Springfield's Urban Histories:

Essays on the Queen City of the Missouri Ozarks

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moon city press
springfield missouri
2012

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Wild Bill Hickok, the Springfield Shootout, and the Development of the No-Duty-to-Retreat Doctrine in the Law of the "Wild West"

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At about six o'clock on Friday night, July 21, 1865, David Tutt walked onto the town square of Springfield, Missouri. On the other side of the square, James Butler Hickok had been waiting. Hickok yelled at Tutt, threatening him if he continued to cross the square. Both men drew their pistols and fired. Tutt missed, but Hickok shot Tutt in the chest. Tutt fell dead on the square. Authorities arrested Hickok and a grand jury indicted him. In the trial the prosecutor argued that the defendant could not have a running dispute with an adversary, wait for his approach, openly challenge and threaten him on a public square, and shoot him dead, then claim it was done in self-defense. But that was exactly what the defense attorney argued. After describing the shootout as a "fair fight," he persuaded the jury to find Hickok not guilty.

The conflict between David Tutt and James Butler "Wild Bill" Hickok on the Springfield town square, which caught the attention of the national press, has long been considered one of the first well-publicized western gunfights. Although gunfights have been romanticized in novels, movies, and television, the Hickok-Tutt shootout has been one of the few actually documented by historians. It was also important in the history of dueling which, during the nineteenth century, went from a formal, private, and secret affair among gentlemen to a public display among desperadoes. And, especially because of its connection with Wild Bill Hickok, it has been a significant part of the cultural history of the American "Wild West." Hickok became an entertainer touring with the Buffalo Bill show and dime novels of the era sensationalized his exploits.

The Hickok-Tutt gunfight's connection to western law, however, is not as well known. Missouri, along with other western states, had changed the law to keep up with changes in society. When confronted by any armed person, one no longer had to retreat but, if armed, could stand and face the assailant and still claim self-defense in court. The Hickok trial was significant in demonstrating this new change in the law. With the jury's not-guilty verdict, the trial was also important in the development of what became known as the law of the "Wild West," wherein after a shootout the gunfighter walked free.

Frontier Violence and War

During the nineteenth century, from the Appalachian to Ozarks frontier, a new kind of dueling emerged with no connection to the traditional codes and southern gentry. Often associated with heavy alcohol consumption, these duels were a rougher form of fighting, more informal and improvised, and public. This change occurred, too, in the western states, where carrying arms had been commonly accepted.[1]

The Civil War, while dealing a great blow to the aristocratic society that had sustained formal-code dueling, also expanded the fighting between pistol-carrying desperadoes. The latter occurred in the Ozarks, long associated with violence and lawlessness, where during the war militias on both sides engaged in guerrilla warfare. The war in the area was truly a civil war pitting Missourians against Missourians and Ozarkers against Ozarkers. The combat did not have distinct sides, since Union soldiers dressed as militia and guerrillas from each side disguised themselves as the other. Usually neither side took prisoners, and guerrilla bands would sweep the countryside plundering, burning, shooting, and terrorizing the people. The guerrillas often took advantage of the situation by stealing or by acts of personal retribution that had nothing to do with the war. Different groups took turns occupying areas and engaging in reprisals on their enemies. This applied to Springfield, an Ozarks-frontier farm town whose population of about 1,300 was similar demographically to the surrounding region in being settled mostly by Scotch-Irish, many from the Appalachian Mountains and being divided in their loyalties during the Civil War. Caught in the middle of the warfare, many of its citizens became refugees. The two sides took turns occupying the town, which was about half-destroyed. After a battle was fought inside the town, Union forces thereafter maintained control.[2]

Springfield became the location for the largest Union army garrison in southern Missouri. The soldiers engaged in heavy drinking and had gunfights in the saloons in town. They stole from and terrorized the community. After the war was over, violence continued to affect Springfield and the surrounding area. The grudges of neighbor-against-neighbor that developed through guerrilla warfare remained unresolved at the end of the war. Unionists engaged in acts of revenge against former Confederates and Confederate sympathizers, who believed for these acts there would be no legal redress. Violence continued, too, after the war as troops were withdrawn and militia disbanded. Many well-armed guerrillas and militiamen became "bushwhackers," robbers, and highwaymen. At the close of the war, Springfield citizens were concerned about all the armed young men in town who had been long trained by their wartime experience in plunder, robbery, and murder. They spent their time drinking and gambling. Among these desperadoes were James Butler "Wild Bill" Hickok and David Tutt.[3]

The Shootout

Hickok, from Illinois, had been a teamster with a wagon company making runs during the war between Springfield and Rolla, which lay at the end of the Pacific Railroad Company line from St. Louis. Later, he served as a civilian scout for the U. S. Army in Missouri and Arkansas. Tutt, from Arkansas, had been a Confederate scout. After the war, in Springfield they spent a good amount of time together gambling. Hickok often borrowed money from Tutt, and that was the occasion for their dispute.[4]

After their gunfight, local officials conducted an inquiry gathering information and testimonial evidence about Hickok and Tutt. Testimonies, important for the arguments of the prosecutor and defense attorney dur-

James B. Hickok.
Courtesy of Buffalo Bill Historical Center, Cody, Wyoming, U.S.A.; Vincent Mercaldo Collection, P.71.478.

ing the trial, showed that on the night of July 20, 1865, the two had been playing cards in Hickok's room at the Lyon House on South Street. The subject of debt arose, and Tutt claimed Hickok owed him $45. Hickok said he did not owe him that much, that he had recently paid him $10 and now owed him only $25. Tutt picked up Hickok's watch that was lying on the table and told him he would hold the watch as collateral until he could pay. Hickok stated he had a memorandum book where he recorded how much he had borrowed and paid back. He thought he owed him either $25 or $35 and, after finding his book, he could pay him that night. They parted, with Tutt saying he owed him $45. Later that evening Hickok said to one of their mutual acquaintances, James Orr, "tell Tutt to bring my watch back in one hour and he will receive the $25. If he does not return the watch something else will be done."[5]

When the two met the next afternoon, Hickok had still not produced his memorandum book and Tutt still held Hickok's watch as collateral. They were with Orr sitting on the porch of the Lyon House when another one of their acquaintances, Eli Armstrong, joined them around 5:00 p.m. Hickok and Tutt had continued their disagreement. When Armstrong heard the amount in dispute, he told them that if that was the only problem, then it could easily be remedied. He took Tutt aside and asked him if he would be willing to settle with Hickok for $35 to avoid the difficulty. Tutt replied he would. Armstrong then took Hickok aside and explained the compromise to which Tutt had agreed. Hickok refused to accept this settlement, insisting instead that he find his memorandum book that would show how much he owed. Tutt, believing Hickok was unwilling to compromise, returned to the demand of $45 and said he would keep the watch until Hickok could pay him. Hickok stated that he would rather have a disagreement with any other man than with him. "You have accommodated me more than any man in town. I have borrowed money from you time and again and we have never had any dispute before in our settlement." Tutt replied he knew that and did not want any difficulty either. At that point Armstrong stated, "Boys that settles it then." Hickok added, "Let us all go and get a drink." He, Tutt, Orr, and Armstrong went into the bar room of the Lyon House and had drinks. Nothing, however, was settled, and Tutt still held the watch as collateral.[6]

After finishing their drinks, Tutt left the Lyon House and walked north on South Street to the square, went past the courthouse (on the west side of the square on the north side of College Street) and went to the saloon near the livery stable. Hickok and Orr left the Lyon House and walked north on South Street to the corner of the street on the square. Orr told Hickok he did not agree with him over his dispute with Tutt. Hickok accused Orr of being Tutt's friend and told him he had better leave. Orr replied that the street belonged to him as much as to any other person, but he did not wish

to have any difficulty, so they parted. At the corner, Hickok told people that Tutt had taken his watch, that he was waiting for him, and that he better not come back across the square carrying his watch. As word spread that there could be a difficulty between the two, people gathered along the south side of the square.[7]

At about 6:00 p.m., Tutt left the saloon and walked south by the courthouse. Hickok left the corner at South Street and walked out onto the square. In front of the courthouse, Tutt walked onto the square. Hickok yelled, "David you cannot cross this square and pack my watch." Both men stopped and drew their pistols. Tutt turned to the side, taking a classic dueling stance and raised his right arm to shoot. Hickok took aim, bracing his pistol in his right hand on his left arm. Both fired at about the same time. While Tutt missed his target, Hickok shot Tutt in the chest. Tutt turned, stumbled through one of the courthouse arches and then, in front of the door, fell back out onto the square. Lying flat on his back, he died quickly. As people gathered around Tutt, one of the spectators, F. M. Scholten, went up to Hickok and said, "That is rather hard." Hickok replied, "It is too late now and I am not sorry."[8]

The Hickok-Tutt shootout showed well the transformation of the personal combat or duel from a private to a public event and from outside to within the purview of the law. Hickok did not resist arrest. In the official inquiry, eyewitnesses and the medical and ballistic examinations confirmed that Tutt was killed by Hickok. Hickok did not deny this. The Missouri Circuit Court for Greene County was in session at the time. A grand

Greene County Courthouse, c. 1880.
Courtesy of The History Museum for Springfield-Greene County.

jury indicted Hickok for manslaughter. After he posted bail, he did not try to flee. He made no effort to circumvent the legal process. Of course, he would claim the fight was in self-defense.[9] For a long time this kind of defense had not been admissible in a court of law. But changes had recently occurred in the law concerning the use of self-defense.

Background on Dueling in the Law

Prior to the mid-nineteenth century, generally in the common law dueling was illegal. It was seen in the law as a premeditated plan to assault another with a lethal weapon. It was attempted murder or, if someone died, murder. During the eighteenth century, given the belief that personal combat was not an enlightened, rational, and civilized way to right perceived wrongs, the common law had been reinforced in Britain and in America with anti-dueling statutes. This continued into the nineteenth century and became standard through American states. Missouri was no exception.[10]

Previously, duelers had tried to avoid the law and keep their affairs out of court, because there was no viable legal defense for their actions. In Britain and America, self-defense was being used by defendants in murder and manslaughter cases to claim that a killing was a justifiable homicide; it was not, however, used for any death resulting from a duel. The common law rule on self-defense, as stated by Blackstone in his *Commentaries*, was that "the person, who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that ... from a real tenderness of shedding his brother's blood." To willfully face another and engage in combat, without retreating from the conflict first, meant in the law that one gave up the right to plead self-defense.[11]

In the mid-nineteenth century, in the western states, participants in the rougher, more informal and improvised public duels often ended up in a court of law. Their lawyers sought a defense. The prevalent use of guns in the west was the occasion for changing the law on self-defense. In Missouri and other western states, courts took up the problem of retreat in fights where the parties used pistols. How could one safely retreat faster than bullets shot from a revolver? It could well be that when, confronted by an assailant with a pistol, the best way to avoid death or great bodily harm was, if armed, to face the threat and shoot back. Blackstone in his *Commentaries* had said, "though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor: because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves." In the American west, the law changed to

accept that point of honor and avoid the cowardice of not standing and meeting one's assailant.[12]

No Duty to Retreat

Missouri was one of the western states leading the way in changing the law. By the 1850s the law in Missouri no longer required a person confronted to retreat but allowed him to stand and meet a threat. When confronted by a person wielding a pistol, if armed, one could respond in kind, and, when taken to trial, use the self-defense argument that the best defense was to shoot back at the assailant. As Judge William Napton stated in the opinion of the Missouri Supreme Court in *State of Missouri v. Epperson*, "A man is not obliged to wait until his adversary draws a bead on him before he commences his self-defense." A drawn pistol pointing in the general direction of the defendant and in firing range was sufficient to be a threat to kill. Or, as Judge John Richardson said in the opinion of the court in *State of Missouri v. Hicks*, "When danger is threatened and impending we are not compelled to stand with our arms folded until it is too late to strike, but the law permits us to act on reasonable fear...."[13]

In the typical self-defense case, to show that a killing was justifiable in the law, defense attorneys argued that any reasonable person would have felt threatened by the deceased. "The menacing attitude of a ... fierce, vindictive, and passionate man," Judge Richardson observed in *State v. Hicks*, "would naturally alarm our fears and make us prompt in anticipating his purposes." To demonstrate that the alleged assailant was a threat, Missouri courts allowed arguments from counsel and found evidence admissible to show that the assailant had a history of being a dangerous character. The defense attorney could attack the character of the deceased, portrayed as the bad aggressor, in order to defend his client, the killer on trial, portrayed as the victim.[14]

In a trial, however, the prosecutor could counter by exploiting weaknesses in the defense argument. In the law the more immediate the confrontation, the more it occurred in the passion of the moment, "the heat of blood," the more the law extenuated. When time permitted more opportunity for reflection and for resolving or withdrawing from a dispute, the accused could be expected to withdraw. If the prosecutor could successfully argue and present evidence showing that the defendant's actions were premeditated and that he had played an active role in bringing about the fight, then, in applying the law to the facts of the case, this could bar the accused from claiming self-defense.[15]

In mid-nineteenth century Missouri (as in other western states), the old, southern-style, private, formal dueling code remained against the law; yet an attorney could make a case in court defending a participant

in the new, frontier and western-style, informal, public duel. They could take advantage of the new no-duty-to-retreat doctrine that had developed. In a fight with revolvers, one could stand and meet the threat, fire back, and still claim self-defense in court. But, regarding motivation and what came prior to the shooting, the law had not changed. There could be no premeditation. One could not help cause the conflict, avoid opportunities to withdraw from or resolve it, and then use self-defense. Even if people tended to see as a "fair fight" any conflict wherein both parties engaged voluntarily, that was not the law. It did not matter whether it involved the old, formal-code duel or the new, informal duel; on premeditation, jurists stood firm and refused to sanction dueling. This was the law in Missouri as the state went through the Civil War, and, in the summer after the war, as Wild Bill Hickok went on trial for killing Dave Tutt.

State of Missouri v. James Hickok

On August 3, in the Missouri Circuit Court for Greene County, the accused gave a plea of not guilty to the charges and put his cause before "the Country," meaning that he exercised his right to be tried before a jury. Hickok, a Union scout who would be tried for killing a Confederate, would benefit from the makeup of the jury. The empanelled jury had to take the "Drake oath" of loyalty to the Union—no former Confederates or Confederate sympathizers were on the jury. Hickok would benefit, too, from drawing on the services of John Smith Phelps. He was not only one of the first lawyers in Springfield and recognized as the leading member of the bar in southwest Missouri, he was also a popular politician who had served in the U. S. House of Representatives, 1845-1863. A strong Unionist during the Civil War, he had raised the Phelps Regiment and served as military governor of Arkansas. Hickok would expect him to be persuasive with the jury and could also hope the judge presiding over the trial would be sympathetic as well. Circuit Judge Sempronius Hamilton Boyd, a strong Unionist and Republican, during the war had raised the Twenty-fourth Missouri Infantry and had served in the U. S. House of Representatives, 1863-1865, and had been a recent judicial appointment by Republican Governor Thomas Fletcher. The trial, *State of Missouri v. James Hickok*, began August 4, 1865.[16]

For the defense, Phelps drew upon the new no-duty-to-retreat doctrine that had developed in Missouri. After the two met on the square, the defendant did not have to withdraw but could stand and face his adversary and still claim the gunfight was in self-defense. Phelps paraphrased the opinion given by Judge Richardson in *State v. Hicks*. When threatened, "a man is not compelled to stand with his arms folded" and allow himself to be shot. Once confronted by Tutt in the square, Hickok was placed in a

situation where he had no choice. If he wanted to avoid getting shot, then his only recourse was to defend himself by shooting Tutt.[17]

The prosecutor, Circuit Attorney Robert W. Fyan, who during the war was a colonel and commander of the Twenty-fourth and Forty-sixth Missouri Volunteer Infantry, did not attempt to argue against the new body of law on self-defense. If the defendant had been an innocent party confronted by an assailant armed with a pistol threatening him with bodily harm, then he did not have to retreat. His best recourse was to draw his own weapon and defend himself. The prosecutor argued, however, that the accused, "willing to engage in a fight," was not just reacting to Tutt's threat but played an active role in bringing on the shootout. He presented testimonial evidence that the defendant had been in a long-running dispute with the deceased, had not tried to avoid the conflict, and, indeed, had rejected efforts made by others to resolve it.[18]

In the law it was damaging to Hickok that they did not just come upon each other. The prosecutor presented evidence that the defendant had waited at the square for Tutt, had told people what could happen if he returned, and, after the two men saw each other, that Hickok had yelled at Tutt not to come across the square carrying his watch. Just before the shooting, the accused had publicly threatened the deceased. Fyan argued that these facts showed premeditation which, in the law, barred the defendant from claiming self-defense. He noted that while Missouri law had changed, moving away from the duty to retreat, the law had not changed on premeditation or the part the accused played in causing a conflict. This was the main weakness in the argument for the defense.[19]

While Fyan stressed the events leading up to the shootout, Phelps emphasized the shootout itself and the character of the deceased. The defense attorney tried to establish before the jury that Tutt, known to be a "fighting character and a dangerous man," greatly threatened his client with bodily harm or death. Further, the defense alleged that Tutt had threatened Hickok before. Given his general reputation and conduct, Phelps argued, the defendant had to expect the worst. The defense attorney wanted the jury members to put themselves in Hickok's place when he saw Tutt's pistol. He argued that any reasonable person would have responded in the same manner to defend himself. Fyan objected to the allegation of a prior threat by Tutt. Judge Boyd sustained the objection, ruled this was unsubstantiated evidence, and instructed the jury to disregard it. Fyan contended that a discussion of the deceased's character had no bearing on the case. This was his weakest argument. In claiming self-defense, the law recognized that the defense attorney needed to establish the threat posed by the deceased.[20]

Phelps, in emphasizing the immediacy of the danger facing his client, contended that Tutt drew first. This was not an important point in the law but he was playing to the jury's emotions. If the defendant waited until the deceased drew first, then, according to popular notions of a "fair fight,"

he could draw in self-defense. Fyan countered, if the accused had helped bring on the conflict and, indeed, had yelled at the deceased threatening him with harm if he continued to walk in a public square, then he had given up his claim to self-defense and was guilty as charged for the killing, regardless of who drew first or fired first.[21]

Further, Phelps lacked conclusive evidence. First, most eyewitnesses could not differentiate the sound of two separate shots. They both fired at about the same time. Second, a few claimed that they saw Tutt draw first, but their claims were questionable because they could not see the front of both antagonists. The evidence showed that the crowd gathered at the south side of the square. Seeing the front of the deceased but only seeing the back of the accused, who carried two revolvers in holsters toward the front of his waist, they were in no position to confirm who drew first. Those who saw Tutt draw could not confirm whether it was before or after Hickok had drawn his pistol.[22]

In a jury trial, what mattered most was persuading the jury. Taking advantage of the all-Union jury, Phelps not only attacked Tutt's character, but brought in the fact he had been a Confederate. Emotions ran high in the summer of 1865, and Unionists were bitter toward former Confederates. Phelps played upon these emotions as he called several defense witnesses, including Captain Adams, Lieutenant John W. Goldston, Major Hart, Colonel John B. Maddill, Captain G. Maddison, and Captain Small, to testify on Hickok's meritorious service to the Union cause. This was where the trial could have become a farce and could have added to the growing perception of a lack of justice for former Confederates. Instead, although Fyan, the prosecutor, had been a commander of Union regiments in the war, and despite what biases he may have had, he made a strong case against the defendant and contended that the jury should not consider the issue of Tutt's loyalty to the Union. The performance of Judge Boyd also dashed any hopes Hickok could have had that he would be sympathetic toward him. He remained impartial and, indeed, the *Patriot*, the town newspaper, complimented him on how well he conducted the trial. The judge focused the trial on the question whether the defendant could claim self-defense to justify killing Tutt. The trial was not over loyalty to the Union. In the law, Tutt's having been a Confederate would not justify the killing.[23]

Phelps had a final argument. If the jury had a reasonable doubt concerning the case, then his client should be found not guilty. Fyan countered that the defense attorney was being misleading. First, there would always be a reasonable doubt because it was impossible to determine a verdict with absolute certainty. Juries were to give verdicts depending on the preponderance of evidence one way or the other. Only when a jury was uncertain, finding the weight of evidence at a near balance, should a reasonable doubt be raised in favor of the accused. Second, reasonable doubt did not apply to the justification a defendant gave for his actions. In this

case, Hickok could be given the benefit of reasonable doubt regarding his guilt of committing manslaughter, but he could not be given the benefit of reasonable doubt regarding the justification he gave for the killing. If the jury was uncertain that the killing was in self-defense, then the defendant should be found guilty.[24]

The law had changed to where, given the deceased's menacing character and his drawing a pistol, Hickok did not need to retreat and could shoot Tutt down in self-defense. The law had not changed, however, regarding a defendant's premeditation and part in bringing on a conflict. Testimonial evidence presented by the prosecutor, and even to an extent by the defense attorney, had showed that the accused and Tutt had been involved in a dispute prior to the shootout and that Hickok had refused efforts at conciliation, did not try to avoid the fight, waited for Tutt to return to the square, and yelled across the square at him before the shootout. By the end of the trial, Judge Boyd found Fyan's arguments more persuasive: the law and the weight of the evidence were against the defendant and his claim of self-defense. For his instructions to the jury, the judge used the draft list of instructions given to him by the prosecutor.[25]

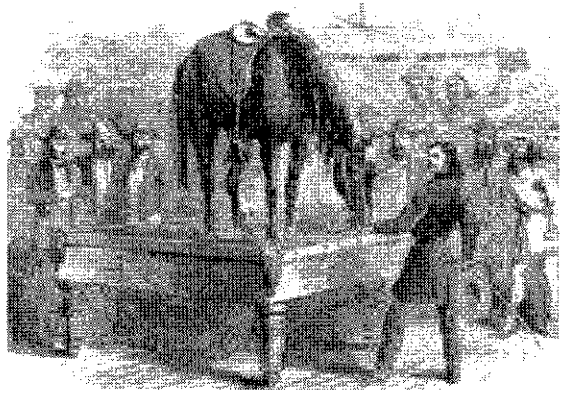
Judge Boyd's instructions to the jury were hypothetically on how to apply the law to the facts of the case. The defense had never challenged the fact of the killing, that Hickok had shot Tutt who died as a consequence. The major question before the jury was whether the accused could use self-defense to justify the killing. He was barred from doing so if there was premeditation or if he had "engaged in a fight or conflict willingly." And this bar remained, regardless of the threat posed by the deceased or his loyalty to the Union; this, too, was a key point upon which the judge agreed with the prosecutor. As for reasonable doubt, it applied only to the guilt of the defendant and not to the justification for the killing. If doubt had been raised about his guilt, then he should get the benefit of the doubt. But, if doubt had been raised about whether the killing was justified as self-defense, then the accused had failed in "his duty to satisfy you that he so acted" and must be found guilty. By Missouri common law, the judge could not go further and comment on the facts, sum up the evidence, or instruct the jury on the weight of the evidence.[26]

Judge Boyd set out the possible alternatives but, in the end, the jury had to decide the facts and give the verdict. After hearing the evidence and arguments of the attorneys presented over two days, the jury deliberated only ten minutes to reach a verdict. They found the defendant not guilty. In Missouri common law, the judge could not rule the jury had given a verdict against the weight of the evidence. Because of the right to no double jeopardy in the Missouri Constitution's Bill of Rights, Hickok would not be tried again.[27]

Harper's "Wild Bill"

The gunfight and trial of Wild Bill Hickok attracted eastern publishers. George Ward Nichols of *Harper's New Monthly Magazine* traveled to Springfield in the summer of 1865 to gather information. During the war, Nichols served on John C. Fremont's and later William T. Sherman's staff. His *The Story of the Great March* was published by the Harper's company in 1865. Given his background, and also to satisfy his eastern readers, Nichols made no attempt to hide his pro-Union bias. His article, "Wild Bill," referred to Hickok as a scout "on our side" during the war, in contrast to Tutt the rebel scout. He used the Civil War to provide a context for and add drama to the shootout. He claimed that, in the Ozarks, the war had occurred in an area already "inhabited by lawless people." After the war, incredible violence and killing had continued. He stated that former Confederates tried to return to Springfield, but they did not remain for long. Having heard that in southwest Missouri about 4,000 returned Confederates had been shot or hanged, he observed, "Revenge for the past and security for the future knotted many a nerve and sped many a deadly bullet." Nichols placed the fight between Hickok and Tutt in this context of Confederates returning to Springfield. Among these, according to Nichols' account, were Tutt and his rebel friends who did not like Hickok and, after Tutt had the watch, jeered him and boasted that Tutt would carry it in public. As Nichols reported, Tutt and his friends were trying to start a fight with Wild Bill. The author made the shootout part of the post-war violence of the area.[28]

Nichols' article, first and foremost entertainment for eastern readers, displayed arrogance and disdain in describing the small, frontier town of



Hickok in *Harper's New Monthly Magazine*, February 1867.
Courtesy of F. T. Miller.

Springfield and its inhabitants. At the town square, the author watched "the coming and going of the strange, half-civilized people . . . dressed in queer costumes . . . made of skin, but so thickly covered with dirt and grease as to have defied the identity of the animal when walking in the flesh." There were "groups of men lolling against posts, lying upon the wooden sidewalks . . . [who] were lazily occupied in doing nothing. The most marked characteristic of the inhabitants seemed to be an indisposition to move, and their highest ambition to let their hair and beards grow. . . . The only indication of action was the inevitable revolver which . . . [all men] wore about their persons." Also, to entertain his readers, much of the article was written as if the author were interviewing a "Captain Honesty" who spoke in a rustic, frontier way. Nichols added a good amount of fiction as he embellished his story. Wild Bill was well liked, for example, because he entertained people with his horse, Black Nell, that performed tricks such as jumping up on billiard tables. Further, the author added a romantic aspect by having Captain Honesty say, "The fact is, thar was an undercurrent of a woman in that fight!"[29]

The *Harper's* story brought national attention to the gunfight in Springfield and publicized the new, western style of dueling—the gunfight or shootout. Indeed, Nichols did much to create the gunfight myth. He moved the time of the shootout to noon. There was plenty of light in July at 6:00 p.m., but the author believed the melodrama increased if the gunfight occurred at midday. Between the two adversaries, a clear contrast was made: while Hickok only played cards, Tutt was a professional gambler; while Hickok played the gentleman, Tutt was confrontational; and, again, in the context of the Civil War, while Hickok was a scout "on our side," Tutt was a rebel scout. It was a classic conflict between a good guy and a bad guy. The author even changed how Tutt died, keeping him in center stage instead of letting him move into the background through the arches of the courthouse building. After Wild Bill had shot him, as Captain Honesty told it, Tutt "stood stock-still for a second or two, then raised his arm as if ter fire again, then he swayed a little, staggered three or four steps, and then fell dead."[30]

Nichols was important in popularizing the idea that the western gunfight was a "fair fight." This theme ran throughout "Wild Bill." About the Hickok-Tutt duel, Captain Honesty said, "I'll tell yer how it happened.... I tell yer twas a far fight...." In Nichols' account, Tutt went for his pistol first. Wild Bill drew his in self-defense. Not only did the author claim there was general agreement on this, even Tutt's friends, as Captain Honesty put it, "said it war a far fight." In "Wild Bill," after the shootout, because it was so obviously a "fair fight" or because of his popularity, Hickok "was tried and cleared the next day. It was proved that it was a case of self-defense." Nichols was also important in popularizing what would become known as

the law of the "Wild West." In "Wild Bill," the gunfighter, the winner of the duel, was acquitted because he shot in self-defense.[31]

Although arising out of a rather petty dispute over gambling debts, Nichols emphasized a point of honor, thus making the Hickok-Tutt conflict appear similar to a classic, formal-code duel. When Tutt took the watch as collateral, as Captain Honesty put it, "This made Bill shooting mad; fur, don't yer see, . . . it was a-doubting his honor like." While in Springfield researching his article, Nichols interviewed Hickok and asked him about the gambling debt and the watch. Hickok told Nichols that Tutt "tried to degrade me, and I couldn't stand that, you know, for I am a fighting man, you know." He added, "One of us had to die." Asked how he could get into such a fight, the author described Wild Bill as having "a proud, defiant expression" when he replied that "a man must defend his honor."[32]

In Nichols' interview, Hickok was unremorseful. He made no attempt to act the victim in the affair or claim he was provoked or surprised. He admitted that there had been a "hard feeling between us a long while" and

1867 Dime novel featuring Hickok.
Courtesy of F. T. Miller.

that, from his perspective, there had been no room for reconciliation. He had not tried to avoid the conflict. The journalist tried to appear detached and not give his approval, but, at the same time, he was not too concerned with the legal ramifications. Whether or not intended by the author, the information provided in the interview supported the prosecutor's trial argument that Hickok and the deceased had had a running dispute, that he had not tried to avoid or resolve the conflict, that he had not just responded to the threat from Tutt, and that there had been premeditation.[33]

In "Wild Bill," Nichols also included other Hickok exploits besides the gunfight with Tutt, and a series of dime novels continued the story, building up a bigger-than-life hero, "Wild Bill the Pistol Prince." Hickok became a celebrity and toured with Buffalo Bill's Wild West Show. *Harper's* "Wild Bill," as well as the national attention that Hickok was receiving, amused people in Springfield, but they also thought that much of Nichol's article—such as Hickok's horse jumping onto billiard tables and the duel being fought over a woman—was exaggeration or fiction. Also, stated in a reply to *Harper's* included in the *Patriot*, "our people do not dress in greasy skins and bask in the sunshine prone upon our pavements."[34]

Violence and Fear

In the *Harper's* story, Nichols had Wild Bill remaining very popular in Springfield even after the gunfight. Contrary to this image, however, he had not enjoyed a consensus of support. After the trial he ran for city marshal in Springfield. He lost in the election of September 13, 1865. As reported in the *Patriot*, many in the town had been greatly disturbed by the shootout and trial. "The citizens of this city were shocked and terrified at the idea that a man could arm himself and take a position at a corner of the public square, in the center of the city, and await the approach of his victim . . . and then willingly engage in a conflict with him which resulted in his instant death." Also, many criticized the jury's verdict and agreed with the prosecutor that Wild Bill could not use self-defense as a justification, because he had not done what he could to avoid the fight. According to the *Patriot* everyone in town, including those who supported Hickok, generally agreed that he had engaged in the fight willingly. Wild Bill himself did not deny it, a point later corroborated by the publication of Nichol's interview with Hickok. Many believed that the jury had given its verdict against the weight of the evidence.[35]

In the *Patriot* the trial and the verdict were placed in the context of the violence and fears that followed the war. People were afraid to speak out against Wild Bill and the other desperadoes. The ruffians had struck fear in the community and, because of fear, could not be brought to justice. On the gunfight and the lack of appropriate legal consequences for Hickok,

many Springfield citizens "failed to express the horror and disgust they felt, not from indifference, but from fear and timidity." The editors of the *Patriot*, a Radical Republican and Unionist paper, may not have wanted to go further and openly criticize the jury for bias. But, about fifteen years later, when Return I. Holcombe was interviewing the citizens of Springfield for his *History of Greene County*, people spoke of the obvious, direct connection between the war and the Hickok trial. The verdict was seen as the action of an all-Union jury clearing a Union man who had shot a Confederate.[36]

The compromising of justice and the general pervasiveness of violence in post-war Missouri were noticed by the state supreme court in a case that was similar to *State of Missouri v. James Hickok*. The kind of questions of law and fact that arose in the Hickok trial came before the supreme court in *State of Missouri v. Starr*. This occurred because in contrast to the Hickok trial, wherein the defendant was acquitted and the prosecutor was barred from appealing, in *State v. Starr* the defendant had been found guilty and appealed. In both trials, the defendant had claimed self-defense to justify a killing, and the prosecutor had presented evidence to show that the defendant had helped cause and had engaged freely and willingly in the fight that had resulted in a death and argued that, because of this, the defendant could not claim self-defense. In both trials, the defense attorney had argued that the defendant believed he was threatened by the deceased. In *State v. Starr*, the trial-court judge had instructed the jury that when the evidence showed, regarding a conflict, that the defendant "was instrumental in bringing it on, the law would not permit him to shield himself behind the doctrine of self-defense" and when the defendant had freely entered into the fight, then he could not use self-defense, no matter "how imminent the peril may have been in which the accused was placed during the conflict." The state supreme court ruled in favor of these jury instructions, which were similar to those requested by Fyan, the prosecutor, and issued by Judge Boyd in the *State of Missouri v. James Hickok*. *State v. Starr* had been similar to the Hickok trial, too, in that the defendant had challenged the deceased just before their fight. The high court ruled that the accused could not provoke as in a challenge or dare and then use self-defense. That was an instruction to the jury that Fyan could have asked Judge Boyd to issue regarding Hickok yelling across the square at Tutt before their shootout. In the Hickok trial, on the whole, Fyan had stated well the law regarding a defendant not being able to claim self-defense if he had helped cause the conflict and willingly engaged in it, and Judge Boyd's instructions to the jury had been clear and were the kind that the state high court determined needed to be issued to check any abuse of the new no-duty-to-retreat doctrine.[37]

The judges of the Missouri Supreme Court regretted the extent to which the change in the law on self-defense, the new no-duty-to-retreat

doctrine, was being used to excuse premeditated killing. Judge David Wagner, in his opinion in *State v. Starr*, emphasized the importance of instructing juries in hopes they would not be inclined to accept the claim of self-defense when the accused had helped bring about and willingly engaged in the conflict. He declared that self-defense did not imply the "right of attack" and could be used neither when "the difficulty was sought for and induced by . . . [the accused] in order to afford him a pretense for wreaking his malice" nor "when a defendant voluntarily and of his own free will and inclination entered into the difficulty."[38]

The state supreme court judges also hoped the legal system could act to constrain some of the negative aftermath of the Civil War. As Judge Wagner observed about the time, "violence and lawlessness are fearfully prevalent in the land." Carrying weapons, and "the disposition to avenge every affront or grudge with a strong hand, are but too painfully manifest." Such was the case in the Hickok-Tutt shootout, where a man died over a watch. Much of this violence, of course, was the result of the war. As the violent crimes of the times were brought before courts of law, justice needed to be carried out. The Hickok trial in Springfield, where fear and a pro-Union bias may well have influenced the jury verdict, was symptomatic of the problems Missouri faced. The partiality of the war, Judge Wagner stated in his opinion in *State v. Starr*, should not be continued within the court system. Courts and juries "must not be swayed or diverted from the path of duty by their sympathies." The high court admonished the state, our "only security and protection is to be found in the determined and impartial enforcement of the law."[39]

"Law of the Wild West"

A popular view of the Hickok-Tutt duel, publicized in *Harper's* "Wild Bill," became part of the national "Wild West" myth: a shootout, wherein both parties willingly engaged, was a "fair fight" and the winner could use self-defense to get out of charges of murder or manslaughter. This has been seen as the legal culture of the "Wild West." But, in Missouri, and in other western states, the law had not changed to accept the western-style gunfight. The law had changed on not needing to retreat, but if the accused had been active in bringing on the fight, and had made no effort to avoid it, then, in the law, he could not use self-defense.[40]

There was a distinction between the law, from statutes or court opinions, pronounced by judges and the facts and verdicts determined by juries. If a prosecutor could convince a jury that the defendant had given up his claim to self-defense because he had brought about the conflict, as in *State v. Starr*, then he could be found guilty. But, as in the Hickok trial, a jury could reject the prosecutor's argument and accept the claim of self-defense despite the evidence of the defendant's actions being premeditated. A jury might be motivated to acquit a defendant such as Hickok because of the influence of the notion that, both parties willing, it was a "fair fight," or the popularity of a defendant, or the persuasiveness of a defense attorney, or the fear of desperadoes, or the need to clear a Union man for killing a Confederate. The actions of juries in trials such as the *State of Missouri v. James Hickok* brought about what became known as the law of the "Wild West." This so-called western "law" was not actually the law, neither from statute nor court opinions, but, rather, resulted at the trial-court level from juries having found defendants not guilty. In the common law in states such as Missouri, a judge could not rule the jury had given a verdict against the weight of the evidence. This meant he could not throw out the verdict, even when he thought a jury had ignored the law. And, because of double jeopardy, the accused could not be tried again.

The gunfight between James Wild Bill Hickok and David Tutt in Springfield—still a western, frontier town, during the violent aftermath of the Civil War—was important in transforming dueling into a public display among desperadoes. It was perhaps the first of the western-style shootouts and one of the few that have been documented by historians. The Hickok duel and trial caught national attention, starting with *Harper's* "Wild Bill," and helped make the western-style shootout a part of the story of America's "Wild West." The trial demonstrated the new self-defense doctrine of no duty to retreat and, with the jury choosing not to apply the law to the case and finding the gunfighter not guilty, also showed the new "law" of the "Wild West."

Notes

1 From the first exploration into the Ozarks frontier, Henry Schoolcraft described the "justice" among the frontiersmen or "hillbillies" who took the law into their own hands or rather of there being no law. Henry R. Schoolcraft, *Journal of a Tour into the Interior of Missouri and Arkansaw* (1821), rpt. Milton D. Rafferty, *Rude Pursuits and Rugged Peaks, Schoolcraft's Ozark Journal, 1818-1819* (Fayetteville, AR: University of Arkansas Press, 1996), 70; Dick Steward, *Duels and the Roots of Violence in Missouri* (Columbia, MO: University of Missouri Press, 2000), 7-8, 41-57, 79-99, 135-36.

2 A. Harwell Wells, "The end of the affair? Anti-dueling laws and social norms in Antebellum America," *Vanderbilt Law Review* (May 2001) (accessed December 30, 2008): http://www.allbusiness.com/legal/3604434-1.html; Michael Fellman, *Inside War: The Guerrilla Conflict in Missouri During the American Civil War* (New York, NY: Oxford University Press, 1989), 166-76. For a good description of Springfield before the Civil War, on the devastation to the town caused by war, and on the Battle of Springfield, see Chapter One in this volume.

3 Fellman, *Inside War*, 166-76; Jonathan Fairbanks and Clyde Edwin Tuck, *Past and Present of Greene County, Missouri* (Indianapolis, IN: A. W. Bowen &

Company, 1915), 1:382-87, 693-96; George S. Escott, *History and Directory of Springfield and North Springfield* (Springfield, MO: Office of the Patriot Advertiser, 1878), 114-15; R. I. Holcombe, *History of Greene County, Missouri* (St. Louis, MO: Western Historical, 1883), 472-91.

4 Hickok, also spelled "Hickcock," "Hicock," or "Haycock," was from Homer or Troy Grove, Illinois and David—also called "Dave" or "Davis"—Tutt was from Yellville, Arkansas. Holcombe, *History of Greene County, Missouri*, 472-91, 764; Fellman, *Inside War*, 56, 177, 232-38; Hamilton Cochran, *Noted American Duels and Hostile Encounters* (Philadelphia, PA: Chilton Books, 1963), 276-77.

5 Springfield *Missouri Weekly Patriot*, July 27, August 10, 1865; written testimonies from Eli J. Armstrong, A. L. Budlong, Dr. E. Ebert, Thomas D. Hudson, Lorenza F. Lee, J. W. Orr, Scott Riggs, F. M. Scholten, and Oliver H. Scott, coroner's inquest, July 22, 1865, and subpoenas, *State v. Hickok*, 1865, Circuit Court of Greene County, Box 486, 498, Files 3, 8, Greene County Archives and Records Center (hereafter GCARC).

6 Ibid., Box 498, File 8.

7 Ibid.

8 Ibid. J. F. Brown, coroner, prepared his report with the aid of a jury of L. M. Bigler, A. F. Church, Jay L. French, J. L. Holland, John Hursh, and William Massey. Dr. Edwin Ebert and Dr. James examined Tutt after the gunfight. The medical examination showed that the bullet went through his ribs, entering on the right side and exiting on the left side.

9 Ibid. and Box 486; Book G, 311, Abstracts of Circuit Court Record Books, GCARC. Tutt's revolver had been fired and one chamber was empty. Grand Jury Indictment, July 24, 1865, and bond hearing, July 24, 1865. Isaac Hoff, John H. Jenkins, and R. B. Owen put up a security of $2,000 to assure Hickok's presence at the trial.

10 Jeremy Horder, "The Duel and the English Law of Homicide," *Oxford Journal of Legal Studies* 12, (1992), 419-430; An act more effectually to prevent dueling, December 13, 1822, *Laws of Missouri* 1: 978-80; Steward, *Duels and the Roots of Violence in Missouri*, 41-57, 79-99; Wells, "The end of the affair?"

11 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), 4: 198-99 (accessed December 30, 2008): http://avalon.law.yale.edu/18th_ century/blackstone_bk4ch14.asp.

12 Blackstone, *Commentaries*, 4:185.

13 *State v. Epperson*, 27 MO 255 (1858); *State v. Hicks*, 27 MO 588 (1859); *Beard v. U.S.*, 158 U.S. 550 (1895); Joseph H. Beale, Jr., "Homicide in Self-Defense," *Columbia Law Review* 3, (1903), 526-45, and "Retreat from a Murderous Assault," *Harvard Law Review 16, (1903)*, 567-82; *Brown v. U.S.*, 256 U.S. 335 (1921); Richard Maxwell Brown, *No Duty To Retreat, Violence and Values in American History and Society* (Norman, OK: University of Oklahoma Press, 1991), 3-37.

14 *State v. Hicks*, 27 MO 588 (1859).

15 *State v. Hays*, 23 MO 287 (1856).

16 Both Judge Boyd (the circuit attorney) and Robert W. Fyan (prosecutor in the trial) were recent appointments by Governor Fletcher. Holcombe, *History of Greene County, Missouri*, 485, 489, 511-13, 575-80, 743, 766, 822-23, 839-40. On the Missouri State Convention that drafted the Constitution of 1865, Charles Drake and the "Drake Oath" or oath of loyalty to the Union, and on the Ousting Ordinance under which public officials were removed from office and replaced by

Republicans, see William E. Parrish, *Missouri Under Radical Rule: 1865-1870* (Columbia, MO: University of Missouri Press, 1965), 14-35, 50. The jury consisted of E. J. Bray, A. Cargile, John Foster, W. B. Gregory, C. C. Headlee, J. P. Julian, T. Kushim, G. M. Lacey, J. W. Langston, W. M. Morris, A. Morrison, and A. H. Murphy, Book G, 387, Circuit Court Record Books, GCARC.

17 Drafts of instructions to the jury, prepared for Judge Boyd by the prosecutor and the defense attorney, Box 498, File 3, Circuit Court of Greene County, GCARC. I have used these sources for the cases presented by each side to reconstruct the attorneys' arguments.

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

22 Ibid.

23 Subpoenas, Ibid., and File 8; *Patriot*, July 27, August 10, 1865; on post-war Unionist acts of revenge and the perception of a lack of justice for former Confederates, see Fellman, *Inside War*, 232-39. The Springfield *Missourian* had been started as a Radical Republican and Unionist paper in 1862 by A. F. Ingram, who was joined as publisher by William J. Teed in 1864 when the paper became the *Missouri Patriot*. Holcombe, *History of Greene County, Missouri*, 768; Minnie Organ, "History of the County Press," *Missouri Historical Review* 4 (July 1910): 292-93. Drafts of instructions to the jury, Box 498, File 3, Circuit Court of Greene County, GCARC.

24 Ibid.; *State v. Nueslem*, 25 MO 111 (1857); *State v. Crawford*, 34 MO 200 (1863).

25 Drafts of instructions to the jury, Box 498, File 3, Circuit Court of Greene County, GCARC; *Patriot*, 10 Aug. 1865.

26 Ibid.; *State v. Dunn*, 18 MO 419 (1853); *State v. Hicks*, 27 MO 588 (1859); *State v. Ostrander*, 30 MO 13 (1860); *State v. Schoenwald*, 31 MO 147 (1860); drafts of instructions to the jury, Box 498, File 3, Circuit Court of Greene County, GCARC.

27 Ibid.; Book G, 392, Circuit Court Record Books, GCARC; *Patriot*, 10 Aug. 1865; *State v. Ostrander*, 30 MO 13 (1860); *State v. Palmer*, 30 MO 385 (1860).

28 George Ward Nichols, "Wild Bill" *Harper's New Monthly Magazine* 34 (Feb. 1867): 275-76.

29 Ibid., 274. There had been an eastern bias going back to the first description of the Ozarks in Schoolcraft, *Journal of a Tour into the Interior of Missouri and Arkansaw*. For a discussion of eastern perceptions of the area, see Fellman, *Inside War*, 11-22.

30 Nichols, "Wild Bill," 275-77, 279-80.

31 Ibid.

32 Ibid., 280-81.

33 Ibid.

34 Ibid., 281-85; *Patriot*, 31 Jan. 1867; Paul Preston, *Wild Bill the Indian Slayer* (New York: DeWitt's Ten Cent Romances, 1867); *Wild Bill's First Trail* (New York: DeWitt's Ten Cent Romances, 1867); Prentiss Ingraham, *Wild Bill, The Pistol Dead Shot* (New York: Beadle's Dime Library, 1882), and *Wild Bill, The Pistol Prince* (New York: Beadle's Pocket Library, 1891); William West Wilder *Wild Bill's Sable Pard* (New York: Beadle's Popular Library, 1892); *Wild Bill* (London: Budget Story Books, 1895). For a good discussion of Hickok's part in the "Wild West," see Joseph G.

Rosa *Wild Bill Hickok: The Man and His Myth* (Lawrence, KS: University Press of Kansas, 1996).

35 Springfield citizens were also concerned that the gunfight, *Harper's* "Wild Bill," and Hickok's notoriety, by adding to the area's reputation for lawlessness, could discourage migration. *Patriot,* August 10, 1865, January 31, February 28, 1867; Nichols, "Wild Bill," 280-81; Escott, *History and Directory of Springfield,* 114-15; Holcombe, *History of Greene County, Missouri,* 763, 766.

36 Ibid., 490-91; *Patriot,* August 10, 1865, January 31, February 28, 1867; Escott, *History and Directory,* 114-15.

37 *State v. Starr,* 38 MO 270 (1866).

38 Ibid.

39 Ibid.

40 *Beard v. U.S.,* 158 U.S. 550 (1895); Beale, "Homicide in Self-Defense;" *Brown v. U.S.,* 256 U.S. 335 (1921); Brown, *No Duty To Retreat,* 36-41, 49-52, 87; Steven Lubet, "Slap Leather! Legal Culture, Wild Bill Hickok, and the Gunslinger Myth" *UCLA Law Review* 48 (2001): 1550-55.

PART TWO: THE AGE OF INDUSTRY, 1870–1945