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Patrick S. Brady

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# SLAVERY, RACE, AND THE CRIMINAL LAW IN ANTEBELLUM NORTH CAROLINA: A RECONSIDERATION OF THE THOMAS RUFFIN COURT

By PATRICK S. BRADY\*

It was not a crime to shoot a slave in the back, declared Associate Justice Thomas Ruffin<sup>1</sup> of the North Carolina Supreme Court. Anguishing over the decision, the justice protested perhaps too much:

The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy.<sup>2</sup>

The blend of squeamishness and severity has made Ruffin's opinion in *State v. Mann* notorious.<sup>3</sup> The decision has been depicted as flying in the face of predominantly liberal winds that supposedly swept through North Carolina slave law. Subsequent decisions such as *State v. Will*,<sup>4</sup> *State v. Jarrott*,<sup>5</sup> and *State v. Caesar*<sup>6</sup> have been represented as efforts by Ruffin's more liberal brethren on the bench to undo the damage done in *Mann*. The patterns of contrast fade, however, if one reexamines *Mann* in the light of these and other decisions treating the criminal law as a means of regulating race relations in antebellum North Carolina.

John Mann, the white defendant in the case that bears his name, had hired from her owner a slave woman, Lydia. When the slave fled minor punishment, Mann shot and wounded her. His conviction of battery was reversed by Ruffin, who held a hirer or master could not be indicted for battery of his slave. Ruffin reasoned that a slave is "one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits." A slave would accept this fate only if the master wielded "uncontrolled authority over the body." This authority

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\*B.A. 1966, Stanford University; Ph.D. 1971, University of California at Santa Barbara; Editor-in-Chief, *Indiana Law Journal*.

1. Serving on the North Carolina Supreme Court from 1829 to 1852 and from 1858 to 1859, Ruffin was Chief Justice from 1833 to 1852. He has been rated one of the ten foremost American judges in R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4, 30 n.2, 84-86 (1938). For a summary of some of Ruffin's leading decisions, see Clark, *The Supreme Court of North Carolina*, 4 *GREEN BAG* 457, 471-74 (1892).

2. *State v. Mann*, 13 N.C. 263, 266 (1829).

3. Even the author of a study of colonial slave law cannot resist glancing forward a few decades to quote some of the harsher passages in *Mann*. See A. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS; THE COLONIAL PERIOD* 8-9 (1978). Other works reprinting or quoting *Mann* are J. WHITE, *THE LEGAL IMAGINATION* 451 (1973) and S. ELKINS, *SLAVERY* 57 n.53 (2d ed. 1968); see also the works cited in notes 8-14 *infra*.

4. 18 N.C. 121 (1834).

5. 23 N.C. 76 (1840).

6. 31 N.C. 391 (1849).

would shrink under judicial scrutiny:

Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.<sup>7</sup>

Such passages suited the polemical purposes of abolitionists, who seized upon the opinion as a slaveholder's confession of the sinfulness of slavery. One antislavery commentator stated that *Mann* meant a slave "may be beaten to any extent short of occasioning death or dismemberment, and his master is wholly punishable."<sup>8</sup> Another gloated over Ruffin's discomfiture: "The moral wrong of slavery is . . . admitted, along with the most resolute determination to support it, *by not allowing the rights of the master to come under judicial investigation*. . . ."<sup>9</sup> Reproach was tempered by grudging respect for Ruffin's candor. Harriet Beecher Stowe reported that *Mann* excited "strong interest" among English jurists because of its "scorn of dissimulation" and "certain severe strength and grandeur . . . which approached to the heroic."<sup>10</sup> Agreeing with the abolitionists, historians have proclaimed that *Mann* sounded a "sentence of fate for the unprotected slave,"<sup>11</sup> "enunciated a principle harsh indeed,"<sup>12</sup> and "expounded a doctrine of absolute dominion that was to become a reference point for conservative judges in other states."<sup>13</sup> According to one scholar, Ruffin "freely admitted" the "ghastly implications" of *Mann*; "Never has the logic of slavery been followed so faithfully by a humane and responsible man."<sup>14</sup>

Despite its "ghastly" reputation, *Mann* did not declare open season on slaves. Though the rhetoric was reckless, the holding recognized several restraints upon whites. It is a truism that a judicial holding extends only to the facts presented in the case.<sup>15</sup> *Mann*, therefore, settled the consequences

7. 13 N.C. at 267. For Ruffin's preliminary drafts of his *Mann* opinion see 4 PAPERS OF THOMAS RUFFIN 249-54 (J. Hamilton ed. 1920) [hereinafter cited as PAPERS].

8. G. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 22 n. (1856). See also *id.* at 10, 29 n.

9. W. GOODELL, THE AMERICAN SLAVE CODE 174 (1853). See also *id.* at 32-34, 79, 126, 154-57, 164, 169-74; 2 F. OLMSTED, THE COTTON KINGDOM 355 (1862); 1 J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 296 n.1 (1858).

10. 1 H. STOWE, SUNNY MEMORIES OF FOREIGN LANDS 260-61 (1854).

11. Bassett, *The Case of the State vs. Will*, 2 TRINITY C. HIST. PAPERS 12, 16 (1898) [hereinafter cited as *State vs. Will*].

12. Yanuck, *Thomas Ruffin and North Carolina Slave Law*, 21 J. S. HIST. 456, 473 (1955) [hereinafter cited as *Ruffin and Slave Law*].

13. Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197, 221 (1969) [hereinafter cited as *Southern Supreme Courts*].

14. E. GENOVESE, ROLL, JORDAN, ROLL 35 (1974).

15. For an engaging discussion of the process of determining the holding of a case see K. Llewellyn, *The Brainerd Case*, 41 S.S. 1 (1930).

only of a nonfatal battery by a hirer or master. Should a stranger strike a slave, he would be indictable under prior case law unaffected by *Mann*.<sup>16</sup> After *Mann*, a master remained indictable for killing a slave.<sup>17</sup> Ten years after his *Mann* decision, Ruffin in *State v. Hoover*<sup>18</sup> affirmed the murder conviction of a slaveowner who for four months beat, tortured, overworked, and starved to death a pregnant slave woman. Citing *Mann*, Ruffin observed in *Hoover* that, "A master may lawfully punish his slave; and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned. . . . But, the master's authority is not altogether unlimited. He must not kill. There is, at the least, this restriction upon his power: he must stop short of taking life." The sadistic acts of this master, Ruffin asserted, "do not belong to a state of civilization."<sup>19</sup>

Another restraint left intact by *Mann* was the threat of civil suit for damages.<sup>20</sup> Though *Mann* released masters, hirers, and overseers from criminal liability for a nonfatal attack, hirers and overseers still faced civil liability for injuries to slaves. The North Carolina Supreme Court twice held hirers or overseers liable to the master for conduct similar to that of John Mann toward Lydia. In one case, the plaintiff's slave had been hired by a turnpike company, whose overseer shot and wounded the slave when the slave fled punishment. The court found that since "the slave was not in resistance to" the overseer, "but was only retreating against his orders, he had no right . . . to use a deadly instrument to stop him."<sup>21</sup> In another case, the plaintiff's slave had been hired by a mine owner, whose overseer attacked with a board when the slave fled punishment. Ruffin found that the overseer had exceeded the limits of "such moderate and usual correction as would have reduced the slave to subordination. . . ."<sup>22</sup> Civil liability, however, could have only spotty impact as a deterrent to such conduct, since the remedy of damages was

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16. *State v. Hale*, 9 N.C. 582 (1823), held a stranger indictable for battery of a slave. Ruffin in *Mann* stated that since a hirer had the authority of a master, he was not indictable as a stranger. See 13 N.C. at 264-65.

17. *Mann* held the court would "recognize the full dominion of the owner of the slave, except where the exercise of it is forbidden by statute." 13 N.C. at 268. By North Carolina statute it was a crime to kill a slave; the statute is discussed in *Southern Supreme Courts*, *supra* note 13, at 203-11 and in Taylor, *Humanizing the Slave Code of North Carolina*, 2 N.C. HIST. REV. 323-24 (1925) [hereinafter cited as *Humanizing*].

18. 20 N.C. 365 (1839).

19. *Id.* at 368. See also *State v. Robbins*, 48 N.C. 249 (1855). Some historians who present *Mann* as illustrative of Ruffin's severity neglect to mention *Hoover*. See, e.g., S. ELKINS, *supra* note 3. Others mention both *Mann* and *Hoover*, but interpret the latter as a departure from the former. See, e.g., E. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE 200-01* (1969). The holdings of the two opinions were, however, consistent.

20. In his *Mann* opinion, Ruffin cautioned: "With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere." 13 N.C. at 264.

21. *Copeland v. Parker*, 25 N.C. 513, 514 (1843). The owner sued the overseer rather than the hirer.

22. *Jones v. Glass*, 35 N.C. 305, 308 (1852). The owner sued the hirer rather than the overseer.

inapplicable when the master himself inflicted the injury.<sup>23</sup>

Though *Mann* assured slaveholders that it was no crime to hit a slave, it left open the possibility that the blow might have other significance in a criminal context. For example, if the slave killed his assailant, the initial assault might be recognized as a provocation, reducing the slave's offense from murder to manslaughter. That the assault by the white could constitute a provocation was settled in the celebrated case of *State v. Will*.

The case originated in a dispute between the slave Will and a slave foreman, who reported the matter to a white overseer. Confronted by the overseer, Will ran; the overseer shot and then pursued him. Overtaken, Will fatally stabbed the white.<sup>24</sup> Will's murder conviction was reversed and a new trial ordered; Justice William Gaston wrote the opinion for the North Carolina Supreme Court. There was little doubt that had Will been white, the attack on him would have constituted provocation for purpose of manslaughter.<sup>25</sup> Gaston observed that, "The prisoner is a human being, degraded indeed by slavery, but yet having 'organs, dimensions, senses, affections, passions,' like our own."<sup>26</sup> Nevertheless, Gaston ruled, criteria of provocation must differ for slaves and whites. A slave should be expected to endure much more mistreatment, especially from an overseer or master. Without offering criteria for deciding how much more was too much, Gaston insisted that Will had been the target of excessive violence. It was unthinkable that the onslaught by the overseer should have no extenuating effect on the slave's reaction: "Unless I see my way clear as a sunbeam, I cannot believe that this is the law of a civilized people and of a Christian land."<sup>27</sup>

Cheers for *Will* have been as numerous as jeers for *Mann*. In silent if indirect tribute, abolitionist legal writers ignored *Will*, presumably discerning in it little potential for propaganda.<sup>28</sup> Historians have hailed *Will* as a "monument . . . to . . . humanity"<sup>29</sup> that "protected thousands of human beings hitherto help-

23. "Where the battery was committed by the master himself, there would be no redress whatever, for the reason given in Exodus 21:21, 'for he is his money.'" T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 90 (1858). The North Carolina Supreme Court heard no case involving a master suing his own overseer for injuries to slaves. A slave, of course, could not bring suit for injuries to himself.

24. 18 N.C. at 121-24.

25. In a case involving a fatal incident between two white men, Gaston found the defendant-killer to have been provoked by three knife wounds, even though a blow by the defendant had preceded the knifing; see *State v. Hill*, 20 N.C. 491 (1839). For general discussion of what has constituted provocation see W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 572-82 (1972).

26. 18 N.C. at 172.

27. *Id.* at 171. Compare *Will* to the holding in another state that fatal resistance by a slave must be murder "because the law cannot recognize the violence of the master as a legitimate cause of provocation." *Jacob v. State*, 22 Tenn. 493, 521 (1842). *But cf.* *Nelson v. State*, 29 Tenn. 518 (1850) (killing of a stranger by a slave may be manslaughter rather than murder).

28. *Will* is mentioned in neither G. STROUD, *supra* note 8, nor W. GOODELL, *supra* note 9.

29. Editorial note in 2 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 2 (H. Catterall ed. 1926).

less"<sup>30</sup> and established "a slave's right to defend himself against the cruel and unjust punishment of a master."<sup>31</sup> The decision supposedly abated "the harshness of . . . prior law,"<sup>32</sup> reached an "opposite result, a far cry from *Mann*,"<sup>33</sup> and "sharply qualified,"<sup>34</sup> overthrew,<sup>35</sup> and "overruled"<sup>36</sup> *Mann*. One scholar has written that, "As Ruffin knew, no civilized community could live with such a view [as that expressed in *Mann*]. . . . The court had to reconsider its attitude." This writer continues:

In 1834, in *State v. Will*, the liberal Judge Gaston, speaking for the same court, handed down a radically different doctrine at once infinitely more humane and considerably less logical. Judge Gaston considered some things more important than logical consistency. . . . Judge Ruffin must have been relieved; he remained silent and did not dissent from a ruling that so clearly contradicted the philosophy inherent in his own previous judgment.<sup>37</sup>

Such plaudits notwithstanding, *Will* neither presaged emancipation nor disavowed *Mann*. Since the holding of a case must be confined to the facts, the different factual settings of the two cases meant *Will* could not overrule *Mann*. True, both cases involved shootings of slaves fleeing punishment; both had broad implications for the authority of slaveholders. But *Mann*, in which the beleaguered slave did not lash out, determined the consequence for the white of his initial assault; *Will*, in which the slave turned upon his pursuer, pondered the culpability of the slave for his reaction. After *Will*, *Mann* remained good law.<sup>38</sup> Justice Gaston explained as much in his *Will* opinion:

The case of the *State v. Mann* . . . does not bear upon the question. It decides, indeed, that the master or temporary owner is not indictable for a cruel and unreasonable battery of his slave. . . . Resistance, therefore, on the part of the slave to the battery of his master cannot be legally excused, although such battery may be unreasonable; but the degree of its criminality that decision cannot aid us to ascertain.<sup>39</sup>

30. Battle, *The State of North Carolina v. Negro Will* . . . , 6 VA. L. REV. 515, 530 (1920) [hereinafter cited as *Negro Will*].

31. *State vs. Will*, *supra* note 11, at 12. See also J. BASSETT, SLAVERY IN THE STATE OF NORTH CAROLINA 25 (1899).

32. *Negro Will*, *supra* note 30, at 530.

33. *Southern Supreme Courts*, *supra* note 13, at 222-23.

34. *Humanizing*, *supra* note 17, at 327.

35. *State vs. Will*, *supra* note 11, at 17.

36. E. CLARK, SLAVE CASES BEFORE THE NORTH CAROLINA SUPREME COURT, 1818-1858, at (3:3 Bluebook) 118 (1959) (unpublished M.A. thesis in University of North Carolina Library) [hereinafter cited as SLAVE CASES].

37. E. GENOVESE, *supra* note 14, at 35-36. *Mann* and *Will* are also contrasted in an editorial note in A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA 219-20 (W. Rose ed. 1976).

38. The supreme court heard no subsequent case involving a slaveholder charged with non-fatal battery of his slave.

39. 18 N.C. at 171.

During appellate argument for *Will*, both prosecution<sup>40</sup> and defense agreed that *Mann* did not grant unlimited power to slaveholders. The defense cautioned that, "It is not intended to combat the correctness of the decision in the *State v. Mann*."<sup>41</sup> There was no need to challenge *Mann*; its holding that the attacking slaveholder had committed no crime was not contrary to the successful defense contention in *Will* that the slave's retaliation was manslaughter.<sup>42</sup> The defense noted that some of Ruffin's "expressions" in *Mann* "have been misunderstood" as placing "the life of the slave at his master's feet." But in such utterances, "the rhetorician hath spoken, and not the Judge."<sup>43</sup> Any disharmony between *Mann* and *Will* was in rhetoric rather than in substantive law. But even in mood the two decisions were not entirely incompatible. Ruffin had engaged in his share of handwringing in *Mann*. Gaston's statement in *Will* that there "is no legal limitation to the master's power of punishment, except that it shall not reach the life of his offending slave"<sup>44</sup> would not have appeared incongruent if inserted in *Mann*. One suspects that *Mann* has been damned and *Will* praised simply because of their respective results; reversing the conviction of a white who shot a slave seems repressive; reversing the conviction of a slave who resisted appears gallant.

The protection *Will* afforded slaves has been overplayed. Gaston did not decide that *Will* had thrust the knife in self-defense, a conclusion that would have exculpated *Will* completely.<sup>45</sup> The decision was of avail only to a slave so rash as to kill, staking his life on the outcome of a murder trial. An accused slave successfully citing the *Will* precedent would be convicted of manslaughter rather than murder; either offense was a felony.<sup>46</sup> The precedent could hardly

40. It would have been to the advantage of the prosecution to argue that *Mann* maximized the power of slaveholders; the greater the authority, the more a slave must endure before being provoked. Yet the prosecution conceded, "It is no part of my proposition, nor was it any part of that of the Court, in the case of the *State v. Mann*, that the master has absolute and uncontrolled authority over the life of the slave." *Id.* at 159.

41. *Id.* at 126.

42. The prosecution confused matters by arguing that the overseer had not provoked the slave because the overseer's conduct would not have been criminal under *Mann*. Gaston readily disposed of this argument, pointing out that there was no rule that only a crime could amount to a provocation. *Id.* at 160, 169.

43. *Id.* at 126-28, 151.

44. *Id.* at 166.

45. It is inaccurate to claim that *Will* "raised the issue as to whether a slave had a right to defend himself when assaulted by his master with intent to kill." *Humanizing, supra* note 17, at 327. The provocation associated with manslaughter, a crime, is quite distinct from self-defense, which is not a crime. Not even *Will*'s defense counsel ventured the argument that *Will*'s act was self-defense. It is true that Gaston said the "slave has a right to defend himself against the unlawful attempt of his master to deprive him of life." But this statement was dictum because Gaston found that when *Will* stabbed the overseer the overseer's acts did "not immediately menace death. . . ." *Id.* at 165, 171. Therefore the facts did not present the issue of self-defense. The decision left open the possibility that under some circumstances the killing of master by slave might be self-defense, but the North Carolina Supreme Court never rendered such a holding.

46. As Justice Richmond M. Pearson noted in *State v. Caesar*, 31 N.C. 391, 406 (1849), a "conviction of manslaughter is far from being an acquittal; it extenuates on account of human infirmity, but [unlike self-defense] does not justify or excuse. Manslaughter is a felony. For the second offense life is forfeited." K. STAMPP, THE PECULIAR INSTITUTION 220-21 (1956) incorrectly suggests that *Will* and *Caesar* meant that a provoked slave could be "exonerated" from all guilt.

heighten the retaliatory tendencies of slaves, even of those who followed supreme court reports. If *Will* would not encourage slaves to resist, neither would it discourage slaveholders from attacking in the first place. Both before and after *Will*, any white who struck his slave did so despite the possibility the slave might return the blow. Reflective indeed would be a slaveholder deterred from bludgeoning his slave not by fear the aroused slave might kill him, but by the prospect that his killer might “escape” with a mere manslaughter conviction.

*Will* has been credited not only with overturning *Mann* but also with inaugurating a trend toward affirming the rights of slaves: “*State vs. Will* was the land-mark for protection of the slave. After that case was decided there was no going back, but, rather, we find more liberal opinions and a pronounced willingness on the part of the Court to assert a humane attitude.”<sup>47</sup> The decisions following *Will*, however, left the mastery of slaveholders undiminished while extending certain authority over slaves to nonslaveholders as well. *State v. Jarrott* and *State v. Caesar* confirmed that any white could chasten a restive slave; *State v. Jowers*<sup>48</sup> indicated that any white could discipline a free black. The trend after *Will* was toward judicial endorsement of the master-slave relationship as a model for race relations. That trend was not a liberal one.

In *Jarrott*, as in *Will*, Gaston found that a slave had been provoked into killing a white. But unlike the overseer in *Will*, the white in *Jarrott* stood in no economic relationship to the slave. The case arose from a Saturday-night fight. Jarrott, several other slaves, a free black, and two whites spent the night at a fish trap. During a card game some of Jarrott’s betting money disappeared, perhaps pocketed by a white. Jarrott called one white a thief. Apparently after an interval, the white set upon Jarrott with a knife and a fence rail. Jarrott clubbed him to death, some of the blows landing after the white was on the ground.<sup>49</sup> Jarrott’s murder conviction was reversed by Gaston.

Though the defense counsel urged that the incident be analogized to the killing of one white by another, Gaston treated it as similar to the killing of a master by a slave. At the trial the defense had requested the judge to instruct the jury: “That if the jury should be satisfied that the deceased did steal the ninepence from the prisoner, the deceased had no right to strike the prisoner, for insulting language, in consequence of it; and in that aspect of the case the prisoner was entitled to be regarded as a white man on this trial.”<sup>50</sup> Refusing the request, the trial judge instead directed the jury that it was insolence for a slave to call a white thief a thief. Gaston approved this instruction, explaining that the offensiveness of Jarrott’s remarks rested not on “the personal merit and demerit” of the parties, but on “the difference of condition between the white man and the

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47. Holt, *The Supreme Court of North Carolina and Slavery*, 17 TRINITY C. HIST. PAPERS 1, 72 (1927) [hereinafter cited as *North Carolina and Slavery*]. *Will* “charted a more lenient policy for North Carolina.” *Ruffin and Slave Law*, *supra* note 12, at 465.

48. 33 N.C. 555 (1850).

49. 23 N.C. at 77-80.

50. *Id.* at 80.

slave, as recognized by our legal institutions. . . ." Even if the white were a thief, "the distinction of castes yet remains. . . ." <sup>51</sup> Continuing <sup>52</sup> slave insolence to a white would justify an "ordinary" battery <sup>53</sup> but not an "excessive" one. <sup>54</sup> Though he defined neither "ordinary" nor "excessive," Gaston was certain an attack with a knife and rail fell in the latter category. Even so, the "law will not permit the slave to resist. It is his duty to submit, or flee, or seek the protection of his master. . . ." <sup>55</sup> Should a slave slay his assailant, the killing would be not self-defense but either murder or manslaughter. Gaston suggested that an excessive battery by a white would produce the provocation <sup>56</sup> associated with manslaughter.

*Jarrott*, like *Will*, has been praised as progressive. <sup>57</sup> In a state committed to slavery, it was perhaps even bold to announce that a slave who killed a white could be guilty of anything less than the most serious crime, murder. Yet the opinion had oppressive aspects. Belying the claim that *Will* heralded a liberal trend, *Jarrott* made reactionary use of the slave-provocation doctrine of *Will*. *Will* established that before provocation would be recognized, a slave must abide more abuse from an overseer than one white would from another; *Jarrott* expanded that principle to hold that any slave must endure more from any white than one white would from another. To state that any white could administer an "ordinary" beating to suppress slave insolence <sup>58</sup> was to designate

51. *Id.* at 81-83.

52. Ordering a new trial, Gaston reversed the murder conviction because of improper instructions to the jury. One error in the instructions of the trial judge had been failure to state that the white had the right to hit the slave only to put a stop to continuing slave insolence and not to avenge past insolence. There was conflicting evidence on whether the insolence had ceased before the white advanced. According to Gaston, the only permissible remedy for past slave insolence to a stranger was punishment either by the master or a magistrate. *Id.* at 84. For cases concerning insolent slaves punished by magistrates see *State v. Bill*, 35 N.C. 373 (1852); *State v. Marley*, 30 N.C. 48 (1847).

53. This view had been suggested in previous decisions. Gaston cited *State v. Hale*, 9 N.C. 582 (1823), for the proposition that although battery of a slave by a white other than the master was ordinarily indictable, such a battery might be justified by circumstances that would not excuse battery of one white by another. Though in *Hale* no such circumstances were found, they were found in *Jarrott*. Gaston cited *State v. Tackett*, 8 N.C. 210 (1820), for the proposition that words from a slave to a white might constitute the provocation that would mitigate murder to manslaughter, while only blows would constitute such a provocation between whites. See 23 N.C. at 82-83.

54. Another error Gaston found in the jury instructions was failure to state that no more than an ordinary battery was warranted. See 23 N.C. at 84.

55. *Id.* at 86.

56. Gaston offered only a conclusionary formula to define provocation: "That is a legal provocation of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well disposed slaves into a violent passion." *Id.* One might characterize this as a reasonable-slave test of provocation.

57. "Surely so humane an opinion as this must have relieved the Negro of a great deal of punishment." *North Carolina and Slavery*, *supra* note 47, at 26.

58. Insolence would be broadly defined: "What acts in a slave towards a white person will amount to insolence it is manifestly impossible to define—it may consist in a look, the pointing of a finger, a refusal or neglect to step out of the way when a white person is seen to approach. But each of such acts violates the rules of propriety, and if tolerated would destroy that subordination upon which our social system rests." *State v. Bill*, 35 N.C. 373, 377 (1852).

all whites enforcers of racial supremacy.<sup>59</sup>

*State v. Caesar* resembled *Jarrott*, arising from an evening encounter between slaves and white strangers. Caesar and another slave were without the required passes in the town of Jameston when approached by two drunken whites. After falsely proclaiming himself a member of the patrol and inquiring about the availability of women, one white beat Caesar's companion while the other held the victim's arms. Exclaiming "I can't stand this," Caesar felled both whites with a fence rail; one died, and Caesar was convicted of murder.<sup>60</sup> The Supreme Court reversed his conviction and ordered a new trial; Justices Frederic Nash and Richmond M. Pearson were in the majority, Ruffin in dissent.

The question in *Caesar*, as in *Will* and *Jarrott*, was whether the white had provoked the slave, reducing murder to manslaughter. All three justices agreed that the law should be slower to recognize provocation of slave by white than of white by white, and that provocation of slave by white required an excessive rather than ordinary battery. The justices split primarily<sup>61</sup> over whether this beating was ordinary or excessive. Pearson and Nash found it excessive, partly because of the lateness of the hour, which meant the slaves could expect no other whites to intervene in their behalf.<sup>62</sup> Ruffin regarded such a battery as ordinary because it was a common occurrence:

The whites forever feel and assert a superiority, and exact an humble submission from the slaves. . . . Negroes . . . take the most contumelious language without answering again, and generally submit tamely to his buffets, though unlawful and unmerited. Such are the habits of the country. It is not now the question whether these things are naturally right and proper to exist. They do exist, actually, legally, and inveterately. Indeed, they are inseparable from the state of slavery; and are only to be deemed wrong upon the admission that slavery is fundamentally wrong.<sup>63</sup>

Ruffin recalled that in four decades he had heard of no more than six killings of whites by slaves, "although the batteries on them by whites have been without number, and often without cause, or excessive." Since Caesar's response was

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59. A proslavery commentator rationalized that "so long as two races . . . live together, the one as masters and the other as . . . slaves, . . . *all* of the superior race . . ." must "exercise a controlling power over the inferior." Otherwise, if "the slave feels that he is solely under the power . . . of his immediate master, he will soon become insolent and ungovernable to all others. If the white man had, then, no right by law to control, the result would be, the excitement of angry passions, broils, and bloodshed." T. COBB, *supra* note 23, at 106.

60. 31 N.C. at 392-96, 399.

61. The justices also differed over whether the beating of the other slave should be recognized as provocation of Caesar. The majority held that it should be recognized, Ruffin that it should not. *Id.* at 400, 404-09, 427-28. For discussion of provocation of one by injury to another see W. LAFAYETTE & A. SCOTT, *supra* note 25, at 577.

62. 31 N.C. at 405-07. The majority found error in the trial judge's jury instructions, which had stated that as a matter of law this attack was ordinary. *Id.* at 406, 411.

63. *Id.* at 421 (Ruffin, C.J., dissenting).

aberrant, Ruffin concluded it must have sprung “from a bad heart—one intent upon the assertion of an equality, social and personal, with the white, and bent on mortal mischief in support of the assertion.”<sup>64</sup> Caesar must have harbored the malice associated with murder.

The *Caesar* decision has been characterized as the “climax of liberality,”<sup>65</sup> and the Pearson and Nash opinions commended for their “liberal spirit;”<sup>66</sup> Ruffin’s dissent has won the endorsement only of a proslavery commentator.<sup>67</sup> Though the divergence between Ruffin’s *Mann* opinion and Gaston’s *Will* opinion was largely illusory, the disagreement in *Caesar* between Pearson and Nash on the one hand and Ruffin on the other was real. Still, the Pearson and Nash opinions were scarcely antislavery; both accepted the *Jarrott* proposition that any white could discipline any slave. Pearson no less than Ruffin assumed that these problems required solutions that would maintain white dominance. The infrequency of behavior such as that of Caesar was, for Pearson, “convincing proof of the due subordination and good conduct of our slave population. . . .” The court could afford to deal mildly with Caesar only because leniency would not erode social order.<sup>68</sup>

Ruffin had argued in *Mann* that broad authority for slaveholders was “essential to the value of slaves as property, to the security of the master, and the public tranquillity, greatly dependent upon their subordination. . . .”<sup>69</sup> The power of the hirer in *Mann* and the overseer in *Will* could have been based at least partly on the economic need to direct slaves as laborers. But since there were no economic ties between the whites and slaves involved in *Jarrott* and *Caesar*, the prerogatives of those whites could have rested only on the desire to promote racial “tranquillity.” Thus the cases after *Will* shifted in emphasis from an economic to a social rationale for white authority. The rationale of racial and social order was the more threatening one, since it could vindicate white browbeating of free blacks as well as slaves.

This rationale was applied to free blacks in *State v. Jowers*. Atlas Jowers, a white man, was convicted of battery for punching a free black man who had called him a liar. Reversing the conviction, Justice Pearson ordered a new trial. The trial judge had instructed the jury that insolence from a free black would not excuse a battery by a white. Pearson found that instruction erroneous; no less than an insolent slave, an insolent free black deserved a beating. Impertinence from either source should be treated alike. “It is a maxim of the common law, where there is the same reason there is the same law.” The same reason Pearson had in mind was concern for racial subordination. “It is unfortunate, that *this third class* exists in our society. All we can do is to make it accommodate

64. *Id.* at 424 (Ruffin, C.J., dissenting).

65. *Slave Cases*, *supra* note 36, at 118.

66. *North Carolina and Slavery*, *supra* note 47, at 26. “Here we have the opinion of three justices of note. . . . Two stand out boldly for a stronger protection of the slave, while the other stands out just as boldly for the privilege of the white man.” *Id.* at 28.

67. T. COBB, *supra* note 23, at 95 n.1, 275 n.2.

68. 31 N.C. at 398-99.

69. 13 N.C. at 268.

itself to the permanent rights of free white men." Pearson was more eager to condone hitting a free black than an enslaved one:

If a slave is insolent, he may be whipped by his master, or by order of a justice of the peace; but a free negro has no master to correct him, a justice of the peace cannot have him punished for insolence, it is not an indictable offence, and unless a white man, to whom insolence is given, has a right to put a stop to it, in an extra-judicial way, there is no remedy for it. This would be insufferable. Hence we infer . . . that this extra-judicial remedy is excusable. . . .<sup>70</sup>

Pearson's opinion in *Jowers*, on the consequence for a white of assailing a free black, was complemented by his opinion in *State v. Davis*<sup>71</sup> on the consequences for a free black of reacting with force. Without justification, a white constable had arrested and attempted to tie Lawrence Davis, a free black. For hitting his would-be captor, Davis was convicted of battery. Pearson reversed the conviction, ruling that the black had the right to resist such "gross oppression. . . . What degree of cruelty might not the defendant reasonably apprehend after he should be entirely in the power of one who had set upon him in so high-handed and lawless a manner?"<sup>72</sup>

The relation of *Davis* to *Jowers* corresponded with that of *Will* to *Mann*. *Mann* ruled out criminal liability for a slaveholder who punished his slave; *Jowers* ruled similarly for a white who silenced an insolent free black. *Will* and *Davis* indicated that, should the slave or free black strike back, the court would ask whether the white assault was provocative in order to determine the criminal significance of the slave response.<sup>73</sup>

"The government of slaves," observed Ulrich B. Phillips, "was for the ninety and nine by men, and only for the hundredth by laws."<sup>74</sup> Whether these proportions should be altered was the question underlying the cases from *Mann* through *Davis*. Ruffin insisted in *Mann* that the courts must not "be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty" by a slave.<sup>75</sup> Daily discipline of slaves required the extra-legal vigilance and discretion of all whites. The resources of the courts were insufficient to maintain subjugation of the sizable black population, free as well as slave. The decisions after *Mann* did not shift significantly from the posture of judicial restraint adopted by Ruffin.

70. 33 N.C. at 556-57.

71. 52 N.C. 52 (1859).

72. *Id.* at 55.

73. In *Will* the white died and the question was whether the slave had committed murder or manslaughter. In *Davis* the white did not die and the question was whether the free black had committed a crime at all; had the white died, the question would have been whether the killing were murder or manslaughter.

74. U. PHILLIPS, *AMERICAN NEGRO SLAVERY* 514 (1918). For general discussion of slavery in North Carolina see R. TAYLOR, *SLAVEHOLDING IN NORTH CAROLINA: AN ECONOMIC VIEW* (1926); Phifer, *Slavery in Microcosm: Burke County, North Carolina*, 28 J.S. Hist. 137 (1962).

75. 13 N.C. at 267.

76. *State v. Hale*, 9 N.C. 582 (1823).

These North Carolina cases sketched out a fairly comprehensive and consistent delineation of the extra-legal authority of whites. Each case originated in an assault by white on black. In *Mann*, *Hoover*, and *Jowers*, the black did not return the blow, and the white was prosecuted. In *Will*, *Jarrott*, *Caesar*, and *Davis*, the black retaliated, subjecting himself to prosecution. *Mann* gave slaveholders a free hand to punish short of killing. In no subsequent case reaching the supreme court was a master, hirer, or overseer called upon as a criminal defendant to justify nonfatal punishment; *Mann* effectively foreclosed such active, direct scrutiny into slaveholder-slave relations. These relations received only indirect scrutiny in *Will*, which inquired whether the overseer had acted provocatively. Only by killing and becoming the accused did *Will* force this question upon the court. The answer to the question bore solely upon the guilt of the slave, not of any white man. The court showed no greater predilection for active supervision of stranger-slave than of master-slave relations. Despite an 1823 decision<sup>76</sup> holding a stranger indictable for battery of a slave, the court decided few later cases involving such a battery.<sup>77</sup> The defendants were not white in the cases in which the court inquired whether white rowdies had acted provocatively; *Jarrott* and *Caesar* triggered the inquiry by chancing their lives in murder trials. The white indicted in *Jowers* hit a free black, not a slave. The court in that case applied rules to white-black encounters resembling those for white-slave encounters.

These decisions have been portrayed as contradictory; the contradictions have been attributed to discord between the conservative Ruffin and the liberals Gaston, Nash, and Pearson.<sup>78</sup> The contradictions and discord have been exaggerated. To interpret results of judicial decisions as reflections of the ideologies of judges is futile and fruitless.<sup>79</sup> If Ruffin is labeled conservative for *Mann* and the *Caesar* dissent, then he should be labeled liberal for reversals, on account of defectively worded indictments, of convictions of slaves charged with raping white women.<sup>80</sup> If Gaston and Nash earn progressive credentials for their respective opinions in *Will*, *Jarrott*, and *Caesar*, they deserve reactionary

77. For one such decision see *State v. Atkinson*, 51 N.C. 65 (1858).

78. Ruffin has been portrayed as "less clear-headed, and certainly less prone to favor the Negro, than . . . Frederick Nash . . . and Richmond Pearson. . . ." Ruffin's *Mann* opinion "marked the deepest impasse wrought by judicial self-restraint on the North Carolina Court. The appointment of Joseph J. Daniel . . . and William Gaston . . . brought two activists to the court who were prepared to decide where the master's dominion ended." *Southern Supreme Courts*, *supra* note 13, at 221 n.93, 222. It has been suggested that "after 1830 the . . . Court . . . accomplished whatever amelioration the slave code underwent," but "the burden of the change was shaped by others on the bench," not by Ruffin. *Ruffin and Slave Law*, *supra* note 12, at 475.

79. To read results of decisions as direct indications of personal ideologies of judges is to take an instrumentalist approach. For an example of such an approach applied broadly to nineteenth-century American legal history see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). For criticism of this approach see R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* (1977).

80. See *State v. Jesse*, 19 N.C. 297 (1837); *State v. Martin*, 14 N.C. 329 (1832). Outside the court Ruffin defended slavery; see 4 PAPERS, *supra* note 7, at 329-35.

ones for their decisions upholding legislation meant to fetter free blacks.<sup>81</sup> If *Caesar* and *Davis* demonstrate Pearson's humanity, then *Jowers* establishes his harshness.

The decisions were not shot through with discrepancies. True, they held that a stranger but not a master could be indicted for a nonfatal battery.<sup>82</sup> But greater latitude in handling slaves was in order for a master; unlike a stranger, he governed slaves in their residences and places of work. True, a master could be indicted for murder but not for battery. But if there is a disparity in reacting more strongly to death than to lesser injuries, it is hardly one that calls for elaborate explanation. Any suggestion that true consistency could have been achieved only by the decriminalization of slave-killing is sophomoric.<sup>83</sup> Judicial-decision making often requires striking a balance between competing concerns. The North Carolina Supreme Court was weighing "the paramount rights of the white population" against "the rights of this inferior race. . . ."<sup>84</sup> The court usually favored the former, but its occasional regard for the latter does not render its decisions irreconcilable.

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81. See *State v. Newsom*, 27 N.C. 250 (1844); *State v. Manuel*, 20 N.C. 20 (1838). A rather "illiberal" opinion by Nash on another subject is quoted in note 58, *supra*. Outside the court, Gaston was critical of slavery: see J. SCHAUINGER, *WILLIAM GASTON: CAROLINIAN* 165-66 (1949).

82. Tushnet, *The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy*, 10 L. & SOC. REV. 141-42 (1976) finds little justification for distinguishing between strangers and masters.

83. "Judge Ruffin said in *State v. Mann* that judicial inquiry into the master's behavior would undermine the authority he required to keep his slaves pacified. If this was so, how could the court continue to permit prosecutions of masters for killing their slaves? Such prosecutions inevitably called the master's authority into question. . . . Thus, the cases on murder and assault must be seen as fundamentally inconsistent." Tushnet, *supra* note 82, at 142.

84. *State v. Davis*, 52 N.C. 52, 54 (1859).