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June 12, 2017

## State v. Will and Some Other Things, Too

On Saturday I thought I'd take a break and go to the dedication of a new highway marker -- over east of here in Edgecombe County -- to the [State v. Will case](#). Will, you may recall, was a slave who in the 1830s was attacked by his overseer and -- after being shot and chased -- fought back and inflicted a moral knife wound. Will



was tried and convicted of murder and sentenced to death, but on appeal to the North Carolina Supreme Court, Justice William Gaston reduced Will's conviction from murder to felonious slaying. He was transported out of the state, to Mississippi. Will might be guilty of only manslaughter because he defended himself -- as any human would do -- from an attack. *State v. Will* acknowledged that a slave might fight back against an overseer, even though less than five years earlier *State v. Mann* had stated that the owner must have uncontrolled authority over the body of the slave. (I've flattened down a lot of nuance here -- if you're interested in this more, [I talk about it a bunch in an article on the Nat Turner trials.](#))

I think two things were at work in *Will*. First, Will's owner hired a distinguished lawyer, B.F. Moore, to defend him and make the case that even enslaved people might defend themselves against an attack. In essence this subordinated everyone to the rule of law. It limited the power (not by much, but some) of overseers over enslaved people (or maybe it's more appropriate to say that it gave space to enslaved people to fight back and in that way limited the complete authority of the owner over the slave.) Second, and probably most importantly, William Gaston-- [who had taken a mildly antislavery stance in a graduation address at UNC in 1833](#) - wrote the opinion. Gaston had helped Quakers hold slaves in a state of quasi-slavery before he went on the bench and I suspect that Gaston was critical to the outcome and certainly the wording of the opinion.

I'm glad to see this highway marker -- in part because it's one of the few that I know of that is a monument to a slave "rebel." And I think the marker's language does a nice job of telling the story without taking what would surely be a controversial stand over Will. One of the things that I like about Will's case -- and those of the Nat Turner rebels and the other rebels I've been spending time of late working on (also from northeastern North Carolina) -- is that we know so little that we can speculate about their motives and their lives.

I returned home to read a couple of books that have been on my list for a while -- first was Andrew Fede's book on homicide of slaves (so pretty closely related to *State v. Will*), [Homicide Justified](#). Andrew looks around the ancient and early modern world to assess how legal systems treated those who killed slaves -- and especially to the US South. The short version is that you shouldn't expect a lot of justice there. I hope to talk about this with more nuance soon.

And I finished up Allen Mendenhall's new book on [Emerson's poetics and Holmes' dissents](#). Allen's book joins two of my favorite figures -- Ralph Waldo Emerson and Oliver Wendell Holmes. He argues that Holmes used Emerson's aesthetics in his dissents and thus introduced a sense that law evolved. I think Allen's book deserves a lot of attention and is super creative. I'm not sure I buy the strong version of his thesis -- that there was some sort of influence here, where Emerson's literary method created a sense that the common law evolved. But I certainly buy the idea that

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transcendentalism influenced law both before the Civil War and afterwards towards retesting old assumptions -- and thus undermined a static vision of law. For me what is most salient about Holmes (and I'd add for some pre-Civil War jurists and treatise-writers, too) was that history cast a long shadow over law and that history might also be used to critique law. Where the historical school of jurisprudence all too often said that history told us what was -- and therefore in the words of Alexander Pope what was right -- that in Holmes' hands history also might undermine law. History could show us why we had arrived at one particular outcome, which might not actually be the one most fitted to the current stage in the United States. History moved from supporter of the status quo to underminer of it. Allen has opened my eyes that aesthetics had something to do with this, too. The form of language and the beauty of it helped to undermine the static vision of law. In this, Holmes was joined by a great many other people -- including those on the front lines of civil rights -- who collectively said that the law was out of touch with reality. **I want to see if I can expand my remarks about historical jurisprudence some to take account of Mendenhall.**

Soon I'll be talking about what literature on southern law a Nazi lawyer cited. You'll be surprised by at least some of them.

Posted by Alfred Brophy at 05:28 PM | [Permalink](#)

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Quite a leap from self defense to murdering babes in their cribs.

When you are reading that Nazi, think about your defense of the latter and what that sort of thinking promotes.

Posted by: anon | June 12, 2017 at 08:32 PM

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