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In preparation for commenting on Richard Maxwell Brown's Article, *Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective,*[1] I read for the first time a number of Professor Brown's earlier works, including his early study of the South Carolina Regulators,[2] his recent general book on American violence,[3] and his contributions to the National Commission on the Causes and Prevention of Violence appointed by President Johnson in the wake of the urban riots of the late 1960's.[4] I came to appreciate the strengths of his work, among them careful, painstaking research, voluminous documentation, and interesting and convincing descriptions of past eras.

I also noted certain flaws that appear with some frequency in those works, most notably a failure to clarify concepts and a tendency toward unsupported extrapolations and somewhat hasty judgments. The latter problems seem to be due in part to the former—the amorphous nature of the concept of "violence" lends itself to generalization. Without a limiting definition there is a danger that every act of physical harm will be seen to relate to every other such act although it would be impossible to prove actual ties. For example, in his *Strain of Violence* Professor Brown indiscriminately lumps together partisan warfare during the American revolution, vigilante actions on the western frontier, racially motivated lynchings, and single and mass murders by deranged men such as Lee Harvey Oswald, Charles Whitman, and Dean Allen Corll, claiming that all these and more constitute "a part of our unacknowledged (or underground) value structure."[5]

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1. 32 VAND. L. REV. 225 (1979) [hereinafter referred to in text as *Southern Violence*].

2. R. BROWN, THE SOUTH CAROLINA REGULATORS (1963).

3. R. BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM (1975) [hereinafter referred to as STRAIN OF VIOLENCE].

4. Brown, *Historical Patterns of Violence in America*, in THE HISTORY OF VIOLENCE IN AMERICA 45 (H. Graham & T. Gurr, eds. 1969) [hereinafter cited as *Historical Patterns of Violence*]; Brown, *The American Vigilante Tradition*, in THE HISTORY OF VIOLENCE IN AMERICA, *supra*, at 154.

5. R. BROWN, *supra* note 3, at 36. Later in the same work Brown states that "a historical trajectory of violence" may be drawn from the gunfights of frontier Texas to Lee Harvey Oswald's assassination of John Kennedy. *Id.* at 286.

In large part, however, this tendency toward unsupported extrapolations reflects the bias of a rather trendy liberalism. One of Professor Brown's contributions to *The History of Violence in America,* for instance, contains the suggestion that the looting and arson of the riots of the 1960's were merely modern variations on the protests against British policy in colonial Boston.[6] Even more strikingly, in his *Strain of Violence* Brown argues that the Vietnam War was somehow attributable to the fact that Lyndon Johnson was raised in "the violent tradition of central Texas."[7] Now, Professor Brown is far too good an historian to make such assertions without qualification. He knows, of course, that John Kennedy, not Lyndon Johnson, sent the first combat troops to Vietnam, and to explain this fact he cites a different regional tradition. Kennedy, he says, was the product of the eastern interventionist tradition of Theodore Roosevelt, John Hay, and Henry L. Stimson.[8] Even this does not suffice, for our commitment was initially made by Dwight Eisenhower of Kansas and was supported by Richard Nixon of California, not to mention hundreds of congressmen and senators from every state in the Union.

Perhaps one could cite other "strains of violence" to explain these factors, but it should be clear that at this level of generality the concept of violence does nothing to explain the Vietnam war or anything else. The fashionable tendency to explain a failed national commitment as the fault of one or two men influenced by the archaic traditions of one or two regions of the country is not very good history, even though it might be very good politics. To the extent that Professor Brown follows this tendency, his work as an historian suffers accordingly.

I have discussed Professor Brown's earlier work at this length because it provides a sharp counterpoint to the instant Article. With the exception of his continued failure to refine the loose concept of "violence," *Southern Violence* does not suffer from those earlier flaws. There are no grandiose extrapolations and no broad liberal interpretations. But neither does this paper reflect the strengths of his earlier writings. In contrast to Professor Brown's earlier work, and especially in contrast to his scholarly study of the Regulator movement,[9] the research in *Southern Violence* is sketchy and superficial, the documentation slight, and the evidence accepted without serious analysis. Moreover, the descriptions of individuals and geo-

6. *Historical Patterns of Violence, supra* note 4, at 53.
7. *See* R. BROWN, *supra* note 3, at 287.
8. *Id.* at 288.
9. R. BROWN, *supra* note 2.

graphical areas—perhaps the most enjoyable aspect of *Strain of Violence*—are neither sufficiently detailed to be interesting nor sufficiently penetrating to be convincing.

Perhaps the greatest failing of Professor Brown's Article is its lack of focus, a failing that is illustrated in the title itself. What is "southern violence"—or, better, *is* there such a thing distinct from northern, American, or human violence? We never learn the answer to that obvious question from Professor Brown. He seems to accept Raymond Gastil's hypothesis that American violence is largely a function of "southernness,"[10] even though Gastil's argument is marked by an obvious cultural chauvinism and is statistically unsound.[11] Apart from these factors, Gastil and Brown simply equate "violence" with "homicide rates." Recent statistics show how misleading that equation is.

RATE OF CRIMES PER 100,000 POPULATION, 1976[12]

Region	Total Crime Index	Violent Crime[13]	Murder and Non-Negligent Homicide
United States	5,266.4	459.6	8.8
Northeast	5,157.7	523.6	7.0
North Central	4,922.9	381.7	7.4
South[14]	4,783.4	429.3	11.3
West	6,782.8	548.3	8.5

Is it accurate to term the South "violent?" Its total crime rate is the lowest in the nation, and except for the north central region, the South's violent crime rate is the lowest. Only in terms of homicide and non-negligent manslaughter is the southern crime rate above the national average. Surely this definition of "violence" is too limited, especially when one considers that most southern homicides occur in family or personal fights,[15] because most people fear

10. R. GASTIL, CULTURAL REGIONS OF THE UNITED STATES 97-116 (1975).

11. *See* Loftin & Hill, *Regional Subculture and Homicide: An Examination of the Gastil-Hackney Thesis*, 39 AM. SOC. REV. 714 (1974).

12. U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1976, at 38-42 (FBI Uniform Crime Reports 1977).

13. Violent crimes include murder, forcible rape, robbery, and aggravated assault. *Id.* at 42 n.2.

14. The FBI defines the South to include all the states of the Confederacy plus Delaware, Maryland, West Virginia, Kentucky, and Oklahoma. *Id.* at 40, 42. This raises another definitional problem with the Brown paper: just what does he mean by "southern?" The term is used often and loosely, but the only extended discussion in the Article concerns just two states, Alabama and Texas, and the last of these often resents the implication that it is southern. Lyndon Johnson, for example, claimed throughout his political career that he was a westerner, not a southerner.

15. Brown, *supra* note 1.

violent crimes generally, not just murder at the hands of family or friends. It also is too limited in another respect. This definition of violence does not consider suicide, the other type of intentional taking of human life. As Sheldon Hackney points out,[16] there is an inverse regional correlation between homicide and suicide rates—the southerner may have more statistical reason than the northerner to fear that his neighbor might kill him, but he has less reason to fear himself. The point is that a careful scholar should not use a general term like "southern violence" without some effort to define his meaning and to show its relevance. Professor Brown unfortunately does neither.

The next part of the title, "Regional Problem or National Nemesis?," is just as confusing. The question mark indicates that the Article's objective is to decide which categorization is appropriate for "southern violence." The reader is faced with an initial semantic difficulty since "southern" already defines a particular regional form of "violence" and "southern violence" must, by definition, be a "regional problem." Beyond that, one finds absolutely no discussion of the regional versus national issue until the final paragraph of the paper. The intervening discussion of Alabama and Texas makes no effort to tie events in those states to any "national nemesis," but Professor Brown abruptly propounds several startling conclusions in the final paragraph. He states that certain "aspects of our national history, such as frontier violence, racial conflict, and individual slayings in defense of personal honor . . . have contributed to the sometimes legal legitimation of homicide in America;" that these aspects have "converged with greatest impact in the South;" and that southern violence therefore has been "both a regional problem and a salient contributor to the national nemesis of violence."

Each of these points may be true, but they are not supported in the text. We are not shown that those "aspects of our national history" have contributed to the "sometimes legal legitimation of homicide in America." (Incidentally, we are never told what "legal legitimation" means, or how often "sometimes" is.) To the contrary, half of Professor Brown's Article concerns the fact that such violence was not accepted by the law in Alabama. We are never shown that those aspects "converged with greatest impact in the South," although other readings might indicate that that is so. Finally, we are never shown that peculiarly southern violence contributes anything

16. Hackney, *Southern Violence*, in THE HISTORY OF VIOLENCE IN AMERICA, *supra* note 4, at 50-60.

to the "national nemesis" beyond its share of the statistics.

If this regional versus national dichotomy is not the theme of the Article, what is? Several pages into the second part of the text Professor Brown again raises our hopes of finding his objective. After pointing out the obvious fact that even in the South most folks are not violent, he says: "Thus a major theme is the confrontation between the law-abiding, peaceably disposed, on the one hand, and the homicidal, on the other." But if this is the Article's theme, it expires rather quickly. It is never directly mentioned again after that statement, and even where it conveniently could be explored in connection with Chief Justice George Washington Stone's campaign against defenses to murder charges, it is ignored.

There remains only a silent theme, one that begs to be introduced but never is. The last part of the Article's title indicates that Brown will explore "Legal Attitudes Toward Southern Homicide in Historical Perspective." With the exception of brief references to Tennessee and Mississippi, he concentrates exclusively on legal attitudes in Alabama and Texas. These two states reveal a strong contrast that clearly intrigues Professor Brown. The Alabama courts restricted defenses to homicide charges in the late nineteenth century, while the Texas courts expanded them. The silent theme almost jumps out: what effect did these contrasting approaches have? Did Alabama's approach reduce the number of such deaths or Texas' increase them? Why or why not?

An earlier draft of this Article indicated that Professor Brown believed there was indeed a causal connection between legal attitudes and homicide rates, but on further reflection he dropped this point. The revised paper is content with an unsupported statement that any relationship was "probably more effect than cause" because "the incidence of killing in Alabama seems to have been no lower than elsewhere in the South." Nineteenth-century statistics are unavailable, but the most recent statistics indicate that Alabama homicide rates indeed have been "no lower" than rates in the rest of the South. In 1976, when the southern rate of homicide and non-negligent manslaughter was 11.3 per 100,000 population and the Texas rate was 12.2, the Alabama rate was 15.1, which made it by far the most murderous state in the nation.[17] Assuming that similar evidence of the situation a hundred years ago could be found, what does it show about the relationship between law and murder? What does Brown mean when he says that the relationship was "more effect than cause?" That the legal attitudes of the Ala-

17. U.S. DEP'T OF JUSTICE, *supra* note 12, at 40, 42.

bama Supreme Court were determined by the homicide rate? If so, where is the evidence for it? Or are the attitudes the "cause" of the homicide rate ("effect")? Again, what evidence supports that assertion?

In short, if this relationship is in fact the theme of the Article, it is never actually presented as such,[18] it is never explored, and it is ignored in the concluding section of the Article. It appears rather as a failed hypothesis, submerged in the data because the facts did not support it. That submersion, however, leaves the Article without *any* focus. The reader learns only that one Alabama Chief Justice opposed homicide a hundred years ago and that the law of Texas at that time allowed victims of attack to stand their ground and fight back. Neither statement is at all striking and each, in the absence of any debate, might be dismissed as inconsequential. In the further absence of any connection between the two statements, the Article itself must be regarded as inconclusive.

Brief mention should be made of the evidence presented by Professor Brown and the use he makes of it. Initially, consider the recurring matter of unpunished murder. Brown makes much of this, citing several early, if unscientific, commentators to the effect that in the South those who committed unjustified murders for "self-respect" were unlikely to be punished. The cases cited to illustrate this statement hardly support that assertion. The first, *Grainger v. State,*[19] was the clearest case of self-defense that one can imagine, and thus proves nothing about real murders going unpunished. The defendant literally was chased by his attacker to a locked door and had no further place to retreat. The reasonableness of his self-defense was so clear that there was no reason for the court to comment upon it explicitly. If that decision was in fact misinterpreted "throughout the South and Southwest" so that murderers went free, Professor Brown should have no difficulty citing cases misapplying the "*Grainger* doctrine." He does not do so, preferring instead to trust the accuracy of a seventy-year-old secondary source.

The second case, *Ex parte Wray,*[20] is seriously misinterpreted. Brown asserts that the Mississippi Supreme Court "gave the mantle

18. A remnant of Brown's earlier position remains in his discussion of Grainger v. State, 13 Tenn. (5 Yer.) 377 (1830). The court in that case reversed a conviction because the defendant believed himself in danger. The opinion did not use the usual qualifying phrase that the defendant thought himself so "upon sufficient grounds." This failure, Brown tells us, inadvertently opened a "huge legal loophole" that allowed the guilty to go free in hundreds of cases. He does not demonstrate, however, why this inadvertency should have had precedential force "throughout the South and Southwest," or whether it actually did.

19. 13 Tenn. (5 Yer.) 377 (1830).

20. 30 Miss. 673 (1856).

of legality to killing in what it termed a 'personal and mutual recontre' " and "gave judicial approval to street-fight killing," resulting in a finding that the "obviously guilty" Wray was innocent of murder. This is heady language, but the facts of the case and the precise holding of the court give quite a different impression.

Wray sought out schoolmaster Brown who had expelled Wray's brother. Wray was armed with a knife and pistol, but before he armed himself, he stated that "if he had a difficulty with Brown, he would take a stick to him, and should the boys 'pitch in,' he would use weapons to defend himself."[21] Wray struck Brown with his fist when they met, and Brown pulled out a whip "loaded in one end, with two and one-half ounces of lead, and struck Wray" repeatedly and rapidly over the head. Wray retreated some distance under these blows and only then drew his knife and stabbed Brown.[22] Wray was charged with murder and appealed the denial of bail to the Mississippi Supreme Court. Because bail could be denied only in capital cases when the proof was evident or the presumption great, the only issue before the court was whether the charge of murder conceivably could be sustained on these facts. "It is neither required nor proper, that we should intimate an opinion, either as to the innocence of the accused, if we entertained it, or as to any decree of manslaughter, of which he might be thought guilty."[23] In keeping with this limited issue, the court held that one essential element of murder, express intent to kill, was lacking on these facts and therefore bail could not be denied. We are never told whether Wray ultimately was found guilty or innocent of any other charges. Wray's conduct certainly was reprehensible, and as the dissent indicated,[24] the court's decision was arguable. But it cannot fairly be said that Wray was "obviously guilty" of murder or that the court "gave judicial approval to street-fight killing."

Furthermore, the Alabama cases discussed next implicitly reject Brown's statement about unpunished murders, because with one exception each involved an affirmance of a lower court conviction for just the sort of crime for which Brown says perpetrators were not punished in the South.[25] The one exception, *Judge v. State*,[26]

21. *Id.* at 675.
22. *Id.* at 677.
23. *Id.* at 678.
24. *Id.* at 681 (Handy, J., dissenting).
25. *See* Johnson v. State, 102 Ala. 1, 16 So. 99 (1894) (conviction reversed on procedural grounds after rehearing); Scales v. State, 96 Ala. 69, 11 So. 121 (1892); Cleveland v. State, 86 Ala. 1, 5 So. 426 (1889); Dolan v. State, 81 Ala. 11, 1 So. 707 (1887); Ingram v. State, 67 Ala. 67 (1880).
26. 58 Ala. 406 (1877).

does lend some support to the belief that southern courts were "soft" on murders arising out of personal quarrels. It undercuts Professor Brown's interpretation of Chief Justice Stone's role, however, because in that case Stone reversed a first degree murder conviction partly because the trial court *too narrowly* stated the permissible grounds of self-defense.[27] The Texas cases discussed last do support Professor Brown's main proposition, but as a whole this seems to be a strange pile of contradictory authority on which to rest generalizations about unpunished southern murders.

There is the further problem of selectivity. Brown's discussion of "southern violence" is restricted chiefly to Alabama and Texas violence. The reader is never told why or whether these states epitomize the South. Is Texas indicative of anyplace beyond its borders? If so, is it not a better example of western violence than southern? By Brown's own statement Alabama was an exception not only to the South but also to the Nation as a whole—Chief Justice Stone, he informs us, fought a "courageous rear-guard action" against the "Americanization of the common law of homicide."[28] What then does that struggle indicate about "southern" violence?

Finally, consider the case of Texas. The reader learns that Texas adopted a number of legal rules widening the plea of self-defense. Among these were the "stand-one's-ground" principle, which held that the victim of an attack need not retreat before using deadly force in his defense, and the recognition of an individual's right to kill in defense of personal property. These rules "reinforced rather than restrained the homicidal tendency" of Texans.

What evidence is the reader given for these statements about nineteenth-century Texas? The stand-one's-ground rule discussion is particularly instructive. Brown states that the issue "is directly relevant to the incidence of homicide in the South." Nothing in his Article supports that assertion. Brown presents not a single statistic connecting that rule with nineteenth-century homicide rates in Texas, the South, or the Nation. The only statistic of any sort offered is irrelevant—a study of 268 Houston murders in 1969 simply concludes that in many cases "both killers and victims could easily have deescalated the seriousness of the situation by retreat."[29] That study says nothing at all about the situation in the rest of Texas or

27. *Id.* at 409.

28. Since Stone's decisions in this rear-guard action simply affirmed the decisions of juries and lower court judges, the reader is entitled to wonder why the adjective "courageous" is applied.

29. H. LUNDSGAARDE, MURDER IN SPACE CITY: A CULTURAL ANALYSIS OF HOUSTON HOMICIDE PATTERNS 164 (1977).

the South a century ago. More importantly, it says nothing about the impact, or lack thereof, of legal rules on human action. Do we have any reason to believe that the sort of murders with which Professor Brown is concerned—barroom brawls and family feuds—normally are committed by persons who know the formal law of Texas? And if such murderers are aware of the law, do we have any reason to believe that they stop to think about it before they pull the trigger or plunge the knife? More generally, if, as Professor Brown admits, the rest of the Nation adopted similar self-defense rules, why should Texas be such an unusually murderous place?[30]

The preceding pages should indicate that *Southern Violence* is a disappointment to those of us whose expectations had been raised by Professor Brown's earlier works and to those who are interested in his stated topic. It is a thoroughly unfocused, loose collection of facts and incidents that will interest only those with a curiosity about Alabama's Chief Justice Stone or the Texas law of self-defense. The paper does contain several seeds of thought that might, if given adequate attention, grow into testable hypotheses. Those hypotheses will be hard to evaluate, but they are of immense importance because they concern the fundamental relationship between formal law and human action. I hope that Professor Brown nurtures those seeds, and I trust that if he does, his harvest will be up to the high standards he set in years past.

30. Chief Justice Stone, it will be recalled, fought a "courageous, rear-guard action," while the rest of the nation was "Americanizing" the common law of homicide. Neither is it clear that Texas was so murderous. At least today Texas is far surpassed by Alabama, see text accompanying note 17 *supra*, which did *not* adopt those rules, and we are given no information about its relative standing in the last century.