

Concealed Weapon Laws of the Early Republic

Most people are surprised when I tell them that the South led the nation in the development of gun control laws. Especially to the cultural elite of American society, the South is stereotyped as a place of rednecks, huntin' dogs, and gun racks in pickup trucks. But when you examine the history of laws regulating firearms and other deadly weapons, the South was decades ahead of the rest of the United States.

There are many reasons, one of which was slavery. The earliest firearms licensing laws in the United States applied only to free blacks; the South feared that free blacks might assist slaves rebelling against their masters. After slavery ended, the Southern states again took the lead in the development of laws regulating the carrying of handguns. The reasons for these post-Civil War laws are clearly stated, and not even controversial among historians of Reconstruction. If the freed slaves were allowed to carry guns, they would be in a position to defend themselves from Klansmen and more willing to demand their equal rights as citizens.¹

But while the South led the country in passing laws that either directly or indirectly prohibited blacks from keeping or bearing arms, there is another class of Southern weapons laws that have long interested historians of the right to keep and bear arms. These are the laws passed before the Civil War, entirely in slave states, that either prohibited or severely regulated the concealed carrying of deadly weapons, decades before similar laws appeared in the rest of the United States. There are curious coincidences of time and place that, at first glance, make it appear that fear of slave rebellion had something to do with these laws. But these laws applied to everyone, white or black, and

¹ Robert J. Cottrol and Raymond T. Diamond. "The Second Amendment: Toward An Afro-Americanist Reconsideration." *Georgetown Law Journal*. 80:2 [December, 1991]:309-61; Clayton E. Cramer, "The Racist Roots of Gun Control," *Kansas Journal of Law & Public Policy* 4:2 [Winter 1995]:17-25.

at a time when state legislatures were quite open in writing racially discriminatory laws.² This suggests that these early concealed weapon laws were not aimed at a particular race.

From a modern perspective, at least for those partial to conventional wisdom on the subject of gun control, figuring out why these laws appeared when and where they did does not seem like a very interesting question. To a great many people in America, regulating the concealed carrying of deadly weapons would seem like the most obvious sort of law. It is conventional wisdom in some circles that allowing people to carry deadly weapons is looking for trouble—that as more people carry guns, crimes of passion are sure to increase. Indeed, I was one of that opinion when I first started to look into this topic in 1989. I started gathering data as state after state adopted non-discretionary concealed weapon permit laws, and I discovered that large numbers of people carrying concealed handguns did no harm to public safety, and perhaps did some good.³ More recently, Professor John Lott and graduate student David B. Mustard of the University of Chicago, using a more sophisticated approach, demonstrated statistically significant reductions in rates of murder, rape, robbery, and aggravated assault associated with these laws.⁴

When you examine the attitudes of the Founding Fathers towards firearms, however, these concealed weapon laws in the early South seem quite remarkable. A widely held belief among the Founders of the American Republic was that the right to armed self-defense was a basic right, one that we had inherited from Englishmen. This right was guaranteed by the English Bill of Rights (1689) and widely recognized in authoritative works such as Blackstone's *Commentaries on the Laws of England*. Indeed, this belief was enshrined in not only the Second Amendment, but also in most of the antebellum state

² Clayton E. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms* (Westport, Conn.: Praeger, 1994), 69-96.

³ Clayton E. Cramer and David P. Kopel, "'Shall Issue': The New Wave of Concealed Handgun Permit Laws," *Tennessee Law Review* 62:3 [Spring 1995] 679-757.

⁴ John Lott and David B. Mustard, "Crime, Deterrence, and Right-To-Carry Concealed Handguns", *Journal of Legal Studies* 26 [January 1997] 1-68.

constitutions—even in the Southern states that, inexplicably, then banned concealed carry, and sometimes even banned sale of concealable deadly weapons.

I recently completed my MA thesis in History, looking for answers to this puzzling question: Why did the South passed concealed weapon laws so contrary to the prevailing sentiments of the Framers of the Republic? As with most historical questions into which I have looked, the results were startling. Even though I have spent considerable energy in documenting how gun control laws have often been passed under the *pretense* of crime control, but really for more nefarious motives,⁵ the concealed weapon laws of the early Republic are not in that category. They were passed as part of a genuine attempt at reducing murder rates. That said, it is important to understand that the laws did not, apparently, achieve the desired goal. When we examine *why* the laws were needed, it becomes a little more apparent why they did not reduce murder rates—and what eventually did.

The Southern states up to 1840 were an extraordinarily violent part of the United States. The historian David T. Courtwright describes the South as “a seedbed of national violence,” not only violent in itself but sending out a stream of single young men with “obsessions about reputation and vengeance and deadly weapons with them.”⁶ The antebellum Kentucky newspaper editor Cassius Clay insisted, based on his reading of newspapers from both regions, that crime rates were “about five times as great in the slave states, as in the free.”⁷ The Northern journalist Frederick Law Olmsted observed that young Southern men were extraordinary willful—short of self-control, leading to

[T]he scandalous fiend-like street fights of the South. If a young man feels offended with another... he will not be content to vituperate, or to cast ridicule upon him; he is impelled

⁵ Cramer, “The Racist Roots of Gun Control”; Clayton E. Cramer, “Fear And Loathing In Whitehall: Bolshevism and The Firearms Act of 1920,” paper delivered at the American Society of Criminology conference, San Diego, November 1997.

⁶ David T. Courtwright, *Violent Land: Single Men and Social Disorder from the Frontier to the Inner City* (Cambridge, Mass.: Harvard University Press, 1996), 60.

⁷ Cassius Marcellus Clay, Horace Greeley, ed., *The Writings of Cassius Marcellus Clay* (New York: Harper & Brothers, 1848; reprint, New York: Negro Universities Press, 1969), 225.

straightway to kill him with the readiest deadly weapon at hand, and with as little ceremony and pretense of fair combat as the loose organization of the people against violence will allow. He seems crazy for blood.⁸

Modern historians, using statistics from court records for particular counties also conclude that the South was substantially more violent than the North.⁹ Why?

There is no shortage of theories that have been advanced to explain antebellum Southern violence. Violence was an unavoidable part of slavery, as the economist Adam Smith's criticism of slavery's inefficiency pointed out. Smith observed that a slave worked as little as necessary to avoid mistreatment by the master: "Whatever work he does beyond what is sufficient to purchase his own maintenance can be squeezed out of him by violence only, and not by any interest of his own."¹⁰ Maintaining slavery, some argue, brutalized not only the slave, but also the masters and their employees; constant willingness to use deadly force against slaves, and the expectation of being obeyed, made free men too willing to kill each other on the slightest provocation.¹¹

An explanation for Southern violence that I find more persuasive is the dominance of Scots-Irish immigrants in the South, especially in the back country west of the Appalachians. They came from border counties between England and Scotland where for centuries armies had marched back and forth, killing, pillaging, and raping. The only law that mattered there was the law that you and your extended family (or clan) could enforce. Gentle people in such a situation did not survive long enough to pass on a culture of peace to their children; only the strong survived.¹² (In these sensitive and prickly times I should

⁸ Frederick Law Olmsted, *A Journey in the Back Country* (1860; reprinted New York: Burt Franklin, 1970), 414.

⁹ Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the 19th-Century American South* (New York: Oxford University Press, 1984), 98-99, 106-16, 311 n. 28; David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (New York: Oxford University Press, 1989), 765-71; Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (New York: Oxford University Press, 1982), 43, 366-8.

¹⁰ Adam Smith, Andrew Skinner, ed., *Wealth of Nations* (New York: Penguin Books, 1979), 489, Book 3, ch. 2.

¹¹ Henry Bradshaw Fearon, *Sketches of America: A Narrative of a Journey of Five Thousand Miles Through the Eastern and Western States* (London: Longman, Hurst, Rees, Orme, and Brown, 1818; reprint New York: Benjamin Blom, 1969), 378-9; Olmsted, 447; Thomas Jefferson, William Peden, ed., *Notes on the State of Virginia* (Chapel Hill: University of North Carolina Press, 1955), 162; Wyatt-Brown, 152-3.

¹² Fischer, 621-32; Ayers, 21-23; James G. Leyburn, *The Scotch-Irish: A Social History* (Chapel Hill, N.C.: University of North Carolina Press, 1962), 3-13.

mention that my own ancestors were part of this proud and dangerous immigrant population.)

Many of these immigrants first settled in Ulster, Northern Ireland, where the English government used them to drive out the native Irish. In the following century, when they arrived in America, both the Pennsylvania and Virginia colonial governments used them similarly against the Indians, giving these wild and martial people land on the frontier. Scots-Irish frontiersmen took not only Indian lands, but also squatted on unoccupied white-owned lands, sometimes threatening violence when the lawful owners attempted to take possession.¹³ This Scots-Irish frontier interaction with the Indians (and sometimes with whites) reinforced their existing traditions about the use of force.¹⁴

Finally, the most important reason why the South was so violent was the absence of religion. At the beginning of the nineteenth century, if you went looking for the largest concentration of people in most Southern communities on a Sunday morning (especially in the upland South), you would not find them in church. You would likely find them at the tavern, drinking whiskey. The men would be getting argumentative, challenging each other to a duel, or perhaps skipping the formalities and attempting to maim or kill each other.¹⁵

Underlying most of this violence was the honor culture. Today, when we speak of “honor,” it means something a bit different than it did in the nineteenth century. In an honor culture, people are restrained by shame: “What will people think of me?” In an

¹³ Carlton Jackson, *A Social History of the Scotch-Irish* (Lanham, Md.: Madison Books, 1993), 62-63, 81-82.

¹⁴ Fischer, 765-71.

¹⁵ Fortescue Cuming, *Sketches of a Tour to the Western Country Through the States of Ohio and Kentucky; A Voyage Down the Ohio and Mississippi Rivers...* (Pittsburgh: Cramer, Spear, and Eichbaum, 1810), 118-119; Elias Pim Fordham, Frederic Austin Ogg, ed., *Personal Narrative: Travels in Virginia, Maryland, Pennsylvania, Ohio, Indiana, Kentucky; and of a Residence in the Illinois Territory: 1817-1818* (Cleveland: Arthur H. Clark Co., 1906), 64-65; Thomas Cather, Thomas Yoseloff, ed., *Voyage to America: The Journals of Thomas Cather* (New York: Thomas Yoseloff, 1961; reprinted Westport, Conn.: Greenwood, 1973), 143-144; Elliott J. Gorn, “‘Gouge and Bite, Pull Hair and Scratch’: The Social Significance of Fighting in the Southern Backcountry,” *American Historical Review* 90:1 [February 1985], 18-43.

honor culture, you behave yourself only if you fear that others will know what you did, and disapprove.

In an honor culture, men duel because they are afraid that they will be called cowards or immoral. It does not matter if the charge is true or not; it is what others think about you that matters. The deathbed complaint of John Hampden Pleasants, editor of the *Richmond Whig*, killed in an 1846 Virginia duel, captures the tragedy of a code where men participated in duels out of fear of what would happen to their reputation: “[W]hat a damned immolation this is to be such slaves to public opinion!”¹⁶

In a conscience culture, however, people are restrained by guilt. Instead of worrying about what others know or think about you, you ask, “What will God think of me?” There are no secret sins, for even if no one else knows what you have done, God knows. At least during the early part of the nineteenth century, the honor culture dominated the South, while the conscience culture dominated the North.¹⁷

The honor culture meant that insults could not be safely ignored. If someone insulted you publicly, or cast doubts about your honor, you challenged them to a duel. Dueling declined in the North after the death of Alexander Hamilton at the hands of Aaron Burr. It remained strong in the South, where honor, not conscience, was the dominant force.

Southern state governments tried to make dueling go away by passing very severe punishments, but juries would not convict duelists. Why? Because most Southerners agreed that honor mattered. They saw nothing wrong with dueling, no matter how many wives, sisters, parents, or children grieved over their dead—and most newspapers of this time and place either supported the practice, or condemned it very lightly.

As the punishments for dueling became more and more severe, state legislatures realized that if juries would not convict, they would have to discourage dueling without

¹⁶ William Oliver Stevens, *Pistols at Ten Paces: The Story of the Code of Honor in America* (Cambridge, Mass.: Riverside Press, 1940), 84-86.

¹⁷ Wyatt-Brown, 350-7.

relying on juries, that most democratic of institutions. Instead, many Southern states required legislators, militia officers, judges, and sometimes lawyers to swear that they had not engaged in a duel, usually after some arbitrary date, such as January 1, 1829.¹⁸ If a young man with political ambitions were insulted, he would not demand a duel, for that might require him to commit perjury in the future. Instead, he would pull a dagger or a gun from under his coat, and settle the matter right on the spot. He would not swear falsely under oath, and risk embarrassment or trial for perjury—but he would tear out another young man’s guts with a Bowie knife over mere words—and consider himself morally right for doing so.

In response, Southern governments passed increasingly stringent laws regulating the concealed carrying of deadly weapons, as well as measures to ban the sale of such weapons.¹⁹ These measures, it is generally agreed, were unsuccessful for the same reason that the laws against dueling were unsuccessful: juries accepted the morality of killing people over insults. Indeed, the laws themselves give you some indication that the legislatures knew that these laws against concealed carrying of arms would be unpopular.

¹⁸ Winston Coleman, Jr., *Famous Kentucky Duels: The Story of the Code of Honor in the Bluegrass State* (Frankfort, Ky.: Roberts Printing Co., 1953), 2-3; *Acts Passed at the First Session of the Twenty Second General Assembly, for the Commonwealth of Kentucky* (Frankfort, Ky.: Gerard & Berry, 1814), ch. 119, 147-148; Ireland, “The Problem of Concealed Weapons in Nineteenth-Century Kentucky,” 370-371 n. 2; David Roberts Lewis, “Dissent to Duelling: Arguments Against the Code Duello in America,” (M.A. thesis, Vanderbilt University, 1984), 30-33, 37-40; *Laws of the State of Indiana, Passed and Published at the Second Session of the General Assembly* (Corydon, Ind.: A. & J. Brandon, 1818), 362-365; “State Legislature,” *Brookville Enquirer & Indiana Telegraph*, December 31, 1819, 2; Merton Coulter, “Alexander H. Stephens Challenges Benjamin H. Hill to a Duel,” *Georgia Historical Quarterly* 56(2):175; Peter A Brannon, “Dueling in Alabama,” *Alabama Historical Quarterly* 17:3 [Fall 1955] 97-98.

¹⁹ *Acts Passed at the First Session of the Twenty First General Assembly for the Commonwealth of Kentucky* (Frankfort, Ky.: Gerard & Berry, 1813), 100-101; *Acts Passed At The Second Session of the First Legislature of the State of Louisiana* (New Orleans: Baird and Wagner, 1813), 172-75; *Laws of the State of Indiana, Passed at the Fourth Session of the General Assembly* (Jeffersonville, Ind.: Isaac Cox, 1820), 39; *Revised Laws of Indiana, In Which are Comprised All Such Acts of a General Nature as are in Force in Said State; Adopted and Enacted by the General Assembly at Their Fifteenth Session* (Indianapolis: Douglass & Maguire, 1831), 192; *Acts Passed at the Called Session of the General Assembly of the State of Alabama* (Tuscaloosa, Ala.: Ferguson & Eaton, 1837), ch. 11, 7; *Acts of the General Assembly of the State of Georgia Passed in Milledgeville at an Annual Session in November and December, 1837* (Milledgeville, Ga.: P.L. Robinson, 1838), 90-91; *Acts Passed at the First Session of the Twenty-Second General Assembly of the State of Tennessee: 1837-8* (Nashville: S. Nye & Co., 1838), 200-201; *Revised Statutes of the State of Arkansas, Adopted at the October Session of the General Assembly of Said State, A.D. 1837* (Boston: Weeks, Jordan and Co., 1838), Div. VIII, Art. I, § 13, p. 280; *Acts of the General Assembly of Virginia, Passed at the Session of 1838* (Richmond: Thomas Ritchie, 1838), 76-77; *Acts Passed at the Annual Session of the General Assembly of the State of Alabama* (Tuscaloosa, Ala.: Hale & Eaton, 1838 [1839]), ch. 77, 67-68.

Tennessee's 1838 ban on concealed carrying or sale of Bowie knives or Arkansas toothpicks included provisions that paid \$50 to prosecutors and \$20 to the state's attorney-general for each person convicted under the statute.²⁰ (Multiply those amounts by about 20 or 30 to get the equivalent in current money.) Virginia's statute provided that if a jury found a person innocent of a crime committed with a concealed weapon, the prosecutor could indict him *again* within one year in superior court.²¹ Presumably in superior court, where the jury would contain fewer of the accused's friends and neighbors, it would be easier to get a conviction.

There are differing opinions as to *why* the honor culture and dueling declined when it did in the South, though most historians acknowledge that the rise of evangelical Christianity is the dominant reason for this change. The increasing influence of evangelical Christianity on the South finally killed the institution of dueling, sometimes as a result of courageous Southern clergymen who were willing to condemn the institution, but more often because some Southern gentlemen regarded their faith as more important than the Southern honor culture. Senator Jeremiah Clemens of Alabama accused Senator R. Barnwell Rhett of South Carolina of "knavery and treason" and cowardice during secession debates in 1852. Clemens expected Rhett to demand a duel. Rhett refused, emphasizing that Christianity and dueling were incompatible: "I cannot and will not dishonor my religious profession. I frankly admit I fear God more than I fear man...."²² For Rhett, guilt (his relationship with God) mattered more than shame (how the voters saw him).

Evangelical Christianity played a significant role in bringing to an end not only this bloody system of dueling, but the even more brutal practices by which young men maimed

²⁰ *Acts Passed at the First Session of the Twenty-Second General Assembly of the State of Tennessee: 1837-8* (Nashville: S. Nye & Co., 1838), 200-201 §5.

²¹ *Acts of the General Assembly of Virginia, Passed at the Session of 1838* (Richmond: Thomas Ritchie, 1838), 76-77 § 2.

²² Stevens, 91-92; Benjamin C. Truman, *The Field of Honor* (New York: Fords, Howard & Hulbert, 1884), 15-16, quoted in Lewis, 14.

each other for sport. No historian seems willing to credit the concealed weapon laws with changing public behavior; hundreds of hours of poring over old newspapers and legislative journals give me no reason to disagree.²³

There is a lesson to be learned here. Laws that run contrary to the spirit of a people may suppress one behavior—but like pushing down on one end of a seesaw, the other end rises. The state legislature did change a behavior—dueling. But all sources that I have consulted, in newspapers and documents of the period, and from modern historians agree that the laws they passed only changed one felony into another. Banning dueling did not end aggressive and violent passions. As a delegate to the Kentucky Constitutional Convention of 1849 explained, while arguing against a constitutional ban on dueling, for all its moral flaws, dueling was better than the alternative: "[A] thousand opportunities exist of effecting a reconciliation between parties where a challenge has passed and a duel is proposed, and the difficulty by the interference of friends may be adjusted; but in the murderous street fight the parties excited with passion, heed no one, and arming themselves, go forth in the thoroughfares and the by-ways, and there in a bloody affray, to the terror of every passer-by, settle their quarrel with the knife and the pistol."²⁴

Until the morals of the people changed—and men no longer felt a need to kill each other over the most minor of insults—the laws accomplished nothing. Unfortunately, moral reform is a slow process, and one in which government's role is necessarily limited. The politician may promote the notion of moral reform, but laws cannot make people better from the inside, where it matters.

Peter Cartwright, a backwoods Methodist preacher in the early decades of the nineteenth century, left us a dramatic example of how the society improved, not by

²³ Ayers, 28-29; Christine Leigh Heyrman, *Southern Cross: The Beginnings of the Bible Belt* (New York: Alfred A. Knopf, 1997), 245-7; Rhys Isaac, *The Transformation of Virginia: 1740-1790* (Chapel Hill, N.C.: University of North Carolina Press, 1982), 169-70.

²⁴ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Kentucky 1849* (Frankfort, Ky.: A. G. Hodges & Co., 1849), 822.

changing laws, but by changing hearts, and it contains a lesson that we as members of society today might usefully bear in mind. Cartwright's autobiography described two young men who became deadly enemies as a result of rivalry over a young lady, and their bitter feud ended in a most unexpected way at a revival meeting:

They quarreled, and finally fought; both armed themselves, and each bound himself in a solemn oath to kill the other. Thus sworn, and armed with pistols and dirks, they attended camp meeting. I was acquainted with them, and apprised of the circumstances of this disagreeable affair. On Sunday, when I was addressing a large congregation, and was trying to enforce the terrors of the violated law of God, there was a visible power more than human rested on the congregation. Many fell under the preaching of the word. In closing my discourse I called for mourners [those repenting of their sins] to come into the altar. Both these young men were in the congregation, and the Holy Spirit had convicted each of them; their murderous hearts quailed under the mighty power of God, and with dreadful feelings they made for the altar. One entered on the right, the other on the left. Each was perfectly ignorant of the other being there. I went deliberately to each of them, and took their deadly weapons from their bosoms....²⁵

The two young men settled their differences that night: "A few hours before they were sworn enemies, thirsting for each other's blood, but now all those murderous feelings were removed from them, and, behold! their hearts were filled with love."²⁶

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²⁵ Peter Cartwright, *Autobiography of Peter Cartwright, the Backwoods Preacher* (Cincinnati: Jennings & Graham, 1856), 238.

²⁶ Cartwright, 239.