was echoed by Moreland and the Baums in declaring that "there is probably no more mooted element of self-defense than [the duty to] 'retreat'" See F. BAUM & J. BAUM, *supra* note 41, at 38; R. MORELAND, *supra* note 39, at 261. In addition to authorities cited elsewhere in these notes, the following commentators deal saliently with the erosion of the legal duty to retreat in the United States. 41 *COLUM. L. REV.* 733 (1941); 39 *KY. L.J.* 353 (1951); 20 *KY. L.J.* 362 (1932). Important cases not cited elsewhere in these notes include *McNamara v. State*, 252 Iowa 19, 104 N.W.2d 568 (1960); *State v. Gardner*, 96 Minn. 318, 104 N.W. 971 (1905); *State v. Bartlett*, 170 Mo. 658, 71 S.W. 148 (1902). The legal distinction between

IV. JUDICIAL RESPONSE TO SOUTHERN VIOLENCE

A. *Justice Stone and the Alabama Supreme Court*

The *Grainger* and *Wray* cases were straws in the wind, but the erosion of the duty to retreat was a major trend. Yet, in one southern state after the Civil War, this Americanization of the common law of homicide met courageous rear-guard action by George Washington Stone and his colleagues on the supreme bench of Alabama. Although Justices Robert C. Brickell, H. M. Somerville, William S. Thorington, and other supreme court colleagues made their contributions in Alabama, the central figure was Stone. Stone, who was born in 1811 and died at the age of eighty-three in 1894, was a typical man of the New South. He reflected the mixture of deep roots in the Old South with professional service to the New South. Socially and politically, Stone shared the conservatism of many New South figures. He was southern born and bred, a devout Presbyterian, a Confederate in Civil War allegiance, and a Grover Cleveland Democrat in politics. His judicial decisions advanced the progress of Alabama corporate interests in the New South era. A man of upright dignity, Stone's portrait, taken late in his life, reveals a thinly whiskered gentleman of steady mien and serene confidence. Severely reserved on the bench and in large public gatherings, Stone was yet sociable among his intimates. He loved to play his violin—no doubt a welcome respite from his relentless pace of decision-writing. Stone was proud of his physical vigor that sustained him

"excusable" and "justifiable" homicide has been controversial as well as complicated. This distinction has been increasingly eroded in the United States, but among those who discuss it are F. BAUM & J. BAUM, *supra* note 41, at 6-23, and R. MORELAND, *supra* note 39, at 253-56. Most authorities who write on the issue of the duty to retreat also are obliged to discuss excusable and justifiable homicide.

One influential authority in regard to the deemphasis of the duty to retreat in the United States was the British commentator, Sir Michael Foster, who in a 1762 treatise on aspects of crown law (including homicide) noted that the victim of a felonious assault was not bound to retreat before killing in self-defense. Foster's doctrine of stand-one's-ground in cases of felonious assault was followed by a later British writer who was even more widely cited in America. See 1 E. EAST, *A TREATISE ON THE PLEAS OF THE CROWN* 271-72 (1803). The impact of the Foster-East doctrine is seen as early as the Massachusetts case of *Selfridge v. Lithgow*, 2 Mass. 347 (1806). It also is reflected in the Ohio case of *Erwin v. State*, 29 Ohio St. 186 (1876), as well as in the writings of various commentators. One impassioned dissenter from Foster's doctrine was Beale, who argued that Foster had misinterpreted Coke and in so doing had mistakenly deemphasized the duty to retreat. Beale, *supra* note 40, at 573.

Another variant of the stand-one's-ground rule, the "true man" doctrine, appears in many cases. See, e.g., *Erwin v. State*, 29 Ohio St. 186 (1876). This doctrine also goes back to Foster. In *Law of Self-Defense*, the Baums have noted that under the impact of the American crime wave of the 1960's and 1970's, the legal right to violent self-defense has been powerfully increased. For example, the trend is present even in the two widely divergent states of heavily urbanized New York and strongly rural Nebraska. New York had been a duty-to-retreat state until about 1940. F. BAUM & J. BAUM, *supra* note 41, at 8-9, 57-59.

through three marriages and more than a quarter of a century on the highest bench of Alabama.⁵⁴

Stone's service on the Alabama Supreme Court was in two spans. The first was from 1856 to 1865; the second, the much more important of the two, was from 1876 to 1894. During the latter term he served as Chief Justice from 1884 until his death in 1894. His impact on Alabama law was great, to say the least, for he wrote about one-sixth of the opinions issued by the Alabama Supreme Court during its first seventy-five years (1819-1894) despite his serving on the court for only twenty-seven years of the seventy-five year period. As noted, he was an indefatigable writer of judicial opinions. Writing in 1910, Francis G. Caffey was of the opinion that until then, Stone's total of 2449 opinions was unexceeded by any "English or American judge of a court of last resort . . ." ⁵⁵ Although Stone's legal and judicial career was moored firmly in the pre-Civil War years, he was not a hide-bound traditionalist. He could combine a deep reverence for the purity and elevation of the morals of the "grand, colossal system" ⁵⁶—the common law—with a forward-looking and prophetic 1889 plea for procedural reform in Alabama in which he paid tribute to England's substitution of a new system of civil procedure for the "cumbrous machinery of the common law." ⁵⁷

From 1876 to 1894 in his appellate opinions, George Washington Stone led a strongly principled courtroom campaign against homicide in Alabama. These appellate cases heard by Stone and his supreme court colleagues are rich in the social history of Alabama violence in the New South period. The facts of the cases are full of the mixture of meanness and tragedy that so deeply anguished both Horace V. Redfield and George Washington Stone. Before discussing the thrust of Stone's homicide decisions, consider the following example of the long forgotten but typical human catastrophes that afflicted Alabama and the South. This episode is from *Judge v. State*,⁵⁸ an appeal heard by Stone and his high-court compeers. The court reporter caught very well the dialect and flavor of the time:

54. Caffey, *George Washington Stone*, in 6 GREAT AMERICAN LAWYERS, *supra* note 43, at 165. See also Farmer, *Stone, George Washington*, in 18 DICTIONARY OF AMERICAN BIOGRAPHY 74 (1936).

55. Caffey, *supra* note 54, at 181-82.

56. *Ex parte Nettles*, 58 Ala. 268, 275 (1877).

57. Merchant, *The Historical Background of the Procedural Reform Movement in Alabama*, 9 ALA. L. REV. 284, 286 (1957) (quoting 12 PROCEEDINGS OF ALA. ST. B. ASS'N 108, 113 (1880)).

58. 58 Ala. 406 (1877).

The testimony was, that the deceased was foreman of a plough squad on the plantation of one Wm. H. Locke, and it was the duty of deceased to report any idleness or misconduct of the plough hands, and that defendant was one of such squad, and a larger man than deceased; that deceased had been instructed by Mr. Locke to hurry up idle hands, and if they refused to report them. About 11 o'clock on the morning of the killing, the hands had come out of the field on account of rain, and when the rain had ceased, the defendant and other hands were going to the lot for their mules. Defendant being a little slow, deceased remarked to him, "Alex, go and get your mule," to which defendant replied, "Ain't I gwine"; deceased replied, "if you are you are going blamed slow," when defendant said, "if you want me to go faster, make me." Deceased then remarked, "Alex, next time I speak to you and you answer me that way, I'll knock your blamed mouth wide open." Defendant then looked back at deceased, but said nothing. Deceased then said, "Alex, if you want a difficulty you can get it right now," to which defendant replied, "if you want one you can get it." Deceased then turned towards defendant and, having gone a few paces in ordinary gait, put his right hand in his pocket, when defendant went to the right, five or six steps from deceased, and snatching up a wagon standard returned, and meeting the deceased struck him two licks on the left arm, which the deceased had thrown up to keep off the blows—the right hand of deceased hanging by his side. The defendant hit deceased a third time, on the right shoulder, and a fourth time, on the head, when deceased fell towards the defendant, who struck him a light blow on the back while he was down. Deceased jumped up immediately. By this time two persons present caught hold of defendant, standing between him and deceased. Deceased was standing still, when defendant jerked loose from those holding him, with the standard still in his hand, and stepped towards deceased and struck him on the head, just above the ear, knocking him down—defendant having both hands on the standard and striking with all his force. Deceased got up "looking foolish," and picked up a knife which was lying on the ground shut up, and opened it and started towards the defendant, when some one present remarked, "shut up your knife, you can't get to that man (the defendant) while he has got that stick in his hand, he will kill you." Deceased then shut the knife, put it in his pocket, and went into a house near by and ordered the hands to go to ploughing. He then came out of the house, got on his horse and rode towards Mr. Locke's house, about a mile off, where he died in a few hours from compression of the brain, (as testified by physicians,) produced by a fracture of the skull from the blow given by defendant.⁵⁹

Such was the senseless dispute between Wallace and Judge and its fatal outcome—it was this frequent and inexcusable taking of life that Stone opposed with all his judicial vigor. In an early case during his second term on the supreme court, Stone handed down an opinion in which he enunciated the motive that would guide him in future decisions⁶⁰—his utter detestation of the popular belief that killing in a mutual fight was not murder or manslaughter, a doctrine deplorably upheld, Stone said angrily, by the Mississippi Supreme Court in *Ex parte Wray*. The principles enunciated in *Wray*, Stone maintained, which were widely held in society in Alabama as well as in Mississippi, were "annually rushing scores, if not hundreds of

59. *Id.* at 407-08.

60. *Ex parte Nettles*, 58 Ala. 268, 274-77 (1877).

our citizens into eternity, red with their own blood causelessly shed."⁶¹ Stone admonished:

Until courts and juries learn to place a proper estimate on the sacredness and inestimable value of human life; learn that life is not to be taken to avenge an insult, even though gross; learn that felonious homicide, even willful and deliberate murder, may [*sic*] be committed during a personal, nay, mutual rencontre; until juries learn that the crime of murder is not expunged from our statute book, nor retained only for the friendless or humble, we may expect the carnival of the manslayer to be prolonged⁶²

Announcing these antihomicide sentiments was one thing; writing them effective by rulings and decisions on points of law was another. Here the jurist, Stone, acted upon what the layman, Redfield, would note in his book⁶³—the spurious plea of self-defense that saved many killers from conviction before the bench. After 1876 the main thrust of Stone's antihomicide opinions was to narrow the grounds for and efficacy of the self-defense argument as a means to legitimate a homicide. Finally, in the 1888 case of *Cleveland v. State*,⁶⁴ Stone summarized certain principles that he, on behalf of his supreme court colleagues, had "often reiterated, as indispensable to the plea of self-defense."⁶⁵

The manslayer must be free from fault, in bringing on, or provoking the difficulty. . . . He must be exposed to present, impending peril; that is, he must be presently exposed to imminent danger of losing his life, or of suffering grievous bodily harm, or must reasonably appear to be so [endangered. He must have] no other reasonable mode of escape, without apparently increasing the imminence of his peril.⁶⁶

In effect, Stone was laying down a three-part test for the plea of self-defense. The test might be called the test of provocation, peril, and escape. The defendant must not have provoked the difficulty; he must have been exposed to present and impending peril, or he must have reasonably thought that he was in such peril; and in line with the aforementioned duty to retreat, safe escape must have been impossible. There was nothing new in these principles. What was significant, rather, was the way in which Stone tightly linked them in a rigorously maintained barrier against illegitimate pleas of self-defense.

The *Cleveland* case, which brought forth this reiteration of

61. *Id.* at 274.

62. *Id.* Although the Alabama reporter states that murder "may be committed during a personal, nay, mutual rencontre," it is clear that Justice Stone intended the opinion to read that murder "may not be committed during a personal, nay, mutual rencontre."

63. See generally H. REDFIELD, *supra* note 6.

64. 86 Ala. 1, 5 So. 426 (1888).

65. *Id.* at 9, 5 So. at 430.

66. *Id.*, 5 So. at 430-31.

basic principles, was a bizarre one, and it may well have tried the patience of Stone and his colleagues. The facts of the case arose from the events of an early February 1888 night in Mobile. Ulysses Cleveland entered into a drunken brawl with three others, and in his inebriated condition in the darkness of the outdoor scene, killed Glennon under the mistaken impression that he was defending himself against Tom Popham, whom he felt was bent on harming him badly. Cleveland did not pass Stone's provocation-peril-escape test, and the lower court's conviction of second-degree murder was upheld.⁶⁷ In the *Cleveland* case Stone stated another highly conservative common law principle that was dying in America, but as applied by the Alabama Supreme Court, increased the difficulty of a defendant gaining acquittal. According to this principle, the burden of proving the necessity for taking life was on the defendant.⁶⁸ According to Blackstone, "[i]n every charge of murder . . . all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him"⁶⁹

Three examples of Stone's application of the elements of the provocation-peril-escape test will be cited. First, *Johnson v. State*⁷⁰ illustrates the factor of provocation. In Birmingham early in the evening of Friday, June 11, 1892, A. R. Johnson brutally shot and fatally wounded an unarmed neighbor, John W. Kimbro, in front of Kimbro's house. It all started over a hot quarrel between their two wives. Mrs. Kimbro had accused Mrs. Johnson of sleeping with a black man-servant. Mrs. Johnson objected, and in rebuttal, Kimbro claimed that Mrs. Johnson had been unladylike in her rudeness to him. Johnson called out Kimbro to talk about it; the words grew angry; each man gave the other the lie. Kimbro struck the first blow with his fist, and Johnson shot him down.⁷¹ He later claimed self-defense. Justice Stone applied the test of provocation to the defendant's contention that Johnson was "reasonably free from fault in provoking, or encouraging the difficulty"⁷² Stone strongly rejected this contention because he was impressed that Johnson was

67. *Id.* at 7-11, 5 So. at 429-31.

68. *Id.* at 9, 5 So. at 431. See also *De Arman v. State*, 71 Ala. 351, 358-63 (1882), *Ex parte Brown*, 65 Ala. 446, 446-48 (1880). The common law doctrine that the burden of proof in homicide cases lies on the defendant is discussed in F. BAUM & J. BAUM, *supra* note 41, at 4-5.

69. F. BAUM & J. BAUM, *supra* note 41, at 4.

70. 102 Ala. 1, 16 So. 99 (1893). In this case the prosecution was aided by Stone's support of the lower court's admission of Kimbro's dying declaration. For the significance of the dying declaration, see text accompanying note 80 *infra*.

71. 102 Ala. at 7, 16 So. at 101.

72. *Id.* at 19, 16 So. at 105.

at fault for going armed to Kimbro's house and calling him out to talk. Johnson flunked the test of provocation, and his conviction of second-degree murder was affirmed.⁷³

Second, *Scales v. State*⁷⁴ illustrates the factor of peril. A quarrel broke out between Robert Scales and James C. McCain in St. Clair County. Scales provoked the dispute, and he later went to McCain's house with a concealed gun in his possession. McCain struck the first blow with his fist; Scales shot and fatally wounded his adversary.⁷⁵ Scales claimed self-defense, and when convicted of first-degree murder in the lower court, appealed to the supreme court. Stone applied the peril test and opined that McCain's fisticuff was not sufficient to cause Scales to fear "impending 'grievous bodily harm'"⁷⁶ Hence, Scales' use of the fatal weapon was inexcusable, and the verdict of the lower court was upheld.⁷⁷

The final element of the provocation-peril-escape test is the duty to retreat and the obligation to escape from the scene, if safely possible, before killing. Among many examples, the escape factor was crucial in *Judge v. State*.⁷⁸ Alexander Judge, the killer of Robert Wallace, easily could have escaped from the scene of the cotton field dispute with Wallace. Thus, Judge gained no sympathy from Stone, who in his opinion spoke strongly in favor of

the old, sound, and much disregarded doctrine, that no man stands excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat It is to be regretted that this salutary rule is not *universally* observed by juries, without reference to the social standing of the prisoner. Its observance would exert a wholesome restraint on unbridled passion and lawlessness, and would, in the end, preserve to the commonwealth many valuable lives.⁷⁹

Still, the provocation-peril-escape test was only a part of Stone's judicial war against Alabama's plague of homicide. While rigorous in applying the provocation-peril-escape test, Stone also seems to have been liberal in allowing the admission into evidence of the "dying declaration" of the deceased, a description of the crime that was a crucial factor in the prosecution's case against the killer.⁸⁰ Moreover, Stone was strongly opposed to what he termed the "most pernicious practice of wearing weapons, with formed de-

73. *Id.*

74. 96 Ala. 69, 11 So. 121 (1892). Other cases demonstrate the peril factor. *See, e.g.,* *Karr v. State*, 100 Ala. 4, 14 So. 851 (1893).

75. 96 Ala. at 74, 11 So. at 123.

76. *Id.* at 78, 11 So. at 125.

77. *Id.*

78. 58 Ala. 406 (1877).

79. *Id.* at 413-14 (emphasis added).

80. A leading example of Stone's liberality is *Ingram v. State*, 67 Ala. 67 (1880).

sign to use them on an insufficient emergency."⁸¹ He also condemned the illegal concealment of such weapons.⁸²

B. The Quest for Impartiality in Alabama Justice

George Washington Stone and his supreme court colleagues rigorously applied the provocation-peril-escape test in homicide cases, but did they do so impartially? When whites killed blacks and claimed self-defense as their reason for doing so, did the Stone court tip the scales of justice in favor of white defendants? Two cases⁸³ heavily charged with racial tension reveal that the Alabama Supreme Court, headed by Stone, applied the law without prejudice to blacks. In these cases Stone's opinions strongly backed similarly unprejudiced rulings by the trial judges in the lower courts. One case was urban; the other was rural. Both featured controverted evidence that easily could have been exploited by prejudiced judges and juries in favor of the white defendants and against the black victims. In neither case did this happen.

The urban case arose in Mobile in the 1880's. Martin Dolan, a white man, killed his black tenant, Robert Winbush, with a shotgun.⁸⁴ The white man was small and wiry, while his black victim was a robust 175 pounds. Neither had a good reputation, and there had been bad feelings between them. In a quarrel over the payment of Winbush's rent, death threats had been exchanged. Also in dispute was a heavy hand chain possessed by Winbush but claimed by Dolan. Winbush finally went to Dolan's house, where they angrily renewed their quarrel over the chain. The two parted with a heated exchange of racial epithets. The white witnesses said that Winbush went up the street to get a gun with which to kill Dolan, but the black witnesses said otherwise. In any case, Winbush strode up the street with chain in hand. Almost immediately Dolan, now armed with a shotgun, followed Winbush and called to him to stop. Winbush then ran back toward Dolan, brandishing the chain and asking Dolan what he was going to do with the firearm. Dolan's brother then appeared, but failed in his attempt to persuade Dolan to withdraw. Meanwhile, Winbush kept advancing toward Dolan. When he was within a few feet of Dolan, the latter shot him down. In a few minutes Winbush was dead.⁸⁵

81. *Mitchell v. State*, 60 Ala. 26, 35 (1877).

82. *Ramsey v. State*, 91 Ala. 29, 8 So. 568 (1890); *Street v. State*, 67 Ala. 87 (1880).

83. *Dolan v. State*, 81 Ala. 11, 1 So. 707 (1886); *Ingram v. State*, 67 Ala. 67 (1880).

84. *Dolan v. State*, 81 Ala. 11, 13, 1 So. 707, 708 (1886). Neither the facts of the case nor Stone's opinion state when Dolan killed Winbush, but it was probably in 1885 or 1886, since the supreme court heard *Dolan v. State* in its December 1886 term.

85. *Id.* at 12-13, 1 So. at 708.

The trial of Dolan was racially polarized. All the prosecution's witnesses were black; all the defense's witnesses were white. Dolan's attorney contended that the prosecution's witnesses could not be believed because they were black. Judge O. J. Semmes scotched this with his charge to the jury that in a case of compelling evidence, "it is just as much the duty of a jury to convict a white man of the murder of a colored man"⁸⁶ as the reverse. Judge Semmes emphasized to the jury that the color of a witness was immaterial; the only issue was his credibility. In his charge to the jury, Judge Semmes called for and obtained the conviction of Dolan for manslaughter. Dolan appealed the conviction to the Alabama Supreme Court, and Stone wrote the court's opinion upholding the lower court's conviction. For his supreme court colleagues, Stone's opinion affirmed Judge Semmes' doctrine of impartial justice for blacks and strictly applied the provocation-peril-escape test to Dolan's plea that he had killed Winbush in self-defense. Scorning Dolan for his inexcusable failure to obey the duty to retreat, a point stressed by Judge Semmes, Stone rejected Dolan's claim of self-defense. Stone upheld Semmes' contention that because Dolan pursued Winbush with a gun, Winbush and not Dolan was on the defensive. In applying the peril test, Stone found that when Dolan went after Winbush, Dolan was in no "imminent, impending, present" danger.⁸⁷ Instead, the peril, if any, was only "prospective" or "in the near future."⁸⁸ Thus, in this case, marked by the trial judge's, jury's, and supreme court's lack of racial prejudice, Stone's opinion was every bit as strict in its scrutiny of the plea of self-defense as in cases of killings involving only whites.

While the racial overtones of the *Dolan* case were deep, neither the white killer nor the black victim had high standing in their communities. The case of *Ingram v. State*,⁸⁹ however, had greater social significance, for it involved the social and economic supremacy of whites in the midst of a heavily black rural community. The scene of the homicide was the little town of Childersburg, Alabama, and the time was half an hour before sundown on the afternoon of October 19, 1876. That day Thomas Ingram, a white man who had previously killed a man in Georgia, had been guarding with a shotgun five blacks who had been charged in the afternoon justice court with stealing cotton from Green, a storekeeper and planter of the community. As the shadows lengthened, a black, Jack Coleman, sat

86. *Id.* at 14, 1 So. at 709.

87. *Id.* at 17, 1 So. at 712.

88. *Id.* at 18, 1 So. at 712.

89. 67 Ala. 67 (1880).

with others on the porch of a house on the town square where the justice court during its sitting that afternoon had heard the charges against the five blacks.⁹⁰

Still carrying his shotgun, Ingram went by the porch and asked for a word with Coleman. Witnesses saw the two of them start across the square toward Green's store. A quarrel broke out; Coleman, the black, in a matter of seconds or minutes was killed by Ingram, the white.⁹¹ At the trial a white witness for Ingram testified that Coleman had pulled a three-inch knife on Ingram. As Ingram and Coleman halted, face to face, the witness continued, Ingram said to Coleman, "do not cut me with that knife."⁹² With the shotgun on his shoulder, Ingram then warned Coleman, "if you cut me, or try to cut me, I will shoot you."⁹³ Again, the witness testified that Ingram said "do not cut me," and as he said it, he stepped backward slightly. The trial record recounted that Ingram "took his gun off his shoulder, held the muzzle of it close to Coleman's breast and fired, the shot taking effect on the left side of his breast"⁹⁴ and making a huge wound. Coleman "fell immediately, and died about a week afterwards."⁹⁵ Immediately after the shooting, as the blood oozed from Coleman lying on the ground, a witness, Joseph H. Keith, asked him what had happened. Coleman replied that he knew that he was going to die, that he had not drawn his knife on Ingram, and that Ingram "had shot him for nothing."⁹⁶

At this time a race riot might well have occurred, for shortly after the shooting fifteen or twenty blacks "marched in procession in Childersburg, and made demonstrations of hostility."⁹⁷ But violence did not occur, perhaps because black manpower and white firepower came to a stand off. In due course, Ingram was indicted and tried for murder before Judge L. F. Box in the Talladega Circuit Court. Ingram, however, was convicted of the lesser charge of manslaughter, and he appealed this conviction to the Alabama Supreme Court. Stone wrote the opinion upholding the conviction.

Ingram was represented by John T. Heflin, who tried to exploit the emotion of racial prejudice by emphasizing the hostility of the blacks marching immediately after the shooting. Stone swept this argument aside as irrelevant.⁹⁸ Moreover, Stone gave an important

90. *Id.* at 68-70.

91. *Id.* at 68-69.

92. *Id.* at 68.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 69.

97. *Id.*

98. *Id.* at 71.

edge to the prosecution by upholding the admission into evidence of Coleman's "dying declaration," although it was made a week before his death. On this point, Stone maintained that the gaping wound in Coleman's chest was serious enough to make credible Coleman's feeling that he was going to die on the spot.⁹⁹ Of course, Heflin's main contention for his client was that he shot in self-defense because Coleman pulled an open knife on him. Stone strictly applied his tests of peril and escape and found that Ingram failed both tests. Stone declared that

[h]uman life is not taken with impunity, if the slayer . . . failed to retire . . . when he could have done so without endangering his life When the accused stepped back, so as to afford him space to level his gun, he had placed the deceased at such a disadvantage . . . that any attempt at aggression by the latter could have been easily averted.¹⁰⁰

Thus, Stone dryly concluded, "[o]ne having a loaded gun pointed at another, who is not advancing, can not be in present imminent peril of life or limb, even though that other have an open knife in his hand."¹⁰¹ Presumably, Stone and his high court colleagues were believers in white supremacy, but in the *Ingram* and *Dolan* cases there was no double standard of justice for whites at the expense of blacks.

C. *A Contrast in Judicial Responsiveness: Unpunished Homicide in Texas*

In striking contrast to the conservative, restrictive attitude of Justice Stone and the Alabama Supreme Court toward the legitimization of homicide was, and is, the permissive legal attitude represented by the extremely violent state of Texas, a state with an explosive mixture of deep southern and frontier western characteristics.¹⁰² In Texas the Americanization of the common law of homicide reached its apex. More than any other state, South or North, Texas altered the old common law tradition of the criminal law.

Comprised of a web of statutes, penal codes, and state supreme court decisions, the Texas system has changed little since the adoption of the first penal code in 1856. This code embodied the Old South tolerance of taking lives in personal disputes. The present

99. *Id.*

100. *Id.* at 72.

101. *Id.* at 73.

102. On the history of Texas violence, see R. BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 236-99 (1975); W. HOLLON, FRONTIER VIOLENCE: ANOTHER LOOK 36-55 (1974); C. SONNICHSEN, I'LL DIE BEFORE I'LL RUN: THE STORY OF THE GREAT FEUDS OF TEXAS (1962). On Texas violence in our own time, among many works, see J. BAINBRIDGE, THE SUPER-AMERICANS 238-58 (1962); H. LUNDGAARDE, *supra* note 9.

penal code of Texas is essentially the same as the 1856 Code. As the foreword to the current code candidly admits, the code "retains too much of the frontier in its treatment of firearms [and] still permits too much force on too many occasions."¹⁰³ Thus, the Texas penal code, which has shown remarkable continuity since antebellum times, provides "private citizens with wide discretionary powers to kill their fellow citizens legally and with impunity."¹⁰⁴ Far from being restricted the rights of killers are explicitly favored. A comparative study found that the Texas penal code significantly widened the common law doctrine of justifiable homicide.¹⁰⁵ Nor was the liberal code the end of the expansive trend in Texas law, for the study also noted that the interpretations of the Texas Supreme Court further liberalized what the already tolerant penal code allowed.¹⁰⁶

True to pattern, the duty-to-retreat doctrine has fared especially badly in the Lone Star state. In his 1885 opinion in *Bell v. State*,¹⁰⁷ Judge Samuel A. Willson of the highest court of Texas forthrightly acknowledged that although the tradition of "[t]he common law required the assailed party to 'retreat to the wall,'" the Texas penal code's abolition of the duty to retreat was "a statutory innovation upon the common law"¹⁰⁸ The facts of the *Bell* case reveal in human terms the impact of this Texas innovation in the law of self-defense. Shortly after midnight in Waco on March 28, 1883, Bill Bell, driver of a horse-drawn cab, and his drunken passenger, A. T. Moreland, entered into a fare-paying dispute over the miniscule sum of twenty-five cents. Moreland was both the bigger man and the aggressor, but he had the misfortune of insulting the smaller man's honor. The imbroglio turned physical when Moreland attacked Bell with his fists. In defending himself with a knife against Moreland's blows, Bell fatally wounded Moreland.¹⁰⁹ The trial court convicted Bell of second-degree murder, but this verdict was reversed upon appeal to the court of last resort. Speaking for the court, Judge Willson held that the lower court judge had erred by failing to instruct the jury that according to Texas law, Bell had no duty to retreat before killing in self-defense. Thus, the court held that Bell's action was one of "justifiable homicide."¹¹⁰ In a duty-to-

103. H. LUNDSGAARDE, *supra* note 9, at 149.

104. *Id.* at 162.

105. 13 Sw. L.J. 508, 515, 518 (1959).

106. *Id.* at 519-20.

107. 17 Tex. Crim. 538 (1885).

108. *Id.* at 550-51. Judge Willson cited article 573 of the Texas penal code.

109. *Id.* at 539-45.

110. *Id.* at 553. Other late nineteenth-century cases in which the highest Texas court

retreat state such as Alabama, Bell's conviction for homicide would not have been reversed.

Because no state has exceeded Texas in its espousal of the stand-one's-ground doctrine, it is often referred to as the "Texas rule."¹¹¹ In a throwback to the nineteenth century, the duty to retreat is mentioned in a recent Alabama case,¹¹² but as noted earlier, the majority of states have turned against it. Nevertheless, it is significant that among all these states the penal code of Texas is the only one that has explicitly repudiated the duty to retreat. A person defending his person or property, said the Texas law until 1973, "is not bound to retreat in order to avoid the necessity of killing his assailant."¹¹³ The duty-to-retreat problem is directly relevant to the incidence of homicide in the South. Henry P. Lundsgaarde in his searching study of 268 of Houston's 1969 homicides tells us that the absence of a retreat provision in Texas law added significantly to the carnage in the Space City, since in case after case, "both killers and victims could easily have de-escalated the seriousness of the situation by retreat."¹¹⁴

Probably no state goes further than Texas in allowing a person to kill in defense of property, including property of "slight value [that] . . . could ordinarily be given up momentarily with only little, if any, loss of face."¹¹⁵ This is in stark contrast to the law in Alabama, where the supreme court in *Storey v. State* held that "[i]t would be shocking to . . . have it proclaimed . . . that one may, in the broad daylight, commit a willful homicide in order to

for criminal cases, the court of appeals, applied the no-duty-to-retreat rule included *Baltrip v. State*, 30 Tex. Crim. 545, 549 (1891); *Nalley v. State*, 30 Tex. Crim. 456, 459 (1891); *Ball v. State*, 29 Tex. Crim. 107, 126 (1890); *White v. State*, 23 Tex. Crim. 154, 163 (1887); *Parker v. State*, 22 Tex. Crim. 105, 109 (1886); *Arto v. State*, 19 Tex. Crim. 126, 135 (1885); *Williams v. State*, 14 Tex. Crim. 102, 112-13 (1883). In all these cases as in the *Bell* case, the court of appeals held that the trial judge was at fault in not instructing the jury that there was no duty to retreat in Texas. In these decisions, the court in effect warned lower court judges that they ran the risk of reversal on appeal if they failed to instruct the jury that there was no duty to retreat. Alabama was exactly the opposite. Stone and his supreme court colleagues held the threat of reversal over the heads of trial judges who did not instruct juries that there was a duty to retreat.

111. R. MORELAND, *supra* note 39, at 262-63. The term "Texas rule" may go back to Holmes' opinion in *Brown v. United States*, 256 U.S. 335, 343 (1921). *Brown* dealt with a Texas killing, and in his opinion Holmes discussed, approvingly, the Texas stand-one's-ground doctrine. This case is discussed in text accompanying notes 119-23 *infra*.

112. *Vander Wielen v. State*, 47 Ala. App. 108, 251 So. 2d 240 (1971); *Beale*, *supra* note 40, at 576 (citing Alabama's nineteenth-century status as a duty-to-retreat state).

113. TEX. PENAL CODE ANN. tit. 15, art. 1224 (Vernon 1911) (emphasis added), *repealed* by TEX. PENAL CODE ANN. tit. 2, § 9.32 (Vernon 1973).

114. H. LUNDSGAARDE, *supra* note 9, at 164.

115. Stumberg, *Defense of Person and Property Under Texas Criminal Law*, 21 TEX. L. REV. 17, 32 (1943).

prevent the larceny of an ear of corn."¹¹⁶ With so many legal provisions for justifiable homicide in Texas, Lundsgaarde found that a majority of the 268 killers studied qualified for consideration by the courts as persons who had justifiably committed homicide. Consequently, although ninety percent of the 1969 Houston killers were apprehended, less than half of them suffered any penalty at law.¹¹⁷ Both G. W. Stumberg and Lundsgaarde found an implicit vigilantism in the Texas situation. So latitudinous are the Texas laws "pertaining to justifiable homicide [that the need] . . . for police, judges, juries, and any form of third party authority [is practically eliminated] as long as one can convincingly establish that the killing was a response to a threat against person or property."¹¹⁸

Carried to its extreme in Texas, the Americanization of the common law of homicide ultimately gained the blessing of the United States Supreme Court's most talented phrase-maker, Justice Oliver Wendell Holmes, in *Brown v. United States*.¹¹⁹ Appropriately enough, the case originated in Texas. Because the homicide in question occurred on United States property, the case was tried in the federal district court rather than in a state court. Ill will between two Texans, Hermes and Brown, had existed for some time. Brown was supervising construction at the site of a post office when Hermes approached him with a knife. When Hermes lunged at Brown with the knife, Brown, who had come armed to his construction job because he feared an attack by Hermes, fired four shots at his assailant and killed him. Convicted of second-degree murder in the federal district court, Brown appealed unsuccessfully to the circuit court. He also appealed to the United States Supreme Court, which issued its opinion in 1921. The issue was whether Brown was under a duty to retreat before killing Hermes in self-defense. The lower courts held that Brown was under such an obligation, and failing to meet it, was guilty of murder. Speaking for the majority of the Supreme Court, Justice Holmes took a contrary view. In so doing, he discussed briefly but incisively the duty to retreat in legal history. Justice Holmes stopped short of a complete endorsement of the doctrine of stand-one's-ground, but he tilted his opinion heavily in that direction. Referring to the gradual ascendancy of the stand-one's-ground rule under American conditions, Holmes wrote that

[t]he law has grown . . . in the direction of rules consistent with human nature. . . . Many respectable writers agree that if a man reasonably believes

116. *Storey v. State*, 71 Ala. 329, 341 (1882).

117. H. LUNDSGAARDE, *supra* note 9, at 145.

118. *Id.* at 164. See generally Stumberg, *supra* note 115.

119. 256 U.S. 335 (1921).

that he is in immediate danger of death or grievous bodily harm from his assailant he may *stand his ground* and that if he kills him he has not exceeded the bounds of lawful self-defense.¹²⁰

This was capped with a typical Holmes apothegm: "Detached reflection cannot be demanded in the presence of an uplifted knife."¹²¹ Brown had been in precisely such a position—facing an uplifted knife. "Therefore," declared Holmes, "in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him."¹²² Before announcing the Court's decision to reverse Brown's conviction, Holmes cited approvingly the law of Texas in favor of the stand-one's-ground doctrine.¹²³

V. CONCLUSION

Both inside and outside the South, was the law a cause of the high incidence of homicide, or was it an effect? It was probably more effect than cause, for despite the antihomicide rigor of its supreme court, on the whole the incidence of killing in Alabama seems to have been no lower than elsewhere in the South. Thus, the conservative Alabama court apparently failed to stem not only the legal trend of the Americanization of the common law of homicide but also the trend of blood-letting in Alabama. In one way this is not surprising, for after all, the great majority of homicide cases never went before the supreme court. Some of the lower court judges, especially LeRoy F. Box of Talladega, O. J. Semmes of Mobile, and James B. Head of Walker County, seem to have applied the law strictly according to Stone and their other mentors on the highest court, but on the other hand, there is evidence of tension between the restrictive stance of Stone's court and the permissive tendency of community opinion. In one homicide trial a defense counsel had the audacity to declare to the jury that it was "above [the] court and the Supreme Court in [its] right to decide [the] case."¹²⁴ The defense attorney was duly reprimanded from the bench, but the whiff of defiance lingered in the air.

Legal rules such as the doctrine of retreat and its obverse, the stand-one's-ground doctrine, are in significant cultural and moral relation to the South's historical national leadership in homicide.

120. *Id.* at 343 (emphasis added).

121. *Id.*

122. *Id.*

123. *Id.* at 343-44. Their reasons not given, Justices Pitney and Clarke dissented from this decision.

124. *Springfield v. State*, 96 Ala. 81, 84-85, 11 So. 250, 251 (1892).

While many courts were lining up behind the "Texas rule" of stand-one's-ground, there was one outspoken and distinguished legal scholar who would have none of it. Joseph H. Beale, writing in the *Harvard Law Review* in 1903, denounced the stand-one's-ground doctrine as a "brutal doctrine" whose judicial ethics were the "ethics of the duelist," values supported chiefly in the South and the West where community *mores* made it "abhorrent to the courts to require one . . . assailed to seek dishonor in flight."¹²⁵

Beale had no doubt about the general theoretical validity of the duty to retreat. "No killing can be justified, upon any ground," unless absolutely necessary, said Beale, and killing is "not necessary . . . when the assailed can defend himself by the peaceful though often distasteful method of withdrawing to a place of safety."¹²⁶ Beale was forthright in confronting the unwritten code of behavior that so often justified killing in the South. In "the case of a killing to avoid a stain on one's honor," wrote Beale, "[a] really honorable man . . . would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more . . . the thought that he had the blood of a fellow-being on his hands."¹²⁷ The identical sentiment was expressed by an Alabama jurist who declared that in the legal doctrine of self-defense, as maintained in the courts of Alabama, there was "no balm or protection . . . provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are [nothing] compared with the inestimable right to live."¹²⁸

In Texas the impact of the formal law, structured to support the person who killed in defense of self or property, reinforced rather than restrained the homicidal tendency. Texans, headed by members of the bench and bar and by state legislators, reflected persisting social mores by extending into the realm of the formal law the unwritten code that approved of violence. Conversely, Stone in Alabama, following the dictates of the old English common law whose "purity and elevation" of "morals" he deeply revered,¹²⁹ sought in his opinions to extend the authority of the formal law into the homicide-ridden society of Alabama. In so doing, Stone and his

125. Beale, *supra* note 40, at 577.

126. *Id.* at 580.

127. *Id.* at 581. In this article Beale, who during his career served briefly as Dean of Law at the University of Chicago and for a long time as Professor of Law at Harvard, obviously did not hesitate to speak his mind strongly. In another article of the same year, *Homicide in Self-Defense*, 3 *COLUM. L. REV.* 526 (1903), Beale confined himself largely to a discussion of case law and held the statement of his own views to a minimum.

128. *Springfield v. State*, 96 Ala. 81, 85, 11 So. 250, 252 (1892).

129. *Ex parte Nettles*, 58 Ala. 268, 275 (1877).

supreme court colleagues wished to narrow the scope of the unwritten code of behavior that so often sanctioned the taking of lives in personal disputes. In this regard, Stone was not only an example to his fellow citizens but also an eloquent spokesman for the deeper values of peace and civility that underlay the superstructure of violence in southern life. The Americanization of the common law of homicide against which Stone and his Alabama Supreme Court colleagues fought was not confined to the South; the West underwent the process as well.¹³⁰ Yet, it seems fair to conclude that aspects of our national history, such as frontier violence, racial conflict, and individual slayings in defense of personal honor that have contributed to the sometimes legal legitimation of homicide in America, have converged with greatest impact in the South. Thus, this exploration of homicide in legal and historical perspective suggests that southern violence has been both a regional problem and a salient contributor to the national nemesis of violence.

130. In regard to the process of the Americanization of the common law, W. E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975), deals primarily with the civil law. There is no comparable book-length study of the criminal law.