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TO GAIN THE WHOLE WORLD AND LOSE HIS OWN SOUL: NINETEENTH-CENTURY AMERICAN DUELING AS PUBLIC LAW AND PRIVATE CODE

Alison L. LaCroix*

[And now, having grasped his new-purchased Sword in his Hand, he was going to issue forth, when the Thought of what he was about to undertake laid suddenly hold of him, and he began to reflect that in a few Minutes he might possibly deprive a human Being of Life, or might lose his own. 'Very well,' said he, 'and in what Cause do I venture my Life? Why, in that of my Honour. And who is this human Being? A Rascal who hath injured and insulted me without Provocation. But is not Revenge forbidden by Heaven?—Yes, but it is enjoined by the World. Well, but shall I obey the World in opposition to the express Commands of Heaven? Shall I incur the divine Displeasure rather than be called—Ha—Coward—Scoundrel?—I'll think no more, I am resolved and must fight him.'

Two hundred years ago last July, the most famous duel in the history of the United States left dead one of the young Republic's most renowned statesmen and transformed another into a social pariah and, for a time, a fugitive from justice. When Aaron Burr shot Alexander Hamilton on the cliffs of New Jersey in an affair of honor, it was the culmination of decades of political and personal animosity between the two leaders. It was also a particularly nineteenth-century moment that contained elements of public and private, honor and virtue, and legality and illegality, all of which existed in uneasy tension at a transitional moment in the history of American law.

For the modern observer, the practice of dueling demolishes any happy notion that people are fundamentally the same regardless of the

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particular chronological moment in which they inhabit the world. The notion of two men exacting payment for insult by standing in an open field and shooting at each other appears to us at best quaint, at worst barbaric, but always alien. The notion of a society countenancing such behavior slams the door of difference and its companion, inscrutability, between us and our predecessors. We know dueling through its occasional performances, notably the Burr-Hamilton encounter, but the epic overtones that Weehawken meeting has assumed since it occurred in 1804, the prominence of its principal parties, and the gravity of its result all work to remove it from the realm of the understandable. An impossibly formal ritual of consensual injury, the duel presents itself to us as an airtight thing rather than as a series of actions directed and executed by human beings. We can imagine a scene called a duel, but we have no idea how or why one would be present at such a scene in the first place.

Yet people dueled—in the United States, as recently as the latter decades of the nineteenth century, although the precise date of the last American duel has been lost to history. Duels were referred to as "meetings," "rencontres," "encounters," and "affairs of honor"—the last the most euphemistic but in many ways the most accurate term, for only the participants' insistence that their honor required them to take the field allowed them to comprehend the duel as distinct from the common brawl or gunfight. Conforming his behavior to a written code with its carefully defined language of challenges, seconds, and satisfaction, the duelist demonstrated to himself and to his community that he was a man of honor, a man whose reputation and integrity were so substantial that to affront him was knowingly to set in motion an inexorable chain of delicate negotiations, an exchange of carefully worded letters and

2. Or, more accurately, men duelled. Female dueling was not unknown in the nineteenth century; however, it is difficult to ascertain how much of the discussion of this phenomenon stemmed from its titillating novelty (and open defiance of gender norms) rather than its frequency. Contemporary treatments of dueling by both European and American authors often included discussions of notable duels between women. See, e.g., LORENZO SABINE, NOTES ON DUELS AND DUELLING 192 (Boston, Crosby, Nichols, and Co. 1855) (recounting the 1853 duel in Buffalo, New York between Jane Hall and Catherine Hurley); 2 ANDREW STEINMETZ, THE ROMANCE OF DUELLING IN ALL TIMES AND COUNTRIES 58, 125 (London, Chapman and Hall 1868) (sections titled "Lady Duellists"); BEN C. TRUMAN, THE FIELD OF HONOR 147 (New York, Fords, Howard, & Hulbert 1884) (chapter titled "Clergymen and Women"). Additionally, at least one popular novel—by a female author—featured a duel by a major female character. See MARIA EDGEWORTH, BELINDA 48-54 (Eiléan Ní Chuilleanáin ed., Everyman 1993) (1801) ("I had never fired a pistol in my life; and I was a little inclined to cowardice; but Harriet offered to bet any wager upon the steadiness of my hand, and assured me that I should charm all beholders in male attire."). This Article will focus on the conventional duel between men.
perhaps even of pistol shots. To duel was to enact one’s gentlemanliness by demanding an opportunity to “call out” a fellow gentleman whose name-calling or accusation of lying had attacked the core of one’s being. To duel was to demand nonlegal (even illegal) retribution for a particular type of injury to one’s person.

But the duel also carried with it profound public meaning, in spite of many duelists’ beliefs that they were simply settling private disputes like gentlemen. True, to duel was to construct a binary dispute between two individuals, each of whom asserted total self-contained accountability and autonomy by accepting the consequences of, on one side, the insult, and on the other, the challenge. Ultimately, each man stood alone facing the other across a prescribed distance, the seconds and other attendants hovering uselessly outside the boundary of this binary arrangement. But consider the setting in which this ostensibly private dispute between gentlemen unfolded: the presence of the seconds and the doctors, the meeting at an infamous dueling ground just outside city limits or across the river, the after-the-fact statements by the parties in the newspapers that all the requirements of rule and form had been followed. Seen in this light, to duel was to perform the specific role of gentleman by asserting the right to vindicate personal honor in the realm of public notice.

Thus, a subtle alchemy was required for dueling to be viable as an institution: a translation from private dispute into public performance that needed no translation of the central term “honor,” for individual honor was wholly determined by its performance in the public arena. And luckily for the duel, this was the case throughout the United States for much of the first half of nineteenth century, before the growing dissonance between North and South led northerners to begin to reject the duel as a relic of undemocratic, unchristian, and uncommercial

barbarism. Consequently, the early nineteenth-century duelist could credibly tell himself that he was simply acting on his own internal moral code and believe it, even as he acted out that internal code in a highly public arena. As long as he believed in the identity between his own code and the “code duello,” the gentleman saw no incongruity in monopolizing the public realm for the resolution of his private dispute.

When this crucial identity began to break apart under the impossible weight of justifying the code of honor, however, the duel came to have less to do with an acting-out of the essential identity of the gentleman and more to do with conformity to a particular set of social morés. This change in nature resulted largely from a change in contemporary perception. Nineteenth-century Americans (both North and South, albeit for different reasons) came to view the duel as entirely artificial, a script of manners rather than an organic system of dispute resolution. For the “unwilling duelist” (a popular type after the Burr-Hamilton duel established the vision of Hamilton as a martyr⁴), the desire to conform to the socially enforced code of elite honor—and the consequent necessity of calibrating one’s own honor according to the community standard—conflicted with suspicions of a disjunction between personal morality and the requirements of the traditional view of gentlemanliness.

By mid-century, prominent northern ministers had seized on the conflict between popular pressures and individual morality in a deliberate attempt to redefine the gentleman as constituted by an inner core of virtue rather than by outward representations of mettle. This effort worked a fundamental shift, for it inverted the traditional notion of honor as publicly proved and publicly rewarded in favor of a vision of honor as an internal moral force that displayed itself in, but was not constituted by, the public realm. On this view, honor—recharacterized as moral courage—contributed to the public realm by infusing it with

⁴. In keeping with the immediately mythic status of the Burr-Hamilton duel, Hamilton’s written statement of his reasons for dueling Burr—and his storied personal opposition to dueling—quickly became part of the public discourse on dueling:

To those, who with me abhorring the practice of Duelling may think that I ought on no account to have added to the number of bad examples, I answer that my relative situation, as well in public as private appeals, enforcing all the considerations which constitute what men of the world denominate honor, impressed on me (as I thought) a peculiar necessity not to decline the call. The ability to be in future useful, whether in resisting mischief or effecting good, in those crises of our public affairs, which seem likely to happen, would probably be inseparable from a conformity with public prejudice in this particular.

Christian virtue. A true gentleman need only possess this solid center and carry it with him into all his endeavors; he need not—indeed, could not—look to public approbation to provide it for him. Combining the Protestant belief in the primacy of inner moral qualities, the democratic privileging of genuine character above mannered affect, and the Victorian fascination with the private sphere, opponents of dueling sought to recast the practice as the antithesis of gentlemanly honor in its new incarnation: individual moral fiber.

The drive to eliminate the duel as a socially acceptable mode of dispute resolution in the North coincided with a related but contrary shift in the South as the brewing sectional crisis transformed regional difference into regional antagonism. Dueling occurred with greater frequency and endured longer in the South than in the North, in large part because many southerners embraced the duel and the code as symbols of their own distinctiveness. The northern rejection of dueling began from the premise that the code of honor was an antique relic of a pre-modern, pre-commercial, status-based society that subordinated personal morality to communal norms and character to reputation. The southern fascination with dueling assumed the same premises but reached the opposite conclusion. Already differentiated by their devotion to chattel slavery, southerners desperate to forge a regional identity conceived of themselves as fundamentally different from northerners and willingly embraced the stereotypes applied to them by northern critics.


6. For a discussion of the character-versus-reputation dichotomy, see Van Vechten Veeder, The History and Theory of the Law of Defamation, 4 COLUM. L. REV. 33 (1904). The opposition between internal (character) and external (reputation) with respect to North and South has also been described as one between “dignity” and honor, AYERS, supra note 3, at 19; “respectability” and honor, WYATT-BROWN, supra note 3, at 19-20; and “underlying reality” and “projections,” Greenberg, supra note 3, at 62.

7. WILLIAM R. TAYLOR, CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER 335 (1979) (“The problem for the self-conscious South finally lay in the need which it felt to isolate—to quarantine—itself from the contaminating influence of the Yankee North, which it both feared and envied—and which, finally, was so much a part of itself.”).
honor but specifically *southern* honor, gentlemen in the South continued to duel long after their northern contemporaries had ceased because they viewed the practice as a badge of regional distinction.

Yet the story of dueling in America cannot be explained by reference to simple geographic and cultural differences and thereby pigeonholed as yet another southern institution so entrenched as to require a civil war to force it into line with a more enlightened northern view of democracy. The story is much bigger as well as much smaller, for it concerns the shift in relationship between individual and society that accompanies the transition to what we think of as a modern commercial worldview, as well as the decline of an archaic ritual that attracted a disproportionate amount of national attention given how tiny a sliver of the population ever actually practiced it. Consequently, the North-South dueling dichotomy must be examined within the context of what contemporaries understood as a confrontation between a social system aspiring toward the modern and the commercial and one aspiring toward the classical and the honor-based.

This Article begins by examining the history of dueling in the United States prior to the mid-nineteenth century, when the differences between North and South became more pronounced. As the Burr-Hamilton duel illustrates, affairs of honor were common in the early republican period, many of them outgrowths of highly personal political affrays. The political duel continued to dominate the popular conception of dueling into the 1830s, with many of the most sensational meetings taking place between men from both North and South (and even West) around Washington, D.C., and culminating in the 1838 duel between Congressman Jonathan Cilley and Congressman William Graves.

Part II describes the Cilley-Graves duel and subsequent events. Dueling changed over time; consequently, this Article aims to provide an antidote to static views of it. I argue that by 1838, northerners began to object to dueling, in large part as a result of a growing belief that the code duello did not comport with private, Christian morality. Political disputes involving sectional issues were, however, a notable exception to this disfavor. Meanwhile, southerners continued to cling to their traditional view of public and private as a single, coherent arena for human activity with a single, highly public code of behavior. After the Cilley-Graves duel and the tremendous public outcry it spawned, the gulf between North and South widened—aided by the growing urgency of the same sectional tension that had sparked the congressmen’s fatal duel in the first place. By mid-century, southerners embraced the code of honor as a uniquely and self-consciously southern institution.
Paradoxically, this conception of the code of honor as a societal imperative requiring performance on a grand scale did not comport with southerners' insistence that the code was a "natural" form of resolving disputes. Rather, the duel became a conscious statement of southern difference even more artificial than the manners on which that difference was supposedly based.

Part III examines dueling’s double relationship to law as both (1) a subject of regulation, and (2) a precursor to such causes of action as libel and slander. My analysis of nineteenth-century state cases suggests that the same ambivalence toward the relationship between public and private that accompanied the demise of dueling in the North continued to endure in the legal mode of obtaining satisfaction that replaced the extra-legal duel. The law claimed to protect only individuals’ property in their reputations (i.e., their projections of themselves into the world around them), not in their characters (i.e., their personal moral cores). In so doing, it abandoned the arguments of dueling’s critics, who had attacked the duel’s unhealthy privileging of external over internal values, in favor of a new privileging of the external. The insults deemed worthy of settlement in the public domain were confined to those affecting individuals’ specifically civic, market-based personas; merely personal insults had no place in the legal system of dispute resolution. In this way, the law replaced the code of honor’s conception of individual life as entirely public—and personal insults as therefore worthy of public settlement—with a new idea that public redress ought to be limited to certain types of insult affecting certain special realms of human activity. Unsurprisingly, the defamation lawsuit appears to have been received much more favorably in the North than in the South as a proxy for satisfaction on the dueling ground. No longer constitutive of the individual’s entire identity and unable to adapt to the modern world, the code of honor ceded the field to the narrower, legal modes of satisfaction.

I. EARLY HISTORY: DUELING IN AMERICA BEFORE 1838

A. How Did It Begin?

Temporal remoteness did not create modern uncertainty about how dueling arrived in the United States, for the origins of dueling in both Europe and America are now and have always been murky. Although some nineteenth-century commentators attempted to trace the duel’s
lineage to the medieval system of trial by battle,\textsuperscript{8} twentieth-century scholars have settled on a more recent story of a dueling renaissance beginning in Italy and France and spreading throughout Europe—and ultimately to the United States—in the sixteenth and seventeenth centuries.\textsuperscript{9} Critics and apologists alike strove to connect the modern duel to age-old traditions of adjudicative combat, either to illustrate the barbarism that men in all eras had proven capable of perpetrating on each other or to lend the patina and credibility of antiquity to the increasingly deadly pistol duel.\textsuperscript{10}

Fittingly, the first recorded duel on what was to become American soil was fought at Plymouth, Massachusetts, on June 18, 1621.\textsuperscript{11} The disagreement, between servants Edward Doty and Edward Leister, ended bloodlessly but with the principals being tied together at the necks and heels in full view of the settlement's entire population before being released by their employer. In the years after the Doty-Leister affair, the colonies witnessed a steady stream of duels, many of which can been attributed to the British occupiers' desire to emulate the ways of fashionable European society.\textsuperscript{12} Particularly in the North, the duel was a

\textsuperscript{8} Often credited with originating the duel was one Gundebald, king of the Burgundians, who was said to have authorized a judicial duel in 501 A.D. in the form of a wager of battle "founded on the presumption that a brave man did not deserve to suffer, and that a coward did not deserve to live." \textsc{Sabine, supra} note 2, at 1; \textit{see also} M.A. De Wolfe Howe, \textsc{The Willing Homicide Unfit to Be a Legislator . . .}, at 12 (Boston, Torrey & Blair 1838) (citing Gundebald's judicial combat as the earliest example in a tradition continued by Francis I of France and Charles V of Spain, who themselves came close to dueling in 1528).

\textsuperscript{9} \textit{See Kiernan, supra} note 3, at 6; \textsc{Stevens, supra} note 5, at 2. This is not to suggest that earlier commentators ignored the Continental cultural crossover that produced the duel, however: [T]ruth, honor, freedome and curtesie being as incidents to perfit chivalry upon the lye given, fame impeached, body wronged, or curtesie taxed, a custom hath bin among the French, English, Burguignons, Italians, Almans and the Northern people (which as Ptolemy notes are always inclined to liberty) to seek revenge of their wrongs on the body of their accuser and that by private combat seul à seul, without judicial lists appointed them. \textsc{Baldick, supra} note 5, at 32 (quoting \textsc{John Selden, The Duello, or Single Combat} (1610)).

The term "duel" rather than "duello" was first used in print in 1611; before that time, it was often spelled "dual," as in an affair that involved two men. \textit{See Kiernan, supra} note 3, at 80.

\textsuperscript{10} Even Lorenzo Sabine, who in 1855 prefaced his 268-page alphabetically arranged list of duels throughout history with a wish that his book might "lessen the number of single combats between persons who may rightfully claim the appellation of gentlemen, and so do something to advance the great cause of human brotherhood," counted among his duels an entry for "GOLIATH, the Philistine, and DAVID, the Hebrew," explicitly linking modern pistols-at-ten-paces bloodshed with epic Old Testament struggle. \textsc{Sabine, supra} note 2, at 184-185.

\textsuperscript{11} \textit{See Baldick, supra} note 5, at 115; \textsc{Sabine, supra} note 2, at 164.

\textsuperscript{12} \textit{See} Evarts B. Greene, \textsc{The Code of Honor in Colonial and Revolutionary Times, with Special Reference to New England}, 26 \textsc{PUBL’NS OF THE COLONIAL SOC’Y OF MASS.} 367, 371 (1926).
custom of the colonizers rather than the colonized, a direct affront to the Puritan mission of stamping out debauched and licentious Old World behavior. Ironically, however, it was the Puritan stronghold of Massachusetts—particularly Boston—that gained the most renown as a dueling site in eighteenth-century America, outstripping the South and every other region of the fledgling nation.\textsuperscript{13}

Initiating a common pattern in American law, British authorities responded to the rash of dueling in the colonies with ostensibly stringent laws that had little effect on the actual incidence of dueling. After a spate of infamous encounters on Boston Common in 1695, 1711, and 1718, the colonial government in 1719 enacted a bill against dueling that punished participants (even in nonfatal duels) with a maximum fine of £100 and imprisonment of as long as six months, with an additional requirement that the parties produce sureties for their good behavior for a specified period of time.\textsuperscript{14} When this approach failed to prevent a fatal 1728 meeting on the Common between Henry Phillips and Benjamin Woodbridge—two well-connected young men whose sword fight became America’s first fatal duel\textsuperscript{15}—the response was a more drastic statute that attempted to employ shame sanctions to counteract dueling’s social meaning as a prestige-enhancing device.\textsuperscript{16} Under the new law, any participant in a duel would be publicly carted to the gallows with a rope around his neck, where he would sit for one hour before facing one year’s imprisonment and the giving of sureties for another year. If the duel proved fatal, the survivor faced trial for “wilful murder,” execution, and, like the victim, coffinless burial without Christian rites and with a stake driven through his body.\textsuperscript{17} While it is not clear whether the fearsome penalties of the Massachusetts law were ever brought to bear on any individual, no other colony provided such harsh punishments. Pennsylvania imposed a fine of £20 or three months’ imprisonment, and Virginia had no specific dueling penalties at all.\textsuperscript{18}

\textsuperscript{13} Compare id. at 370 (“Duelling is commonly thought of as especially prevalent in the South; but careful studies of the subject show that appeals to the code were very rare in colonial Virginia, and there are cases on record which indicate public disapproval of the practice.”), with STEVENS, supra note 5, at 11 (“[D]espite the Puritan tradition against mutual slaughter there were more notorious encounters in Massachusetts than in the entire South during most of the Colonial Period.”).

\textsuperscript{14} See Greene, supra note 12, at 371-73.

\textsuperscript{15} See BALDICK, supra note 5, at 118.

\textsuperscript{16} See Greene, supra note 12, at 375.

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 375-76.
By the time of the Revolution, dueling—which had already firmly entrenched itself in American culture—became still more prevalent, stern colonial laws notwithstanding. The turn of the nineteenth century heralded the real heyday of dueling, heavily influenced by American army and navy officers who had come into contact with the British code of honor during the war and who had adopted the same forms to prove themselves officers and gentlemen. 19 Individual representatives of the early Republic’s quest for identity and credibility, its elites adopted the very modes of the mother country they had lately conquered as a means of demonstrating the all-important value they continued to share with that country: honor. At the same time, however, it now fell to these same elites to struggle with the paradox of a supposedly egalitarian, anti-status-hierarchy nation permitting certain of its citizens willfully to kill each other as long as they were of a certain class and followed certain forms. 20

The Northern states seemed especially concerned by this contradiction, promulgating new anti-dueling statutes in response to the ritual’s increasing popularity. Evidencing a slightly different basis for

19. Id.; see also STEVENS, supra note 5, at 50.

20. The importance of the duel as a tool of class hierarchy cannot be underestimated, since the essential premise of the code of honor was that it was the gentleman’s code and that only gentlemen could meet on the field of honor. This fact helps explain the longevity of the duel in the South, where the preservation of hierarchy and order were essential to the survival of the plantation system. BRUCE, supra note 3, at 12 (describing the southern tendency “to see a threat to social order at almost every turn”); BUEL, supra note 5, at 80-81 (noting that in the South, unlike the North, “dueling became fashionable partly because social instability in the period between the Revolution and the Civil War created the need for a means of distinguishing the gentry.”).

Based on the social stratification the duel required and preserved, many scholars have concluded that the code of honor functioned as a defensive device enabling elite classes faced with pressures from below to assert their superiority to mere law. E.g., KIERNAN, supra note 3, at 81-82 (“[T]hose who felt [British] duelling to be an evil were likely to think of it as an aristocratic vice. As such it was more obnoxious to middle-class elements, urban and rural, feeling their growing strength and resentful of the ascendancy of those above them . . . .”). But see Antony E. Simpson, Dandelions on the Field of Honor: Dueling, the Middle Classes, and the Law in Nineteenth-Century England, 9 CRIM. JUST. HIST. 99, 116 (1988) (“The bourgeoisie demonstrated considerable tolerance of the duel. This tolerance can be documented through the contrast between the law affecting dueling and its application, and through the fact of substantial middle-class participation in events on the field of honor.”).

In any event, the tedium of gentry life both in Great Britain and America contributed greatly to the prevalence of dueling among the upper classes. See KIERNAN, supra note 3, at 117 (“A great deal must be allowed for sheer boredom.”); WYATT-BROWN, supra note 3, at 328 (noting the boredom of southern gentry life). Along with tedium came excessive use of alcohol. See KIERNAN, supra note 3, at 120 (recounting Thackeray’s observation that Restoration-era men spent as much as a quarter of their time drinking). Bad moods did not help, either: Kieman notes that “[a] study of how people got on with one another in England from the fifteenth to the seventeenth century indicates that at all levels men and women were extremely short-tempered.” Id. at 79.
their opposition to the duel, a growing number of the post-revolutionary statutes imposed political penalties that permanently disqualified the parties from office. In the North the duel was beginning to be seen as an offense against the civic entity, a privileging of interpersonal disputes and the need for social validation above the countervailing values of social order and state authority. It was only beginning to be seen this way, however, for decades would elapse before northerners would reject the duel altogether. From 1800 to 1810, New York—especially Manhattan—rose to dubious prominence as a locus of dueling, albeit a locus in name only because the majority of New York duelists ferried across the Hudson River to the more congenial (i.e., less prosecutorially aggressive) shores of New Jersey. But the tragic outcome of the July 1804 duel between Aaron Burr and Alexander Hamilton largely quelled New Yorkers' frenzy for dueling, with the state's last fatal encounter taking place in late 1804 between Federalist newspaper editor William Coleman and a Captain Thompson, Republican collector of the Port of

21. Greene, supra note 12, at 386-87; see also Greenberg, supra note 3, at 67 ("In the United States by the nineteenth century, the most common anti-dueling penalty had become a disqualification from holding office."). Regional differences remained even among northern states, with Massachusetts continuing to lead the way in strict anti-dueling laws with its 1784 statute that revived and enhanced the shame sanctions of the earlier colonial statute. In addition to requiring parties to non-fatal duels to sit on the gallows with ropes around their necks, the new law replaced imprisonment with public whipping; instead of dishonorable burial of the guilty survivor of a fatal duel, the new law provided for dissection. All participants were liable to disqualification from office for three years. Pennsylvania, meanwhile, strengthened its penalties in 1779 to provide that parties were subject to a fine of £500 or one year in prison, as well as permanent disqualification from office. In 1786, however, the fine was reduced to £100 and the penalties were differentiated such that the acceptor and the carrier of the challenge received half the penalties of the challenger; additionally, the disqualification from office was omitted. Connecticut's 1779 law imposed a $3000 fine and perpetual disqualification from office on all parties and also required the challenger to find sureties for his good behavior for life. Rhode Island's maximum fine was $500, and its maximum imprisonment was six months, both for all parties; no political penalties were established. Greene, supra note 12, at 386-88.

22. STEVENS, supra note 5, at 47; see also Joanne B. Freeman, Dueling as Politics: Reinterpreting the Burr-Hamilton Duel, 53 WM. & MARY Q. 289, 294-95 (1996) (observing that "there were more honor disputes in the early republic than previously recognized," and that in New York City, "there were at least sixteen affairs of honor between 1795 and 1807, most of them heretofore unrecognized because they did not result in a challenge or the exchange of fire"). Freeman also notes that dueling continued in New York City for several years after 1807. Id. at 295 n.17.
New York,\textsuperscript{23} near a desolate country lane known today to Manhattanites as University Place.\textsuperscript{24}

B. \textit{How It Worked: The Code of Honor.}

Along with the duel’s increasing popularity came increasing formality. The modern, romanticized vision of the duel contemplates billowing-white-shirted participants stand back-to-back before striding a marked distance and wheeling around to fire at each other. The nineteenth-century reality was similarly dramatic but open to significant variation within the prescribed confines of what came to be known as the “code of honor.”

Interpreting a set of rules governing a moribund practice the sole object of which was to effect intentional homicide presents modern-day observers with a major hermeneutic challenge. Yet such an understanding is crucial to a discussion of dueling, for conformity to the code was essential to the duelist’s claim of having behaved honorably. A duelist who acted outside accepted norms jeopardized himself by failing to present his actions as quotations of a socially approved system of behavior. Moreover, his sloppiness elided the boundary between the duel and the vengeful murder, potentially exposing gentlemanly duelists—with their just-in-case wills and gleaming matched pistols—as nothing more than elegantly turned-out street brawlers. Furthermore, because duelists conceived of “duelist” and “gentleman” as synonymous, they escaped having to define “honor” because they could always assert that anyone who needed to ask what honor was obviously lacked it—and therefore had no business on its field.

On some level, then, the duelist’s stated objective of proving his honor was guaranteed to come to naught—or at the very least to tautology—because his reasoning proceeded in the following manner: 1) I am a gentleman; 2) my honor has been traduced; 3) gentlemen duel when their honor is traduced; 4) I must duel in order to affirm to the world that I am indeed a gentleman. According to this reasoning, the initial premise of the duel was identical to the desired conclusion: the duelist is a gentleman and possesses a gentleman’s honor.

\textsuperscript{23} \textsc{Stevens, supra} note 5, at 47, 48-49. The parties fought at eleven o’clock at night during a blinding snowstorm in order to avoid detection and swore to keep the meeting a secret thereafter. Thompson was killed in the Exchange. \textit{See id.}

\textsuperscript{24} University Place lies at the heart of Greenwich Village, traversing the busy stretch between Washington Square Park and Union Square.
Enter the code, the mechanism by which one demonstrated that one’s own rule system mapped directly onto a kind of collective norm comprising identical, aggregated individual norms. The code assured each individual that not only was he a gentleman, he was a gentleman among gentlemen. The status of “gentleman” was thus utterly relative, an ostensibly personal quality that in reality had little or nothing to do with the individual except insofar as it described his willingness, Hamilton-like, to subordinate his private moral code to the public code of honor.25 Because most duelists believed themselves to be gentlemen and came to the field with that fact as a given, however, they could tell themselves that their actions constituted a making patent of that ineffable honor which was carried latent within them,26 rather than the bizarre and anomalous social performance that those actions are now considered to be.

The question of what “really” was happening and what was exerting the force that compelled people to duel is unknowable. The essential point is that people at the time did not think about these things or in these terms. On the contrary, they viewed as completely permeable the boundary between themselves, their morals, and their society; therefore, one could argue, they did not conceive of it as a boundary at all. (And further, one could argue, such a boundary did not exist.) Thus, the question “Do I duel to validate my own conception of myself as a gentleman or to achieve external validation from those around me when assembled in their corporate form as ‘society’?” would have been unthinkable to the early-nineteenth-century dueling gentleman because

25. Much of the scholarship on dueling has focused exclusively on the South and has concluded that the southern quest for honor was “public” insofar as its goal was to enhance status and reputation vis-à-vis other individuals. See, e.g., AYERS, supra note 3, at 16 (“Since the heart of honor was the respect of others, public life offered the opportunity to garner honor from the broadest of all audiences.”); BRUCE, supra note 3, at 29 (“[H]onor was very much a public matter, involving not only one’s opinion of himself, but also his sense of what others should expect him to be.”); WYATT-BROWN, supra note 3, at 350 (describing honor as the reflection of the community’s judgment of a man); William W. Fisher, III, Ideology and Imagery in the Law of Slavery, 68 Chi.-Kent L. Rev. 1051, 1073 (1993) (“The organizing idea of the code of conduct to which [white southern men] committed themselves was that a man has only so much worth as others confer upon him—or, put differently, that a man is what he appears to be.”); Greenberg, supra note 3, at 62 (“The central issue of concern to men in [a culture of honor] is not the nature of some underlying reality but the acceptance of their projections.”); Stowe, supra note 3, at 8 (“[I]t seems to have been particularly Southern to stress an awareness of a man’s public image . . . .”).

26. Cf. HANNAH ARENDT, THE HUMAN CONDITION 175 (2d ed., Univ. of Chicago Press 1998) (1958) (quoting DANTE ALIGHIERI, 1 DE MONARCHIA 13 (1310): “For in every action what is primarily intended by the doer, whether he acts from natural necessity or out of free will, is the disclosure of his own image. . . . Thus, nothing acts unless [by acting] it makes patent its latent self.”).
the order of his universe hinged on the belief that these two forms of validation were identical, that self-conception as a gentleman was worthless without providing society with the opportunity to judge for itself. It did not seem incongruous to him to claim public space to hash out his personal disputes because he saw both as unified by their presence in the undivided world of his experience as a gentleman.

1. The Codes.

The first written compilation of the rules for plein-air dispute resolution emerged in 1777 in the form of twenty-six articles adopted at the Clonmel, Ireland, summer assizes. Known in Galway as the “thirty-six commandments,” the Clonmel code quickly came to dominate duels beyond Ireland, spreading throughout Britain and its colonies and eventually to the United States. Unable to resist the temptation to

27. Cf. Kiernan, supra note 3, at 15 (“By the ritual of the duel, private resentments were lifted above the merely personal level of revenge; the combatant’s honour merged into that of the class to which both he and his antagonist belonged, and to which they were making a joint obeisance. It was this corporate honour that all its members were bound to uphold.”).

28. Whether the nineteenth-century duelist’s view or the modern view is more accurate is beyond the scope of this Article. The point here is that the early-nineteenth-century worldview allowed for dueling because it had not yet devised (and then convinced itself that it had not devised but rather that it had discovered) a distinction between public and private spheres of life.

29. BALDICK, supra note 5, at 33.

30. SABINE, supra note 2, at 30. The thoughtful authors of the code included the following rules:

Rule 13. No dumb-shooting or firing in the air admissible in any case. The challenger ought not to have challenged without receiving offence, and the challenged ought, if he gave offence, to have made an apology before he came on the ground; therefore children’s play must be dishonorable on one side or the other, and is accordingly prohibited.

Rule 22. Any wound sufficient to agitate the nerves and necessarily make the hand shake, must end the business for that day.

Rule 25. Where seconds disagree, and resolve to exchange shots themselves, it must be at the same time and at right angles with their principals. If with swords, side by side, with five paces interval.

Id. at 32-34.

31. The speedy rise of the Clonmel code becomes all the more interesting when contrasted with the conspicuous current of anti-Irish rhetoric running through contemporary British and American commentaries on dueling. Considered hot-tempered and mercurial, Irishmen were seen as particularly avid duelist. But in spite of—or perhaps because of—this abundant experience on the field of honor, they were thought to be unreliable seconds and conniving adversaries, their countrymen’s authorship of the great code notwithstanding. Baldick elaborates:

All authorities were agreed that seconds should be men of experience and moral courage, justice and urbanity; and two authorities specifically debarred infidels and Irishmen—the
produce a British version, an anonymous author calling himself "A Traveller" published a manual titled The Art of Duelling in 1836, which quickly became the most popular treatise on the subject in Britain, detailing precisely how one should conduct oneself at a rencontre. 32 Apparently believing that earlier guides had paid insufficient attention to the duelist’s preparations, “A Traveller” advised the principal to plan a festive evening of cards and port the night before the encounter, rise at five o’clock on the fateful morning, take coffee and a biscuit, and set out for the dueling ground in an anonymous post-chaise lest his own carriage be recognized by Bow Street authorities; upon reaching the field, “he should dismount and walk about, coolly puffing his cigar, leaving his second to forward the arrangements and mark out the ground.” 33

Both the Clonmel code and the advice of “A Traveller” served as the backdrop to the seminal American dueling treatise: former South Carolina governor John Lyde Wilson’s 1858 Code of Honor. 34 Before embarking on a list of numbered rules for dueling, Wilson’s forty-six-page book addressed the public to explain that the book was aimed at bringing about an end to dueling by educating the young “[s]crupulously to guard individual honor, by a high personal self-respect, and the practice of every commendable virtue.” 35 Wilson then proceeded to enumerate specific rules of conduct for sending a challenge, receiving a challenge, carrying out the duties of a second, loading the weapons, and conducting events on the ground.

2. Prelude to the Meeting.

Most duels arose out of a verbal slight in which one gentleman called into question the character of another by using certain coded words such as “puppy,” 36 “liar, poltroon, [or] coward.” 37 The insults

former because . . . “it is not proper that an unbeliever should witness the shedding of Christian blood, which would delight him,” and the latter because “nine out of ten Irishmen have such an innate love of fighting that they cannot bring an affair to an amicable adjustment.”

BALDICK, supra note 5, at 38.
32. Id. at 45.
33. Id. at 45-46 (quoting “A Traveller,” The Art of Duelling (1836)).
34. JOHN LYDE WILSON, THE CODE OF HONOR; OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELLING (Charleston, James Phinney 1858).
35. Id. at 9.
36. In this context, “puppy” signifies not a small dog, but “a fop or coxcomb, corresponding to the French poupée; the word charges a man with being little more than a woman’s plaything or pet.” Freeman, supra note 22, at 299.
most widely acknowledged to be duelworthy attacked the veracity and therefore the manliness of an individual, attempting to unmask him as something other than what he appeared to be and thereby "proclaim[ing] as false [his] projection of [himself]." Known among gentlemen as "giving the lie," these accusations of dissembling justified—and even demanded—the issuance of a challenge from the accused party to his accuser, for only by confronting the issuer of the insult could the affronted party obtain the all-important "satisfaction" that would restore his honor and his reputation.

But satisfaction would not come quickly. As soon as an individual believed he had been given the lie, the verbal exchanges took on a new solemnity as the parties began to conform their particular set of events to the template of the duel. From the initial insult to the meeting on the field, the duel was driven by and understood according to words with specific cultural meaning. Furthermore, because both parties shared the vocabulary of honor, as soon as "events" recast themselves as the particular thing called "an affair of honor" it was clear what would happen next. The formality of the duel began early: the ritual insult; the predetermined meaning; the adoption of bastardized French terms of art such as "rencontre" (meeting), "leech" (to step up to the point of fire), "releaguer" (dueling ground).

37. See Wyatt-Brown, supra note 3, at 360.
38. Greenberg, supra note 3, at 63; see also Stowe, supra note 3, at 12 ("Personal" language, the language in which duels were rooted, was language that cast a man's motives, his intentions, and hence his character and leadership position into public doubt.").
39. Contemporary critics of dueling made much of this need to maintain reputation. See, e.g., Frederick Beasley, A Sermon on Duelling 22 (Baltimore, Joseph Robinson 1811) (commenting that seducers, adulterers, and libertines "when sprinkled with the blood shed in these holy conflicts, come out with the purity of confessors. . . . Wonderful, in such cases, is the efficacy of a duel! Miraculous it's [sic] power, in cleansing the reputation from the most indelible stains!"); Samuel Low, A Discourse on Duelling 16 (Richmond, John O'Lynch 1811) ("They feel no real hostility; they only affect or appear to desire revenge: and for what reason? because their reputation is at stake, and the world, forsooth, expects and requires a duel; because their honor demands the sacrifice. Oh supreme folly! infatuation worse than madness! Oh daring wickedness! shocking impiety!").
40. Not everyone viewed "giving the lie" as an unimpeachable ground for dueling. Andrew Steinmetz, a 19th-century British observer, reported the following anecdote:
   A graduate of Cambridge gave another the lie, and a challenge followed. The mathematical tutor of his college, Mr. V—, heard of the dispute, and sent for the youth, who told him he must fight.
   "Why?" asked the mathematician.
   "Because he gave me the lie," said the youth.
   "Very well; let him prove it; if he proves it, you did lie, and if he does not prove it, he lies. Why should you shoot one another? Let him prove it. Q.E.D."

Steinmetz, supra note 2, at 380.
41. See Simpson, supra note 20, at 109.
The end to be achieved was satisfaction, but the thing to be avoided if possible was the challenge. As technological advances made pistols rather than swords the weapon of choice for duelists, the chances of serious injury increased. In 1817, a British commentator estimated that a duelist had a one-in-four chance of being killed or wounded. Consequently, elaborate negotiations preceded any meeting on the field and often continued up to the day of the meeting, motivated by both sides' desire to avoid the meeting altogether by salving wounded honor with scrupulous formality. Authorities advised cool deliberation and immediate resort to written communication as a means of controlling emotion, both as a sign of good breeding and as a safeguard against inflaming the dispute. Under the heading "The Person Insulted, Before Challenge Sent," Wilson's code recited in detail the proper approach, albeit—as the title suggests—assuming that a challenge would issue in the end: "Never send a challenge in the first instance, for that precludes all negotiation. Let your note be in the language of a gentleman, and let the subject matter of complaint be truly and fairly set forth, cautiously avoiding attributing to the adverse party any improper motive." But there was only so much an affronted party could do before enlisting the assistance of a second, a trusted confidant ("a friend," in the nuanced parlance of the pre-duel correspondence) to represent him in his negotiations with the adversary. The role of the second cannot be underestimated; indeed, Wilson opined that "nine duels out of ten, if not ninety-nine out of a hundred, originate in the want of experience in the seconds." Each second had full authority to exercise his judgment on

42. See id. at 112. Technological advances occurred within limits; however, before the 1830s, even the best pistols were not completely accurate, with "disparts" or "throws" (deviations from trajectory) estimated as half an inch or more across a distance of twelve to fifteen yards. BALDIJK, supra note 5, at 43. Although gun manufacturers insisted that more accurate weapons would reduce incentives to duel, see id. at 44, modern commentators have concluded that a similarly lethal advance—the replacement of the sword by the pistol—"had the effect of strengthening the power of the duel as a public test of courage alone." Simpson, supra note 20, at 114.

43. WILSON, supra note 34, at 12.

44. Correspondence associated with the 1797 affair of honor between Alexander Hamilton and James Monroe, which ended before the parties reached the field, uses typically elliptical language: "Mr. Hamilton requests an interview with Mr. Monroe at any hour tomorrow forenoon which may be convenient to him. Particular reasons will induce him to bring with him a friend to be present at what may pass. Mr. Monroe, if he pleases, may have another." Freeman, supra note 22, at 300 (quoting Hamilton to Monroe, 21 HAMILTON PAPERS 57 (July 10, 1797)).

45. WILSON, supra note 34, at 10. Not every observer took such a charitable view, however. See, e.g., WALTER COLTON, REMARKS ON DUELLING 34 (New York, Jonathan Leavitt 1828) ("But for the fiery agency of these irresponsible subalterns, a duel would seldom take place; and much less seldom terminate fatally. They seem to take an infernal delight in bringing the matter to the most
behalf of his principal and to cobble together a mutually acceptable resolution to the disagreement. The involvement of the second was thus another formalized code element aimed at controlling duelists' passions in order to ensure "civilized" duels and to mitigate the rage associated with affronts to masculine character.  

In the most extreme version of the principal-second relationship—a version upon which dueling's critics often seized—the principals were envisioned as "passive instruments, with no other functions than to pull triggers at word of command." While Wilson did exhort the conscientious second to withdraw "when your principal refuses to do what you require of him," it seems safe to assume that this rarely occurred. Instead, the seconds often cooperated with each other to bring the dispute to a nonviolent resolution, even going so far as agreeing to withhold principals' inflammatory notes in hopes of staving off a trip to the dueling ground. Ultimately, the seconds functioned as the arbiters of satisfaction, custodians of their own principals' honor and guarantors of the identity between the gentleman and the duelist. 

Despite the seconds' endeavors, however, the negotiations often broke down, and the challenge—also called the "cartel"—issued from the offended party (by way of his second) to the offender. It then fell to

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46. BRUCE, supra note 3, at 32-33. Bruce's study focuses on dueling as a particularly southern conflict between natural passion and civilized restraint, see id. at 38, but the specific point about seconds may be generalized to both North and South.

47. Duelling in America, 15 LIVING AGE 467, 468 (Dec. 4, 1847). Echoing Wilson's lament but in the service of the opposition to dueling, the Boston journal continued: "What a scandal to an age of civilization, that A and B should shoot each other because C and D did not know what they were about, and had not the sense necessary to the adjustment of an affair of honor!" Id.

48. WILSON, supra note 34, at 20.

49. BRUCE, supra note 3, at 33. At least two commentators have likened the seconds to attorneys negotiating a contract. See KIERNAN, supra note 3, at 139 ("Most issues could be resolved, it was often held, by judicious management. Between them the seconds could constitute a small court of honour."); Warren F. Schwartz et al., The Duel: Can These Gentlemen Be Acting Efficiently?, 13 J. LEGAL STUD. 321, 337-40 (1984) (describing the seconds as acting both as representatives and as independent judges).

50. Wilson's code was uncharacteristically vague as to precisely when a party could justifiably send a challenge: "After all efforts for a reconciliation are over, the party aggrieved sends a challenge to his adversary, which is delivered to his second." WILSON, supra note 34, at 21. The Clonmel code also skirted the issue. See Simpson, supra note 20, at 113 ("It includes considerable detail on the conduct of the duel, and the conditions under which it was concluded. The things never regulated were the exact circumstances that justified the issuing of a challenge, and the form it should take.").

Sometimes the challenge failed to have the desired result and was declined by the recipient. In such situations, the sender would often print an item in the newspaper or post a public notice declaring the unwilling adversary a coward. Known as "posting," this procedure was a purely
the seconds to draw up the rules that would govern the encounter. The rules specified type of weapons, distance, procedure for giving the command to fire, and number of exchanges of fire, all with an eye toward equality between the principals. Additionally, in the day or two before the meeting the seconds on each side of the affair aided their principals in practicing marksmanship and, less optimistically, drawing up wills.

3. Encounter on the Field.

And so they came to the field, usually at dawn. Many cities had their own celebrated dueling grounds, semi-secret places with names like Bloody Island (in the Mississippi River near St. Louis) and the Dueling Oaks (outside New Orleans). In addition, the District of Columbia had the Bladensburg, Maryland, dueling ground; New York had Weehawken; London had Hyde Park; and Paris the Bois de Boulogne. This is one of the great ironies of dueling: ostensibly motivated by fear of legal sanctions, the parties traveled to sites known by everyone in the community to be suitable for conducting affairs of honor and named accordingly in the local lexicon. In so doing, the parties obliterated any colorable claim to being anything but duelists as they raced over the road in their hired carriages at sunrise, privileging the ritual value attached to a particular piece of land above the need to elude the negligible chance of arrest.

Rather than focusing on secrecy for its own sake, duelists sought out these symbolic sites as part of their performance of the script of the duel, demonstrating to all the world their grasp of what it meant to engage oneself in an affair of honor. Moreover, the quasi-public nature of the dueling grounds—identified enough to possess group meaning, concealed enough to be appropriate for a dispute between private

American invention and supposedly originated in 1807, when General James Wilkinson responded to Virginia Congressman John Randolph’s disdainful decline of his challenge by posting signs saying, “I denounce to the world John Randolph, a member of Congress, as a prevaricating, base, calumniating scoundrel, poltroon, and coward.” TRUMAN, supra note 2, at 83-84. Typically, the recipient’s silence stemmed from a belief that the challenger was a social inferior and therefore not entitled to issue a challenge at all. In such cases, the venomous posting might have little effect.

In other cases, the posting led to a subsequent publication by the recipient of the challenge (and target of the posting) explaining his version of events and disclaiming responsibility for the unfortunate situation. One such recipient, Colonel Isaac A. Coles, was posted by Dr. James C. Bronaugh as “a base liar, infamous scoundrel, and coward.” Coles’s response was a broadside beginning, “Forced before the Public by Doctor Bronaugh, the following Notes place us as we ought to stand,” and reprinting all his correspondence from Bronaugh. I.A. COLES, FORCED BEFORE THE PUBLIC BY DOCTOR BRONAUGH . . . (n.p. 1815).
gentlemen—reflected the duelist's fragile conception of himself as an individual called upon to prove to the world that he was indeed what he claimed to be. On a more fundamental level, mutual adherence to a fictitious secrecy functioned to assure the duelists of the very thing they were out in the field to demonstrate: namely, that each contained within himself a particular self-conception that could readily be translated and understood by those around him because they contained it as well. Even as they prepared to take each other's life, duelists devoted punctilious attention to concealing weapons in portmanteaus so that onlookers could honestly report that they had not seen guns. Other common practices included firing while attendants' backs were turned so that they would not see the shots and hiding behind umbrellas after the exchange so that the attendants would be able to say that they had not actually seen the principals on the field.51

Elaborate schemes of concealment notwithstanding, at some point the principals stood facing each other, their actions driven by the procedural rules the seconds had drawn up. In addition to the principals and the seconds (and further eroding the myth of secrecy), doctors often stood at a safe distance from the immediate area of gunfire, averting their eyes to avoid any charges that they had aided in a duel.52 In his section titled "Who Should Be on the Ground," Wilson directed that each principal might bring his own surgeon and assistant surgeon, as well as any number of friends as agreed upon by the seconds with the exception of sons, fathers, or brothers of the principals.53

All these onlookers stood by as the seconds loaded the pistols. Wilson preferred "smooth-bore pistols, not exceeding nine inches in length, with flint and steel" but commented that "[p]ercussion pistols may be mutually used if agreed on, but to object on that account is lawful."54 After loading the weapon, the second was to present it by placing it in the principal's non-shooting hand with the muzzle facing opposite the direction in which he would fire. The principal was then to grasp the weapon in his pistol hand and bring it to the fighting position: "with the muzzle down and the barrel from you."55

51. See Freeman, supra note 22, at 303 (describing precautions taken at the Burr-Hamilton duel); see also Gore Vidal, Burr 269 (1973) ("Pendleton carries an umbrella. So does Van Ness. Which looks most peculiar on a summer morning but the umbrellas are to disguise our features. We are now about to break the law.").
52. See Kiernan, supra note 3, at 147.
53. See Wilson, supra note 34, at 29. Presumably, this prohibition stemmed from concerns about emotion overwhelming the supposed rationality of the code.
54. Id. at 30.
55. Id. at 31.
Distance varied depending on the arrangement the seconds had brokered. Some duels began with the parties facing each other, in contrast to the popular back-to-back image.\textsuperscript{56} The customary distance was twelve paces, or twenty yards.\textsuperscript{57} As for the actual firing, the duel was more a test of nerve and steadiness than of simple speed, for the "most common command" was "Ready?... "Fire!... One... Two... Three... Stop!", with the principals allowed to shoot at any point between the word "Fire" and the word "Stop."\textsuperscript{58} Weapon malfunctions generally counted as fires. After the first round of fire, the seconds met to determine whether the injured party's honor had been satisfied, which it often was after a single round with no injuries. In cases where the challenger felt the affront to be more serious, however, the exchange could last for as many as three or four rounds before one of the bullets found its mark and either satisfaction or injury was obtained.\textsuperscript{59} An injured principal had a duty to say he had been hit, at which point the duel would cease and the challenger either could demand no more or, if the challenger was the victim, he would excuse his opponent from the field.\textsuperscript{60}

But some of the most celebrated duelists eschewed these formalities, often without alerting opponents that they had opted out of the rules. One such renegade was Andrew Jackson, whose 1806 duel (one of many in his lifetime) with Charles Dickinson earned him years of infamy. After Dickinson allegedly insulted Jackson's wife Rachel and reneged on a promissory note to Jackson, the two met on the banks of Kentucky's Red River according to the following rules: "'[T]he distance shall be twenty-four feet; the parties to stand facing each other, with their pistols down perpendicularly. When they are ready, the single word, "Fire," to be given; at which they are to fire as soon as they please.'"\textsuperscript{61} Dickinson fired first, and as the report issued from

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\item \textsuperscript{56} See Ben C. Truman, Duelling in America 18 (Steven Randolph Wood ed., Joseph Tabler Books 1992) (1884).
\item \textsuperscript{57} See Kiernan, supra note 3, at 147.
\item \textsuperscript{58} See Truman, supra note 56, at 19.
\item \textsuperscript{59} See Bruce, supra note 3, at 36-37.
\item \textsuperscript{60} See id. at 37. Deliberately bloodless duels occasionally crop up in histories of dueling; they "originated not by prior mutual agreement, but by each principal's decision to put his own life on the line while not placing that of his opponent in jeopardy. The drama of the duel was contained in the risk each participant had to take as he sought to defend his honor on the ground." Id.
\item \textsuperscript{61} Indeed, brazen public acceptance of risk—to the point of foolhardiness—became one of the recurring themes of the duel. One anecdote tells of a Joseph Cheves who, reluctant to fight but not to display a flair for the dramatic, toasted his adversary William Trapier with champagne before every shot, drank, and then fired in the air. Id. at 37-38.
\item \textsuperscript{61} Webb, supra note 5, at 71. The following description comes entirely from Webb.
\end{itemize}
Dickinson’s pistol, Jackson—wearing a long, heavy overcoat although the day was warm—clasped his left arm against his chest and raised his pistol. Stepping off his mark, Dickinson cried, “‘Great God! Have I missed him?’” and had to be ordered back to his place. This time Jackson’s pistol malfunctioned and failed to fire. Dickinson and his second had every right to demand that this be counted as Jackson’s turn, but they remained mute. Jackson recocked his pistol and fired again, and Dickinson dropped to the ground dead. As Jackson and his second left the field, it became apparent that Jackson had in fact been hit by Dickinson’s first shot but had twisted sideways in the thick coat, deflecting the bullet from his heart to his breastbone and ribcage, where it remained lodged for the rest of his life. Jackson had deliberately worn a bulky overcoat, failed to announce that he had been hit, and arguably fired out of turn when he took deadly aim at Dickinson—three major code breaches that resulted in widespread public criticism of his behavior.  

C. Attitudes Toward Early Duels.

Early-nineteenth-century duels drew a great deal of attention because they often involved political figures and other renowned persons. Joanne Freeman has described the early republican duel as an example of the highly personal nature of early-nineteenth-century politics and the consequent blurring that occurred between politicians’ self-image and self-performance. For Alexander Hamilton and his contemporaries, she writes,

the duel was a praiseworthy attempt to serve the common good, a public, political act. Yet it was also an intensely personal attempt to preserve his public career and private sense of self—to prove to the world and to himself that he was a man of his word, a man of courage and principle, a leader.  

Because they viewed the political arena as governed by the same norms of personal honor that controlled every other domain of activity, 

62. *Id.* Interestingly, Sabine’s alphabetical compendium of duels throughout history does not mention the Jackson-Dickinson affair. Under “Jackson, Andrew,” Sabine says only the following: Unable to obtain authentic accounts of the affairs with which he was connected in early life, and unwilling to do so distinguished a person injustice, I deem it best to use no part of the fragmentary materials in my possession, and to ask the reader’s indulgence until better success shall attend my researches. 

SABINE, supra note 2, at 221. Was this perhaps a thinly veiled attempt to circumvent speaking ill of a then-venerated (and rehabilitated) figure? Sabine says no more. *Id.*  

63. Freeman, supra note 22, at 292-93.
leaders of the time believed in the logic of the duel. "[M]en of public duty and private ambition who identified so closely with their public roles that they could not always distinguish between their identity as gentlemen and their status as political leaders,"64 they saw no incongruity between conducting their professional as well as personal lives according to the code of honor. On the contrary: like dueling, politics was a gentleman’s business, a business that took as its baseline the common possession of certain ideas and values but that was so anxious about the preservation of these values that it required its practitioners constantly to reaffirm their devotion. As Hamilton’s anguish demonstrates, however, obedience to the code of honor sometimes required gentlemen to surrender their personal beliefs in order to defend their public reputations.

Significantly, both dueling and politics were seen as calling upon elite men to produce for society the best from within themselves. And as long as they believed in the classical republican equivalence between personal and civic virtue, the public arena served as both the source of and the forum for the activities that constituted gentlemanliness. The constant across all areas of the gentleman’s life was his honor, which proceeded in a loop from his presentation of himself in the public gaze to his benevolent but firm governance of his family and landholdings and back into the public gaze. The code of honor required a unified view of the world in which “home,” “work,” and “politics” were seen not as overarching, autonomous institutions but simply as specific, defined types of activity. Thus, the dueling, politicking gentleman could view himself as engaging in these pursuits rather than as adopting different personas for different spheres of his life. The self maintained its integrity as it went about its activities without ever contemplating that the activities might rise up and demand the power to define the self. Unconsciously, the gentleman distinguished between noun and relative phrase: I am not a duelist, I am a gentleman who duels; I am not a politician, I am a gentleman who engages in politics. As long as these statements remained true, nothing more than the gentleman’s fine-tuned sense of decorum was necessary. Only when the category of “gentleman” was no longer necessarily coterminous with those of “duelist” and “statesman” did anyone consider that what had previously been understood as a general statement about the world (i.e., all gentlemen behave this way) was really a specific postulate about a

64. Id. at 295.
certain kind of social order (i.e., if gentlemen derive their identity from the public realm, then they will behave this way).

Not all citizens of the early Republic sympathized with the internal logic of the duel, however. On the contrary, the Burr-Hamilton affair, the encounter that has defined dueling in America since July 11, 1804, plunged the nation into mourning for the martyred victim and arguably destroyed the reviled survivor, who fled south to avoid indictments in New York and New Jersey for issuing a challenge and for murder, respectively. Even eighty years later the standard story of noble Hamilton and vile Burr endured:

Undoubtedly the survivor was made to feel the hell that seems to have been reserved for him upon earth. The living victim of that fatal meeting upon the banks of the noble Hudson was the greater victim of the two. He killed his opponent, to be sure, but he made him a god, with fifty millions of people to-day as worshippers, and ingloriously shot himself into a loathsome living grave.

In response to events on the heights at Weehawken, several northern states passed more stringent anti-dueling laws, but the practice proved too deeply ingrained to be curtailed by law alone. Only one state—Illinois—ever hanged a man for murder by dueling. Furthermore, the Burr-Hamilton affair was followed in 1820 by a famous duel between Commodore Stephen Decatur and Commodore James Barron in which Decatur, “the glory of the navy and the pride of the nation,” was killed with pistols at the popular distance of eight paces. Clearly, the United States was still too enamored of affairs of

65. See STEVENS, supra note 5, at 161-62. For a detailed description and analysis of the Burr-Hamilton duel and associated events, see Freeman, supra note 22, at 304-18.
66. TRUMAN, supra note 2, at 352.
67. See DON C. SEITZ, FAMOUS AMERICAN DUELS, WITH SOME ACCOUNT OF THE CAUSES THAT LED UP TO THEM AND THE MEN ENGAGED 29 (1929). News of the Illinois execution, which occurred in 1819, quickly spread precisely because it was unprecedented. William Bennett had challenged Alphonso Stewart, and Stewart was killed, resulting in a murder conviction for Bennett. The pair fought with rifles at 25 paces. KIERNAN, supra note 3, at 306; SEITZ, supra, at 29.
68. The Bladensburg Dueling Ground, 16 HARPER’S NEW MONTHLY MAG. 471, 475 (1858). Harper's went on to reprint the following obituary from the National Intelligencer:
“A HERO HAS FALLEN! Commodore Stephen Decatur, one of the first officers of our navy—the pride of his country—the gallant and noble-hearted gentleman—is NO MORE.

Mourn, Columbia! for one of thy brightest stars is set—a son ‘without fear and without reproach’—in the freshness of his fame—in the prime of his usefulness—has descended to the tomb.”
Id. at 480-81 (quoting National Intelligencer, Mar. 23, 1820).
honor to be swayed by the deaths of a few national heroes, deaths that ultimately served to enhance the mythic status of the duel.

As they observed the duel gaining in popularity, many public figures undertook after 1804 to convince the American people of the absurdity and sinfulness of dueling. Usually delivered as sermons or public addresses and then printed in pamphlet form, these philippics issued from some of the nation’s most prominent divines and moral leaders. Many of these addresses attacked the duelist’s need for external validation, depicting it as a sign of moral decay and preoccupation with public glamour at the expense of personal rectitude. In an attempt to capture the term “gentleman” and invest it with the Protestant ethic of inner character, dueling’s opponents insisted that true honor required something besides public acclaim; it required the self-contained moral courage of the honest, authentic individual. Yet this vision of private, moral courage did not wholly reject the code of honor’s emphasis on the public realm; on the contrary, the private Christian gentleman was expected to issue forth into the world and enact his core virtue in the commercial and political arenas.

One of the most widely circulated addresses was a sermon delivered by Timothy Dwight, president of Yale College, in September 1804. Obviously aware that his timing suggested a direct response to the death of Hamilton two months earlier, Dwight prefaced his comments with the following disclaimer, which likely had an effect opposite to its stated goal:

The following discourse was written, and is this day delivered, by particular request. It is no part of the design of any observations made in it to refer to any particular events or persons. Whatever may be thought of a late encounter, which has engrossed the attention of this country, it is especially to be remarked, that I do not intend to refer to it at all.

Casting the duelist as a depraved character with a selfish need for the approval of others, Dwight attacked both the man of honor and the society in which he lived. But his sermon expressed ambivalence with

69. Southerners, too, perceived a conflict between the practice of dueling and the teachings of Christianity. The evangelical movement was especially critical of the code of honor, for “[m]any of the activities the Code commended or tolerated—materialism, ostentation, drinking, gambling, and (above all) dueling—they denounced as sinful. Honor itself they characterized as a delusion, and the love of it as a form of bondage.” Fisher, supra note 25, at 1075 (footnotes omitted).

regard to where public opinion truly stood on the question of dueling. For his message to work, it had to acknowledge the importance of enlightened, anti-dueling public opinion while rejecting its malevolent, code-of-honor-enforcing incarnation. At one point, Dwight stated that "public opinion has erred endlessly in every age and country," suggesting that the would-be duelist should instead stand firm against the unhealthy influences of those around him. Yet the next page finds Dwight "boldly deny[ing], that the generality of men, in any (civilized) country, ever justified dueling, or respected duellists... In this country, certainly, the public voice is wholly against the practice." Without resolving this contradiction, Dwight concluded that the real outrage lay in the duelist's willingness to shirk his responsibilities to those around him: "As a man, he owes ten thousand duties to his fellow men; and these are all commanded by his God. His labours, his example, his prayers, are daily due to the neighbour, the stranger, the poor, and the public. He cannot withdraw them without sin."

In contrast to Dwight's emphasis on the individual duelist, Lyman Beecher addressed his April 16, 1806, sermon to abating the spread of dueling. How were conscientious opponents to the code of honor to prevent it from winning more lives? "By withholding [their] suffrages from every man whose hands are stained with blood, and by intrusting to men of fair character and moral principle the making and execution of your laws." Beecher aimed to strike at the very heart of the tripartite gentleman-duel-politics alliance, sundering the unity between the gentleman-acting-as-duelist and the gentleman-acting-as-politician and establishing a new set of norms to govern the realm of political activity. By severing the connection between the code duello and politics, Beecher sought to erect a boundary around the area of political activity. In so doing, he proposed a distinctly public, political sphere that required those who would enter it self-consciously to accept and conform to its special rules. The code of honor would thus be reduced from a generally appropriate mode of behavior to a narrowly defined and artificial set of rules suddenly out of place in one of its essential theaters of operation. Deprived of the ability to perform his honor, the politician would be forced to find other ways to prove his fitness for public office.

71. Id. at 13.
72. Id. at 14.
73. Id. at 22.
There is an irony here, for this is precisely the opposite of what Beecher conceived himself to be doing. Even as his sermon called for politics to be set off as a special zone that no duelist could penetrate, an exceptional safe harbor separate from the great confusion of every other human activity, Beecher seemed to take as his premise the notion that it was *duelists* who were the outliers from society, operating in a narrow and unrealistic mode of behavior. While his suffrage-based remedy put forth a vision of "politics" as a new entity created and defined in order to remove it from the ravages of the duelist's bloodied hands, his larger message aimed to convince his listeners that dueling was not as widespread as they had been led to believe.\(^{75}\) In other words, the logical conclusion of his no-votes-for-duelists campaign would be to drive a wedge between the small, political (duel-free) and the large, personal (duel-full) arenas of activity, even as he argued that it was *dueling* that was aberrant and parochial.

Other elements of Beecher's sermon suggest a nascent conception of a distinction between private and public morality but quickly reject that distinction out of a fear of its repercussions for public life. In phrases uncannily similar to sentiments uttered today, Beecher addressed the relevance of private morality:

> [W]hat is a man's political creed—what is his past conformity to your wishes, when his profligate private life demonstrates that he is prepared to betray you the first moment he shall find it for his interest? Dispense with moral principle and private virtue, and all is gone.\(^{76}\)

For Beecher, then, private virtue had some content apart from the private and dangerous values embodied in the code of honor. Moreover, "private virtue" was so named presumably because it contrasted with some other sort of virtue that existed in a different realm of human activity. Yet Beecher was unwilling to conceive of a genuine separation between public and private virtue, as illustrated by his conclusion that political activity required private morality. Like dueling's proponents,

\(^{75}\) See, e.g., id. at 33 ("There are yet remaining multitudes, thousands and thousands whose abhorrence of duelling, though diminished by the frequency of the crime, is still sufficient to overwhelm its abettors with infamy."). Many opponents of dueling struggled to paint the affair of honor as a modern scourge while also claiming that public opinion—at least the public opinion that counted—rejected the practice. See, e.g., Low, *supra* note 39, at 7 ("[I]t would be monstrous injustice to ascribe my pacific conduct to an unmanly degree of fear, or to brand me with the opprobrious name of coward. But you will be thus branded.—By whom? Surely not by the intelligent and virtuous: No, but by the multitude, who do not think correctly, and cannot reason justly.").

\(^{76}\) BEECHER, *supra* note 74, at 12 (emphasis added).
Beecher believed in a connection between the public and private realms; unlike the duelists, however, Beecher’s vision began with private morality and projected it into the public arena rather than privileging the public world of appearances.

By the late 1820s, critics of dueling were more numerous, and at least one prominent pamphleteer had begun to speak explicitly in terms of public and private as distinct locations of activity, if not as components of human personality. In a sixty-two-page volume titled simply Remarks on Duelling and taken from “a course of ethical Lectures, delivered by the Author to the Cadets, members of the American, Scientific, and Military Academy,” Walter Colton attacked the notion that personal gunfights translated into public honor. Describing the initial insult as occurring “within the limits of the domestic circle,” Colton rebuked the duelist for turning personal affairs into public affrays:

And we are warranted in saying, that in many instances, the wound which the complainant pretends has been inflicted upon his fair reputation, would never have been so much as discovered by the public, but for a determination on the part of the person affected, to make it an occasion of bringing himself into the public notice. He cries, there is a wound on my reputation, a blot upon my character, and begins to unfold himself, till at length a wound and blot are in fact discovered, but whether they have been inflicted by himself, or another, is the only question that awakens the least interest.

In Colton’s view, the duelist could not be justified in dragging his messy private altercation before the public eye and then blaming the public eye for forcing him to the field of honor. For Colton, the duel was an inappropriate remedy for a personal insult because the duel sought recompense for interior damage in a highly visible, exterior context. Painting a picture of an indifferent public yawning at the prospect of yet another pair of self-aggrandizing code devotees facing each other on the field, Colton noted, “Every scene in the play is familiar as the features of a family cur. The actors play for their own sport, and whether they are behind or before the curtain, is a matter of no consequence.... They are

77. COLTON, supra note 45, at 3.
78. Id. at 15.
79. Id.; cf. WYATT-BROWN, supra note 3, at 360 (“[The]he principals might well have been acting out private dramas of their own and asking the public to bear witness that their inner sense of worthlessness applied better to the opponent than to themselves. The parties sought to kill personal anxieties along with the scapegoat who stood ten or twenty paces away.”).
not of that consequence in the world, which they had supposed.\(^{80}\)
Rather than providing a means to attain honor and status, the duel
inappropriately demanded civic space in order to validate interpersonal
conflict. Echoing Beecher and Dwight, Colton described the true
gentleman as impervious to public opinion but always able to draw upon
his reserves of moral fiber when called upon to enter the public realm:
“A man of true courage is always cool and deliberate . . . . From the
conflicting circumstances around him, he retires within himself,—he
rises upon his collected energies, till he obtains an elevation, that quietly
overlooks the convulsed elements beneath.”\(^{81}\)
Moreover, in addition to this changing view of how disputes should
be settled, Colton’s comments suggest that the view of the underlying
dispute had also altered. The insult to reputation occurred in the
“domestic circle,” “behind the curtain,” among ordinary people with no
claims on the public attention; for the combatants, the duel was “an
occasion of bringing [themselves] into public notice.” Colton’s remarks
demonstrate an awareness of a boundary between private and public
spaces, between intimate quarrels and affairs worthy of community
recognition, that earlier commentators had not articulated. Dueling was
beginning to lose its usefulness in the North because it revealed nothing
about individuals’ inner character at a time when northerners were
increasingly focused on the role of private morality in a commercial
society. The purpose of the duel was to provide a single, discrete, public
event in which a man would be judged and his reputation assigned based
on his ability to perform a preconstructed social role. This social role
had little meaning for northerners, who increasingly considered
mannered punctiliousness to be the exclusive province of the southern
gentry.

II. HEYDAY AND DECLINE: 1838 AND AFTER

A. The Cilley-Graves Affair.

Ten years after Colton’s pamphlet came one of the most infamous
duels in American history,\(^{82}\) a meeting uniquely political in that all four

\(^{80}\) COLTON, supra note 45, at 16-17.

\(^{81}\) Id. at 23.

\(^{82}\) Truman counts it as one of the four most noted fatal duels fought in the United States,
along with the Hamilton-Burr, Decatur-Barron, and Broderick-Terry encounters. In all but the
Cilley-Graves duel, pistols were the weapon of choice. See TRUMAN, supra note 2, at 81. On the
Broderick-Terry duel, see infra text accompanying notes 190-92.
principals and seconds were United States congressmen, uniquely brutal in that the parties exchanged three rounds of rifle fire before one of them fell, and uniquely foolhardy to modern-day eyes in that the principals had no real quarrel with each other. Yet the meeting on February 24, 1838, signaled a watershed in the history of dueling in America—not because it was the first or the last of its kind, but because it contained within it, in tragic purity, all the refined elements of the duel at its zenith. By the 1830s, the duel had achieved the stylized form that would mark its halcyon days in the South, as well as the relentless insistence on public honor as a sign of personal worth that would restrict it among northerners to political disputes carried on in the southern latitudes of the District of Columbia. Moreover, the Cilley-Graves affair made explicit the role of the duel as a symbol of North-South difference even as it became the modality by which northerners and southerners settled their differences with one another. In the decades before the Civil War, major political disputes increasingly served as the backdrop for duels. In spite of Lyman Beecher’s entreaties thirty-one years earlier, duels continued to center on political issues for two reasons: politics was still largely personal, and politics was increasingly associated with the rising sectional conflict.

1. The Insult.

In addition to its other singularities, the Cilley-Graves duel originated in a convoluted set of facts. In remarks on the floor of the House of Representatives responding to Virginia congressman Henry A. Wise’s motion for a select committee to investigate corruption charges that a New York newspaper had leveled against another member of Congress, Congressman Jonathan Cilley stated that “he did not think the charges were entitled to much credit in an American Congress.” In

83. Sabine begins his entry for the Cilley-Graves duel thus:

The parties were members of the House of Representatives; the first from Maine, the last from Kentucky. Among the gentlemen present at the meeting were six other members of Congress; namely, Messrs. Crittenden and Menefee, of Kentucky; Wise, of Virginia; Duncan, of Ohio; Bynum, of North Carolina; and Jones, of Wisconsin.

This was a combat under the duello, under a mere point of honor. There was no difficulty between Messrs. Graves and Cilley, at any time. Even upon the ground, after an exchange of shots, the latter declared, that he entertained for Mr. Graves “the highest respect, and most kind feelings.”

SABINE, supra note 2, at 89.

84. Id. at 92. Sabine’s account of the duel comes from the report of the House committee appointed to investigate the causes of Cilley’s death—specifically to determine whether a breach of the privileges of the House had occurred.
response, Wise is said to have suggested that such an investigation might target Cilley himself, muttering, "'But what is the use of bandying words with a man who won't hold himself personally accountable for his words?"" A blatant reference to New Englanders' refusal to bind themselves to the code of honor, Wise’s remark likely touched a nerve with Cilley and other northern congressmen, who were regularly the targets of such slights.

Cilley’s comments elicited a response from James Watson Webb, editor of the New York Courier and Enquirer—the anonymous “Spy in Washington” who had authored the original corruption charges and a notorious duelist in his own right. In a letter tendered to Cilley via Kentucky congressman William J. Graves, Webb demanded that Cilley explain his remarks on the floor of the House. Cilley refused even to read the letter, prompting messenger Graves to enter the epistolary fray. Graves’s February 20 letter introduced the third-party dispute that would prove the subject matter of the duel: whether Cilley had intended to insult Webb by refusing to accept Webb’s letter. Graves put the question to Cilley:

[Y]ou will please to say whether you did not remark... that the ground on which you rested your declining to receive the note was distinctly this: that you could not consent to get yourself into personal difficulties with conductors of public journals, for what you might think proper to say in debate upon this floor... and that you did not rest your objection in our interview upon any personal objections to Colonel Webb as a gentleman.

Graves thus demanded that Cilley affirmatively state that it was not because he disputed Webb’s status as a gentleman that he had refused Webb’s letter. Furthermore, Graves demanded private retribution for comments Cilley had made from the floor of Congress in his public, civic capacity. Yet by inserting himself into an as-yet one-sided debate and demanding a response from Cilley, Graves had effectively implied that Webb was in fact not a gentleman; otherwise he would not have

85. STEVENS, supra note 5, at 221.
86. See KIERNAN, supra note 3, at 308; see also infra note 173 (describing Webb’s further adventures); SEITZ, supra note 67, at 283-309 (discussing Webb’s 1842 duel with Kentucky Congressman Thomas F. Marshall and his ensuing indictment and arraignment in New York). Along with—and often with respect to the same issues as—politicians, many colorful 19th-century newspaper editors were inveterate duelist. But the two classes of public figures rarely intersected on the field of honor. See Freeman, supra note 22, at 305 n.58 ("[T]he ambiguous social status of newspaper editors made them unsuitable dueling partners for politicians and more fitting victims of legal action or physical violence—in particular, canings.").
87. SABINE, supra note 2, at 93.
needed Graves to act on his behalf. This irony was apparently lost on Graves, however.

The conflict escalated when Cilley refused to deny the motive Graves ascribed to him, reiterating that he had "declined to receive [the note] because I chose to be drawn into no controversy with him."\footnote{Id. at 94.} On February 23, Graves replied with a challenge to Cilley, delivered by Wise:

"As you have declined accepting a communication which I bore to you from Colonel Webb, and as, by your note of yesterday, you have refused to decline on grounds which would exonerate me from all responsibility growing out of the affair, I am left no other alternative but to ask that satisfaction which is recognized among gentlemen. My friend, Henry A. Wise, is authorized by me to make the arrangements suitable to the occasion."\footnote{Id. at 95.}

Passive in motive as well as voice, Graves's note was nevertheless active in import: he demanded satisfaction from Cilley for Cilley's supposed insult to Webb. Echoing both Hamilton's words when faced with Burr's challenge and Hamilton's storied opposition to dueling, Cilley explained his resolution to a friend: "'Although I know the sentiment of New England is opposed to dueling, I am sure my people will be better pleased if I stand the test than disgrace myself by humiliating concessions.'"\footnote{STEVENS, supra note 5, at 223.} In spite of the efforts of Beecher, Colton, and other critics, the dissonance between private values and public norms still resolved itself in favor of the public.

Exercising the challenged party's prerogative, Cilley proposed rifles at eighty yards and selected the Anacostia Bridge near Marlborough, Maryland, for the site of the encounter.\footnote{Apparently, Cilley was inexperienced with pistols. See id.} Calling the terms "'unusual and objectionable,'" Wise nevertheless agreed on behalf of

\footnote{\textbf{Sabine, supra} note 2, at 95.}
Graves. Negotiation had failed. The dispute would be settled on the field.

2. The Meeting.

The parties arrived at the agreed-upon location at about two o'clock on the afternoon of February 24. After the seconds had marked off the distance, Cilley and Graves took their positions shortly after three o'clock and exchanged shots. Both missed. A colloquy ensued among the principals' friends wherein George Wallace Jones, Cilley's second, inquired of Wise whether Graves was satisfied. More lawyerly hairsplitting followed:

Mr. Wise immediately said, "Mr. Jones, these gentlemen have come here without animosity toward each other; they are fighting merely upon a point of honor; cannot Mr. Cilley assign some reason for not receiving at Mr. Graves's hands Colonel Webb's communication, or make some disclaimer which will relieve Mr. Graves from his position?" Mr. Jones replied, "While the challenge is impending, Mr. Cilley can make no explanation." Mr. Wise said, "The exchange of shots suspends the challenge, and the challenge is suspended for explanation." Mr. Jones thereupon went to Mr. Cilley and returned.92

Jones returned with Cilley's reiteration of his original story: Cilley had declined to receive the note because he did not want to be drawn into controversy with Webb, and he still would not offer any opinion on Webb's character as a gentleman. Cilley's supporters "urged that Mr. Graves should now be satisfied, and that the affair should now terminate, without requiring from Mr. Cilley any further concession beyond what he had already made,"93 but Graves's friends Wise, Crittenden, and Menefee insisted that the fight continue.

The principals exchanged a second round of shots and missed again. Graves insisted on another shot; again the friends convened. At one point, seconds Jones and Wise walked away from the rest of the group and attempted to string together words that each thought would mollify his principal without costing the other's honor, but to no avail. As the parties prepared for the third round of fire, Wise told Jones that if the shots missed again he would propose shortening the distance "to

92. Id. at 97. Sabine does not mention what was occupying Cilley and Graves during this exchange.
93. Id. at 98 (internal quotation marks omitted).
prevent a prolongation of the affair." Jones agreed to entertain the proposition if the shots missed. But as the two fired together, Graves's shot found its mark. "Mr. Cilley was shot through the body. He dropped his rifle, beckoned to one near him, and said to him, 'I am shot,' put both his hands to his wound, fell, and in two or three minutes expired."

3. The Aftermath.

Cilley's death caused a tremendous furor around the nation, especially in the Northeast. The congressman's casket lay in state in the Capitol rotunda beneath John Trumbull's "Surrender of Burgoyne," in which Cilley's grandfather, an officer in the Continental army, was pictured. Politicians and leaders gathered to pay their respects; the justices of the Supreme Court, however, refused to attend. Assigned to investigate the events that resulted in Cilley's death, a specially convened House committee reported that Webb and two of his cronies had planned to assassinate Cilley if he survived the meeting with Graves. Somewhat ironically given the complicity of its members in the affair (or perhaps out of a sense of guilt about that complicity), the House report described dueling as "that custom, the relic of unenlightened and barbarous ages, which was formerly supposed to be a

94. Id. at 100.
95. Id. (internal quotation marks omitted).
96. See STEVENS, supra note 5, at 226.
97. See id. at 225.
98. See HENRY WARE, JR., THE LAW OF HONOR: A DISCOURSE OCCASIONED BY THE RECENT DUEL IN WASHINGTON 18 (Cambridge, Folsom, Wells, & Thurston 1838). Both the House and the Senate, however, voted unanimously to attend the funeral, determining that "as a testimony of respect for the memory of the deceased, they will go into mourning, by wearing crape round the left arm for thirty days." N.Y. MORNING HERALD, Mar. 1, 1838.
99. See SABINE, supra note 2, at 101. The plot was truly diabolical:

Early in the day on which [Cilley] fell, an agreement was entered into between [Webb and two others], to arm themselves, repair to the room of Mr. Cilley, and force him to fight Webb with pistols on the spot, or to pledge his word of honor to give Webb a meeting before Mr. Graves; and if Mr. Cilley would do neither, to shatter his right arm.... Before arriving there, it was agreed between Webb, Jackson, and Morell, that Webb should approach Mr. Cilley, claim the quarrel, insist on fighting him, and assure him if he aimed his rifle at Mr. Graves, he [Webb] would shoot him [Mr. Cilley] on the spot. It was supposed by them that Mr. Graves, or Mr. Wise, or some of the party, would raise a weapon at Webb, whereupon it was agreed that Webb should instantly shoot Mr. Cilley, and that they should defend themselves in the best way they could.

Id. at 100. Webb's determination to avenge himself on Cilley—and Graves's virtual irrelevance to the main quarrel—is obvious here, given the possibility that events might conspire to have Graves firing on Webb.

The House committee recommended expulsion for Graves and censure for Wise and Jones, leaving Webb to "'the chastisement of the course of law, and of public opinion.'" Id. at 108.
proof of some degree of physical courage, but is, in fact, a signal monument of the want of the higher attribute of moral courage."100

Unlike the slain Hamilton, who was universally venerated as a martyr, Cilley received a measure of criticism for his failure to draw on the reserves of "moral courage" that every virtuous northerner was expected to possess. By agreeing to Graves's challenge, Cilley had capitulated to the irrational forces of appearance, "which can furnish no criterion for truth, justice or honor," rather than asserting the preeminence of inner character as a guide to public identity. After a promising start, the new idea of the Christian gentleman had stalled in the face of the overwhelming need to prove both masculinity and northern competence on the field of honor.

Nevertheless, Cilley's participation in the duel disqualified him neither from sympathy nor from victimhood. On the contrary, the Cilley-Graves affair fit perfectly into the governing narrative of the duel that had endured since the notorious Weehawken encounter: the unwilling opponent of dueling so hounded by calumny that he is ultimately goaded into a meeting against his better judgment, a meeting at which he falls to the ground and dies with words of forgiveness on his lips.101 The practice of dueling seemed an unavoidable evil, a symptom of societal disease that could be treated but never cured. After all, if noble Cilley believed himself compelled to duel, who could argue that to duel was merely to submit to base vanity?

100. Id. at 107 (emphasis added).
101. Id. at 103 (noting that even after the first round of fire, Cilley "positively avowed . . ., that he entertained for [Graves] the highest respect and the most kind feelings"); see also The Bladensburg Dueling Ground, supra note 68, at 480 (describing the scene after both Barron and Decatur had been wounded—Decatur mortally: "The interview was inexpressibly affecting, reminding one . . . 'of the closing scene of a tragedy—Hamlet and Laertes.' Barron proposed that they should make friends before they met in heaven, for he supposed they should both die immediately.").

Both these narratives comport with "A Traveller's" instructions to the duelist who found himself wounded:

"I cannot impress upon an individual too strongly the propriety of remaining perfectly calm and collected when hit; he must not allow himself to be alarmed or confused; but summoning up all his resolution, treat the matter coolly; and, if he dies, go off with as good a grace as possible."

BALDICK, supra note 5, at 48.
4. The Response.

Newspapers, abundant and vociferous commentators on all events of nineteenth-century political life with no pretense to objectivity, captured the spectrum of responses to the Cilley-Graves duel. While it is entirely too easy to conclude that the South remained indifferent to Cilley’s death, the response in the North—particularly New England—was both more dramatic and more willing to cast the encounter as part of a larger social phenomenon of political squabbles leading to the dueling ground. On their editorial pages, newspapers reported the facts of the duel as they became known, bruiting details of the events that had led to the meeting, speculating about the fates of Graves, Webb, and the other parties, and demanding a wide array of responses to the events.

Manhattan papers had the most to say about the duel, largely because the activities of one of their own—and his role in local political conflicts—were widely acknowledged to have precipitated the encounter. “The public mind is in a state of agony,” observed the New York Morning Herald in one of its initial commentaries on the meeting, headed “Horrible Doings.” Taking for granted the malevolence of Webb, “the instigator of this most foul and inhuman transaction,” the author noted that Representative Alexander Duncan of Ohio (one of Cilley’s friends at the dueling ground) had also been involved in the House debate that had caused Webb such offense, but that “Webb selected . . . the late member from Maine, knowing that he, being from the east, might hesitate about fighting.” Combining a general distaste


103. But see Stevens, supra note 5, at 226 (reporting a tremendous outcry in the North and commenting that “[n]one of this sentiment, however, was echoed south of the Mason-Dixon line”).

104. Nineteenth-century newspapers comprised advertisements, reprints of other papers’ reports, serialized fictional stories, and a substantial amount of what we would term editorial material. Most papers were four pages long and devoted a substantial percentage of their columns to tiny, classified-style advertisements. Additionally, no clear line separated editorials from articles: the latter almost always blurred into the former, with considerable attention to lauding the particular paper’s political party and attacking the opponents and their paper.

105. N.Y. Morning Herald, Feb. 27, 1838.

106. Id.

107. Id.
for dueling with a more specific attack on Webb's negative influence on New York politics, the Herald commented:

We scarcely know in what terms to characterize this horrible effusion, in which a deliberate propensity for shedding human blood is characterized by the names of "chivalry" and "honor."...

... The Wall street press has long been corrupt and rotten—it is now reeking in human blood. Let the people of this city meet at once, and ascertain if any moral principle exists in our social system.\(^{108}\)

In the days following the duel, the Herald reported some ambivalence among New Yorkers about Cilley's role as both victim and perpetrator. After observing that "[t]he public mind is sick—a feeling of loathing has taken possession of it towards all the parties concerned in the awful tragedy,"\(^{109}\) the editor quoted the New York Sun's characterization of Cilley as a "young, talented and promising young man, cut down in the prime of his life, while six or seven scoundrels were present aiding and abetting."\(^{110}\) This view stood in sharp distinction to that of the Express, which the editor quoted as saying, "Mr. Cilly [sic], dead as he is, we must say was guilty of but a quibble—because he wanted the courage to resist, as well he could, considering the New England District he represents, the absurd and criminal practice of duelling."\(^{111}\) After three weeks, however, the focus of popular commentary shifted such that the Herald contained only a single item related to the encounter, asking, "The abhorrence of the public sentiment against the practice of duelling, increases and widens as the news of the late duel travels over the land .... Ought not the idea of "gentleman" to be reformed altogether?"\(^{112}\)

By invoking the word "gentleman," which as a contested term had served as the gravamen of this particular duel and as an overarching ideal spurred countless other men to the field of honor, the Herald highlighted the traditional congruence between expectations of personal and public behavior and asked whether that congruence and its component parts should be reconsidered. The newspaper's call for a reexamination of the idea of "gentleman" suggested that this congruence lived on: the way to curtail the practice of dueling was to excise it from

\(^{108}\) Id.
\(^{109}\) N.Y. MORNING HERALD, Feb. 28, 1838.
\(^{110}\) Id.
\(^{111}\) Id.
\(^{112}\) N.Y. MORNING HERALD, Mar. 27, 1838.
the gentleman’s code of behavior while continuing to demand that individuals in society comport themselves according to a revised version of the code. A newly sanitized gentlemanliness with dueling defined out of it would now govern politicians’ disputes. Increasingly, the personal norms that mattered were independent of the public realm rather than derived from it.

Yet the Herald’s comments also suggested a degree of uncertainty about precisely which parts of the gentleman’s code were to be salvaged and which eliminated. Boston’s Daily Evening Transcript appeared to share this uncertainty in an item reprinted from that city’s Journal of Commerce: “It did not occur to us that there was any thing in [Cilley’s] remarks which need disturb the nerves of the most sensitive man, conscious [sic] of his own integrity—but it seems we miscalculated the nicety of the thing called ‘honor.’”

Coupled with this awareness of the need to adapt the code for changing times was a growing dissonance between North and South, as the following passage from the Evening Transcript suggests:

We have heard the frequency of duels in the South instanced as evidence of the superior courage of the people’s nicer sense of honor and decorum. The position is false, and the history of the country proves it. Massachusetts gave the largest quota of revolutionary soldiers; and it may be conjectured that the bravest spirits at Bunker Hill, were steady, pious church-goers—those who reserved their fire for their enemies and not for their friends.

Proponents of the moral courage notion clearly felt some anxiety about the ease with which their adversaries could paint the idea as a mere front for cowardice and a lack of masculine vigor. To reject the code of honor was to reject the code of elite masculinity. Thus, in addition to the obvious geographical conflict displayed in the persons of the principals (Cilley from Maine, Graves from Kentucky), the congressmen’s duel conjured up deeper anxieties about regional friction insofar as its cause could be traced to a fundamental dispute about what the category of “gentleman” meant—and what it required of those who belonged to it.

Echoes of the Cilley-Graves duel also reverberated at the highest levels of government. Essentially, the disagreement between Cilley and Graves turned on whether Cilley could be called to the field of honor to answer personally for comments he had uttered about Webb, who was

113. BOSTON DAILY EVENING TRANSCRIPT, Feb. 28, 1838.
114. BOSTON DAILY EVENING TRANSCRIPT, Mar. 6, 1838.
not a politician, on the floor of the House in his official capacity. In this way, the dispute was about the relationship between those inside Congress and those outside. The members of the House committee investigating the duel perceived this, for they took as their mission "to inquire whether there has been... a breach of the privileges of the House." 115 As the principals’ correspondence in the days leading up to the duel demonstrates, Cilley vehemently opposed the notion that he owed any sort of apology or explanation to Webb. 116 In Cilley’s view, debate in Congress was confined to Congress; therefore, it was inappropriate to demand further explanation outside the halls of the Capitol—let alone to demand the satisfaction of a private gentleman on the dueling ground. Thus his terse, repetitive responses to Graves’s increasingly insistent letters: Cilley refused to acknowledge a private remedy for statements made in the course of public legislative debate.

By refusing to elaborate on his comments, Cilley insisted that they be left in the public realm, where they had been uttered. In so doing, he refused to submit to Graves’s belief that personal letters—even between gentlemen—constituted an appropriate forum for continuing congressional debate. When Cilley rejected Webb’s letter, he refused Webb entry into the sacred citadel of political power. In this regard at least, Webb was partly correct in claiming that Cilley had shown him disrespect; that disrespect, however, had more to do with the fact that Webb was an outsider to the special zone of politics than his inferior status as a newspaperman. When Cilley rejected Graves’s demands for explanation, he refused Graves’s entreaties to debase the citadel into a forum for private arguments. Reminiscent of Lyman Beecher’s vision of politics as a realm apart from the squalidly personal arena of everyday insult and bloody code, Cilley’s actions bespoke a deep belief in the

115. Sabine, supra note 2, at 91.
116. The following exchange, two days before the duel, is especially illustrative of Cilley’s intractability on this point:

"[Mr. Cilley].—Your note of yesterday, in reply to mine of that date, is inexplicit, unsatisfactory, and insufficient. Among other things in this, that, in your declining to receive Colonel Webb's communication, it does not disclaim any exception to him personally as a gentleman. I have, therefore, to inquire whether you declined to receive his communication on the ground of any personal exception to him as a gentleman or a man of honor? A categorical answer is expected."

....

"[Mr. Graves].—Your note of this date has just been placed in my hands. I regret that mine of yesterday was unsatisfactory to you; but I cannot admit the right on your part to propound the question to which you ask a categorical answer, and therefore decline any further response to it."

Id. at 94 (third emphasis added). In response, Graves issued his challenge.
separateness of the political from the merely personal, the high civic from the petty individual. His comments on the floor of the House stood on their own and became something apart from the person of Jonathan Cilley, insulated as they were by the location in which they had been uttered. Consequently, when his fellow congressman Graves insisted that Cilley enter into the quintessentially private discourse of an exchange of letters in order to “explain” these comments, Cilley bridled, replying that he could not “admit the right on your part to propound the question to which you ask a categorical answer.”  

In this way, the events leading up to the Cilley-Graves meeting stood in sharp distinction to those preceding the encounter between Hamilton and Burr. No single comment—much less one pronounced on the floor of Congress—had sparked the Burr-Hamilton duel; indeed, the precise events leading up to that famous meeting remain somewhat shrouded in obscurity, having certainly been fueled by years of antagonism between the two men. Moreover, Hamilton did not choose a rarefied political space in which to utter his allegedly incendiary statements about Burr. On the contrary, the long-lived controversy between Hamilton and Burr played itself out in the pages of partisan newspapers and pamphlets—the wide-open arenas of a politics of personality.  

Unlike the Cilley-Graves duel, the Burr-Hamilton affair was not about the correct contours and location of political debate. Both principals in the 1804 meeting took for granted that political disputes between gentlemen were best settled by resort to the same group norms that settled personal disputes. By 1838, however, that consensus among gentlemen had deteriorated to such an extent that Cilley could argue that neither a private exchange of letters nor a semi-public exchange of gunfire was a suitable forum for parsing congressional debate—and, indeed, that no suitable forum existed outside the demarcated political space of the Capitol. Seen in the light of the burgeoning sectional crisis,

117. Id.

118. William P. Van Ness, Account of the Events of June 18, 1804, in Interview in Weehawken, supra note 4, at 41 (“Upon my arrival [Burr] observed that it had of late been frequently stated to him that [General] Hamilton had at different times and upon various occasions used language and expressed opinions highly injurious to his reputation . . . .”).

119. At least one scholar has suggested that late-twentieth-century American politicians have returned to a politics of personality. See, e.g., Robert N. Bellah, The Meaning of Reputation in American Society, 74 CAL. L. REV. 743, 747 (1986) (noting that “a politics of personality is replacing a politics of reputation”). I am not convinced that a politics of personality and a politics of reputation are necessarily mutually exclusive, at least with respect to the era of the Burr-Hamilton duel.
Cilley's initial refusal to adhere to the code fueled the notion that northerners (especially New Englanders) did not duel. The conclusion that followed from this notion depended on the observer's particular latitudinal location. To northerners, it was further proof of the superiority and advancement of northern civilization; to southerners, it was additional evidence that southerners were the only true gentlemen. Insofar as North and South had begun to disengage from each other, each coming to follow its own social trajectory, both were right. Yet ultimately Cilley did duel, earlier refusals to traffic in base, scripted honor notwithstanding. Faced with the challenge, there was little else for him to do. Nevertheless, the terms with which he postponed his fatal trip to the releaguer stood as a testament to the emerging northern belief in the divide between the official, civic speech of the gentleman politician and the personal, egotistical speech acts of the gentleman duelist.

Contemporary commentators (most of them ministers) were quick to seize on the uniquely political nature of the Cilley-Graves encounter, exhorting the American people to rise up and reclaim their government from immorality. In an address titled "The Willing Homicide Unfit to Be a Legislator," M.A. De Wolfe Howe, rector of St. James's Church in Roxbury, Massachusetts, cast recent events darkly: "The fact that they did the deed is not so revolting, as that it could be done. Their personal presence in the hall of legislation, is not the foulest blemish upon its purity, but the astounding fact, that they had the assurance of a reception, which induced them to return to it . . . ."120 Following Lyman Beecher's thirty-one-year-old advice, the horrified commentators implored their audiences to open their eyes to the connection between politicians' morality and their ability to serve the public.121

Needless to say, the divines rejected the idea that the code of honor constituted a legitimate moral system. Lambasting worldly honor as "a multitude of fictitious forms,"122 one speaker—anticipating postmodernism—went on to characterize it as a mere simulacrum of virtue:

120. Howe, supra note 8, at 18-19, 20.
121. See, e.g., James M. MacDonald, A Mourning Land: A Sermon 13 (New London, Ebenezer Williams 1838) ("It needs but little reflection to perceive that a pure morality, in our rulers, is indissolubly connected with its prevalence in the country at large."); Sprague, supra note 5, at 7-8 ("[T]here is an indirect influence exerted by rulers scarcely less important than that to which I have already adverted—I refer to the influence of their example. What is said of the church may be applied to them—they are 'a city set upon an hill.'").
122. Ware, supra note 98, at 8.
Thus Honor comes to bear the same relation to Virtue, that politeness does to kindness; it is its representative; it keeps up the form and pretension when the principal is absent; and, for all the ordinary purposes of the superficial social system of the world, it is accounted quite as good as that which it stands for.

This then is the first objectionable trait in the world’s law of Honor, as a rule of life; it is deceptive and superficial; it is a thing of appearances only, and not a reality.\(^\text{123}\)

In other words, the “world’s law of Honor” seemed to northern observers a mere sham honor, a public display of formalities rigged up to conceal an emptiness where genuine individual honor and morality should have been. Refusing to allow this perversion to stand in for the totality of personal honor, mid-century critics of the code insisted that the moral courage vision supplied the needed correction.

Along with injunctions to the populace came considerable outrage at the complicity of so many government officials in the murder of one of their number. Cilley drew a substantial share of criticism as well as sympathy, for as a New Englander he was expected to resist the call of the field of honor.\(^\text{124}\) As a result, his acceptance of the challenge seemed a betrayal of his region. “That a man, educated in the land of the Pilgrims, and representing, in the national council, a portion of their sons, should so unhesitatingly, become a party in a mortal combat, sufficiently evinces that the tone of moral feeling, even among us, is fearfully depressed,” lamented one commentator.\(^\text{125}\)

Most appalling to these observers, though, was the fact that the hallowed precincts of the Capitol had served as the site of the dispute—and that the parties’ political prominence might be invoked to transform vile murder into justified retribution.\(^\text{126}\) Henry Ware, Jr. was aghast:

\(^{123}\) Id. at 9.
\(^{124}\) An 1883 essay from Harper’s “Easy Chair” series described widespread revulsion at the congressmen’s behavior:

This event occurred forty-five years ago, but the outcry with which it was received even at that time—one of the newspaper moralists lapsing into rhyme as he deplored the cruel custom which led excellent men to the fatal field, “where Cilleys meet their Graves”—and the practical disappearance of Mr. Graves from public life, showed how deep and strong was the public condemnation, and how radically the general view of the duel was changed.


\(^{125}\) Macdonald, supra note 121, at 5.
\(^{126}\) Compare Britain’s Wimbledon Common Affair—also in 1838—in which principal and second faced capital convictions for their roles in a duel arising out of a carriage collision. Although
If two men in higher life, taking deliberate and formal counsel of other men, all of them under oath to guard the welfare of the republic, go forth at mid-day to commit the foul offence, and one of them dies upon the spot,—the others return in safety to their seats as the guardians of the public weal, and the highest authorities of the Republic pay honors to the remains of him who died in the act of violating its laws.\footnote{127}

Unable to reconcile the base and bloody doings on the field with the exalted duty of Congress, Ware's language suggests that he envisioned the duel as a particularly spatial phenomenon, wheedling the parties out of their rational higher life and into the blazing midday sun of vice and illegality. The congressmen had to "go forth" in order to engage in the affair of honor, for their usual theater of operation gave no quarter to this sort of activity. Increasingly, northern observers saw dueling as an egotistical ritual rather than a natural result of politics' inseparability from its participants' private lives.

This is not to suggest, however, that dueling's critics thought the political realm should be an autonomous garrison sealed off from any conception of personal morality. While much of the mid-century criticism of dueling took for granted a divide between the personal and political spheres, commentators struggled to articulate precisely how the two realms ought to interact. By adopting the Beecheresque view of a civic sphere separate from the banalities of the merely personal, these reformers also inherited the resulting conundrum of wanting more virtuous, more responsible politicians as well as politicians who did not feel their public actions to be controlled by private group norms. The reformers demanded ethics in their political figures, but not the ethics of

\footnote{127. WARE, supra note 98, at 18-19 (footnote omitted). The visual motif of Cilley and Graves literally leaving the Capitol to aim rifles at each other recurred in other public addresses, often as a means of dramatizing the incomprehensibility of their behavior:

An individual in the heat of public debate dropped a word that fell harshly upon the ear of some who heard it; and that provoked the resentment of some who read it. And the strange result is, that a man who has received no injury goes to a man who has inflicted none upon him, and makes the foolish and desperate proposal, that they go out into a bye place, and stand up and face each other with the weapons of death, and each do his best to send the other stained with the guilt of murder, into eternity.

SPRAGUE, supra note 5, at 13.}
the code duello, which they saw as an artificial subset of true morality. Senate chaplain Henry Slicer captured this tension in the title of a July 1838 address delivered at the Capitol: “That Which Is Morally Wrong, Can Never Be Politically Right.” Slicer and others viewed the code duello as a corruption rather than a manifestation of personal morality. This corruption, they believed, had taken over political debate.

Unlike the Burr-Hamilton duel, in which political animosity flowed smoothly into private letters and then onto the dueling field, the Cilley-Graves encounter involved a jerky transition between the dignified space of political debate and the anomic space of the supposedly instinctual code. An uneven attempt to carry out the old maneuver of translating public stature into the terms of public honor, the congressmen’s meeting ultimately demonstrated the degree to which the gentleman’s code no longer controlled events beyond the narrowing ambit of a certain vision of society. The gentleman who politicked and dueled had begun to cede the public forum to the politician who conceived of himself as a public servant. Instead of a set of universal rules with a colorable claim to representing existing behavioral norms, the code duello had become—at least to northerners like Cilley—an awkward and archaic template that was utterly alien to political life. Yet it was in political life that northerners came most often into contact with the duel, for as the nineteenth century unfolded, challenges seemed to follow wherever sectional disputes cropped up.


129. The 1856 caning of Massachusetts senator Charles Sumner by South Carolina congressman Preston Brooks was not a formal duel, but it nevertheless resonated with contemporary views of the code of honor. The attack followed an anti-slavery speech by Sumner; the blows that Brooks delivered when he surprised Sumner at his desk in Congress nearly killed Sumner. See KIERNAN, supra note 3, at 310. In both North and South, the incident became a rallying point for sectional sentiment. Brooks’s choice of weapon sent a clear message that he considered Sumner to be an inferior, for caning was generally seen as a way of dealing with those who did not merit a challenge according to the code of honor. Cf Freeman, supra note 22, at 305 n.58 (discussing the prevalence of canings in disputes between politicians and newspaper editors). Many southerners applauded Brooks’s action, sending him gold-handled canes and horsewhips as tokens of their approval. See STEVENS, supra note 5, at 104.

But that was not the end of the story. After Brooks declined a challenge from Massachusetts’s other senator, one of its congressmen, Anson Burlingame, denounced Brooks and received a challenge in response. Accepting the challenge, Burlingame named a Canadian hotel across Niagara Falls as the meeting place. Brooks, however, failed to make the trip north because he feared he would be lynched while crossing northern territory; consequently, the duel never took place. *ld.* at 105-06.
B. Sectional Differences: Duelling North and South at Mid-Century and Beyond.

By mid-century, the practice of duelling had taken on new significance as both a metaphorical and an actual site of North-South conflict. Each region had developed its own attitudes toward duelling based on its particular conception of the role of individual honor in society. Northerners increasingly insisted on a new conception of the relationship between the public and the private realms, while southerners reasserted the supremacy of publicly performed honor. Yet when representatives of the regions met in Congress or elsewhere, the duel carried another significance apart from its meaning in either region: insurmountable regional difference. As a symbol of a particular historical and temporal context, the duel came to be seen by both regions as a distinctly political act that replicated on an individual scale the larger national conflict beginning to surge around them.

1. The North.

Although most duelling activity in the North had ceased by the middle of the nineteenth century,130 a few notable encounters kept the practice alive above the Mason-Dixon line well into the 1840s. According to contemporary reports, most of these meetings were concentrated south of New England, although Lorenzo Sabine's comprehensive list of pre-1855 duels includes an 1853 challenge issued in Boston that never reached fruition due to the intervention of civil authorities.131 Other famous encounters included a fatal 1830 duel between two doctors in Philadelphia;132 a fatal 1837 meeting in

130. BALDICK, supra note 5, at 134; KIERNAN, supra note 3, at 309; STEVENS, supra note 5, at 73; see also AYERS, supra note 3, at 15 ("For a few decades, Northerners as well as Southerners fought on the field of honor, but by 1830 duelling and the South had become virtually synonymous.").

131. Sabine gives the following account of the dispute between Barnard S. Treanor and Patrick O'Donahoe:

A public dinner was given at Faneuil Hall ... in honor of the birthday of Thomas Francis Meagher, an Irish exile of some note. Treanor was president of the day; O'Donahoe, another exile who had recently escaped from Van Diemen's Land [Tasmania], was a guest. At table, the course of Treanor gave O'Donahoe offence, which the latter, immediately after the company separated, made known in a written communication. Treanor thereupon, it appears, demanded a withdrawal of the letter, an apology for its contents, or a hostile meeting. He obtained no satisfactory reply to his demand, and a formal challenge followed. Legal proceedings against the parties put an end to the affair.

SABINE, supra note 2, at 298.

132. See STEINMETZ, supra note 2, at 303 (describing the Smith-Jeffries duel).
Brownsville, Pennsylvania over an insulting mark in a hotel register;\textsuperscript{133} and a nonfatal 1842 meeting in Wilmington, Delaware between James Watson Webb (of Cilley-Graves fame) and Kentucky congressman Thomas F. Marshall, which ended in New York's first prosecution for dueling.\textsuperscript{134} Below the Mason-Dixon line but still arguably in the North,\textsuperscript{135} Messrs. Cocheran and May met in 1844 near a Washington hotel to settle a dispute over a dance the evening before, resulting in Cocheran's death.\textsuperscript{136} And as late as 1877, the Maryland-Delaware line served as the setting for a nonfatal meeting between New Yorkers James Gordon Bennett, Jr. (son of the editor of the New York \textit{Herald}) and Frederick May (a different Mr. May from Cocheran's adversary) over Bennett's "unbecoming conduct" toward his fiancée, who happened to be May's sister.\textsuperscript{137}

Clearly, earlier commentators who had boasted that the duel was unknown in the nineteenth-century North\textsuperscript{138} were either mistaken or excessively optimistic. The precise year—or even decade—of the last affair of honor to take place either in the North or between northerners remains shrouded in obscurity. Nevertheless, it is safe to say that by the middle of the nineteenth century the northern duel had become something of an anomaly, in contrast to the South's appropriation at that time of the duel as a badge of regional distinctiveness.\textsuperscript{139} This trend

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\textsuperscript{133} See id. at 305 (describing the Anderson-Jones duel).
\textsuperscript{134} See \textit{SEITZ}, supra note 67, at 283-308. Webb, editor of the New York \textit{Courier and Enquirer} and a leader of the Whig party, was prosecuted and convicted under a New York statute that made it a crime for citizens to leave the state to take part in a duel. He was immediately pardoned. See id. at 306-08. For further discussion of the Webb-Marshall duel, see infra text accompanying notes 172-173.
\textsuperscript{135} But see \textit{STEVENS}, supra note 5, at 73-74 (arguing that Washington resembled the South more than the North in the high incidence of dueling).
\textsuperscript{136} See \textit{STEINMETZ}, supra note 2, at 311-12.
\textsuperscript{137} \textit{SEITZ}, supra note 67, at 30. But see \textit{TRUMAN}, supra note 2, at 333 (giving date of duel as 1876). Truman lists additional mid-century northern duels: Gray-Pope in Indiana, 1849; Stowe-Townly in New Jersey, 1852; Snowden-Ready in Pennsylvania, 1854; and Breckinridge-Leavenworth at Niagara Falls, 1855. See id. at 388-90.
\textsuperscript{138} See, e.g., \textit{BEASLEY}, supra note 39, at 24 ("[H]ow do our fellow-citizens of the Eastern states, save themselves from the foul imputation [of cowardice]? They are no duellists . . . ."); \textit{BEECHER}, supra note 74, at 31 ("[W]hy does the crime shrink before the stern justice of New-England, and rear its guilty head in New-York, and stalk with bolder front as you pass onward to the south."); \textit{SPRAGUE}, supra note 5, at 14 ("[T]he practice of duelling has disappeared almost entirely from the part of the country in which our lot is cast [Albany] . . . ."); see also \textit{WYATT-BROWN}, supra note 3, at 20 ("The Rev. Lyman Beecher's assault on dueling after Alexander Hamilton's fatal encounter with Aaron Burr met a widespread popular response. The custom, which was based on the ethic of honor, became exceedingly rare thereafter in the free states.").
\textsuperscript{139} See infra Section II.B.2.
accorded with developments abroad, for Britons were also shedding the duel and the code of honor at this time.140

But why did the practice of dueling cease in the North? Just beneath the surface of this question lie two vital and related questions: (1) why did the practice of dueling last as long as it did in the North?; and (2) why did it end in the North before the South? As all these questions suggest, by mid-century the concept of the northern duel (or, slightly different, the duel between northerners) had separated completely from that of the southern duel. No longer could one invoke the code of honor without a certain degree of self-consciousness about the meaning of that code in one’s particular societal and regional context.

As the North underwent massive industrialization and urbanization and moved away from the traditional agrarian mode of social organization,141 the duel became less appropriate as a means of settling disputes for the simple reason that the old idea of gentlemanliness had ceased to serve as the standard by which behavior was measured in every arena of human activity. In a commercial society, factors such as honesty, creditworthiness, and success in business simply mattered more than did sensitivity to insult or the ability to pen a well-worded challenge. To use Edward Ayers’ terminology, mid-century northern culture rejected honor, “the overweening concern with the opinions of others,” in favor of dignity—“the conviction that each individual at birth possessed an intrinsic value at least theoretically equal to that of every other person.”142 Intimately connected with the expansion of capitalism,

140. See Steinmetz, supra note 2, at 336-79. Steinmetz distinguishes between the last duel between Englishmen in England, which took place in 1845, and the last duel in England, which was between two Frenchmen in 1852. The last duel fought by a British subject, meanwhile, occurred in France in 1862. Writing in 1868, the Englishman Steinmetz made no pretense of hiding his disdain for the French and their insistence on the rituals of honor: “[I]f Englishmen will go and mix with Frenchmen in France, and adopt their mode of ‘envisaging’ matters, they had better take my advice and go thoroughly prepared with both weapons—sword and pistol—and ponder over very attentively all that I have expounded . . .” Id. at 379. Steinmetz’s American contemporaries did not fare much better, as the following histrionic account demonstrates:

In the hotels at Washington and elsewhere, you may see the marks of bullets on the walls, shots that missed, fortunately, or that went through a man, leaving him dead on the floor. The barman at hotels is always prepared. There is a ready revolver on the shelf behind him. . . . In the street men “exchange” revolver shots occasionally; and in the wild forests they track each other like game or “varmint.” Nevertheless, a man, taking care to be reasonable, may pass through the States most comfortably.

Id. at 298-99.


142. Ayers, supra note 3, at 19 (footnote omitted).
dignity’s insistence on the value of the individual “grew up simultaneously with the new ideals of character, of self-control, of discipline, of delayed gratification that have come to be the hallmark of the bourgeoisie.”

With these changes came a new interest in the internal and the nonpublic, those areas of life that operated outside the realm of the market as well as outside the comprehension of a public code of conduct.

The practice of dueling lasted as long as it did in the North because while it lasted there was no reason for it to cease. While this sounds like a neatly circular nonexplanation, in fact it goes to the heart of the meaning of the duel in the mid-1800s, and to the modern observer’s unconscious acceptance of that meaning. We marvel at the longevity of dueling in the North because we have been accustomed to viewing the duel as something particularly southern, another link between the status society of the Old South and the medieval world of chivalry and Knights Templar. Yet to marvel is to forget to look behind the phenomenon to its motivation, and instead to take the actions of historical persons as wholly unmediated expressions of their essential being, as if olden-days people were too naive to have figured out the difference between behaving and performing.

The American duel was no more a direct descendant of the age of chivalry than Sir Walter Scott was a historian. On the contrary, both were quintessential products of the nineteenth century, as were the tropes of Cavalier and Roundhead that were deployed in order to explain the supposedly fundamental differences between northerner and southerner. We twenty-first-century observers put the question as “Why did northerners duel as long as they did?” because we cannot make sense of northern dueling. We cannot make sense of northern dueling because we have received from history a definition of dueling as distinctively southern. The duel fits with a stereotyped vision of the South as romantic and courtly but not with the complementary vision of the North as rational and market-driven. Consequently, we wonder why southerners ever stopped dueling, and why northerners ever started in

143. Id. at 24.
144. See, e.g., Webb, supra note 5, at 66 (“Particularly in the South people became obsessed with notions of chivalric derring-do, thrown-down gauntlets . . . and all the attendant claptrap.”).
145. See, e.g., SABINE, supra note 2, at 42 (“The Roundheads of England, from whom we [northerners] are descended, could justly plead religious scruples in answer to cartels from the Cavaliers, for they conformed to no customs, indulged in no fashions, inconsistent with an austere, with a self-denying faith.”); see also TAYLOR, supra note 7, at 15 (“The Yankee was a direct descendant of the Puritan Roundhead and the Southern gentleman of the English Cavalier, and the difference between the two was at least partly a matter of blood.”).
the first place. In so wondering, however, we forget that these stereotypes emerged from the same historical moment that witnessed a documentable gap between the frequency of northern and southern dueling. They therefore cannot be used to explain the causes of that gap.

Another factor in the duel’s endurance above the Mason-Dixon line was the preeminence of the political duel as the modal northern affair of honor. Besides the encounters listed above, which achieved renown precisely because their causes were so petty and their effects so extreme, each of the major duels between northerners could be described as political in nature: Burr-Hamilton, Barron-Decatur, and Cilley-Graves. As the Cilley-Graves affair demonstrated, by the late 1830s the sectional crisis had begun to dominate political discussion, rendering political dispute equivalent to sectional dispute. Thus, even as Lyman Beecher envisioned politics as a realm separate from merely personal quarrels—and even as Jonathan Cilley struggled to compel his adversaries to accept this new vision—politics became the terrain on which northerners struggled with southerners as synecdoches of North struggling with South.

Although the Cilley-Graves encounter was not explicitly about the sectional crisis, sectional difference lay at the heart of the meeting and the horror it provoked. Quite simply, no one expected that a New Englander would accept a call to the field of honor. Moreover, Cilley’s dogged attempts to convince Graves of the inappropriateness of personal remedies for political remarks—and Graves’s equally dogged refusal to acknowledge this point—illustrate the nascent northern desire to reconceptualize the political arena as insulated from such things as personal affronts and private codes. Southerners, however, refused to allow the code of honor to be shut away in a small drawer of anachronisms remote from the most vital debates of the day.

Dueling ceased in the North because, to put it bluntly, northerners resembled Jonathan Cilley more than they resembled William Graves. By the middle of the nineteenth century, northerners no longer believed that the code of honor provided a single universally applicable norm of gentlemanly conduct. Instead of viewing society as an aggregation of interactions between the gentleman and the public gaze in which the individual’s vision of himself depended entirely on his appearance to others, Cilley’s contemporaries insisted that the code of honor provided

146. See supra text accompanying notes 132-39 (listing mid-century duels between northerners).

147. Congressman Preston Brooks’s caning of Senator Charles Sumner stands as the most extreme example of this equivalence. See supra note 129.
no moral authority by which individuals' actions could be judged. Moreover, as the North began to see itself as industrialized, market-driven, and generally unlike the agrarian South, the idea of premodern, elite honor as an organizing principle for society seemed less and less appropriate. Growing numbers of northerners understood their lives as segmented into the separate spheres of the domestic and the commercial, the home and the workplace, the private and the public. Once this transformation had taken place, the practice of dueling seemed absurd, a misguided attempt to monopolize public space for purely self-aggrandizing purposes—i.e., not unlike the modern view of the duel.

Having constructed this vision of society and persons as divided between public and private realms, the nineteenth-century northerner came to reject the code of honor as a relic of the antique gentleman who viewed public life as the exclusive source of validation and personhood. The code was inappropriate for a man of business who was also a man of family, a man whose activities took place in the specific arenas of nineteenth-century urban society but were ultimately governed by his own moral core.

Even as it faded, however, the code of honor continued to figure prominently in northerners' popular imagination, as the following passage from a widely circulated 1833 etiquette manual makes clear:

Remember, that the honour which comes from God, the approbation of Heaven, and of your own conscience, are infinitely more valuable than all the esteem or applause of men... 

Sell not your hopes of heavenly treasures, nor any thing that belongs to your eternal interest, for any of the advantages of the present life:

149. Kieman gives a particularly bleak characterization of this phenomenon: "On adults the result of herd-living, combined with strict rules of behaviour, must be to dualize consciousness, dividing it into two existences, public and private, outward and inward." KIERNAN, supra note 2, at 116.
150. Recall Walter Colton's comments:
And we are warranted in saying, that in many instances, the wound which the complainant pretends has been inflicted upon his fair reputation, would never have been so much as discovered by the public, but for a determination on the part of the person affected, to make it an occasion of bringing himself into public notice.
COLTON, supra note 45, at 15 (emphasis added); see also supra text accompanying notes 77-81 (discussing Colton's statements).
"What shall it profit a man, to gain the whole world, and lose his own soul?"151

But not all northern treatments of dueling resembled this pious echo of sermons by Dwight and Beecher. The end of an 1858 Harper's piece on the Bladensburg dueling ground adopted an almost nostalgic tone that contrasted sharply with the matter-of-factness of the rest of the article, which recounted two famous Bladensburg encounters: "[T]he old dueling ground is dismantled now, and its distinguishing features have passed away... nothing now remains to indicate its former uses but the sad traditions and melancholy memories that will forever cluster around it."152 Although it might recede into memory, the practice of dueling would remain fascinating to northerners—especially while it continued in the South.

2. The South.

Writing in 1884, Ben C. Truman captured the peculiar difficulties of drawing conclusions about the decline of southern dueling:

Practically, public opinion firmly sustains the consolidated enactments for the suppression of duelling in the United States; and, as an institution, it may be said to have ceased to exist in our beloved country,—notwithstanding the Cash-Shannon duel in South Carolina in 1880, the Elam-Beime meeting in Virginia in 1883, and later the remarkable encounter in Louisiana between a soda-water seller and a catfish dealer of New Orleans, which was fought with rapiers and lasted eighty-three minutes before either of the combatants drew blood.153

As this quotation demonstrates, dueling endured in the South long after the Civil War, the traditional terminal point given for the code of

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151. THE AMERICAN CHESTERFIELD 228-29 (Philadelphia, John Grigg 1833) (quoting Matthew 16:26: "For what is a man profited, if he shall gain the whole world, and lose his own soul?").
152. The Bladensburg Dueling Ground, supra note 68, at 481. The first paragraphs of the piece sounded slightly more sinister:
   Apart from its wildness, however, there was nothing about the place to attract the attention of the traveler, and unless it had been specially pointed out to him by some one acquainted with its history, he would, in all likelihood, have passed it wholly unobserved. But yet that dark-looking jungle, apparently so void of interest, is a locality known all over America. It is the celebrated BLADENSBURG DUELING GROUND.
   Id. at 472.
153. TRUMAN, supra note 2, at 86.
According to Truman's report, the last fatal duel in the United States was between Colonel William M. Shannon and Colonel E.B.C. Cash in Darlington County, South Carolina on July 6, 1880; however, he noted that several other meetings had taken place since that date. Other accounts detail southerners meeting on the field as late as 1889.

Clearly, southerners had a profound attachment to dueling, one that kept the practice alive well past its mid-century northern demise. While not every white southern man subscribed wholeheartedly to the code of honor, the tenacity with which the duel survived the Civil War and Reconstruction suggests a special relationship between the South and the code duello. Yet the duel that endured in the South after mid-century to fuel the myth of noble Cavalier and courtly tournament bore little resemblance to its then-deceased northern cousin. To be sure, the language of challenge and satisfaction remained unchanged, as did the procedural forms and all the other trappings. New, however, was a notion of the duel as a particularly southern practice, another institution peculiar from the perspective of those outside its scope but natural and necessary to those on the inside. As they watched the North transform itself into an urban, industrialized, and (they felt) machinelike society frightening in its willingness to shed the traditions of the code of honor and to attack those who embraced it, southerners marshaled their defenses by laying claim to and accentuating that which made them different, asserting that they had chosen their difference rather than having it thrust upon them.

In keeping with this project of deliberately “otherizing” themselves, southerners clung to the very elements of American society that had made the early Republic fecund soil for the cultivation of the code of honor: an agrarian economy; a dearth of large cities; an insistence on hierarchy; and, most importantly, an emphasis on gentlemanliness. In their drive to distinguish themselves from the growing numbers of northern critics, antebellum southerners deliberately shunned the

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154. See, e.g., KIERNAN, supra note 3, at 313-14 (“After the defeat of the south duelling withered away even there.”).
155. See TRUMAN, supra note 2, at 391.
156. See Webb, supra note 5, at 83-84 (describing the duel between J.R. Williamson and Patrick Calhoun in Cedar Bluff, Alabama).
157. Truman notes that “two of the most eminent crusaders against the evil were Charles Cotesworth Pinckney and Robert Barnwell Rhett, of South Carolina.” TRUMAN, supra note 2, at 78.
158. Numerous scholars have explored the self-consciousness with which southerners of the mid-19th century set about creating a particular regional identity for themselves. For three seminal accounts of this process, see DREW GILPIN FAUST, THE CREATION OF CONFEDERATE NATIONALISM: IDEOLOGY AND IDENTITY IN THE CIVIL WAR SOUTH (1988); JOHN MCCARDELL, THE IDEA OF A SOUTHERN NATION (1979); DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861 (1976).
changes that recent decades had wrought to northern society. In so doing, they ensured the survival of the duel (albeit only for a limited time), for southerners’ rejection of northern-style commercialism necessarily included a rejection of the attendant emphasis on dignity and character as opposed to honor and reputation. The southern gentleman disdained the northern merchant and his need to subordinate his own honor to such things as the market. By explicitly basing the honor of his region on the duel, however, the southerner placed too much pressure on that fragile practice for it to flourish as more than a contrived display of sectional bravado.

While this description of the mid-century southern viewpoint may seem extreme, that is precisely the point. As the rumblings of sectional discord mounted, the South came to see itself as a kind of repository of traditional ways of life and conservative values with an almost messianic mission of redeeming the Republic from the clutches of godless northern mercantilism.159 Seizing on the duel as a visceral emblem of an imagined golden age, advocates of southern exceptionalism viewed the decline of dueling in the North as a sign of a larger decline in morality above the Mason-Dixon line. Consequently, southerners received attacks on the practice of dueling with almost masochistic glee, treating them as evidence of the inferiority of northern culture. In his Code of Honor, South Carolinian John Lyde Wilson derided a northern periodical for depicting the duel as a sign of southern barbarism: “I am very sure, that the citizens of the States so disrespectfully spoken of, would feel a deep humiliation, to be compelled to exchange their urbanity of deportment, for the uncouth incivility of the people of Massachusetts.”160

Criticism from without simply reaffirmed burgeoning southern nationalism, fueling both regions’ belief in fundamental and insurmountable North-South difference. Indeed, the southern strategy of embracing regional distinctiveness proved so effective that “duel” became synonymous with “southern,” as an 1847 magazine article titled “Duelling in America” demonstrated when, after a generic program of “[t]rac[ing] the history of a duel” from challenge to encounter, it suddenly declared, “The reader has, in the details given, more or less

159. See, e.g., FAUST, supra note 158, at 13 (quoting the Nov. 13, 1861 Daily Richmond Enquirer: “There is nothing whatever in this movement of a revolutionary, radical or Red Republican character. It is the natural, necessary protest and revolt of, not a class or order, but an ancient and glorious nation, against that crushing, killing union with another nationality and form of society.”) (internal quotation marks omitted).

160. WILSON, supra note 34, at 36. And yet Wilson also insisted, “I would not wish to be understood to say, that I do not desire to see duelling to cease to exist entirely, in society.” Id. at 8.
true of all southern duelling—a picture of the course which honorable men pursue in endeavoring to slay each other! A testament to the success of the southern desire to claim exclusive possession of the duel, such statements find their modern-day reflection in our willingness to believe in the duel as an organic outgrowth of southern society rather than as a self-conscious, highly symbolic component of the South's self-conception.

This is not to suggest that southerners fully comprehended what they were doing as they insisted on the centrality of the duel to southern culture. On the contrary, they appear to have fully internalized their own system, playing the role of Dueling Southerner even among themselves. In a famous 1845 duel between Congressman William Lowndes Yancey of Alabama and Congressman Thomas Lanier Clingman of North Carolina, the dispute centered on Yancey's accusation that Clingman was a traitor to the South because Clingman opposed the admission of Texas, a slave state, to the Union. After the trip from Washington to Maryland ended in a harmless exchange of shots and settlement by the seconds, Yancey defended himself against the criticism of his fellow southerners by appealing to shared regional identity. "I was a Southern representative who in defending Southern rights, and the honor of the whole Southern delegation, was called into account," he wrote in a widely printed statement. Yancey's explanation illustrated the new essentiality that the term "southerner" had achieved. Like his predecessor, the early-nineteenth-century northern or southern gentleman-who-dueled, Yancey conceived of himself as a southerner above all else. In his view, the rest of his endeavors were nothing more than modifiers of this fundamental quality of being; consequently, he could appropriately cite this quality as the motivating factor behind his challenge to Clingman. The term "southerner" presumed the suffix "-who-duels."

But Yancey and his cohort protested too much. If, as they claimed, their presence on the field of honor was nothing more than a manifestation of their core southernness, why had any northerner ever issued a challenge? Why had it become necessary to justify dueling by reference to one's geographical origin rather than one's innate sense of morality and gentlemanly self-worth? Why did a supposedly organic set of norms suddenly in 1858 require widespread promulgation and

162. *See Bruce, supra note 3, at 21-26.
163. *Id.* at 26 (internal quotation marks omitted).
anxious justification in the form of an actual printed code, albeit with
canny references to the codifier's role as a mere transcriber of Hibernian
heritage rather than as a genuine author?

The southern species of duel resembled only slightly the species
that had driven Alexander Hamilton and Jonathan Cilley to early graves.
Its genius was its ability to pass as the latest incarnation of that species;
its demise lay in the self-consciousness with which Hamilton's and
Cilley's southern successors went about following its rules while
scanning their audience to make sure their obedience was noticed.
Constructed to serve the specific historical context of antebellum
America, the southern code of honor expired because it was artificial,
because it was overdetermined, and—most importantly—because it was
too invested with meaning by its contemporaries. As had happened in
the North decades before, dueling dwindled in the South after
Reconstruction because southern society was no longer hospitable to it.
The code of honor ultimately failed the South because the South relied
too heavily on it, constituting itself as a region around a stylized ritual
lacking any organic social function. Instead of a restatement of the
public norms that governed social interaction, the duel had become a
discrete code, a script to be performed as a demonstration of nationality.

In short, antebellum southerners were altogether too aware of the
meaning of the duel for it to remain viable on its own terms. Southerners
could exploit the duel for its symbolic content precisely because it had
ceased to function as an organic social institution and instead was
available to be freighted with cultural significance. Faced with what they
perceived as an increasingly unfathomable North of commerce and
modernization, southerners cobbled together a regional identity based on
a reified notion of honor, an all-encompassing and opaque characteristic
that was said to be constitutive of southernness.¹⁶⁴ And for the most part,
they succeeded, creating a self-conscious image of essential
southernness that has endured to the present day. What was a
southerner? A gentleman with a refined and highly cultivated sense of
honor. How did he demonstrate this honor to the world? By demanding
satisfaction for insult on the field of honor—by arrogating to himself

¹⁶⁴ Sabine seems to have believed in honor—in all areas of life, both private and public—as a
defining mark of the southerner:

We of the North denounce individual gentlemen, who meet one another to adjust their
personal or political differences, in terms measured only by our respective powers of
anathema, and we do wrong; for we forget that, if a gentleman at the South refuses to
send or accept a challenge, he loses his position in society, and is sometimes shunned
and hunted down.

SABINE, supra note 2, at 44 (emphasis added).
what northerners saw as the public space according to the dictates of a manual that was more proto-nationalist, manifesto than restatement of norms. Why was it important to show that he was a southerner? Because the mounting political tempest demanded self-identification based on certain sectional stereotypes. Did he actually possess some essential quality called honor, or did he merely hold himself out to the world as possessing this quality? It did not matter, for even if he was engaged in mere performance, he believed in his role so much that he came to define himself by the reactions he apprehended in his audience.

III. THE DUEL AND THE LAW, THE DUEL IN THE LAW

In addition to insisting that the duel represented a regionally specific species of honor, elite antebellum southerners viewed themselves as standing in a fundamentally different relation to the law from that of their northern cousins.165 This was the case despite the fact that dueling was typically illegal whenever and wherever it occurred. For as long as dueling endured in each region, its practitioners shared a belief that the code of honor trumped mere statutes and common law.166 This belief became more entrenched in the South as sectional antagonism increased and dueling came to seem an integral element of southern identity. Moreover, as the practice continued in the South, northerners—in keeping with their developing notion of the divide between public and private spheres—attempted to employ the legal system to redress certain kinds of heretofore challengeable insults. Consequently, the duel related to the law both as a subject of legal regulation and as a precursor to legal causes of action.

A. The Law of Dueling.

Nineteenth-century restrictions on dueling present a complex picture of public outcry, legislative reaction, selective (or non-) enforcement, and creative interpretations of the elements of criminal offenses. As a 1927 commentator observed, "In the case of duelling, as in the modern instance of prohibition, we have a striking illustration of

165. See Charles S. Sydnor, The Southerner and the Laws, 6 J. S., Hist. 3, 13 (1940) ("[T]he planter 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.").

166. See id. at 19 ("[I]n case of insult the code of honor required action; the state code enjoined submission. Here was a conflict of law. Therefore, the individual had to decide which body of law applied to the case, and if he decided in favor of the code of honor he was simply transferring the case from state jurisdiction to the jurisdiction of the unwritten code.").
conflict between social convention and the law of the land."\textsuperscript{167} Certainly the statute books of most states contained anti-dueling provisions by mid-century,\textsuperscript{168} but this does not necessarily demonstrate opposition to dueling any more than a paucity of actual prosecutions proves that few duels took place. Always fraught with danger, extrapolation from case law and statutory provisions to social attitudes about a given activity presents special hazards when the most frequent participants in that activity were the very persons who decided the cases and proposed the statutes.

So what do we know about the law of dueling? While we do not know whether anti-dueling laws were more stringently enforced in the North than in the South, we can comfortably say that nineteenth-century Americans \textit{believed} this to be the case, and that this belief both stemmed from and fed into a willingness to accept the duel as particularly southern after mid-century. Widely viewed as more law-obsessed and statute-bound than southerners, northerners seemed eminently reluctant to countenance bloody affrays. Thus developed the standard story of northern authorities standing firm against dueling while their southern counterparts not only failed to prosecute duelists but met on the field of honor themselves.\textsuperscript{169}

To be sure, periodic crackdowns on dueling followed particularly scandalous meetings on the field of honor, such as the Burr-Hamilton and Cilley-Graves affairs, especially in the locales that had served as the sites of the initial insult. Only after the death of Cilley in 1838 did

\textsuperscript{167} Greene, \textit{supra} note 12, at 368.
\textsuperscript{168} Indeed, even strongholds of the code of honor such as Virginia and Mississippi had strict anti-dueling statutes on the books by the 1830s. In 1868, Steinmetz described the Virginia legislature's "ingenious" approach:

They laid it down as a maxim, that, when in frivolous matters, or in differences of opinion, which the law tolerates and even authorizes, a man is induced to expose himself to death or to slay another, he is actually \textit{demented}, and that, therefore, all principals and seconds in a duel should be considered laboring under an \textit{alienation of mind}, and deprived of any public station that they might hold; that their property, moreover, should be vested in the hands of trustees, and, in fact, be considered as under an interdiction.

After that . . . , we are told that duels in the State of Virginia have been rarely heard of.

\textsc{Steinmetz, supra} note 2, at 299-300. Mississippi apparently took a less creative route, requiring the survivor of a fatal duel to pay his victim's debts. See \textit{id.} at 299. Steinmetz tempered these sprightly observations with the following bleak remark: "But then, all enactments against duelling in the States may be easily rendered a dead letter or inoperative." \textit{Id.} at 300.

\textsuperscript{169} See, e.g., \textsc{Stevens, supra} note 5, at 48 ("While the Southern police, judges, and juries wholly sympathized with the \textit{code of honor}, those in New York were determined to enforce the law whenever possible."); \textsc{Truman, supra} note 2, at 78 ("It is a noteworthy fact, however, that the laws against the tyrannical custom have always been more vigorous and restraining in the Northern States than in the Southern.").
Congress finally pass a law prohibiting the sending and accepting of challenges in the District of Columbia.\textsuperscript{170} Farther afield, the Massachusetts legislature issued a \textit{Report and Resolves on the Subject of Duelling}, in which it exhorted the state's senators and representatives in Washington to "use all reasonable exertions to procure the passage of a law by Congress, for the suppression of duelling."\textsuperscript{171}

But a scant four years after Cilley and Graves exchanged fire, New York's first prosecution for dueling—of editor James Watson Webb, the instigator of Graves's challenge to Cilley—turned into empty mummery when fourteen thousand New Yorkers presented a petition to Governor William H. Seward requesting Webb's pardon.\textsuperscript{172} Although Webb's latest enormity, a duel with Kentucky congressman Thomas F. Marshall, had ended without serious injury to either party, Webb had been tried and convicted upon his return from the dueling ground in Delaware for the offense of leaving New York in order to fight a duel. Immediately after Webb received his two-year prison sentence (the statutory minimum), Seward issued the pardon on the condition that as long as Webb remained a citizen of New York, he could not violate state anti-dueling laws, aid or abet any duelists, or publish any defenses of dueling in his newspaper.\textsuperscript{173}

The Webb case illustrates state authorities' reluctance to hold even notorious duelists accountable for their illegal activities. Furthermore, commentators as early as Blackstone had noted the difficulties of enforcing anti-dueling laws:

\begin{quote}
[T]he strongest prohibitions and penalties of the law will never be entirely effective to eradicate this unhappy custom; till a method be
\end{quote}

\begin{flushright}
170. See \textit{Baldick}, supra note 5, at 117; see also \textit{Charleston Courier}, Mar. 5, 1838 ("Mr. Prentiss gave notice that he should on to-morrow introduce a bill for the suppression of duelling in the District of Columbia.").

171. \textit{Commonwealth of Massachusetts, Report and Resolves on the Subject of Duelling}, H. 59 (1838). The report noted that previous attempts to enforce anti-dueling provisions had come to naught because of individuals' resistance to the laws:

Ordinary legislation could do little more than has already been done by many, if not most of the states, to restrain the practice of duelling. The difficulty in punishing this offence, has been a reluctance on the part of the public, to prosecute and convict the offender, rather than any defect in the law itself.

\textit{Id.} at 7.


173. See \textit{id.}. The \textit{New York Herald}, rival to Webb's \textit{Courier and Enquirer}, had mocked Webb's situation as he awaited his sentence in New York's Tombs Prison, comparing him to a prizefighter named Lilley who was facing manslaughter charges after his opponent McCoy had dropped dead in the ring after 119 rounds. Unlike Webb, Lilley and his associates, known by the colorful appellation of the "prize-ring gang," did not receive a pardon after they were convicted of fourth-degree manslaughter. \textit{Id.} at 304-08.
found of compelling the aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable as that which is now given at the hazard of the life and fortune, as well as of the person insulted, as of him who hath given the insult.\textsuperscript{174}

The ambivalence with which nineteenth-century courts and legislatures regarded dueling stemmed from a belief that disputes concerning affronts to reputation were fundamentally different from the types of disputes that were appropriately settled in court. If the legal system provided no redress for insults to a gentleman’s honor, the logic ran, and a gentleman’s honor was a vital part of the equipment with which he engaged the world, then some other avenue of satisfaction was necessary. The extralegality (not to say illegality) of the code of honor was therefore crucial to the code’s success, for it allowed the code’s followers to style it as a legitimate, parallel rule system that dealt with the extralegal right of a gentleman to defend his honor.

Indeed, duelists frequently embraced the rhetoric of extralegality to justify their activities. “How many cases are there, that might be enumerated,” demanded Wilson’s \textit{Code of Honor}, “where there is no tribunal to do justice to an oppressed and deeply wronged individual?”\textsuperscript{175} Wilson continued: “[I]n cases where the laws of the country give no redress for injuries received, where public opinion not only authorizes, but enjoins resistance, it is needless and a waste of time to denounce the practice.”\textsuperscript{176} Earlier in the century, a British commentator had put the case even more forcefully:

\begin{quote}
I have never known a man whose heart was in the right place bring an action for damages against another for seducing a beloved wife, a daughter, etc. For these and such like offences \textit{the law can make no adequate retribution}—in such a state life is a burthen, which cannot be laid down or supported, till death either terminates his own existence or that of the despoiler of his peace and honour.\textsuperscript{177}
\end{quote}

\begin{itemize}
\item \textsuperscript{174} Greene, \textit{supra note} 12, at 369 (citing Blackstone’s \textit{Commentaries}).
\item \textsuperscript{175} \textit{WILSON, supra} note 34, at 4.
\item \textsuperscript{176} \textit{Id.} at 6. But opponents of dueling such as Lyman Beecher brooked none of this type of justification: “The feelings for which the law makes no provision, are feelings for which it ought not to provide.” \textit{BEECHER, supra} note 74, at 17.
\item \textsuperscript{177} \textit{ABRAHAM BOSQUETT, THE YOUNG MAN OF HONOUR’S VADE-MECUM} (London, 1817) \textit{(quoted in BALDICK, supra} note 5, at 32-33) (emphasis added; internal quotation marks omitted). Andrew Jackson’s mother instilled the same notion in her son’s mind with her pronouncement that “[t]he law affords no remedy that can satisfy the feelings of a true man.” See \textit{AYERS, supra} note 3, at 18. The lesson apparently stuck with young Andrew. See \textit{supra} text accompanying notes 61-62.
\end{itemize}
Thus, duelists argued that the gravity of certain offenses placed them beyond the purview of the legal system, demanding a more visceral retribution than courts could dole out.\footnote{178}

Even when civil authorities determined that duelists ought to face criminal sanctions, harshness in theory often transmitted into lenity in practice. In his study of nineteenth-century British duels, Antony Simpson argues that while "the substantive law of England was unreservedly intolerant of dueling . . . the law in these matters was never strictly followed except in the most unusual circumstances."\footnote{179} Faced with overwhelming evidence of premeditation, malice, and planning, courts could not explicitly instruct juries to ignore the common law definition of murder; they could, however, shift the inquiry to focus on the fairness of the fight and the parties' adherence to the code duello.\footnote{180} Using this fairness test, a British judge in 1830 encouraged the jury to acquit a Captain Smith and his second of the murder-by-duel of a Dublin lawyer named O'Grady, opining that "'[T]he conduct of the prisoners when in the field, was such as to leave no stain upon their character.'"\footnote{181} The tractable jury acquitted Smith and his comrade of murder, convicting them of manslaughter instead.\footnote{182}

Contemporary observers noted a similar tendency on the part of American courts. Sabine had this to say:

In the United States, as in England, killing in a duel is murder; but here, as there, OPINION is superior to LAW. Bennett, as far as I have been able to ascertain, is the only person who has been executed for taking the life of a fellow-man in single combat since we became a free people. In some States, the parties have seldom been held even to answer; in others, the inquiry in the courts has been confined to the single question of the "fairness of the fight," and this point determined in favor of the survivor, acquittal has followed as a matter of course.\footnote{183}

"Bennett" was William Bennett, executed in Illinois in 1819 for killing Alphonso Stewart after challenging him to a duel. Although this

\begin{itemize}
\item \footnote{178} See Fisher, supra note 25, at 1074 (noting "the reluctance of white [southern] men to submit personal disputes to the courts for resolution"); Vandervelde, supra note 5, at 835 (noting that devotees of the code of honor believed "that recourse to legal actions was neither manly nor honorable").
\item \footnote{179} Simpson, supra note 20, at 121.
\item \footnote{180} See id. at 122.
\item \footnote{181} Id. at 123.
\item \footnote{182} See id. Simpson notes that juries occasionally nullified on their own despite pressure from the bench to return murder convictions, suggesting that sympathy for duelists was not confined to the judiciary. See id.
\item \footnote{183} SABINE, supra note 2, at 43.
\end{itemize}
melancholy fact was often bandied about as an example of northern intolerance of dueling, the bizarre facts of the Bennett-Stewart encounter suggest a different conclusion: that the severest legal penalties were reserved for those who failed to comply with the fair fight rule. The seconds intended for the affair to terminate in a mock duel and had loaded the weapons with powder only, but Bennett had somehow discovered their plan and loaded his gun with bullets as well after his second handed it to him. Unsurprisingly, Stewart was killed at the first shot. Expressing outrage at this clear breach of the code of honor as well as basic human decency, the jury convicted Bennett of murder and sentenced him to hanging.

In another famous collision between law and code, a jury in 1859 acquitted General Daniel E. Sickles of the murder-by-duel of Philip Barton Key (son of Francis Scott Key) after Sickles claimed temporary insanity. Although the facts of the case were apparently clear-cut and not totally indicative of temporary insanity, the jury determined that the homicide was justifiable in that Key had been "paying attention to" Sickles’s young wife. Because Sickles had abided by the rules of fair play as contained in the code of honor, the jury absolved him of wrongdoing.

Many commentators remarked upon the lawlessness of the code of honor, especially as the northern duel receded into memory and the code became associated with the South and, increasingly, the West—especially California. In 1884, Ben Truman felt qualified to state that "between the years 1850 and 1860 more fatal encounters took place in the Golden State than elsewhere in the Union during the same length of time." Most famous and formalized of these was the 1859 meeting

184. See STEVENS, supra note 5, at 93.
185. See id.; see also SABINE, supra note 2, at 43.
186. See STEVENS, supra note 5, at 278. Stevens refers to this as the first American case in which a murder defendant pleaded temporary insanity. See id.
187. Id.
188. See, e.g., Thomas J. Kerman, The Jurisprudence of Lawlessness, 29 A.B.A. REP. 450, 452 (1906) (listing "Law V" of the "decalogue" of jury-made lawlessness as the rule that "[t]he survivor of a fatal duel must be acquitted, if the duel was fairly conducted according to the time-honored provisions of the Code of Honor").
189. TRUMAN, supra note 2, at 78. Truman was particularly taken with the idea that the code of honor had moved west to reincarnate itself as the cowboy gunfight: [T]here still remains a duelling custom among a class of Americans known as the "cowboys" of the West, which nothing but the overwhelming approach of civilization and power of empire can effectually obliterate. The cowboy is ostensibly an owner or herder of stock upon unpurchased or unpaid-for ranges of nutritious grasses in the western part of the United States; but, in reality, he is a stealer of horses and cattle, a guzzler of adulterated spirits, and a shooter of men; and it may be said of him, with
between Judge David S. Terry and Senator David C. Broderick, which centered on the parties’ political aspirations and opposing stances on slavery and resulted in the death of Broderick. After the duel, which took place in a ravine twelve miles outside of San Francisco, Terry was indicted for murder but acquitted at trial. The code of honor had once again triumphed over mere law, but it proved a Pyrrhic victory for Terry: “He continued to live in San Francisco and held his head high, but people viewed him much as New Yorkers had viewed Aaron Burr.”

B. The Duel in the Law.

Observing the tenacity of the duel in the South and searching for a parallel northern institution that adjudicated insults to honor, many scholars have seized upon the legal actions of libel and slander as the natural heirs to the duel. While the symmetry of this evolution is appealing, it seems too neat, too difficult to substantiate. Yet it is also difficult to disprove. Clearly, libel and slander law took up where the duel left off in that they addressed the same basic need of the individual to avenge and vindicate himself against a verbal attacker. Furthermore, the rise of libel and slander actions in the North fits neatly with a vision of the North as essentially legalistic and bureaucratic, in

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perfect truthfulness, that he fears neither God, man, nor devil. . . . His “code” is to “always go well heeled and never let an enemy get the drop on him.”

Id. at 88-89.

190. STEINMETZ, supra note 2, at 314-16; Pistols From a Final Duel Are Sold for $34,500, N.Y. TIMES, Nov. 26, 1998, at A35; see generally SEITZ, supra note 67, at 317-30.

191. See STEINMETZ, supra note 2, at 315. The ravine, at Lake Merced near the San Francisco-San Mateo County line, is known to present-day San Franciscans as a golf course. See Pistols From a Final Duel Are Sold For $34,500, supra note 190.

192. SEITZ, supra note 67, at 329-30. Terry became embroiled in scandal again after the duel with Broderick: he was shot and killed in 1889 by the bodyguard of United States Supreme Court Justice Stephen Field when he attacked Field after making threats against him, apparently over a lawsuit. See id. at 330.

193. See, e.g., IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 502 (1965) (“Civil actions for slander and libel developed in early ages as a substitute for the duel and a deterrent to murder.”); INTERVIEW IN WEEHAWKEN, supra note 4, at 176-77 (“The change in attitude [after the Civil War] may account in some small part for the increase in suits for libel and slander during the late nineteenth century. An offended person now looked to his lawyer instead of his pistol.”); Lawrence M. Friedman, Dead Hands: Past and Present in Criminal Justice Policy, 27 CUMB. L. REV. 903, 917 (1997) (“Southerners fought duels, while Northerners sued each other.”).

194. See Robert C. Post, The Social Foundations of Defamation Law: Reputation and the Constitution, 74 CAL. L. REV. 691, 704-05 (1986) (“There is a clear analogy between the traditional common law of criminal libel and the ‘Code of Honor’ under which gentlemen duelist sought to avenge insults and thereby achieve the restoration of wounded honor. As the old saw would have it, ‘The laundry of honor is only bleached with blood.’”).
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contrast to the more traditional, norm-based social organization of the South.

But even if we could substantiate the claim that libel and slander actions increased in frequency in the nineteenth century, marshal evidence that more of the duelists were northerners, and then isolate the nonavailability of the duel as the but-for cause of their decision to bring a lawsuit, we would still lack the answer to one crucial question: were they bringing the lawsuits to vindicate the same rights for which they had sought redress on the field of honor? Or had libel and slander emerged on the horizon as viable options precisely because the nature of the underlying right had changed—because individuals no longer conceived themselves to be vindicating the entire amorphous notion of honor, but rather certain components of that heretofore undifferentiated set of values?

These are largely unanswerable questions that defy explanation based on the concise conclusions of nineteenth-century cases. Yet one significant connection between the duel and the actions of libel and slander does emerge from the shadows of the common law: the same ambivalence toward the public-private divide that characterized the end of dueling in the North endured in libel and slander, the legal modes of satisfaction. Nineteenth-century case law suggests that courts hearing defamation claims tacitly adopted the code of honor’s emphasis on the individual’s external projection of himself—rather than the inner-character focus of the moral courage vision—even as they held themselves out as the antithesis of the standardless adjudication of the releaguer. At the same time, however, the courts moved beyond the code of honor’s obsession with mere appearances to consider some insults in light of their potential actually to effect the insulted individual in his commercial capacity. The doctrine of libel and slander centered on “reputation,” but it was not the same reputation that had driven Hamilton or even Cilley to the field. The courts’ version acknowledged its limits by dealing only with certain types of insult and by admitting that reputation was a poor proxy for character.

In a seminal 1904 article on the history of defamation law, Van Vechten Veeder set out the parameters of the doctrine as it had developed through the nineteenth century. Building on the common

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195. Veeder, supra note 6, at 33.
law idea that "reputation is regarded as a species of property," Veeder defined reputation in the following way:

It is to be observed that it is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be. One is composed of the sum of the principles and motives—be they known or unknown—which govern his conduct. The other is the result of observation of his conduct—the character imputed to him by others.

Character as the "being," reputation as the all-important "seeming": Veeder's typology described a legal system that had all but revived the code of honor, with its insistence that society ought to deal with insult based upon the assumption that individuals' identities were constituted of and by public display—that is, by "the character imputed to [them] by others." Abandoning the Beecher-Dwight-Colton belief in the primacy of private morality, defamation law regressed toward treating the individual as nothing more than a collection of others' reflected opinions. Moreover, the law even adopted the code of honor's own term for this societal assemblage: "reputation."

But the path from the code of honor to the cause of action for defamation was not as direct as these similarities would suggest. An insult to reputation alone did not suffice to make a case for libel or slander; in addition, the aggrieved party was required to show that the insult fell within one of four general categories of actionable defamation as enunciated by Veeder: words that caused "special damage" based on a pecuniary test; words that imputed an indictable offense; words that imputed certain contagious disorders; and words that injured the plaintiff in his "profession, trade, or means of livelihood."

Interestingly, each of these categories dealt with a particular manifestation of that property known as reputation, rather than treating an insult to reputation per se as an actionable offense. "The one thing that is clear is that the right to reputation seems to have been completely

197. Veeder, supra note 6, at 33.
198. Id. at 50.
199. See id. at 49.
200. See id.
201. Id. at 50; see also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (DaCapo Press 1971) (1827) ("The injury consists in falsely and maliciously charging another with the commission of some public offence, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment . . . ").
lost sight of,” Veeder proclaimed. Instead of offering legal redress for attacks on honor and reputation in their pure forms, the doctrine as it had grown up required that the harmful words interfere with the relation between these qualities and the civic or commercial world in which they were expressed. In so doing, the law followed a middle course between the code of honor’s view of individual identity as wholly dependent on public opinion (defined from the outside in) and the critics’ view of individual identity as wholly dependent on personal morality (defined from the inside out). Northerners’ belief in the essentiality of character prevented them from returning to an entirely appearance-based system of assessing an insult’s effect, but their awareness of the impossibility of scrutinizing character led them to adopt damage to reputation as a metric of injury.

Unwilling to cede the public space of the courtroom, as it once had the public space of the dueling ground, to an injured party’s desire to display a personal wound to the world, nineteenth-century American common law developed the requirement of injury to a narrowly defined type of reputation. In so doing, courts sent a clear message that they would traffic only in injuries they could do something about: damage to an individual as a commercial actor. In Veeder’s words, “The law classes broken hearts and blasted hopes with wounded vanity and soured tempers, and protests that it cannot deal with such sentimental considerations.” With this as its mission, nineteenth-century doctrine set about parsing the elements of harm to the individual’s public identity. Rather unsurprisingly, the majority of the litigation focused on the action for injury to “profession, trade, or means of livelihood,” for the boundary between cause and lack of cause here went to the heart of the northern narratives of commerce and modernization. In essence, defamation law set itself the twin tasks of defining and policing the line between public and private insult.

Thus ensued a line of cases throughout the North at once frustrating and almost comical in their sedulous efforts to tease out a principled definition of an insult to professional or trade capacity and their dogged belief that such a definition existed. British jurist Thomas Starkie appreciated the difficulty of this exercise:

202. Veeder, supra note 6, at 48.
203. Id. at 51.
204. I have focused on New York cases for the sake of doctrinal coherence. See, e.g., Fry v. Bennett, 28 N.Y. 324 (1863) (stating that a publication that injures a plaintiff in his business, if false and malicious, commits an actionable libel); Kinney v. Nash, 3 N.Y. 177, 178 (1849) (stating that "words not actionable in themselves, are not actionable when spoken of one in an office, profession
Words imputing dishonesty to a tradesman, it seems, are not actionable, unless spoken with reference to trade. So that to call a tradesman a cheat, generally, has been held not actionable. But otherwise to say, "He keeps false books;" for the words evidently relate to his course of trading. . . . It may, however, be doubted, whether there is any solid distinction between these cases, since every tradesman's livelihood depends in some measure upon his general character for honesty and integrity; and it is difficult to suppose, that a general imputation of dishonesty, if believed, would not operate to his prejudice.205

Above all, courts sought a means of distinguishing insults to a party's private self from insults to a party's expression of that self in the public realm of the market. Northerners' conflicted feelings toward the duel had allowed them to decry it as both too focused on the personal (in the form of the empty performance of individual vanity that Colton had condemned206) and as not focused enough on the personal (in the form of the internal character idea that Beecher and others had advocated207). The law attempted to achieve a compromise between these views in the following two ways: (1) by defining a certain class of insults as simply too personal to admit of legal remedy, thereby avoiding the waste of judicial resources on disputes better left unscanned by the civic eye; and (2) by creating a truth exception to the right of reputation,208 thereby establishing a special rule for situations in which outer reputation actually mirrored inner character.

With boundless Victorian faith in the classifiability of all elements of human experience (and in their own ability to set up the initial classification scheme), nineteenth-century courts determined that the
proper test of an insult's effect on a party's public, market-participating self was the degree to which the insult described an act done rather than an inchoate tendency or other intrinsic quality.\textsuperscript{209} Based on a Lockean notion of reputation as "something that a person can earn through 'the exertion of talent' or the exercise of 'mechanical skill and ingenuity'"\textsuperscript{210} and "'the fruit of personal exertion,'"\textsuperscript{211} the emerging libel and slander doctrine effected a shift from the code of honor's notions of the relationship between the individual and society, for it defined reputation as the result of individual action rather than societal judgment. Thus, the late-nineteenth-century American legal system refused to construe reputation as the heir of externally defined honor, instead according the individual much greater latitude and agency in constructing his own projection of himself into the world. Reputation spoke of the businessman himself, while honor spoke only of the shadow that the duelist cast onto his society.

IV. CONCLUSION

The duel was a carefully constructed spectacle in which individuals claiming the status of gentlemen presented themselves before the public eye to stake their lives on the merit of their claims. In order to function as a viable method of dispute resolution, the duel required a society that permitted gentlemen to appropriate public space for settling their quarrels with one another. Less benignly, the duel allowed foppish, elite men to engage in absurd shows of bravado that were intended to prove membership in the club of gentlemen but that merely exposed themselves and their petty punctilios to the public gaze.

Regardless how charitably one views the duelist, one aspect of his motivation remains constant: his desire consciously to choose a single course of action to serve as the basis for society's judgment of him. Believing the code of honor's fiction that his inner being was defined by and secondary to his public display on the releaguer, the duelist both posited and proved his gentlemanliness by setting foot on the field. His display of himself on the field required that he empty himself of any

\textsuperscript{209} See, e.g., Walton v. Singleton, 7 Serg. & Rawle 451 (Pa. 1821) ("But to say of one he is a whoring fellow, is a charge of whoredom. The distinction is between words merely adjective, as thievish, and participles as thieving; the latter are actionable, because they import an act done; the former are not, because they import only an intention.")

\textsuperscript{210} Post, supra note 194, at 694 (quoting Starkie, supra note 205, at xx).

\textsuperscript{211} Id. (quoting J. Hawes, Lectures Addressed to the Young Men of Hartford and New Haven 95 (Hartford 1828)).
ethic save that of honor, for the all-encompassing title of gentleman
would provide him with a code equally applicable to all realms of life.

In their drive to redefine the meaning of “gentleman,” critics of the
code of honor also viewed the duel as the defining moment of an
individual’s life. Moreover, they appreciated the duelist’s willingness to
throw himself on the mercy and judgment of his society. But where the
duelist claimed noble valor, they saw selfish vanity; where the duelist
claimed compulsion and necessity, they saw frailty and self-murder.
Imploring the duelist to abandon the quest to throw the correct shadow
onto the screen of his society and back onto himself, opponents of
dueling such as Beecher, Dwight, and Colton attempted to invert the
dynamic of honor so that the right to call oneself a gentleman would
derive from internal character rather than external reputation, from virtue
rather than its hollow reflection.

Thus, dueling’s opponents sought both to infuse the definition of
“gentleman” with a stronger dose of private morality and to excise from
it much of the basely personal craving for external validation. In so
doing, they found themselves in the delicate position of demanding a
finer moral intuition from a class that cited its adherence to the code of
honor as evidence of its nice moral sensibility. Yet “intuition” was the
language of character, while “sensibility” was the language of
reputation. As an added complication, by mid-century the North had
adopted the language of character, while the South clung to its emphasis
on reputation as a badge of distinctively southern honor.

The Cilley-Graves duel stemmed from a similar inability to agree
on fundamental terminology, for dueling tyro Cilley’s repeated
statements that he had not implied that Webb was not a gentleman
invited a challenge, according to the code of honor. For Cilley the New
Englander, the word “gentleman” simply did not carry the judgmental
charge that it did for Webb and Graves. As this fundamental North-
South disagreement about specific definitions of the words of honor
grew more accentuated, the duel became one of the few remaining sites
of barely containable but still socially acceptable sectional dispute. The
Cilley-Graves encounter demonstrated that by mid-century, both North
and South viewed the code of honor—despite its emphasis on individual
reputation—as a vital means of uttering a political statement about
regional character.

The tension between reputation and character was mirrored in
nineteenth-century law. The common law causes of action for libel and
slander recognized injury to reputation in the marketplace but not to
character as a gentleman. Public redress was therefore available only for
certain types of insults affecting certain special realms of human activity. The code of honor's insistence that gentlemen's lives unfolded entirely within the public realm thus gave way to a new vision of elite white men conducting business affairs in public while living the rest of their lives in private.