

The Faculty Lounge

Conversations about law, culture, and academia

SEARCH THE LOUNGE

Search the Lounge

only search The Faculty Lounge

CATEGORIES

- AALS
- ABA
- Academia
- Accreditation
- Administrative Announcements
- Advertising
- African American History and Law
- Airline News and Views
- ALI
- Arts and Culture
- Bar Examinations
- Beyond Categorization
- Blogs and Blogging
- Board Diversity
- Books
- Business Organizations
- Calls for Papers
- Clerkships
- Conference News
- Constitutional History
- Constitutional Law
- Criminal Law
- Culture of Commerce
- Current Affairs
- Deans
- Death Penalty
- Disability Rights
- Economy and Markets
- Education
- Elections and Voting
- Ethics
- Eugenics
- European Financial Crisis
- Faculty Compensation
- Fairness and Justice
- Family Law
- Fear
- Fellowships
- Film
- Financial Market Regulation
- Food and Drink

« [Miguel Méndez, 1943-2017](#) | [Main](#) | [Presidents Ranked from Worst to Best](#) »

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

RECENT COMMENTS

[anon](#) on [Presidents Ranked from Worst to Best](#)

[Steve Lubet](#) on [Presidents Ranked from Worst to Best](#)

[Orin Kerr](#) on [Presidents Ranked from Worst to Best](#)

[PaulB](#) on [Presidents Ranked from Worst to Best](#)

[anon](#) on [State v. Will and Some Other Things, Too](#)

[anon](#) on [Response to David Bernstein](#)

[anon](#) on [Response to David Bernstein](#)

[Jeremy Telman](#) on [Response to David Bernstein](#)

[Jeremy Telman](#) on [Response to David Bernstein](#)

[anon](#) on [Naturopaths in Oregon](#)

BLOGGERS

[Dan Filler](#)

[Laura Appleman](#)

[Alfred L. Brophy](#)

[Kevin Noble Maillard](#)

[Calvin Massey](#)

[Timothy Zinnecker](#)

[Jacqueline Lipton](#)

[Kimberly Krawiec](#)

[Eric Muller](#)

[Bridget Crawford](#)

[Michelle Meyer](#)

[Jeff Redding](#)

[Steven Lubet](#)

[Bernie Burk](#)

BLOGGERS EMERETI

[Kathleen Bergin](#)

GUESTS, CURRENT AND PAST

[Adam Benforado](#)

[Beth Haas](#)

[Beth Thornburg](#)

[Bill Reynolds](#)

[Brando Starkey](#)

[Brian Clarke](#)

[Brian Sawers](#)

[C. Scott Pryor](#)

[Cassandra Burke Robertson](#)

[Daniel Sokol](#)

[David J.R. Frakt](#)

[David Orentlicher](#)

[David S. Cohen](#)

- [Food, Arts & Culture](#)
- [Funny Stuff](#)
- [Games](#)
- [Gender](#)
- [GLBT](#)
- [Harper Lee Symposium](#)
- [Health](#)
- [Intellectual Property](#)
- [International Law](#)
- [Internet](#)
- [Journalism](#)
- [Judiciary](#)
- [Language](#)
- [Law and Economics](#)
- [Law Firms and Practice](#)
- [Law Reviews](#)
- [Law School Deans](#)
- [Law School Hiring](#)
- [Law School News](#)
- [Law School Rankings](#)
- [Legal Education](#)
- [Legal History](#)
- [Literature and Law](#)
- [Memorial Notices](#)
- [Monuments](#)
- [Music](#)
- [News Media](#)
- [Nineteenth Century History](#)
- [Non-Law School Hiring](#)
- [Pedagogy and Assessment](#)
- [Photo Archive](#)
- [Politics](#)
- [Privacy](#)
- [Property](#)
- [Race](#)
- [Rankings](#)
- [Recent Scholarship](#)
- [Religion](#)
- [Religion and Faith](#)
- [Reparations](#)
- [Reproductive Markets](#)
- [Scholarship Strategy](#)
- [Science](#)
- [Sentencing](#)
- [Sexuality](#)
- [Slavery](#)
- [Sociology](#)
- [Sporting Life](#)
- [Sports](#)
- [Starting A Law School](#)
- [Stuff You Can't Categorize](#)
- [Supreme Court](#)
- [Taboo Trades](#)
- [Teaching](#)


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](#)

[Tweet](#) [Like 1](#)

Comments

 You can follow this conversation by subscribing to the [comment feed](#) for this post.



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

Post a comment

Comment below or sign in with [Typepad](#) [Facebook](#) [Twitter](#) [Google+](#) and [more...](#)

(URLs automatically linked.)

Your Information

(Name and email address are required. Email address will not be displayed with the comment.)

- [David Yellen](#)
- [Derek W. Black](#)
- [Diane Curtis](#)
- [Donald Tibbs](#)
- [Ediberto Roman](#)
- [Ediberto Román](#)
- [Elizabeth M. Glazer](#)
- [Elizabeth R. Dale](#)
- [Eric Chaffee](#)
- [Eric Chiappinelli](#)
- [Franita Tolson](#)
- [Gary Rosin](#)
- [Greg McNeal](#)
- [Gregg D. Polsky](#)
- [Jeff Lipshaw](#)
- [Jessie Hill](#)
- [Jessie Owley](#)
- [John Inazu](#)
- [John Kang](#)
- [Joshua Stein](#)
- [Kathy Stanchi](#)
- [Kelly Anders](#)
- [Marc Roark](#)
- [Mark C. Weidemaier](#)
- [Matt Lister](#)
- [Michael Higdon](#)
- [Michael J. Madison](#)
- [Michael Lewyn](#)
- [Michelle Meyer](#)
- [Miriam Cherry](#)
- [Nancy Rapoport](#)
- [Nareissa Smith](#)
- [Patrick S. O'Donnell](#)
- [Paul McGreal](#)
- [Phil Pucillo](#)
- [Ralph Clifford](#)
- [Ray Campbell](#)
- [Richard Gershon](#)
- [Rita Trivedi](#)
- [Robert Heverly](#)
- [Robert Spitzer](#)
- [Roger Dennis](#)
- [Sarah Lawskey](#)
- [Scott Taylor](#)
- [Sharona Hoffman](#)
- [Sheila B. Scheuerman](#)
- [Steven Lubet](#)
- [Taja-Nia Y. Henderson](#)
- [Tamara Piety](#)
- [Tommy Crocker](#)
- [Tuan Samahon](#)

[Subscribe to this blog's feed](#)

STATCOUNTER

[Television](#)
[Terrorism](#)
[Travel](#)
[Trusts and Estates](#)
[University News](#)
[Web/Tech](#)
[Weblogs](#)
[Writing/Clinic Faculty Searches](#)

READING ROOM

[Above The Law](#)
[Adjunct Law Prof Blog](#)
[Antitrust & Competition Policy Blog](#)
[Balkinization](#)
[Brian Leiter's Law School Reports](#)
[Brian Leiter's Legal Philosophy Blog](#)
[Brian Leiter's Nietzsche Blog](#)
[Business Law Prof Blog](#)
[Cambridge University Press NA Blog](#)
[Capital Defense Weekly](#)
[Chris Uggen's Weblog](#)
[CLR FORUM](#)
[Commercial Law](#)
[Concurring Opinions](#)
[Conglomerate](#)
[Criminal Law and Criminal Justice Books](#)
[CrimProf Blog](#)
[Dorf on Law](#)
[Election Law](#)
[Empirical Legal Studies](#)
[Feminist Law Professors](#)
[First Amendment Law Prof](#)
[Gender & Sexuality Law Blog](#)
[Harvard University Press Blog](#)
[How Appealing](#)
[Ideoblog](#)
[Info/Law](#)
[Institutional Review Blog](#)
[IntLawGrrls](#)
[Law Librarian Blog](#)
[Law School Innovation](#)
[Law, Economics & Cycling](#)
[Legal History Blog](#)
[Legal Scholarship Blog](#)
[Legal Theory Blog](#)
[Madisonian](#)
[Mirror of Justice](#)
[MoneyLaw](#)
[Nancy Rapoport's Blogspot](#)
[NYU Press Blog](#)
[Opinio Juris](#)

StatCounter



Blog powered by [Typepad](#)

ARCHIVES

[June 11, 2017 - June 17, 2017](#)
[June 4, 2017 - June 10, 2017](#)
[May 28, 2017 - June 3, 2017](#)
[May 21, 2017 - May 27, 2017](#)
[May 14, 2017 - May 20, 2017](#)
[May 7, 2017 - May 13, 2017](#)
[April 30, 2017 - May 6, 2017](#)
[April 23, 2017 - April 29, 2017](#)
[April 16, 2017 - April 22, 2017](#)
[April 9, 2017 - April 15, 2017](#)

[More...](#)

OUP Blog
PrawfsBlawg
Professor Bainbridge
PropertyProf
Ratio Juris
ReligiousLeftLaw
Reproductive Rights Prof
scatterplot
SCOTUSblog
Sentencing Law and Policy
Sports Law Blog
TaxProf
The Becker-Posner Blog
The Right Coast
The Situationist
The Volokh Conspiracy
Truth on the Market
Turtle Talk
**University of California Press
Blog**
**University of Chicago Press
Blog**
Voir Dire
White Collar Crime Prof Blog
Word on the Streeterville
Workplace Prof
WSJ Law Blog
Yale Press Log
