

**Vengeance and Justice: Crime and Punishment in the 19th Century American South.** By Edward L. Ayers. New York: Oxford University Press, 1984. Pp. ix, 353. \$24.95.

*Reviewed by Mark V. Tushnet\**

The usual image of the South in the nineteenth century is of a region pervaded by racism and violence, yet one in which the concept of honor played a central role in the social order. A number of recent historical studies have begun to investigate the connections among racism, violence, and honor. Edward L. Ayers' book *Vengeance and Justice: Crime and Punishment in the 19th Century American South* admirably investigates some connections that have not been fully explored before.<sup>1</sup> Bertram Wyatt-Brown in *Southern Honor*<sup>2</sup> mapped out in great detail the dimensions of the Southern concept of honor, but he strove too hard to deny a strong connection between honor and slavery. Ayers, in contrast, carefully explains the link.

Ayers begins by describing the "legendary" violence of the South (p. 9). Observers noted that most Southerners bore the scars of violent confrontations, that brawls among the lower classes and duels among the elite were common, and that violent crime often went unpunished. He then discusses the common judgment that slavery bred violence by instilling in slave-owners, and by extension in all whites, a character that valued the complete domination of one person over another, a character that came to infect relations among free men as well (pp. 10-11). Ayers

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<sup>1</sup> The book consists of seven loosely-linked essays on aspects of crime and punishment in the South during the nineteenth century. Four chapters examine the incidence of crime and punishment in three Southern communities before and after the Civil War. Two discuss the antebellum Southern prison system and the post-war system of convict-leasing. In this review I will focus on Ayers' first chapter, both because its discussion of honor provides the analytical framework for much of what follows in the book, and because my knowledge of Southern law in the nineteenth century is largely confined to the antebellum period. I should note that I found the essays that I do not discuss here informative, well-written, and interesting.

<sup>2</sup> B. WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (1982); see also O. PATTERSON, *SLAVERY AND SOCIAL DEATH* 99 (1982) (discussing "timocracies": societies ordered by concepts of honor).

argues that the connection between slavery and violence, which Wyatt-Brown underplays, was significant, but was less direct than the "character" explanation implies. Instead, slavery and violence were connected by the mediating concept of honor, a cultural phenomenon that provided the matrix within which character developed.

It may be useful to approach Ayers' analysis by examining one aspect of honor and crime, the duel (ch. 1).<sup>3</sup> Duels were crimes in a number of ways: they involved assaults in the usual sense, they were specifically prohibited by statute, and significant segments of the Southern elite condemned them. Yet duels persisted, not infrequently over incidents that observers regarded as trivial. Plainly, duelling was a practice intimately connected to the Southern concept of honor.

James Henry Hammond, a prominent South Carolina planter and politician, was involved in several revealing incidents.<sup>4</sup> Hammond, whose father aspired to social place but failed to reach it, began his career as a lawyer in Columbia. He then moved into political journalism, where his defense of the South in the nullification crisis of 1832 brought him to the attention of the state's political leaders. His rise was aided when he challenged a unionist to a duel. The unionist had said that one of Hammond's editorials insulted his constituents, and Hammond responded that the charge was itself an insult justifying a duel. The challenge, which attracted widespread attention and generated publicity favorable to Hammond, resulted in a compromise in which the unionist retracted his "insults" and Hammond "explained" what he had meant by the editorial.<sup>5</sup> Meanwhile, Hammond had courted and married, over her family's objections, a member of one of South Carolina's leading families. In 1834 Hammond was elected to Congress, where he served for one term, and in 1842 he became Governor of South Carolina, though he was at best an inept politician. Hammond's political career came to an abrupt halt in 1843, when his brother-in-law Wade Hampton accused Hammond of attempting to seduce four of his nieces.<sup>6</sup> The accusation was well-founded. Hammond acknowledged in his diary that he had done "every thing short of direct sexual intercourse" with the teen-aged young women. Hampton

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<sup>3</sup> Ayers discusses duelling on scattered pages of his first chapter. A more systematic recent investigation is Schwartz, Baxter & Ryan, *The Duel: Can These Gentlemen be Acting Efficiently?*, 13 J. LEGAL STUD. 321 (1984) (discussed *infra* text accompanying notes 7-9).

<sup>4</sup> On Hammond, see the brilliant biography, D. FAUST, *JAMES HENRY HAMMOND AND THE OLD SOUTH* (1982).

<sup>5</sup> *Id.* at 50-54.

<sup>6</sup> *Id.* at 241-45.

adopted a cunning strategy to ruin Hammond. He let his friends know of the sexual intimacies, thus isolating Hammond from elite society. Among gentlemen, the attempted seduction would have been a breach of honor, justifying a duel. But Hampton deliberately refrained from challenging Hammond to a duel, thereby communicating as effectively as he could his judgment that Hammond could not be regarded as a gentleman who had violated the standards of a community of which Hammond and Hampton were both members.

Hammond's career illustrates the interaction between honor and the duel. A recent article by Warren Schwartz, Keith Baxter, and David Ryan attempts to provide what it calls a positive theory of the duel.<sup>7</sup> Schwartz, Baxter, and Ryan begin by noting that duels were provoked by breaches of honor. Yet, they argue, duelling was not a terribly effective means of deterring dishonorable conduct. Its rules were such that the risk of death, while real, was small: the weapons used were not very accurate at the distances involved, and compromises such as the one between Hammond and his unionist adversary were possible. They suggest that duelling served the nondeterrent function of revealing to observers that the participants were the kind of people who deserved to have unblemished reputations. Since direct observation of character is difficult, some indirect measure such as willingness to engage in risky activity is required. This would account for Hampton's refusal to challenge Hammond to a duel, and for the utility of duelling in promoting Hammond's earlier political career.

As a metaphor of honor, this analysis is certainly enlightening. As a positive theory, however, it has serious defects. One is the tension between the analysis of deterrence and that of reputation-revealing. Suppose, as the deterrence analysis suggests, it was widely known that the risk of death from duelling was small. It then becomes unclear how willingness to engage in a duel reveals anything about character. Observers could shrug off a participant's willingness to duel as meaningless bombast, since little was really at stake.

More substantial problems inhere in the structure of the analysis which postulates that if (a) Southerners were committed to a particular,

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<sup>7</sup> Schwartz, Baxter & Ryan, *supra* note 3. The paper can be read to make a more modest claim (as indicated by the "can" in the subtitle) that under some circumstances an institution roughly similar to the Southern duel could efficiently reveal socially valuable information and deter acts by those seeking to take advantage of the compliance by others with social norms. This existence theorem is much less interesting than the claim that duelling in the South was an efficient institution. Even the existence theorem seems flawed in its analysis of deterrence, as indicated in the text.

well-defined concept of honor, and (b) desired or were induced to implement that concept as efficiently as they could, then (c) they would have adopted a set of rules that closely corresponded to those that actually regulated the practice in the South. Neither condition (a) nor condition (b) is well-supported by evidence.<sup>8</sup> As to the former, there are two problems. First, relatively small changes in the concept of honor to which Southerners were committed, coupled with the efficiency of condition (b), could well produce a set of rules other than those actually observed. That is, the cost-benefit analysis is likely to work effectively, if at all, only when relatively gross cultural characteristics are involved; it is less likely to work well with relatively fine-grained characteristics. Second, Schwartz, Baxter, and Ryan have essentially no evidence to support their imputation of a particular well-defined concept of honor to the Southern elite. Their analysis is of the "If I were a chicken" sort — they ask themselves, "If we, as twentieth century urbanites, had a set of rules about duelling, what values would we have such that those rules would be an efficient way to implement our values?" Although that approach can produce some insights on the level of metaphor, its obvious logical circularity defeats the possibility that it will produce a positive theory of the sort Schwartz, Baxter, and Ryan desire.

One can also question the attribution of an efficiency motivation to the Southern elite. Just about everything we know about the South suggests that slaveowners rejected the values of the marketplace that we now call efficiency. Robert Fogel and Stanley Engerman have argued in a controversial work that by the usual economic measures Southern slavery was economically efficient.<sup>9</sup> Even if that were true, it would not support the broader attribution involved here. Economic efficiency could have resulted from the planters' involvement in market processes whose invisible hand drove them to results they did not intend and may even have not desired. No such invisible hand seems available in the present context.

Ayers discusses and properly dismisses another common explanation

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<sup>8</sup> This criticism is inapplicable to the simple existence theorem. *See supra* note 7. That theorem deals with institutions roughly similar to duelling in the South, and so can accommodate variations in the underlying concept of honor. It also can be satisfied by finding the appropriate motivations or a mechanism that leads to efficient behavior. But, as indicated in the text, there is little reason to think that these conditions were in fact satisfied in the South.

<sup>9</sup> R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974). For critiques, see P. DAVID, H. GUTMAN, R. SUTCH, P. TEMIN & G. WRIGHT, *RECKONING WITH SLAVERY* (1976); H. GUTMAN, *SLAVERY AND THE NUMBERS GAME* (1975).

for Southern violence, including duelling: the role of the frontier. Men on the frontier, freed of the restraints of civilized society, let their passions run wild, leading to a level of violence far higher than that in long-settled areas (p. 12). In more contemporary terms, we might treat violence as a self-help remedy to punish and thus deter breaches of the social order. Violence, however, is not very efficient overall. It will appear as a substitute for state-enforced sanctions only if the state is so weak that its sanctions are even less efficient. Ayers discusses the weakness of Southern state governments (ch. 2), a weakness related to the slave system. But this "economic" explanation for violence is ultimately unsatisfactory. First, as did the "economic" analysis of duelling, this theory depends on estimates of differences in the efficiency of institutions that are certainly undetectable now and that seem likely to have been so small as to make it surprising were they to have had significant institutional consequences. Second, and more important, violence took a particular form in the South. The level of violence in the frontier Midwest was certainly lower than that in the South, and Ayers observes that the violence in Western cattle-towns "may well have been Southern violence transplanted" (p. 12). Third, at least some forms of Southern violence — notably the duel — had analogues in other societies, like nineteenth century Germany, with well-developed state institutions. What links those societies, and distinguishes the South from other frontier societies, is the role that honor played in imposing social order.

What we need, and what Ayers supplies, is a truly cultural analysis of Southern honor, one that is sensitive to the vagueness of cultural concepts as they work their way into social institutions and sensitive as well to the links between cultural concepts and economic and political institutions.<sup>10</sup> Ayers' fundamental observation is that violence and honor were part of a Southern culture in which slavery was the dominant "institution" — or perhaps more precisely, that the South was a culture of slavery.<sup>11</sup> After canvassing a series of observations of contempo-

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<sup>10</sup> Schwartz, Baxter & Ryan, *supra* note 3, provide a section on *Efficiency and Culture*. It does not offer a cultural explanation of honor. Instead, it argues — in my view circularly — that if a society has a dominant set of values, it is efficient to arrange its institutions so that people develop characters that lead them to comply relatively automatically with the dominant values. The circularity is that it is difficult to distinguish among values, character traits, and institutions as this account demands.

<sup>11</sup> That is, even though owners of large numbers of slaves were a minority in the South, they provided the economic and cultural capital that had to be used by owners of one or two slaves and by nonslaveowners. *Contra* J. OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* (1982).

In this connection it may be worth noting that honor mediated between slavery and

aries that identify some components of the Southern concept of honor (pp. 12-19), Ayers turns to his primary argument, which hinges on a comparison between Northern and Southern cultures. In the North, the central organizing concept was "dignity" — "the conviction that each individual at birth possessed an intrinsic value at least theoretically equal to that of every other person" (p. 19). In the South, the central organizing concept was honor. How did these different cultures arise? To Ayers, slavery is the key. Southern culture derived from "the values of a proud and domineering English ruling class . . . whose power and authority [Southern elites] planned to replicate." (P. 21). This aristocratic culture was pervaded by violence and honor. It was supported in addition by the lower-class English and Scots-Irish immigrant to the South, who in their own culture had developed a strain of violence, though not a culture of honor (pp. 21-22).

Yet Ayers notes that many Scots-Irish settled in the middle colonies, where no culture of honor developed. However, the diversity of the North generated cultural conflict that supported the maturation of governing institutions to balance the conflicts among competing interests (pp. 22-23). As Ayers puts it:

Without the disunity engendered by immigrant groups of widely varying background, without the social diversity generated by economic diversity, without any long-term challenge to its slaveholding oligarchies, the South maintained into the nineteenth century a pattern of local and personal power that Northern colonies and states . . . could not . . . perpetuate. (P. 23).

The Northern concept of dignity required personal restraint, not self-assertion. It fit into a matrix of values "that accompanied the growth and development of capitalism" (p. 24). Dignity meant, in its extended metaphoric sense, discipline, progress, moderation, and delayed gratification.

Honor, in contrast, was the cultural expression of slavery. To Northerners, slavery supported honor by producing an extraordinarily wealthy aristocracy accustomed to exercising unquestioned domination, and by structuring a pattern of settlement that impeded the development of government (pp. 25-26). In Ayers' words, "Honor presupposes undisguised hierarchy, and a slave society builds an incontrovertible hierarchy into basic human relations." (P. 26). Ayers does not deny that

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violence in the South, while it could well have played a different, perhaps more limited role in other timocracies like nineteenth century Germany. Only careful historical accounts will be able to distinguish between Southern honor and the definition and origins of honor in other societies.

cultural forces existed in the South that stood in opposition to the culture of honor. The most notable was evangelical religion; a second was the weight given in Western culture to legalism and "the state" (pp. 27-32). But Ayers argues effectively that slavery "insulated" the culture of honor from these forces (p. 27).

One important topic that Ayers' analysis illuminates is a specific manifestation of the weakness of state institutions in the South. The second chapter of the book examines the history of the prison in the antebellum South. Criticizing Michael Hindus for treating as typical the unusual situation in South Carolina, where no prison was built,<sup>12</sup> Ayers offers a convincing explanation of the complex Southern reaction to the development of prisons. The story that Ayers tells is rich with detail, but particularly important is the weakness of the Southern attachment to the penitentiary. In the North the penitentiary movement fit easily into the culture of dignity, as an institution where individuals could take control of themselves. Southerners were attracted to the penitentiary as a progressive reform and as the expression of the values of legality. But they were also concerned that the state should not extend its sway too far into the affairs of the citizenry. "[C]entralized power . . . promised more evil than good. The abstract good of 'social improvement' did not seem worth the risk of giving up concrete liberties." (P. 41). This concern too rested on the existence of slavery. Slavery meant that all white men were equals, none dependent as slaves were on any other, and, most certainly, none to be put in a position of dependency on the state. Slavery produced an image of society that relegated the state to a secondary place, indeed that in its logic was hostile to the existence of the state.<sup>13</sup> In these circumstances it is not surprising that the penitentiary gained only a weak foothold in the antebellum South.<sup>14</sup>

The links Ayers draws among violence, honor, and slavery are important. This cultural account of various dimensions of Southern crime and punishment contributes important insights into central issues in the interpretation of Southern law and history.

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<sup>12</sup> M. HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878* (1980) (discussed p. 294 n.51).

<sup>13</sup> M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

<sup>14</sup> It is worth noting that the structure of this argument makes the weakness of the state a dependent variable, derived from slavery, rather than an ultimate explanation for the use of such self-help devices as duels.

