A More Equitable Past - Southern Supreme Courts and the Protection of the Antebellum Negro

A. E. Keir Nash

A MORE EQUITABLE PAST? SOUTHERN SUPREME COURTS AND THE PROTECTION OF THE ANTEBELLUM NEGRO

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I. SOUTHERN APPELLATE JUSTICE TODAY AND YESTERDAY—A QUESTION OF EXTRAPOLATION

The recent refusal of the United States Senate, by a vote of fifty-five to forty-five, to confirm Judge Clement F. Haynsworth, Jr., to fill the vacancy created by Justice Abe Fortas' resignation from the United States Supreme Court marked only the second time in the twentieth century that the Senate has rejected a presidential nominee to the High Court. Thirty-nine years earlier, Herbert Hoover had been no more successful than was Richard Nixon in 1969. Both Presidents were Republicans, and both Haynsworth and Hoover's rejected nominee, John J. Parker, were Southerners. Indeed, the parallel runs closer: both were Carolinians and members of the Federal Court of Appeals for the Fourth Circuit, and both nominations were strenuously opposed by labor unions and by civil rights advocates.

It is the latter point that is significant here, for it seems safe to say that had either Judge been known as a "progressive" in respect to civil rights, the outcome would have been senatorial acquiescence in presidential selection.[1] Whether either President would have designated the same nominee had his civil rights reputation been different is not relevant. The essential point is, rather, that a substantial part of the opposition to both nominations derived from a wide-spread national feeling that Southern appellate judges of the twentieth century have too frequently reflected local community sentiments of the white majority about the proper status of the black minority and have too infrequently displayed eagerness to render decisions in line with broadly egalitarian readings of the fourteenth

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[1] I find it hard to believe that the additional factor to which opponents of the Haynsworth nomination pointed—the Judge's alleged error of omission in neglecting to disqualify himself from sitting on a handful of cases in which he was said to have a "conflict of interest"—would, minus the civil rights question, have availed to produce an adverse majority vote.

and fifteenth amendments. I have perhaps understated the matter. Certainly, there have been stronger expressions. Thus, five years ago, an attorney for the Legal Defense and Education Fund of the National Association for the Advancement of Colored People, declared:

> One expects a degree of impartiality from the state appellate courts. Because they are elected by a statewide constituency, political pressure is less concentrated and more easily parried by these judges. They are somewhat removed from the courthouse gang of prosecutors and police who dominate southern politics in all but the larger cities. Unfortunately, such expectations of impartiality are not fulfilled. State appellate courts have shown themselves to be as susceptible as local courts to pressure and prejudice against Negro rights.[2]

The attorney, Michael Meltsner, was referring to state appellate courts, but it is probably fair to take his statement as representative of the attitude of many non-Southerners toward all Southern appellate courts, federal as well as state. Moreover, it is probably fair to describe this view of Southern justice as one that would extend its adverse judgment about Southern appellate courts quite far back in time, at least to the post-Reconstruction era if not to well before the Civil War.

It is not my purpose in this article to evaluate the contemporary aspects of that judgment. Rather, what I wish to raise is a question suggested by one of the earliest court decisions in that most Southern of states, Mississippi. Four years after her admission to statehood, one of her judges was confronted by a white man convicted under a common law indictment of murdering a slave.[3] Justice J. G. Clarke was asked by the defendant to rule that the American slave could derive no protective benefit from the common law, but only from specific statutory prohibitions. Rejecting the appellant's contention, Justice Clarke declared that slavery itself had no foundation in the law of nature but only in positive statute. He concluded that the captive Negro had all natural rights except those expressly removed by legislation. A slave "is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law . . . ."[4] Turning to ancient history, Clarke argued that even the "northern barbarians" who conquered Rome had deemed it murder whether the victim were free or slave. He concluded

[2] Meltsner, *Southern Appellate Courts: A Dead End,* in SOUTHERN JUSTICE 136, 138-39 (L. Friedman ed. 1965).

[3] State v. Jones, 2 Miss. (Walker) 83 (1820).

[4] *Id.* at 84.

rhetorically: "And shall this court, in the nineteenth century, establish a principle too sanguinary for the code even of the Goths and the Vandals?"[5] The answer was no, and defendant Jones was sentenced "to be hung on the 27th July 1821."[6]

It is not at all obvious that mid-twentieth-century Southern judges are as convinced of the humanity of the Negro as were their forebears in an age of slavery. Or, to approach the problem from another direction: do we analyze correctly the genetics of contemporary Southern justice—and thus do we "prescribe" properly for its "cure"—if we expand our perceptions of cases such as *Brown v. Mississippi*[7] backward into a general characterization of Southern courts as inclined to apply to Negroes a principle too sanguinary even for the Goths and the Vandals? It is hardly an uncommon expansion by historians. Stanley Elkins stated the resulting view of the matter elegantly in his brilliant brief for the interpretation of the Negro's Southern experience as an extended residence in a gigantic and terrifying concentration camp. Even where statutory protection of the Negro existed, he found that a great gulf was fixed between the words and the application of the law:

> [W]herever protection was on the one hand theoretically extended, it was practically cancelled on the other by the universal prohibition in Southern law against permitting slaves to testify in court, except against each other . . . Even the murder of a slave found the law straining all its resources to avoid jurisdiction.[8]

According to a prominent Negro historian, John Hope Franklin, moderate rational Southerners lost out to militant supporters of lynch-law after the rise of Northern abolitionist attacks upon the South in the 1830's: "All over the South mob action began to replace orderly judicial procedure, as the feeling against abolitionists mounted and as Southern views on race became crystallized."[9]

This picture of the antebellum South as given to speedy and violent

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[5] *Id.* at 86.

[6] *Id.*

[7] 297 U.S. 278 (1936), *rev'g* 173 Miss. 180, 161 So. 465 (1935). The Mississippi Supreme Court, while recognizing that confessions of murder were coerced by physical torture of the Negro defendants, held that due process was not violated by admitting the confessions since defendants' objections to the admission were not technically correct and therefore amounted to a waiver of their right against self-incrimination. 173 Miss. 180, 161 So. 465 (1935).

[8] S. ELKINS, SLAVERY 56-58 (1963).

[9] J. FRANKLIN, THE MILITANT SOUTH at ix (1964).

settlement of Negro-white imbroglios with scarcely a nod to the formal law's delays amounts to something like the "Standard Version." Without seeking to deny the obvious partial truths of this version of things—certainly permitting slaves to testify against whites should have greatly helped the Negro's quest for justice, certainly mob violence was far too frequent—let me urge that its truths are defective. Prior to the Civil War "Negro law" differed in at least one important respect from both the "concentration camp" paradigm and from the sort of "justice" that prevailed after Reconstruction. One important sector of Southern governments, far from straining to avoid jurisdiciton over white assaults upon Negroes, strained to exercise it. Between the end of the eighteenth century and the Civil War, and particularly between 1830 and 1860, Southern state supreme courts sought almost without exception to expand protection of the Negro.[10] If we wish to continue the "concentration camp" analogy, we should modify it to suggest that, at the top, stood judicial guardians determined to do what they could to ameliorate the terrorism of the peculiar institution of slavery. Just as in the related area of criminal trials of Negroes in which Southern judges demonstrated their determination to accord as fair trials as latitudinarian construction of statutes and precedents would permit,[11] so here, in the area of our interest, Southern judges lent their willing aid to the punishment of whites who injured Negroes, whether bond or free.

This thesis, if sustained, has at least two implications. The first is a question of historiographical readjustment of the American past. The second bears upon the future quest for justice in the South: perhaps the problem for civil rights lawyers and federal appeals courts is not so much to inculcate a sense of law where none ever existed as it is to reawaken a regionally-indigenous behavior once genuinely inclined to greater fairness.

II. The North Carolina Court—Natural and Unnatural Law, 1800-1830

Despite the presence of the Negro on American shores since 1619 and despite attempts to establish order through the Slave Codes of the pre-

[10] Unless otherwise specified, this conclusion and other generalizations in this article apply to the supreme courts of all states that seceded in 1860-61, except Virginia and Louisiana. Virginia's Court of Appeals did not have criminal jurisdiction until 1851. Louisiana was not a common law state.

[11] *See* Nash, *Fairness and Formalism in Trials of Blacks in the Supreme Courts of the Old South*, 56 Va. L. Rev. — (1970) [hereinafter cited as *Fair Trials for Blacks*].

revolutionary generation,[12] the early years of the Republic awaited settlement of a very basic question about the status of the African import. The fact of unresolved status was unduly dimmed by time. Thus, Chief Justice Roger Taney, writing in 1857 in *Scott v. Sanford*,[13] could confidently assert that, no matter what individual actions a state might take, the 1789 Constitution excluded Negroes from its social contract. Taney sought to eliminate the apparent conflict between the fact of slavery and the all-encompassing rights to liberty proclaimed in the Declaration of Independence by urging that the framers were not slipshod authors. They were

> great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not, in any part of the civilized world, be supposed to embrace the negro race, which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery. . . . This state of public opinion had undergone no change when the Constitution was adopted. . . .[14]

Without disputing Taney's specific conclusion that the Constitution's framers did not mean to extend United States citizenship to freed Negroes, let me urge that the generalization leading to his conclusion offered an illusory picture of certainty about the Negro's status in that earlier age. Previously in his *Dred Scott* opinion Taney had observed that the Negro "was bought and sold, and treated as an ordinary article of merchandise and traffic . . . ."[15] If Taney meant this statement as a non-exhaustive description, it is unassailable. Yet it seems to imply more—that the slave was *always* regarded as an ordinary article of merchandise. That interpretation is flatly inaccurate—and not merely with reference to occasional Jeffersonian qualms about the peculiar institution. Rather, on the far more important level of the state supreme courts—final arbiters in that pre-fourteenth-amendment day of the main body of personal rights—radical uncertainty obtained precisely because the slave was *not* regarded as an *ordinary* article of merchandise and traffic. On the contrary, he was

[12] *E.g.*, Slave Act of 1741, ch. XXIV N.C. Laws 85 (1791) (North Carolina); Act of May 10, 1740, No. 670, 3 S.C. Stat. 568 (1716-1752) (South Carolina).
[13] 60 U.S. (19 How.) 393 (1857)..
[14] *Id.* at 410.
[15] *Id.* at 407.

regarded as extraordinary—not merely because he was both perishable and expensive but because of uncertainty as to just how much of him was property and how much humanity. Nor was the uncertainty in the least bit relieved by confidence in his inferiority to the white man. It is true that Southern judges occasionally managed very clear definitions of status. Two years after *Dred Scott*, a Mississippi judge offered an extraordinary justification for his refusal to allow an ex-Mississippi slave living as a free Negro in Ohio to bring suit for inherited property. Justice William Harris took Ohio to task for freeing the plaintiff and embracing "as citizens, the neglected race . . . occupying, in the order of nature, an intermediate state between the irrational animal and the white man."[16] He advanced a peculiarly horrible rationale to support his claim that not Mississippi but Ohio was guilty of denying interstate principles of comity:

> Suppose that Ohio, still further afflicted with her peculiar philanthropy, should be determined to descend another grade in the scale of her peculiar humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that "comity" will require of the States not thus demented, to . . . meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy?[17]

If Harris' views typified Southern attitudes, we might well agree with the substance, if not the dating, of Justice Taney's certainty. That the matter was far less simple and far less definite is suggested by the circumstance that Harris was overturning a precedent not a year old,[18] and that the author of the precedent, still on the bench, disagreed vehemently. Justice Alex Handy—though a firm believer in both the right of secession and the positive goodness of slavery—dissented because Harris' position that the Negro was to be regarded as an alien enemy under international law would make it impossible for a freed Negro unlawfully kidnapped and held as a slave to bring suit for freedom, would remove the "restraint in our law against taking his life,"[19] and would resurrect "the barbarian rules which prevailed in the dark ages."[20] The matter is made yet less simple—indeed it reopens the whole question—if we compare Harris' logic with the reasoning advanced by a Tennessee

[16] Mitchell v. Wells, 37 Miss. 235, 263 (1859).
[17] *Id.* at 264.
[18] Shaw v. Brown, 35 Miss. 246 (1858)..
[19] 37 Miss. at 281 (Handy, J., dissenting).
[20] *Id.* at 282.

judge to reach precisely the opposite conclusion in respect to a Negro whose status should have been less likely to result in a favorable outcome. In *Ford v. Ford*,[21] a slave sought to sue an executor who was delaying carrying into effect his master's bequest of freedom. The executor, attempting to borrow a leaf from the book that Taney must have read, asserted that the Negro in bondage is a piece of chattel property and that chattels cannot sue. Nonsense, declared Judge Nathan Green:

> [A Negro in bondage] is made after the image of the Creator. He has mental capacities and an immortal principle in his nature, that constitute him equal to his owner but for the accidental position in which fortune has placed him. The owner has acquired conventional rights to him, but the laws under which he is held as a slave have not and cannot extinguish his high-born nature.[22]

In 1859 the Tennessee Court upheld[23] and indeed expanded its decision in *Ford*. Nevertheless, it would appear safest to hypothesize that, Justice Taney notwithstanding, as late as the Civil War the elements of property and humanity making up the slave had not been analyzed in a fashion acceptable to all Southern supreme court judges.

The first question needing analysis—first in terms of both jurisprudential logic and existential importance to the enslaved Negro—was that which defendant Jones posed in 1821 to Justice Clarke: was the slave entitled to the protection of the common law, or could he depend only on the far more flimsy armor of statute? Was he as much at the mercy of his owner's whim as he had been at the instant of his capture in the African jungle, except insofar as the legislature had limited the master's absolute power, or did he enjoy the general peace of the state?

Chance, early settlement, and structural conditions combined to bring this question first before the North Carolina Supreme Court.[24] In De-

[21] 26 Tenn. 92 (1846).

[22] *Id.* at 95-96.

[23] Stephenson v. Harrison, 40 Tenn. 728 (1859). Slaves were allowed to bring a cross-bill by a next friend to protect their interest in a trust.

[24] Of the four South Atlantic states whose early settlement made such consideration likely, two were "disqualified" by structural conditions. As previously noted, Virginia's Court of Appeals was restricted to civil jurisdiction until 1851, while Georgia's legislators did not even create a supreme court until 1845. South Carolina would have been as likely a forum as North Carolina, yet the issue was never heard by the full court until the early 1830's when the South Carolina court reached a negative conclusion. *See, e.g.*, Helton v. Caston, 18 S.C.L. 45, 2 Bail. L. 95 (1831); State v. Maner, 20 S.C.L. 249, 2 Hill 453 (1834). "There can be . . . no offense against the State for a mere beating of a slave . . . . The peace of the

cember 1801, *State v. Boon*[25] provided the opening round for a dispute that was to last for the greater part of the tenures of the two most influential early nineteenth-century North Carolina judges, John Louis Taylor[26] and John Hall.[27]

Boon had been convicted under a 1791 act that provided:

> [I]f any person shall hereafter be guilty of wilfully and maliciously killing a slave, such offender shall upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a freeman; any law, usage, or custom to the contrary notwithstanding.[28]

This law expressly repealed a statute of 1774 that had merely imposed a year's imprisonment for murdering a slave.[29] Since there was no doubt that Boon had killed maliciously, one could well be excused for thinking that he should suffer death, the penalty for first degree murder of a freeman. The lower court judge thought otherwise and sent the case directly to the supreme court. It was not an easy problem; the wording of the 1791 Act contained a stumbling block. As Judge Hall observed:

> It may be thought that the words 'shall suffer the same punishment as if he had killed a freeman' . . . should be allowed to have this meaning . . . 'as if he had wilfully and maliciously killed a freeman.' I cannot agree.[30]

"Killed" could mean anything from justifiable homicide to murder with malice aforethought. What were the justices to do? They were confronted with a deed of which they thoroughly disapproved.[31] Nor was "there . . . doubt . . . respecting the intention of the Legislature";[32] almost certainly it intended to establish equal punishments for first degree murder. The decisive factor, however, was a historical principle of Anglo-Saxon juridical practice: "Judges in this country as well as in England have

State is not thereby broken, for a slave is not generally regarded as fully capable of being within the peace of the state." *Id.* at 249, 2 Hill at 454.

[25] 1 N.C. 191 (1801).

[26] Chief Justice, 1800-1829.

[27] Associate Judge, 1800-1833.

[28] Ch. IV N.C. Laws 3 (Supp. 1791-94).

[29] Act of March 2, 1774, ch. XXXI N.C. Laws 274 (1791).

[30] 1 N.C. at 193.

[31] Judge Samuel Johnston's opinion of Boon's action was probably shared by his Brethren: "The murder of a slave appears to me a crime of the most atrocious and barbarous nature; much more so than killing a person who is free, and on an equal footing." *Id.* at 198.

[32] *Id.*

. . . invariably adhered to very strict rules in the construction of penal statutes in favor of life . . . nothing shall be taken by construction . . . from the context."[33] The court unanimously agreed that the 1791 Act could not be applied because of its vague conclusion. The court could have left the issue there; further deliberation was not necessary to the disposition of the case. That indeed was what Judges Macay and Johnston did. Yet Hall and Taylor felt called upon to inquire about the status of the slave prior to the 1774 statute. Presumably they wished to shed some light on a future possibility—indictments for slave-killing brought under the common law. But the beams cast by their respective reasons shone in utterly different directions.

John Hall started up the road that would soon become a familiar path for extremist pro-slavery judges—one that rejected arguments on behalf of the similarity between English villeinage and American slavery, and thus cut off at its source any stream of logic that sought to flow from the historic inclusion of the villein under common law to similar protection of the slave. In Hall's view, English villeinage shed very little light on the subject of slavery. Villeins were the king's subjects, and though attached to the land, could sue everyone except their immediate lords, whereas "slaves in this country possess no such rights; their condition is more abject; they are not parties to our constitution; it was not made for them."[34]

Did the slave enjoy any protection under the common law? To answer this question, Hall turned to England and Blackstone. According to Blackstone, the slave on his arrival in England "falls under the protection of the laws, and so far becomes a freeman. . . ."[35] But why did this occur? Simply because English law does not recognize slavery on English soil. "[T]he moment he lands in England he undergoes a change, . . . in contemplation of the law, at least, he is no longer a slave, but a free man."[36]

Yet conversely:

> [I]t would follow, that if . . . his condition of slavery were not altered, the laws would not extend their protection to him; because a slave in a pure state of slavery has no rights. . . . Montesquieu, in his Spirit of Laws . . . and Sir William Blackstone in his Commentaries . . .

[33] *Id.* at 199.
[34] *Id.* at 195. *Compare* Scott v. Sanford, p. 201 *supra.*
[35] 1 W. BLACKSTONE, COMMENTARIES *127.
[36] 1 N.C. at 194.

> define slavery to be, that whereby an absolute power is given to the master, over the life and fortune of the slave.[37]

Although some slave countries had taken away this absolute power, the resulting restraints

> were the consequence of positive laws: they did not exist before these laws imposed them; they were unknown in a pure state of slavery. . . . [H]e that was taken in battle, remained bound to his taker forever, and he could do with him as with his beast; he could kill him with impunity.[38]

In sum, the North Carolina slave had rights only insofar as he had been granted them by express legislative enactment. Absent it, the right to kill simply transferred with the bill of sale. John Hall might have considered his state's "connection with slavery" to be unfortunate,[39] but so long as slavery remained, his deductions from its Romanist premises would be remorseless.

Having been clearly shown by Hall where rigorous logic led, John Louis Taylor—a London-born waif who had come to Virginia at the age of 12, earned his way through William & Mary, moved to North Carolina, and been elected to the state legislature in 1794 where he had sponsored several unsuccessful bills to encourage manumission—balked. In pained sentences he declared:

> I can not yield my assent to the position, that a new felony is created by the act of 1791, or that any offense is created which did not antecedently exist. For the killing of a slave, if accompanied with those circumstances which constitute murder, amounts to that crime in my judgment, as much as the killing of a free man.[40]

After all, "a slave is a reasonable creature," and there was another natural law than that of which Hall spoke.

> Upon what foundation can the claim of a master to an absolute dominion over the life of his slave, be rested? The authority for it, is not to be found in the law of nature, for that will authorize a man to take away the life of another, only from the unavoidable necessity of

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[37] *Id.*.

[38] *Id.* at 195.

[39] In fairness, I should note that Hall, a Democratic Republican originally from Virginia, was not himself a proponent of slavery. See his opinion in Trustees of the Quaker Society v. Dickenson, 12 N.C. 189, 208 (1827).

[40] 1 N.C. at 199.

> saving his own; and of this code, the cardinal duty is to abstain from injury, and do all the good we can. It is not the necessary consequence of the state of slavery, for that may exist without it; and its natural inconveniences ought not to be aggravated by an evil, at which reason, religion, humanity, and policy equally revolt.[41]

The legislature could make what changes it willed in the positive law, but

> the crime is unchanged in its essence, undiminished in its enormity. The scale of its guilt exists in those relations of things which are prior to human institutions, and whose sanctions must remain forever unimpaired.[42]

With these words, Taylor placed in American slavery jurisprudence an alternate Natural Law tradition to the Continental doctrine offered by Hall. Taylor's version was a singular blend of several English political theories most beneficial to Negro rights. Absolute dominion is not to be found in the law of nature—but not in whose law of nature? He begins with nothing more positive than a Hobbesian position—a man can only kill "from the unavoidable necessity of saving his own" life. Then he proceeds in the same sentence to a statement seemingly imbued with Lockean ethics—the cardinal duty is to abstain from injury. Finally, with but a comma separating theory from theory, he reaches back to the medievalism of Hooker to discover a positive duty of doing all the good we can.[43]

Neither side could "win" in *State v. Boon*, but the dicta of today might become the doctrine of tomorrow. Tomorrow came, indeed, but not for nearly a quarter of a century, not until June 1823 when *State v. Reed*[44] reached the court, which was then a three-man bench consisting of Judges Taylor, Hall, and Henderson. In *Reed*, the plaintiff-in-error sought a new trial because he had been convicted for murder of a slave under an indictment that concluded at common law rather than *in formam statuti*.

Predictably, Judge Hall agreed with the contentions of Reed's counsel: if the murder of a slave were held a common law offense, so must any other injury—such as assault or mayhem—actionable under common law. And he may well have been flattered by the lawyer's statement: "[I]n

[41] *Id.* at 199-200.
[42] *Id.* at 200.
[43] *Id.* at 199.
[44] 9 N.C. 454 (1823).

this country the subject has been fully examined, and the argument of Hall, Judge, in The State v. Boon . . . is unanswerably correct, and exhausts the subject."[45] Predictably, too, Judge Taylor disagreed with Reed's counsel, citing his own position in *Boon*. There was just one further sentence to his opinion.

> I think that there was no necessity to conclude the indictment against the form of the statute, for a law of paramount obligation to the statute was violated by the offence—the common-law, founded upon the law of nature, and confirmed by revelation.[46]

In this dispute Judge Leonard Henderson[47] held the balance of power. He agreed with the results of Taylor's ragout of Higher Law, but his deciding opinion was far more ingenious. He displayed something of John Marshall's capacity for giving a veneer of reasoned inevitability to a tortuous logical path. He began by restating Hall's and Reed's argument that while a Negro might be a reasonable human being and so the possible victim of murder, as a slave and thus property, his fate was of no more concern to the state "independently of . . . acts of the Legislature . . . than . . . the death of a horse."[48] Then he penned two extraordinary sentences:

> This is an argument the force of which I cannot feel, and leads to consequences abhorrent to my nature; yet, if it be the law of the land, it must be so pronounced. I disclaim all rules or laws in investigating this question but the common law of England as brought to this country by our forefathers when they emigrated hither, and as modified by various declarations of the Legislature since, so as to justify the foregoing definition.[49]

The first sentence augurs judicial self-restraint, yet the second belies it. By disclaiming all laws but the common law, Henderson virtually transforms the central question into a premise. Having accomplished this metamorphosis, Henderson has proceeded about three-quarters of the way toward his goal.

To travel the remaining quarter of the distance, Henderson engaged

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[45] *Id.*

[46] *Id.* at 455.

[47] A popular Federalist who was appointed Associate Judge by a Republican legislature in 1808, he served as Chief Justice from 1829 to 1833; unlike Hall and Taylor, he was a native of North Carolina.

[48] 9 N.C. at 454.

[49] *Id.* at 455.

in some rather dubious legal footwork. In attempting to discredit the relevance of Continental jurisprudence concerning slavery, he insisted that neither the laws of modern Turkey nor those of ancient Rome could have any bearing upon American slavery.[50] Turkish law was, of course, beside the point, but in dismissing Roman jurisprudence so abruptly, he bypassed a crucial difficulty. As Judge Hall had pointed out, English decisions that protected the Negro within the motherland did so because the common law negated the status of slave entirely so long as the Negro remained in England. Yet English decisions recognizing slavery in the colonies and on the high seas were based on something other than the common law. They were based on the reasoning of Continental theorists—such as Pufendorf, Grotius, and Vattel—whose own thinking depended heavily on Roman doctrines of slavery. Consequently, it was not at all obvious how the same common law that could not in England co-exist with slavery could properly be said to have been "brought to this country" in a fashion that included slavery and excluded Roman doctrines thereof.

Neither the statement that absolutist doctrines were "abhorrent to the hearts of all those who have felt the influence of the mild precepts of Christianity"[51] nor the statement that if Hall's views were correct "then the life of a slave is at the mercy of anyone, even a vagabond"[52] did much more than barely obscure this central weakness in Henderson's argument. Absolutist doctrines might be abhorrent, but they were not ipso facto irrelevant. Nor did Hall's views lead to the end that Henderson imputed to them. As in Roman law, the master would have had the right to kill his slave, but certainly no other person would have possessed such a right. Henderson, in brief, never really demonstrated that absent positive statute the common law itself protected the slave from his master. And that was what it was really incumbent upon him to do.[53]

Perhaps the strangest part of all about Henderson's opinion was that its flaws were not necessary to assuring that Reed got his just deserts. There was no good reason why the court could not have arrested the judgment. The prosecutor could then have brought a new indictment and made sure that it concluded *in formam statuti.* Was it simply that Judge Henderson was bent on speedy vengeance, or did he have a greater aim?

[50] *Id.* at 456.
[51] *Id.*
[52] *Id.* at 457.
[53] For a detailed critique of Henderson's opinion, see Nash, *Negro Rights and Judicial Behavior in the Old South* (unpublished dissertation, Harvard University) [hereinafter cited as *Negro Rights*].

What happened six months later suggests that he did have larger goals in mind. In December 1823, the court extended the common law yet further—to protecting the slave from assault and battery by whites. This time Chief Justice Taylor took the leap. He began his opinion in *State v. Hale*[54] by announcing that the absence of a positive law pertaining to the offense required deduction from "general principles, from reasonings founded on the common law. . . ."[55] The appositive phrase indicates the great tactical advantage for libertarian judicial behavior that was the legacy of Henderson's *Reed* opinion: Taylor could now announce baldly that the general principles were to be those of the common law. With one value-judgment he dispensed with juridical modesty:

> It would be a subject of regret to every thinking person if courts of justice were restrained by any austere rule of judicature from keeping pace with the march of benignant policy and provident humanity, which for many years has characterized every legislative act relative to the protection of slaves, and which Christianity, by the mild diffusion of its light and influence, has contributed to promote . . . .[56]

Armed with this optimistic statement, he turned to Hale's objection that only the master could rightfully seek a remedy for trespass to his slave. Agreeing that the master had such a right, Taylor justified state interference with a description of Negro psychology somewhat at odds with the "Sambo" behavior pattern that Stanley Elkins has argued became characteristic of slaves brought from Africa.[57] The slave might well submit to correction by his master, but "when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights, and to prompt the slave to a resistance, often momentarily successful, sometimes fatally so."[58] Then he plays a Hendersonian trick:

> The public peace is thus broken as much as if a free man had been beaten, for the party of the aggressor is always the strongest, and such contests usually terminate by overpowering the slave and inflicting on him a severe chastisment, without regard to the original cause of the conflict. There is consequently as much reason for making such offenses indictable as if a white man had been the victim.[59]

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[54] 9 N.C. 582 (1823).
[55] *Id.*
[56] *Id.* at 583.
[57] S. ELKINS, SLAVERY 131-33 (1963).
[58] 9 N.C. at 584.
[59] *Id.*

The peace may be practically disturbed, but what is the "reason" that requires the common law indictment for assault? Certainly neither the "reason" of pure slavery nor that of necessary protection for the South's peculiar institution: the problem could have been dealt with by civil suit. It seems, rather, a Lockean "reason" that decides the basic issue of "the slave, within—without the law?" by a humanitarian *ipse dixit.*

One might have expected Judge Hall to deliver a heated dissent to this further expansion of the common law, but strangely he did not. In the six months between *Reed* and *Hale* he seems to have abandoned his anti-common law stance. Possibly he felt that as long as his views could not win, he had best remove any judicial opposition that could become political fuel for a conservative anti-court movement. Almost certainly he personally preferred any amelioration of the slave's lot. And it was a substantial amelioraion: John Louis Taylor and Leonard Henderson had done as much to help the Southern slave as any American up to that point in the nineteenth century. Others had tried for a great deal more, but they had not yet accomplished anything of greater practical effect than bringing the slave clearly within the peace of the state. What would happen in other Southern states whose later settlement entailed a later societal embedding in slavery? One might well anticipate that slavery, after the invention of the cotton gin had greatly enhanced its economic attractiveness, would be measurably more exploitative. Equally, one might expect plantation capitalism to be reflected on the judicial level by rejection of Taylor's common law doctrines in favor of Hall's Continental absolutism. One might expect, in short, quick judicial resolution of the Negro's problematic status against "humanity" and in favor of "property" to precisely the terminus that Roger Taney reached in *Dred Scott.*

III. 1829-1832: The Four Fateful Years of Southern Decision-Making?

According to what we might call the "Revised Standard Version" of Southern history,[60] Jeffersonian sympathies for dismantling the peculiar

[60] "Revised" with respect to revisions of the Northern interpretations that were prevalent during the post-Civil War decades. The "Revisionist" school formed in the 1890's at Columbia under Dunning, whose numerous Southern-born graduate students became the most influential historians of the South during the early twentieth century. "Standard" since their interpretation—reaching its apogee in the writings of U. B. Phillips of Georgia—effectively displaced the Northern school. The essential difference was that the Revisionists were inclined to see far

institution of slavery were substantial prior to the occurrence of four events between 1829 and 1832. The 1829 Walker pamphlet urging slaves to revolt, the first publication of William Lloyd Garrison's *The Liberator* on January 1, 1831, and the Nat Turner rebellion of 1831 produced an "agonizing reappraisal" in the form of the Virginia Slavery Debates of 1831-32. After the issue was narrowly resolved in favor of slavery, Virginia and the rest of the South determined to resist emancipation come what might, and Southern liberalism was dead. On that showing, public attitudes should have dovetailed with economics and conspired against the future of Taylor's theory of protection.

Yet, far from seeing a retreat after 1830, Taylor's common law doctrine gained increasing acceptance. Although South Carolina had rejected it in 1831,[61] the Tennessee court was lending its weight to protection. In 1829, in *Fields v. State*,[62] Judges Jacob Peck and Robert Whyte adopted the Taylor position with much less ado than had been provoked on the North Carolina bench. Whyte simply short-circuited the defendant's elaborate argument that the common law had no application since "slavery never existed in England"[63] by remarking that villeinage and slavery showed a strong resemblance. Peck at least addressed himself to the main point of the defendant—the master's right in Continental theory to his slave's life. Arguing that the defendant was misconstruing Vattel,[64] Peck asserted that such was "a doctrine too monstrous for my mind."[65]

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more Southern liberalism before 1830 and to blame Yankee abolitionists for forcing the South into a "concert of defense" of slavery. *See* T. PRESSLY, AMERICANS INTERPRET THEIR CIVIL WAR *passim* (1954). For a paradigmatic statement of this view, see R. OSTERWEIS, ROMANTICISM AND NATIONALISM IN THE OLD SOUTH 21-22 (1949).

[61] Helton v. Caston, 18 S.C.L. 45, 2 Bail. L. 95 (1831).

[62] 9 Tenn. 156 (1829), which held that a white acquitted of the statutory crime of murdering a slave could still be convicted for common law manslaughter.

[63] *Id.* at 157.

[64] The argument was seemingly correct. The citation given in the Reports is VATTEL 421. I can find nothing in my edition of E. DE VATTEL, THE LAW OF NATIONS (Dublin: Luke White, 1787) at that page, and there is no section with so high a number. However Book III, Chapter 8, section 152, at 531, seems more susceptible to Peck's view. True, Vattel says that if one takes a prisoner of war and makes him a slave, "I still continue with him a state of war." In isolation this implies the defendant's claim. But Vattel precedes his comment by stating, "The ancients used to sell their prisoners of war for slaves. They indeed thought they had a right of putting them to death. In every circumstance, when I cannot innocently take away my prisoner's life, I have no right to make him a slave." And he has just previously limited the right to kill to those "who have rendered themselves guilty of some crime deserving death."

[65] 9 Tenn. at 163.

> I have been taught that christianity is part of the law of the land. The four gospels upon the clerk's table admonish me it is so every time they are used in administering oaths .... Is it expected that we must retire into the dark, and become in government partly christian and partly pagan because we own pagans or savages for our property?
>
> ....
>
> It is well said by one of the judges of North Carolina, that the master has the right to exact the labor of the slave—that far, the rights of the slave are suspended; but this gives the master no right over the life of the slave. I add to the saying of the judge, that the law which says thou shalt not kill, protects the slave; and he is within its very letter. Law, reason, christianity and common humanity, all point one way.[66]

Twenty-two years later the most brilliant antebellum Georgia judge, Eugenius A. Nisbet, a moderate by that state's standards, would characterize *Fields* as resulting from a "fervid zeal in behalf of humanity to the slave" and resting upon a wholly untenable legal ground.[67]

Without passing on Nisbet's description of the Tennessee judges' motives in *Fields* beyond noting that, of all the Southern courts, the Tennessee bench seemed persistently the most inclined to find on behalf of Negroes,[68] let me urge that the outcome in *Fields* was far more typical of what happened in post-1830 Southern appellate courts than one would expect. The reports of these courts clearly show that prosecutions of whites did not end after 1830. They are replete with hundreds of civil suits for abuse ranging from medical neglect and resultant ill-health to maltreatment producing death. Of course, these suits, usually brought by masters against hirers of their slaves, are by themselves hardly surprising. It would be difficult to disprove the contention that they were motivated more by property interests than by humanitarianism. Thus, with the exception of a very few opinions whose language constitutes strong evidence for the presence of non-property motives,[69] we need not analyze them. Of far greater import are the criminal prosecutions of whites initiated by the state. Fifty-five reached the appeals courts of seven states between the rise of the abolitionist movement and the Civil War.[70] In thirty-eight, the white defendants failed to secure new trials—an inci-

[66] *Id.* at 164-65.
[67] Neal v. Farmer, 9 Ga. 555 (1851).
[68] *Negro Rights, supra* note 53, at 203-67.
[69] *See, e.g.*, Brock v. King, 48 N.C. 45 (1855). *See also* Polk, Wilson & Co. v. Fancher, 38 Tenn. 336 (1858); Kirkwood v. Miller, 37 Tenn. 455 (1858).
[70] Thinly-populated Arkansas and Florida had no such prosecutions.

TABLE I

APPEALS FROM CONVICTIONS BY WHITES AND NEGROES IN NINE STATES 1830-1860

First column in each section indicates appeals made.
Second column indicates appeals granted.

State	*All Injuries to Negroes*		*All Trials of Slaves*		*All Trials of Free Negroes*	
Alabama	12	7	40	25	0	0
Arkansas	0	0	9	8	2	0
Florida	0	0	4	2	1	1
Georgia	4	1	14	2	1	1
Mississippi	7	4	34	21	3	1
North Carolina	9	3	43	22	28	14
South Carolina	16	2	9	6	3	1
Tennessee	3	0	33	23	10	7
Texas	4	0	3	2	1	0
TOTALS	55	17	189	111	49	25

dence, as Table I shows, of "success" considerably lower than that of convicted Negroes seeking reversals. To some extent, these convictions of whites may well have stemmed from state motives similar to civil suits brought by masters: valuable "goods" were worth protection. But to what extent? Did, perhaps, some norms of justice and humanity, some Enlightenment views of the slave as a human being, propel the state to action?

IV. PROSECUTIONS FOR HOMICIDE OF SLAVES

There were thirty-seven prosecutions for homicide or attempted homicide of slaves between 1830 and 1860.[71] Two points are suggested by the bare figures. First, prosecutions did not taper off as the Civil War approached; the majority of the cases appeared after 1850. Perhaps there were simply more crimes; perhaps the per capita frequency of prosecutions did not increase. There is not a sufficient number of cases available to make statistically reliable calculations. The important point that can

[71] A list of these cases and their outcome is included in Appendix I.

be fairly deduced is that the Southern police system did not wholly cease to protect slaves.

Second, the prosecutory system did not operate solely on whites who had no "property-relationship"[72] with their victims. If such had been the case, it would be easy to consider criminal suits as engendered by the same property-motives as the civil damage cases. However, forty-one per cent of the prosecutions were brought against masters and overseers —thirteen against the former and two against the latter. Furthermore, at least in terms of raw outcomes, the courts did not favor owners and overseers as against "unconnected" whites. As Table II indicates, in all three types of cases, the appeals refused outnumbered those granted by at least two to one.

TABLE II

APPEALS FROM CONVICTIONS FOR HOMICIDE AND ATTEMPTED HOMICIDE IN SEVEN SOUTHERN STATES, 1830-1860

State	Relation of Defendant to Slave					
	Master		*Overseer*		*"Unconnected" White*	
Appeals:	*Heard*	*Granted*	*Heard*	*Granted*	*Heard*	*Granted*
Alabama	4	3	1	0	6	3
Georgia	2	1	1	0	1	0
Mississippi	2	1			4	3
North Carolina	2	0				
South Carolina	3	0			8	1
Tennessee					1	0
Texas					2	0
SUBTOTALS:	13	5	2	0	22	7

TOTAL: 37 Heard; 12 Granted

Looking beyond the results to the judicial reasons, does the glow of fairness persist? In my judgment the answer is clearly yes. Almost without exception the judges rendered decisions with exemplary fairness to the Negro. To draw this conclusion, it is not necessary to explicate each case in the exhaustive fashion by which we analyzed the decision-making

[72] Masters and life-tenants, members of their immediate families, overseers, hirers.

of the North Carolina court. *Boon, Reed,* and *Hale* not only set the standards for later judges; they also serve as analytic paradigms of the extent to which options lay open to the judicial mind. The thrust of post-1830 decisions can be adequately illustrated by giving principal attention to two sorts of cases: first, those ending in new trials and second, those rejecting appeals that could plausibly have been granted.

None of the twelve reversals could have been fairly withheld. Thus, in three Mississippi cases there had been a failure to prove that the cause of the victim's death was the same as that charged in the indictment, no proof that the defendant had murdered the slave except the testimony of one witness that some hours before the homicide the defendant had been pursuing the slave with a knife and that he had afterward made a threat to kill him, and nothing in the official record to show that an indictment had even been returned by a grand jury.[73] The reasons for four of the Alabama reversals granted during the last dozen years before the Civil War, when Revisionist theory might expect the least degree of concern for justice, adequately illustrate the neutrality that characterized the Alabama court throughout the antebellum years: an unclear verdict, an indictment erroneous as to ownership of the deceased slave, prosecution under the wrong statute, and the admission of incompetent evidence.[74] In the South Carolina case the defendant had never been furnished with an accurate copy of the indictment, which he had requested from the judge.[75] The Georgia reversal came because one juror was obviously prejudiced against the defendant. A day or two before the trial the juror had observed that the defendant ought to be hanged. Afterwards he had said "in justification of the verdict of guilty which he and his fellow jurors had rendered, that the Martins were bad men anyhow, for he had heard that they had beat a man pretty nigh to death the spring before."[76]

What of the twenty-five appeals that were denied? Only one seems to have been wrongly denied, but six others are also worth examining

[73] Jenkins v. State, 30 Miss. 408 (1855); Bradley v. State, 18 Miss. (10 S. & M.) 618 (1848); Dowling v. State, 13 Miss. (5 S. & M.) 664 (1846). *See also* Oliver v. State, 39 Miss. 526 (1860).

[74] Dupree v. State, 33 Ala. 380 (1859); *Ex parte* Howard, 30 Ala. 43 (1857) (the court required the defendant to post a 5000-dollar bond pending a second trial under the correct statute); Eskridge v. State, 25 Ala. 30 (1854); Cobia v. State, 16 Ala. 781 (1849). *See also* State v. Slack, 6 Ala. 676 (1844); State v. Marler, 2 Ala. 43 (1841).

[75] State v. Winningham, 44 S.C.L. 86, 10 Rich. 257 (1857).

[76] Martin v. State, 25 Ga. 494 (1858). Martin's son had also been indicted, but he was not tried. Hence the plural reference in the juror's remarks.

because under other circumstances—heard either by another antebellum court or by a libertarian contemporary judiciary—they could have easily been decided in favor of the white defendants.

The dubious one involved a jury shown to have been drinking while discussing the defendant's fate.[77] Yet since he could not prove that they had "drunk excessively," he could not have a new trial. Perhaps the fact that this was a Tennessee case makes it less surprising. It may be merely an instance of that court's strong tendency to favor the Negro.

In addition to this case there were two others that a modern court might have thought contained sufficient grounds for reversal. In 1854 the South Carolina Court of Appeals refused to grant a new trial to a defendant from whom a confession had been coerced.[78] The confession itself was not used at trial, but it had led to the discovery of the corpus delicti. Three years later, the Georgia court took the position that the defendant had waived his right to challenge the trial by failing to make a timely objection to the fact that the panel of prospective jurors contained one less than the number required by statute.[79] Let me emphasize that I am not arguing that the courts *should* have accepted these motions for new trials but merely that, had they done so, they could not fairly be accused of straining to void just convictions.

The remaining four convictions found the courts of Texas, Alabama, and Mississippi adopting common law liberalism; and, indeed, in one instance taking a more liberal position than that laid down by the pre-abolitionist North Carolina court. In 1847 the Texas Supreme Court could see no merit in the absolutist theories of either Judge Hall or the South Carolina Supreme Court that the common law did not of its own force protect Negroes. Explicitly adopting the stance of the Tennessee Court in *Fields*, Justice Royall T. Wheeler ruled that, despite the absence of a specific statute about slaves, murder of a slave without malice constituted common law manslaughter.[80] He thought that the "learned court" of Tennessee had reached a conclusion "so consonant to reason and principle as scarcely to require the support of argument or authority."[81] Indeed, as

[77] Rowe v. State, 30 Tenn. 491 (1851). *Cf.* People v. Douglass, 4 Cow. 26 (N.Y. Sup. Ct. 1825). "[T]he mere fact of drinking spirituous liquor is enough to set aside the verdict." *Id.* at 36 (Southerland, J.).

[78] State v. Motley, 41 S.C.L. 128, 7 Rich. 327 (1854).

[79] Jordan v. State, 22 Ga. 545 (1857).

[80] Chandler v. State, 2 Tex. 305 (1847).

[81] *Id.* at 309. Justice Wheeler's decision-making—and more generally that of the Texas court—is illustrative of an intriguing minor theme of antebellum

far as Wheeler was concerned, "the only matter of surprise is that it should ever have been doubted."[82] Eight years later he was to express himself with yet more vigor on the subject. Knifing a Negro in bondage was "a crime against the law of nature and the laws of society, and equally within the spirit and intention of the statute, as if . . . committed upon a free person."[83]

In 1843 the Alabama Supreme Court sustained a conviction for manslaughter in which the indictment was "framed as at common law" but concluded "against the form of the statute."[84] To do so, the court had to adopt the view that the statute in question merely raised the penalty for a pre-existing common law offense.

Finally, in 1849 the Mississippi Supreme Court rejected an appeal based on the lower court's refusal to let a defense witness testify that the deceased slave "was generally insolent and impudent to white persons."[85] Aware that allowing such an exclusion seemed to go against the North Carolina precedent of *State v. Tackett*,[86] in which the court granted a new trial because of exclusion of similar testimony, Chief Justice Sharkey distinguished *Tackett* on the grounds that there had been prior quarrels and fights between the defendant and the victim, and that "the circumstances attending the homicide were moreover unexplained."[87] The admission of the evidence in *Tackett* could explain those circumstances; hence the admission. Here, however, Sharkey said, the circumstances were already explained and there was no evidence of prior fights. I find the distinction not altogether convincing. In *Tackett*, Judge Taylor's opinion seemed to assert the admissibility of general testimony regardless of special circumstances such as those to which Sharkey pointed. For Taylor, "the temper and disposition of the deceased, and *his usual deportment* toward white persons, might have an important bearing on . . . the degree of provocation received by the prisoner."[88] I find it hard to believe that

Southern justice. Wheeler, though born and raised in Vermont, was—like most of his Texas colleagues—a believer in the right of secession. Yet when it came to bequests of freedom, and criminal trials of or about Negroes, he and his secessionist colleagues followed the Unionist minority's tendency to opt in favor of the Negro's claims to justice and freedom.

[82] *Id.*

[83] Nix v. State, 13 Tex. 575, 579 (1855).

[84] State v. Flanigin, 5 Ala. 477, 480 (1843).

[85] Jolly v. State, 21 Miss. (13 S. & M.) 223, 226 (1849).

[86] 8 N.C. 210 (1820).

[87] 21 Miss. (13 S. & M.) at 225.

[88] 8 N.C. at 216 (emphasis added).

the North Carolina court of Taylor, Henderson, and Hall would have refused Jolly a new trial.

In summary, the reasoning behind both the reversals and the denials in which reversal would have been relatively easy strengthens the implication of the raw outcomes: the appellate judges do not seem to have been straining to excuse white murderers of slaves.

V. Prosecutions for Attacks on Free Negroes and Lesser Injuries to Slaves

If only murder had caused the slave-states to bring prosecutions, it would be feasible—though not necessarily compelling—to argue either that the motivation behind the trials was solely the protection of property or that if other motives entered in, at most they were barely vestigial and generally inactive remnants of Enlightenment humanitarianism. That is to say, perhaps the white community punished even the slave's owner for reasons of state policy: slaves cognizant of lack of protection even from death might be more prone to insurrection. Alternatively, perhaps the vestigial sense of guilt acted only in extremis.

However, two other types of prosecution brought between 1830 and 1860 thrust against the sufficiency of such interpretations—prosecutions for less than homicidal attacks on slaves and prosecutions for injuries to free Negroes. Four masters, one overseer, and five "unconnected" whites appealed from sentences for abuse of slaves. Additionally, the courts heard two appeals from convictions for murdering, and five appeals from convictions for assaulting, free Negroes. As can be seen from Table III, the appellants fared but slightly better than in the slave-murder cases. In all, thirteen appellants were rebuffed, and less than half that number received new trials.

Only the Alabama and North Carolina courts granted new trials, and neither displayed undue anxiety to find a "way out" for the defendant. *Turnipseed v. State*[89] genuinely required reversal. Turnipseed had been convicted for cruel and unusual punishment of his own slave, but his indictment had failed to specify what the instrument of punishment was or exactly what he had done. It was, therefore, necessarily defective. Chief Justice Henry W. Collier was seemingly not pleased to have to reverse the judgment:

[89] 6 Ala. 664 (1844).

TABLE III

APPEALS FROM CONVICTIONS FOR INJURIES TO SLAVES AND FREE NEGROES, 1830-1860

	Abuse of Slaves by:									
STATE	MASTER		OVERSEER		OTHER WHITES		MURDERS OF FREE NEGROES		LESSER ASSAULTS ON FREE NEGROES	
Appeals:	*Heard*	*Granted*	*Heard*	*Granted*	*Heard*	*Granted*	*Heard*	*Granted*	*Heard*	*Granted*
Alabama	1	1								
Mississippi			1	0						
North Carolina					1	0	2	1	4	2
South Carolina	1	0			3	0			1	0
Tennessee	2	0								
Texas					1	0				
TOTALS:	4	1	1	0	5	0	2	1	5	2

Total "Slave" Appeals: 10 Heard; 1 Granted
Total "Free Negro" Appeals:
7 Heard; 3 Granted

> We regret the necessity imposed on us, of reversing the judgment in this case, upon an objection taken after conviction, where the defect complained of, could scarcely have operated prejudicially to the defendant. But we must hold these scales of justice in equipoise, and however odious the offence, we must admeasure right to every one according to law.[90]

The earliest of the four North Carolina reversals, *State v. Mann*,[91] was a landmark decision in three respects. First, in setting aside the conviction of a master who had shot and wounded a Negress fleeing from chastisement, it expounded a doctrine of absolute dominion that was to become a reference point for conservative judges in other states.[92] The lower court judge had instructed the jurors that Mann could be found guilty of a cruel and unwarrantable punishment. Reversing the jury's finding of guilt, Thomas Ruffin,[93] Taylor's successor on the bench, declared that as long as slavery existed "[w]e 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 . . . ."[94] It was the "duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute."[95] Ruffin's words seemed to reject summarily the whole tradition that John Louis Taylor and Leonard Henderson had built up over thirty years. Additionally, they embraced more than was needed to acquit defendant Mann.

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[90] *Id.* at 667. I am inclined to take his words at face-value. Collier was a strong Unionist who successfully ran for re-election as governor in 1851 against a States-Rights candidate. He died in 1855. In suits for freedom he tended to follow legislative intent closely. *See Negro Rights, supra* note 53, at 357-59. In criminal trials of Negros he demanded fair procedures. *Id.* 425, 457. *See also Fair Trials for Blacks, supra* note 11.

[91] 13 N.C. 263 (1829). Because of the date, this first important slavery decision of the post-Taylor court is not counted in Table III or in the generalizations about frequency of prosecution.

[92] *E.g.*, George v. State, 37 Miss. 316 (1859), in which Taylor's jurisprudence was objected to as "founded mainly upon . . . the unmeaning twaddle . . . of 'natural law.'" *Id.* at 320.

[93] Judge, 1829-1833; Chief Justice, 1833-1851; Ruffin was ranked by Roscoe Pound in 1938 as one of the ten most important American Judges of the nineteenth century. R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 4 (1938). In respect to slavery jurisprudence, I am inclined to view him as less clear-headed, and certainly less prone to favor the Negro, than his two successors, Frederick Nash (Associate Justice, 1844-1852; Chief Justice, 1852-1858) and Richmond Pearson (Associate Justice, 1848-1858; Chief Justice, 1858-1878). *See Fair Trials for Blacks, supra* note 11, at — - —.

[94] 13 N.C. at 267.

[95] *Id.* at 268.

Yet, they were not the product of a positive-good[96] mentality.[97] Ruffin thought it "impossible" that the decision could be sympathized with outside of the South, and he confessed to a "struggle" in his "breast between the feelings of the man and the duty of the magistrate."[98] It is fair to say that Ruffin's views at this time were in a kind of anomic stasis. On the one hand, he disapproved of the "false and fanatical philanthropy" of abolitionism, yet (and in the same sentence) he categorized slavery as "an acknowledged evil."[99] He did not then, in 1829, even think a moral argument on behalf of slavery possible:

> What moral considerations shall be addressed to such a being to convince him what it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty . . . .[100]

The principle of domination of one man over another was "a principle of moral right every person in his retirement must repudiate . . . . It constitutes the curse of slavery to both the bond and free portion of our population."[101] There might be some barbarities that a court should stop, but "the difficulty is to determine where *a Court* may properly begin."[102] As Ruffin did not know what judicial action could be taken, the peculiar institution of slavery itself required that Mann be acquitted.

The third point of importance was that *Mann* marked the deepest impasse wrought by judicial self-restraint on the North Carolina Court. The appointment of Joseph J. Daniel (1832-1848) and William Gaston (1833-1844) brought two activists to the court who were prepared to decide where the master's dominion ended. Five years after *Mann*, in a decision equally important but as a future libertarian source of argument, the court reversed the conviction of a slave who had murdered his master while the master was endangering his life.[103] This opposite result, a far

[96] The "positive-good" theory embraced the view that slavery was a "positive-good" for both races. *See generally* W. JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH (1935).

[97] At least at the time. By 1855, Ruffin had changed his views. See his Address Before the State Agriculture Society of North Carolina, 1 CAROLINA CULTIVATOR 309, when he asserted that slavery had "a beneficial influence on [the] physical and moral state of both races."

[98] 13 N.C. at 264.

[99] *Id.* at 268.

[100] *Id.* at 266.

[101] *Id.*

[102] *Id.* at 267.

[103] State v. Will, 18 N.C. 121 (1834).

cry from *Mann*, was much more in tune with the path of the North Carolina Supreme Court in adjudicating maltreatment cases during the 1840's and 1850's.

In at least two of the three later reversals fairness more clearly required the North Carolina judges to grant new trials. All three involved injuries to free Negroes. In the first, *State v. Hathcock*,[104] the indictment charged Hathcock with disturbing the peace by standing outside the house of some free Negroes, calling them names, and "offering them for sale at auction." It was fatally defective because it failed to allege that the Negroes were at home at the time.[105]

At the lower court trial of the second case, *State v. Jowers*,[106] the defendant had not been allowed to excuse his fighting with a free Negro by pointing to the fact that the Negro had called him a liar. Judge Richmond Pearson, speaking for a majority of the court,[107] held that the white had to be allowed an extra-judicial right to put a stop to "insolence,"[108] since insolence was not an indictable offense.[109] The absence of a remedy would be "insufferable." Therefore the common law, whose "principles" expanded "like the bark of a tree, . . . to accommodate . . . to any new exigence or condition of society,"[110] would excuse Jowers' action.

If *Jowers'* reversal were dubious, the third case,[111] one of homicide, clearly required a new trial. The lower court judge had charged the jury: "If the deceased approached the prisoner in the manner stated by the

[104] 29 N.C. 52 (1846).
[105] *Id.* at 53-54.
[106] 33 N.C. 555 (1850).
[107] One member dissented silently—almost certainly Frederick Nash rather than Thomas Ruffin. See their differences of opinion in State v. George, 30 N.C. 324 (1848); State v. Henry, 31 N.C. 463 (1849); and particularly, State v. Caesar, 31 N.C. 391 (1849), reversing the homicide conviction of a slave for the murder of a white who had been assaulting a Negro friend of the defendant. Ruffin thought the reversal of the murder conviction boded future disaster: slaves, thus allowed to resist, would denounce the injustices of slavery and "band together to throw off their common bondage entirely." *Id.* at 428. Pearson, on the contrary, admired the black's "valiant defense" of his comrade. Nash objected vehemently to Ruffin's doctrine that slaves had to put up with abuse "that . . . would rouse to phrensy a white man . . . . I am told that policy and necessity require . . . a different rule . . . in the case of a slave. Necessity is the tyrant's plea, and policy never yet stripped, successfully, the bandage from the eyes of justice." *Id.* at 409.
[108] 33 N.C. at 557.
[109] But, in some other slave-states, for instance South Carolina, it was a punishable offense. See *Ex parte* Boylston, 33 S.C.L. 20, 2 Strob. 41 (1847).
[110] 33 N.C. at 557.
[111] State v. Floyd, 51 N.C. 392 (1859).

witness and made no assault and the prisoner dismounted and slew him with the bowie knife, it was murder."[112] As Judge Pearson observed, the charge omitted an all-important aspect of the evidence, namely, that "after the prisoner got off his horse, they engaged in a fight. This is acting the play of Hamlet with the character of Hamlet omitted."[113] Pearson's Shakespearian analogy may not have been too accurate, but certainly he was right that "the gist and very essence of the matter was that the parties had engaged in a fight . . . . So of course, it was error to put any hypothesis to the jury omitting this fact."[114]

If these were only the North Carolina cases, I might conclude that its court of the 1840's and 1850's found good excuses for reversing convictions when it could and used poor ones—in *Jowers*, for example—when it could not. However, three refusals to excuse white-imposed injuries found the court turning down justifications considerably stronger than the de minimis one rejected by the Arkansas court in a case where the defendant tried to argue that his indictment was fatally defective for failing to state that a Wyandott Indian was a human being and thus a possible object of murder.[115]

In *State v. Sewell*,[116] a white had killed a free Negress and, apparently, raped her after she had died. These facts were too much for the supreme court. It refused to allow proof that the defendant had had delirium tremens a few days before the murder in order to sustain his plea of insanity. In one of two battery cases, *State v. Atkinson*,[117] the defendants, acting as "unofficial patrollers," had whipped some slaves found wandering away from their plantation. The court was "very far from thinking that the authority which the law confers on patrols can sanction such outrageous conduct."[118] In the other, *State v. Norman*,[119] the court seems to have veered off "neutral" as in *Jowers*. But this time they veered in the other direction. The prisoner had whipped a free Negro, who was serving a five-year term of slavery for larceny, with the permission of his "master." The defendant's objective had been to force a confession about the whereabouts of a gun thought to be the instrument of murder by the Negro. Certainly, had the Negro made a confession, it would

[112] *Id.* at 397.
[113] *Id.*
[114] *Id.*
[115] Reed v. State, 16 Ark. 499 (1855).
[116] 48 N.C. 245 (1855).
[117] 51 N.C. 65 (1858).
[118] 51 N.C. at 68.
[119] 53 N.C. 220 (1860).

have been barred in any proceedings against him. Yet—and surprisingly—in *Norman* the state was prosecuting the white for battery. In view of the "master's" permission, the upholding of the conviction implied that the Negro was not, for his five-year-term, as completely reduced to the status of "slave" as one might have expected.

In general, I think it fairest to conclude that the North Carolina judges—with the exception of Thomas Ruffin and one uninfluential secessionist appointed just before the Civil War[120]—never were able to resolve the conflict between their perceptions of the Negro as property and humanity. This inability was particularly evident in their wrestling with the status of the free Negro in a slave society—a particularly grave problem in a state that had many more such residents than her southerly and westerly neighbors.[121] Three of the four influential North Carolina judges of the 1850's—Ruffin, Pearson, and Battle—may well have concurred in the abstract with the observation in *Jowers* that in a slave state the existence of such a "third class" was "unfortunate."[122] Yet their immediate reflexes when confronted with the suit of an individual black were to favor his cause. Pearson's and Battle's behavior indicated general agreement with the attitudes of their most libertarian brother, Frederick Nash, who was willing to presume almost anything in order to free slaves claiming a right to liberty, who viewed whites attempting to hinder liberty as vicious "birds of prey . . . upon the wing,"[123] and who considered attempts to frustrate anti-manumission laws as stemming from a "pure and benevolent motive."[124] Even Thomas Ruffin rejected out-of-hand the truly conservative doctrines of the pro-slavery courts in Georgia and in Virginia after 1858[125] that slaves were not rational beings who could

[120] Matthias E. Manly (1859-1864).

[121] Nearly ten per cent of the Negro population in North Carolina was free. This percentage was not as great as in Virginia, but was much greater than the two percent average prevalent in the Deep South—a fact that accounts, in combination with North Carolina's large number of slaves throughout the antebellum period and with her early-developed appeals-process, for the comparative frequency with which her judges rendered important decisions.

[122] 33 N.C. at 556.

[123] Mayo v. Whitson, 47 N.C. 231, 239 (1855).

[124] Grimes v. Hoyt, 55 N.C. 271, 274 (1855). For an argument that the North Carolina Supreme Court became more liberal in regard to manumission during the 1852-58 Chief Justiceship of Frederick Nash, see *Negro Rights, supra* note 53, at 323-30.

[125] For an account of the sharp struggle on the Virginia bench in which pro-freedom judges—in the ascendancy from 1851 to 1858—found themselves outvoted three-to-two in the latter years, see *Negro Rights, supra* note 53, at 258-66. *Compare* Foster v. Foster, 51 Va. 636, 10 Gratt. 485 (1853) *with* Bailey v. Poindexter,

choose between freedom and slavery and opt where they wanted to go, but rather—in the artificial eyes of the law—were "property" incapable of choice.[126] "Humanity"—or at least uncertainty about the Negro's condition when free—led them to refuse to change North Carolina presumptions on the basis of color. Only if the color be "black," rather than "coffee," would the presumption be against freedom.[127]

But perhaps the case most indicative of prevalent North Carolina judicial sensibilities about the condition of antebellum free Negroes was one heard less than a year before Abraham Lincoln's election. Though a state action against a free Negro, it should be mentioned here because it effectually inverted *State v. Jowers*.[128] *State v. Davis*[129] applied the right of taking the law into one's own hands to a free Negro who was resisting a white—a fact the more surprising since the white involved was

55 Va. 428, 14 Gratt. 132 (1858). From its creation in 1845, the Georgia court had the solitary distinction of being the only Southern bench persistently opposed to freedom—although occasionally it grudgingly upheld grants on the basis of pre-1845 circuit-court precedents. For an analysis, see *Negro Rights, supra* note 53, at 188-202. For examples of such surrealism, see American Colonization Soc'y v. Gartrell, 23 Ga. 448 (1857), in which the court refused to allow the Society to "alleviate" the problem by taking bequeathed slaves to Africa and suggested that it might be against state policy even to grant the Society standing to sue in Georgia courts! *Accord*, Knight v. Hardeman, 17 Ga. 253 (1855), in which freedom was refused to a Maryland Negress transported to Georgia before her liberty fell due under a Maryland will at the age of thirty. For more sensible holdings, *see* Hogg v. Capehart, 58 N.C. 72 (1857); Guillemette v. Harper, 38 S.C.L. 75, 4 Rich. 186 (1850).

[126] *See* Reeves v. Long, 58 N.C. 355 (1860) (Manly, J., the lone North Carolina secessionist wrote the opinion); Harrison v. Everett, 58 N.C. 163 (1859); Redding v. Findley, 57 N. C. 215 (1858) (Ruffin, J., explicitly repudiated the majority in Bailey v. Poindexter, 55 Va. 428, 14 Gratt. 132 (1858). For similar "humanity" holdings, see Stephenson v. Harrison, 40 Tenn. 728 (1859); Purvis v. Sherrod, 12 Tex. 140 (1854); Elder v. Elder, 31 Va. 930, 4 Leigh 252 (1836).

[127] *See* Nichols v. Bell, 46 N.C. 32 (1853). In this area their holdings effected the desires of the most influential post-1830 South Carolina judge—Chief Justice John Belton O'Neall—to change his state's laws in a direction more favorable to the Negro. In 1848 that extraordinary judge drew the wrath of the state Senate's Judiciary Committee for recommending, *inter alia*: placing the burden of proof of color not on the Negro but on the State; giving all Indians the vote and allowing them to hold office; repealing laws restricting the right to free and educate Negroes; granting the right of habeas corpus to free Negroes; extending to both bond and free the right to testify under oath; reducing enticement of slaves to escape to a non-capital offense; re-opening South Carolina to free Negro travel and settlement (a position more liberal than that of Illinois or Indiana); and, finally, recognizing the legality of interracial marriage. For a discussion see Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neall*, 21 S.C.L. REV. 141 (1969).

[128] See p. 223 *supra*.

[129] 52 N.C. 52 (1859).

the local constable. Lawrence Davis, the Negro, had neither paid his city taxes nor turned out to work on the streets, which was the alternative to payment. The constable had been detailed to serve notice on him to appear in court for default of payment, but instead of so doing, he tried to arrest him and to tie his hands. Thereupon Davis struck the constable and continued to do so until he fled. The state then proceeded against Davis for assault and battery. It is not hard to imagine what would probably have happened to a free Negro who tried this sort of self-help tactic fifty years later. Yet in December 1859, the court—notwithstanding the decline in liberal perspectives with Nash's death—acquitted Davis. Conviction, Judge Pearson stated, would require the extreme "proposition that a free Negro is not justified under any circumstances in striking a white man."[130] To this he could not assent.

> An officer of the town having a *notice to serve on the defendant*, without any authority whatever, *arrests him and attempts to tie him!* Is not this 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? Was he to submit tamely? Or was he not excusable in resorting to the natural right of self-defense?[131]

Self-defense was "a natural right." Proper subordination of the free Negro might require "that the right should be restricted, yet nothing short of manifest public necessity can furnish a ground for taking it away absolutely."[132] In the instant situation, Pearson and his colleagues saw no manifest public necessity, and Davis went free.[133]

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[130] *Id.* at 53.

[131] *Id.* at 54-55.

[132] *Id.* at 53.

[133] Not only the North Carolina court objected to "police brutality" in the antebellum era. *See* State v. Greenwood, 8 S.C.L. 111, 1 Mill 420 (1817), upholding the conviction of a constable for assault and false imprisonment of a free Negro. For further indications of North Carolina views, see Brock v. King, 48 N.C. 45 (1855), holding that a jailor was not liable because he had failed to place in chains a captured runaway slave who had escaped a second time. In the light of post-Civil War chain-gangs, Judge Battle's reason was extraordinary; chaining the slave would have been "cruel." *Id.* at 49. See also State v. Jacobs, 50 N.C. 259 (1858), a free Negro case in which the court was more libertarian than the United States Supreme Court has ever been. The Negro—on trial for infringing a gun-control law that applied only to Negroes—argued that his being forced to present himself before the jurors so that they could tell his color amounted to self-incrimination. Battle agreed! *Contra,* Holt v. United States, 218 U.S. 245 (1910). Battle's argument that though the defendant

Four other state supreme courts besides Alabama's and North Carolina's heard appeals from maltreatment-of-Negro-convictions—those of Texas, Mississipi, South Carolina, and Tennessee. The Texas and Mississippi Courts each heard but one suit. As the Texas appellant's claim was as flimsy as that in the Arkansas Wyandott Indian case,[134] I have to rely on the expressions of attitudes in the Texas murder cases already discussed.[135]

The single Mississippi case, however, is more significant. *Scott v. State*[136] was an appeal by an overseer from a conviction for cruel and unusual punishment of a slave. Scott suggested to the court an ingenious "out." His indictment named him only as the "overseer." The 1822 statute on which it was based spoke of the "master or other person entitled to the service of any slaves."[137] Overseers are "not beneficially interested in" and do "not own the labor of slaves committed to their charge." Therefore the indictment's description did not bring him under the statute with sufficient clarity to convict.[138] Further, the only alternative mode of sustaining the conviction was to hold him indictable under the common law; but that solution was barred by the line of logic laid down in Ruffin's *State v. Mann* opinion.[139] Surely the court could have accepted Scott's argument; however, Chief Justice Smith, remarking that its acceptance "would, to a great extent, defeat the benign and salutary purposes of the law,"[140] would have none of it and the conviction was upheld. *Scott* does not, of course, prove that the Mississippi court's motives were primarily humanitarian protection of slaves. It could still be argued that they were concerned only with protecting property interests—with guarding the master's property against the overseer's conduct. But this argument strikes me as far-fetched for reasons quite apart from the language of Smith's opinion. It was not shown that Scott had permanently damaged the slave, and, even if he had, the master's interest would have been adequately protected by a civil suit asking monetary damages from the

had to be in court, he was not "bound to stand or sit within view of the jury," 50 N.C. at 260, strikes me as a greater extension of the "self-incrimination" privilege than one could expect even from the United States Supreme Court today.

[134] See p. 224 *supra*.

[135] See pp. 217-18 *supra*.

[136] 31 Miss. 473 (1856).

[137] Act of June 18, 1822, ch. 73, § 44, [1823] Revised Miss. Laws 369, *quoted in* Scott v. State, 31 Miss. 473, 475 (1856).

[138] 31 Miss. at 473-74.

[139] See pp. 221-23 *supra*.

[140] 31 Miss. at 479.

overseer. Thus, *Scott v. State* at least creates the presumption that "humanitarianism" was a factor in the court's motivation.

The South Carolina and Tennessee cases did not offer such plausible grounds for reversal; neutrality required affirming the convictions. In consequence, my concern is restricted to the nature of the offenses against which the states acted and to judicial expressions of opinion.

The South Carolina court said: first, and in opposition to their rejection of common law criminal prosecutions for assaults on slaves, that a white could be punished under the common law for assault and battery on a free Negro; second, that pistol-whipping a slave constituted cruel and unusual punishment—as did, third, two hundred strokes with an India rubber whip; and fourth, that keeping slaves on a vegetarian diet and not renewing their shoes or clothing for seventeen months constituted punishable maltreatment.[141] Only the last charge was brought against a master, but here a court strongly disposed to indulgence could have released him, for, in sustaining the conviction, the South Carolina court disregarded all the defense witnesses' testimony. These witnesses were, besides the master himself, his two daughters and several neighbors. The neighbors were, the court decided, not in a position to know, while the defendant's testimony was "vague and evasive; and that of his young girls, incredible."[142] On the other side of the scales was only the overseer's word, but this, they thought, "should outweigh that of all the other witnesses."[143] The court was solidly in favor of the statute:[144]

> The law is salutary, even more by the opprobrium which follows a a conviction, than by the penalties for its violation. Public opinion derives force from its sanction; and the rapaciousness of the owner is checked by fear of its active interference.[145]

The Tennessee court heard a nearly similar case, one of providing inadequate clothing, and were disgusted.[146] They were more than disgusted by the case of *Worley v. State*,[147] in which the master had castrated

[141] State v. Harden, 29 S.C.L. 63, 2 Speers 152 (1832); State v. Wilson, 25 S.C.L. 66, 1 Cheves 163 (1840); State v. Harlan, 39 S.C.L. 189, 5 Rich. 470 (1852); State v. Bowen, 34 S.C.L. 299, 3 Strob. 573 (1849). See also State v. Boozer, 36 S.C.L. 11, 5 Strob. 21 (1850).

[142] 34 S.C.L. at 300, 3 Strob. at 575.

[143] *Id.*

[144] Act of 1740 for the Better Government of Slaves, § 38, 7 S.C. Stat. 397 (1840). In pertinent part, this act required a master to provide adequate food, clothing and shelter for his slaves.

[145] 34 S.C.L. at 300, 3 Strob. at 575.

[146] Britain v. State, 22 Tenn. 203 (1842).

[147] 30 Tenn. 171 (1850).

a slave "of a most wicked and turbulent disposition, . . . in the constant habit of running away, . . . lewd and incontinent, and in other respects of very bad morals and character."[148] The master's action could not be extenuated by ample proof that he was generally "remarkable for his kindness and humanity towards his slaves," and that for a long time up to the moment of his crime he had tried "mild and reasonable means to reform" the slave.[149] Said Judge Nathan Green:

> We utterly repudiate the idea of any such power and dominion of the master over the slave, as would authorize him thus to maim his slave for the purpose of his moral reform. Such doctrine would violate the moral sense and humanity of the present age.[150]

It is possible of course that Nathan Green's humanitarian statements were no more genuinely motivated by sympathy for the Negro than may have been his pronouncements about the natural equality of slaves when he allowed them to probate their master's will in *Ford v. Ford*.[151] Posssibly the Tennessee judges were motivated only by a desire to counter abolitionist propaganda. If so, they camouflaged their motives oddly in three other cases—two civil suits between whites and one criminal prosecution of a free Negro—for the result of their behavior was to highlight rather than to tone down instances of cruelty. In setting wrongs aright, the primary effect was to publicize relatively obscure injustices, particularly in the free Negro case.

The two civil suits were both to recover the value of slaves murdered by whites: the first shot for supposedly taking part in an insurrection[152] and the second lynched while in jail awaiting trial on charges of raping and murdering a white female.[153] The judges had little patience with the defendants. They seemed anxious to make sure that the masters got at least their money's worth, but their language suggests two other motives —anxiety for the security of society and ire over the illegal taking of Negroes' lives.

In *Kirkwood v. Miller* the defendants won their first trial. On appeal the supreme court reversed for two reasons: the introduction of newspaper accounts "on the subject of the apprehended insurrection"[154] and

[148] *Id.* at 175.
[149] *Id.*
[150] *Id.*
[151] See p. 203 *supra.*
[152] Kirkwood v. Miller, 37 Tenn. 455, 458 (1858).
[153] Polk, Wilson & Co. v. Fancher, 38 Tenn. 336 (1858).
[154] 37 Tenn. at 458.

the absence of proof connecting the murdered slave with an insurrectionary scheme, which the judges doubted "existed outside of the distempered imagination of the people."[155] At the second lower court trial, all the defendants were held liable. Two of them then appealed on the grounds that they had not struck the death blow. The court thought their argument "very ingenious and labored," but rejected it strongly.

> We find no justifiable cause . . . for the capture . . . of the slave, in the first instance . . . . He had not misbehaved himself in any way . . . . After being . . . unlawfully tied with a rope, he became alarmed at what he saw and heard around him, and in endeavouring to make his escape from this unlawful confinement, was slain by one of his pursuers, in the joint purpose to recapture him . . . .[156]

The court held that the "wild panic, and vague, undefined apprehensions about a 'rising . . . of the slaves,' " could not save the defendants from liability. Both the "general interest of slave-holders" and "all proper principle" establish "the necessity of the most stringent laws on this subject. Humanity, as well as the general interest, demand the enforcement of these laws."[157] Slaves "are property—but have souls and feelings, and claims upon humanity. Those who take it upon themselves, in these periods of groundless panic, to slay and destroy, without sanction of law, must do so at their peril."[158] A lawless spirit could not be tolerated. Even if the proper course of the law "should fall short" of preventing all evil, "the evil had far better be endured than to throw off its restraints, and permit men to take vengeance into their own hands."[159]

In *Polk, Wilson & Co. v. Fancher* the lower court had permitted the defendants to adduce testimony that the slave's character was bad and that he was thus a valueless "article." On appeal, the supreme court said that the verdict in favor of the defendants was "a mockery of justice."[160] The judges insisted that the owners should get a fair value, but their expressions of opinion went further. If the slave had been guilty of the crimes charged,

> no punishment would have been too severe for him. . . . But no man, whether bond or free, is to be condemned or punished without a hear-

[155] *Id.* at 457-58.
[156] *Id.* at 459.
[157] *Id.*
[158] *Id.*
[159] *Id.* at 460.
[160] 38 Tenn. at 341.

> ing—a fair and impartial trial. There is neither valor nor patriotism in deeds like these. Not valor, because there is no contest—the victim is already in bonds and harmless; nor patriotism, because the country has provided for the proper and legal punishment of offenders, and needs not the aid of mobs and lawless combinations to wield the sword of justice or quicken its stroke.[161]

The slave's "guilt had not been established. The presumption of innocence can only be removed by proof upon a legal trial."[162]

In *Mayor v. Winfield*,[163] the free Negro case, the Tennessee court went beyond mixed indignation about property rights, public security, and claims upon humanity. The judges insisted upon the positive extension of certain rights to "free persons of color." In March 1839, the city of Memphis had established a curfew for slaves and free Negroes that forbade them to be on the city streets after 10 p.m. Winfield was arrested for violating the curfew, jailed for the night, and fined ten dollars without being given a trial. The local justice of the peace voided the ordinance and released the defendant, and the city appealed unsuccessfully both to an intermediate and to the supreme court. Judge Green and his brethren took a dim view of the ordinance. "This new curfew law . . . cannot . . . be enforced against free persons of color, for we think it is high-handed and oppressive, and enacted by the corporation without any authority . . . ."[164] Not only was the conviction void for lack of a jury trial; "it is an attempt to impair the liberty of a free person unnecessarily."[165] After all, the free Negro must live. "Every one knows that in cities, very often, the most profitable employment is to be found in the night, loading and unloading steamboats and other craft, waiting about hotels, theatres, places of amusement both public and private, wood-cutting, fire-making, shoe- and boot-cleaning . . . ."[166] To deprive the free person of color of these "sources, in large cities, of much profit" would be virtually compelling him to act as a "wild beast, to hide his head in his den from ten o'clock until daylight . . . ."[167]

The court pointed out that had there been any attempt to "enforce such an ordinance *against a free white person*, public indignation would

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[161] *Id.* at 338.
[162] *Id.* at 339.
[163] 27 Tenn. 707 (1848).
[164] *Id.* at 709.
[165] *Id.*
[166] *Id.*
[167] *Id.* at 710.

have been aroused, and the corporation would not only have been sued to recover back the fine, but also for false imprisonment."[168]

The free Negro could not be denied all rights. He

> is not, it is true, a citizen of full privileges in our own state, but still he is a free person, and cannot be punished in this summary mode . . . . The lot of the free negro is hard enough at best, resulting from necessity . . . out of the relation in which he stands to his brethren who are in servitude, and it is both cruel and useless to add to his trouble by unnecessary and painful restraints in the use of such liberty.[169]

VI. The Mediative Judicial Role and the Rule of Law

Such was appellate judicial treatment of the white who injured the antebellum Negro. Even after imposing the qualifiers that caution and balance behoove—that many crimes by whites must have never reached the supreme courts, that the statutes barring Negro testimony immodestly disadvantaged the black grievant, that the actions of Southern courts may have lessened but did not eliminate the terrors of the peculiar institution, etc.—three specific propositions about the workings of antebellum Southern justice appear warranted.

First, the police systems of the slave states did act against whites, at least to the extent of trying fifty-five criminal cases. Probably other cases never reached the appellate courts. A South Carolina judge, writing in 1832, justified a common law conviction for battery of a free Negro on the grounds that "[t]he practice to indict a white man for an assault and battery on a free negro, seems to be well settled, by a variety of circuit decisions, for upwards of thirty years."[170] I cannot determine whether there were unappealed convictions or whether all of the circuit indictments prior to this one resulted in acquittals. Nor can I know how large was the "variety of circuit decisions." It is, however, likely that, after 1832 as before, the state prosecutors brought more successful indictments than reached the high courts.

Second, juries were sufficiently bestirred to find some defendants guilty. Several hundred white Southerners—more if there were unappealed convictions—acted against fellow whites.

Third—and the prime consideration here—in almost all the cases that were reviewed on appeal, appellate judges acted with considerable fair-

[168] *Id.* at 709 (emphasis added).
[169] *Id.*
[170] State v. Harden, 29 S.C.L. 63, 63-64, 2 Speers 152, 153 (1832).

ness. Only one of the twenty-four trials for homicide and attempted homicide of slaves reached a non-neutral result. In *Rowe v. State*, where the jurors had been drinking, the white defendant ought to have received a new trial.[171] There was no significant difference in the courts' dispositions of cases involving masters or overseers as opposed to "unconnected" whites. The cases of non-fatal abuse of slaves seem to have reached similarly neutral conclusions with the possible exception of *Scott v. State*.[172] I have no doubt that the legislature intended to embrace overseers in its prohibition of cruel and unusual punishment. However, it does strike me that the Mississippi court followed the spirit rather than the letter of the law to find against the overseer and thereby ignored the general precept that penal laws be construed narrowly.

Trials for murder and assault to free Negroes also reached clearly neutral ends with the exception of *State v. Jowers*, in which insolence was held to justify the battery.[173] Looked at from the perspectives of the mid-twentieth century, the fact that the North Carolina court thought that self-help, in the absence of an alternative mode of prosecution, was excusable may strike one as "illiberal." Certainly the North Carolina judges did not believe in the complete equality of races. Indeed, I doubt that even Justice William Gaston, whose conviction that slavery should be abolished was deep-dyed, would have taken that position. But judgments of "liberalism" and "conservatism," of "fairness" and "unfairness," should be formed in relation to the social context of nineteenth-century America, not in relation to an "a-racial Utopia," not even in relation to blissful estimates of contemporary Northern treatment of the Negro. Secondly, this case should be compared with *State v. Davis*,[174] which demonstrates that it would be clearly incorrect to conclude that the North Carolina judges thought that the free Negro had no rights whatsoever. In that instance he had the "natural right" of self-defense against "police brutality." Likewise, the Tennessee judges in the Memphis curfew case seemed to think that the free Negro had some rights.[175]

These specific propositions lead to a general judgment. Whatever else may be said about the antebellum South's treatment of the Negro, the goals toward which the appellate courts were working appear manifestly more consonant with decency than could be anticipated by extrapolating

[171] See p. 217 *supra*.
[172] See p. 228-29 *supra*.
[173] See p. 223 *supra*.
[174] See pp. 226-27 *supra*.
[175] See pp: 232-33 *supra*.

backward from twentieth-century Southern jurisprudence. In this sense, the decisions studied here parallel in thrust the markedly libertarian insistence on reasonably fair trial standards when antebellum Negroes themselves stood accused of crime. So too, they are largely consonant with pervading libertarian tendencies to find in favor of Negroes bringing suit for freedom during the antebellum era.[176]

Why should this be? Some sort of explanation is urgently called for.

I do not think that the cases can be explained away by arguing that the courts were merely purveying deathless words of humanitarianism for purposes of counter-propaganda against Northern abolitionism. Of course, it is unlikely that property motives did not enter measurably into judicial calculations. But there are at least three reasons to deem it equally unlikely that their motives were always either so cunning or so impure.

First, judges whom we know to have been exponents of the positive goodness of slavery, such as Justice Harris of Mississippi or Chief Justice Lumpkin of Georgia, did not hesitate both to expatiate upon the peculiar institution's virtues and its attackers' moral baseness. Nor did they hesitate to upbraid fellow judges whose opinions they believed thrust in too liberal a direction. A would-be "cunning" propagandist had his work too often undone by the bold dicta of pro-slavery exponents to anticipate success. Second, the effect of decisions was not infrequently to punish precisely those who had no property-interests in punishment—malevolent masters. Third, unless I misread utterly the tone of the opinions convicting whites, genuine feeling is there. The opinions of liberal judges whose views of the peculiar institution are not known are too similar in tone to those (for instance, William Gaston of North Carolina) whose statements and actions off the bench leave no room for doubt about their personal hostility toward slavery. In brief, both the wording and the practical punitive effect of these decisions inclines me strongly to the view that they tapped a genuine demand that the right of Negroes to consideration as humans be enforced by the governmental structure. That conclusion leads us back once again to the problem of explanation.

Unfortunately, the most obvious explanatory possibility will not bear scrutiny. I am thinking of the notion that the occupants of these benches were statistically a very peculiar lot. Either, and rather doubtfully, they happened to belong to anti-slavery sects such as the Quakers or, and more plausibly, they were liberal, aristocratic holdovers from a Jeffer-

[176] The first of these two areas is explored in *Fair Trials for Blacks, supra* note 11. For a full treatment of suits for freedom, see *Negro Rights, supra* note 53.

sonian day cut short in other governmental branches by the rise of racist "Jacksonian rednecks." The fact is that analysis of the judges' socio-economic characteristics simply does not help much. Many liberal judges were appointed after the the rise of Yankee abolition. There is no "helpful" skewing of the judiciary in terms of religion, class-background, or education that would clarify the apparent persistence of tolerance for the black. Indeed, most of the statistically-derived suggestions push in the opposite direction or in none at all. To give two examples: the religions most strongly represented among the more libertarian judges were Fundamentalism and Episcopalianism, and the lower the judge's socio-economic origins the more inclined he seemed to be to apply the law in favor of the Negro.[177]

One has, in short, to look elsewhere. Two possibilities present themselves. The first interpretation would suggest that characterizations of the post-1830 South as reacting in a blind, monolithic defense of slavery against its Northern opponents are vastly overdrawn, that, really, the antebellum South was quite different, was far more "liberal," than accepted historical interpretations would have it. On this showing, the courts' behavior was representative of general public opinion rather than a curious sport.

But this possibility strikes me as attempting to seize too much ground. A second interpretation seems more tenable. Such an interpretation would seek its analytic ground in role theory and begin by suggesting that the major sources upon which historians have drawn to characterize antebellum Southern views have been skewed in favor of a picture of ardent support for slavery. I am thinking, of course, of the writings of Southern editors, senators, congressmen and "sociological" apologists for slavery.

The word "apologist" suggests the crux of the matter. That sociological writers on behalf of the peculiar institution were engaged in a "peculiarly" apologetic role requires no demonstration. What of editors, elected representatives, and judges? Many editors, interested in circulation, might well have reflected in their papers and journals a majority viewpoint. More important, reporting and thus reading national news, they would have come across, in their daily work, a substantial quota of "foreign" attacks upon the structure of Southern society. The same is true in greater measure of Southern congressmen and senators in Washington. If there was any locus in the United States—short of excursions to

[177] For discussions of the analytic results recapitulated here, see *Fair Trials for Blacks, supra* note 11; *Negro Rights, supra* note 53.

abolitionist Boston—where they would hear plenteous vituperation about the mores of their native region, it would surely have been in the halls of Congress. If the onslaughts of John Quincy Adams and Charles Sumner were to provoke a "concert of defence," surely the first instruments to respond in unsympathetic vibration would be the voices of elected Southerners.

By contrast, a member of a slave state's highest court remained relatively insulated from frontal attacks. To be sure, as a member of the Southern intelligentsia, the judge would read of them, and, on summer trips to Northern "watering-places," perhaps encounter them directly. Nevertheless, the average quotidian force of these attacks must have been considerably less. If the concert of defense was indeed in any great measure the consequence of abolitionist attacks, it is reasonable to expect a correspondingly lesser reaction from the members of the bench.

This suggested interpretation is by no means an attempt to resurrect a nineteenth-century view of the judge as different in kind from other political actors. It is offered merely to note a difference in degree of engagement in what Lester Milbrath has aptly called the politician's "gladiatorial" role.[178] There are, certainly, ample reasons for expecting attitudinal differences to spring from variances in roles.

First of all, incursions of Jacksonian democratic ideology upon the methods of selection of Southern judges were fairly limited. It is true that under the Virginia Constitution of 1851 judges were required to undergo the periodic reckoning of running for popular re-election. However, terms lasted for a rather lengthy twelve years. Similarly in Tennessee, Jacksonian egalitarianism simply reduced the length of the legislatively-selected term from twelve to eight years. The term's span afforded substantially greater leeway for making "unpopular decisions" than was granted to legislators and governors elected every two, four, or six years.

Additionally, "populist" attitudes toward judges—as distinct from their structural reflection in limited terms and popular elections—appear to have fallen well short of equating judicial and legislative accountability to the people's will. I believe that there is substantial applicability throughout the South of Henry S. Foote's explanation of the extraordinary number of Whigs—in view of their statewide minority status—elected to the Mississippi bench during the antebellum period. Foote argued

[178] *See* L. MILBRATH, POLITICAL PARTICIPATION 8-25 (1965).

that Mississippi attitudes entailed popular selection of judges with regard to their personal and legal capacities rather than to their party affiliations.[179] A supporting illustration is provided by the career of Chief Justice William Sharkey. His Whiggery should have been one strike against him. The fact that he took up the minority position on an issue about which Mississippi tempers ran high during the late 1840's—by refusing to hold that Mississippi could repudiate her state bonds—should have constituted at least one, if not two, more. Yet he had no difficulty returning to the court when he ran for re-election. The voting public seemed to feel that the judge was, at any rate, a special species of politician.

Certainly, in that heyday—before the fourteenth amendment so greatly restricted their power as final arbiters—state supreme court judges enjoyed positions of both influence and prestige easily underestimated in retrospect. Roscoe Pound's list of the "ten judges who must be ranked first in American judicial history,"[180] bears witness to their influence: six of the ten made their national reputations entirely from state benches. The preference of judges who later became senators for retaining their judicial titles suggests their prestige. So too does the difficulty encountered by presidents seeking to convince state judges that a federal cabinet post constituted an advancement. Thus, the Court President of Virginia, Henry St. George Tucker, rejected Jackson's offer of the Attorney-Generalcy, while Millard Fillmore was no more successful in persuading William Sharkey to take on the Secretaryship of War.

In sum, while Jacksonian democratic theory prescribed to the legislator the role of delegate of the people's will on specific issues, its rejection of the older view of the representative as a wise and superior man elected for his capacity to debate rationally "far from the madding crowd" was much less thorough-going in respect to the judicial branch.[181] To a measurable extent, the Southern judge continued to be ascribed the role of mediating between the "right" of the constitutional legacy of the past, the statutory expressions of public "will," and the "interests" of suitors.

The plausibility of these role differences in accounting for the fair-

[179] H. FOOTE, THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST 59 (1876).

[180] R. POUND, *supra* note 93, at 4.

[181] For a brilliant exposition of theories of representation and their political consequences, see S. BEER, BRITISH POLITICS IN THE COLLECTIVIST AGE (1966).

ness of judicial behavior toward the Negro depends, of course, upon the real existence of what several historians have recently argued was a persistent feature of the antebellum Southern psyche: moral doubts—despite brave political and sociological rhetoric—about the South's treatment of the black against the developing liberal ideology of the nineteenth-century "North Atlantic community," doubts that may have been driven underground by abolitionism but that dwelt on at a subconscious level. As Charles Sellers has put it, no historian who describes the Old South as "confident and united in its dedication to a neo-feudal order" and who misses "the inner turmoil of the antebellum Southerner can do justice to the . . . southern experience."[182] If any such doubts persisted up to the Civil War, it seems plausible to expect that their likely form of continuing articulation in the political arena would be in the appellate judges' decision-making. Besides the role distinctions already suggested, at least two further aspects of the judicial vocation strengthen the likelihood of such articulation.

The first bears specifically on the judicial role in adjudicating suits concerning Negroes. The senator or congressmen perceived slavery primarily in general terms. So too, did the state legislator enacting the laws of slavery. Obviously, this was not their only type of perception. If nothing else, Southern senators had Negro valets who took their coats when they returned to their Washington lodgings. But, and importantly, the judicial vocation entailed a different weighting of perceptions. To be sure, the judge would have been aware that the individual suit—the particular claim of a Negro to a fair trial, or freedom, or the specific horrors of a particular slave's murder by a white—contained, depending upon the way he decided the case, alternative general implications for the societal process. Nonetheless, the specific perception was eminently present in the form of the individual Negro, or his counsel, standing before him seeking justice. It is a commonplace of social psychology that an individual's prejudices are frequently stronger when he expresses an ethnic generalization than when he is engaged in specific personal dealings with individuals of the "despised" group. May there not be a psychological analogy here? The legislator, acting in general, might by the nature of his job, be far more inclined to rule that the

[182] THE SOUTHERNER AS AMERICAN 40 (C. Sellers, Jr. ed. 1960). For a brilliant exigesis of the philosophic tortures imposed upon the Southern mind by the attempt to square Enlightenment ideals and chattel slavery, see L. HARTZ, THE LIBERAL TRADITION IN AMERICA 145-200 (1955).

Negro be treated as an ordinary article of commerce. For the judge, such a ruling may well have been more difficult. If there *was* any tension induced by dual perceptions of the Negro as property and humanity, surely the judicial forum was the most likely place for its resolution in favor of humanity.

A final difference consists in the peculiar vocational interest of the judge in the rule of law. The antebellum vitality of this interest seems to have been considerable at the appellate level—thus its prevalence over other political objectives in the mind of a secessionist such as Alex Handy when dissenting from the "ourang-outang jurisprudence" of his Brother Harris.[183]

In sum, it seems fair to conclude that the characteristic most distinguishing antebellum from post-Reconstruction Southern appellate justice was the former's ideological irresoluteness. In the judicial arena four ideological components of the Southern value-system fought an unfinished battle: the supremacy of whites versus the supremacy of law, and the Negro as property versus the Negro as human. For the Negro, the irony of the Civil War and Reconstruction lay in the gap emergent between the general legal form of rules and their specific application. Despite the formal advantages that accrued with the Civil War Amendments, the two concepts that had assisted his condition in antebellum days —the rule of law and the black as human—weakened measurably by 1900. Such was the perversity of history: the "unfree" economic marketplace seemed to allow in the judicial marketplace a freer competition of these four ideological components. Of course, that competition did not abolish the shackles or terrors of slavery. Nor did it establish equality. What the Southern jurists sought was not so much to promote "due process" and "equal protection of the laws" in their most latitudinarian contemporary meanings, but rather to strengthen an ordered justice that might be best termed "due protection under the laws." For that age and culture such an enterprise was remarkable. Perhaps, in light of the cultural stresses imposed upon Southern mores by post-*Brown v. Board of Education* federal statutes and decisions, it may be too much to expect Southern supreme courts to exhibit today the legal creativity of a century ago—although, surely, the pressures from without are hardly greater than they were just before the Civil War. Be that as it may, I find it difficult to doubt that the Negro's present condition would be notably

[183] See p. 202 *supra.*

improved had twentieth-century Southern judges displayed their forbears' zeal for closing the gap between the formal structure of law and its application.

APPENDIX

CRIMINAL PROSECUTIONS OF WHITES FOR INJURIES TO NEGROES, 1830-1860

Cases starred with an asterisk were won by the defendant. Cases in Roman type involved homicide or attempted homicide; cases in italics involved lesser injuries.

ALABAMA

State v. Coleman, 5 Porter 32 (1837).
*State v. Marler, 2 Ala. 43 (1841).
State v. Flanigin, 5 Ala. 477 (1843).
State v. Jones, 5 Ala. 666 (1843).
**Turnipseed v. State, 6 Ala. 664 (1844).*
*State v. Slack, 6 Ala. 676 (1844).
*Cobia v. State, 16 Ala. 781 (1849).
Carpenter v. State, 23 Ala. 84 (1853).
*Eskridge v. State, 25 Ala. 30 (1854).
*Ex parte Howard, 30 Ala. 43 (1857).
*Dupree v. State, 33 Ala. 380 (1859).
Hudson v. State, 34 Ala. 253 (1859).

GEORGIA

Jordan v. State, 22 Ga. 545 (1857).
*Martin v. State, 25 Ga. 494 (1858).
Camp v. State, 25 Ga. 689 (1858).
Bailey v. State, 26 Ga. 579 (1858).

MISSISSIPPI

Kelly v. State, 11 Miss. (3 S. & M.) 518 (1844).
*Dowling v. State, 13 Miss. (5 S. & M.) 664 (1846).
*Bradley v. State, 18 Miss. (10 S. & M.) 618 (1848).
Jolly v. State, 21 Miss. (13 S. & M.) 223 (1849).
*Jenkins v. State, 30 Miss. 408 (1855).
Scott v. State, 31 Miss. 473 (1856).
*Oliver v. State, 39 Miss. 526 (1860).

NORTH CAROLINA

State v. Hoover, 20 N.C. 500 (1839).
State v. Hart, 26 N.C. 222 (1844).
**State v. Hathcock, 29 N.C. 52 (1846).*
**State v. Jowers, 33 N.C. 555 (1850).*
State v. Sewell, 48 N.C. 245 (1855).
State v. Robbins, 48 N.C. 249 (1855).
State v. Atkinson, 51 N.C. 65 (1858).
*State v. Floyd, 51 N.C. 392 (1859).
State v. Norman, 53 N.C. 220 (1860).

SOUTH CAROLINA

State v. M'Kee, 17 S.C.L. 297, 1 Bail. L. 651 (1830).
State v. Harden, 29 S.C.L. 63, 2 Speers 152 (1832).
State v. Maner, 20 S.C.L. 249, 2 Hill 453 (1834).
State v. Cheatwood, 20 S.C.L. 252, 2 Hill 459 (1834).
State v. Gaffney, 24 S.C.L. 180, 1 Rice 431 (1839).
State v. Wilson, 25 S.C.L. 66, 1 Cheves 163 (1840).
State v. Harden, 31 S.C.L. 213, 2 Rich. 533 (1846).
State v. Smith, 33 S.C.L. 37, 2 Strob. 77 (1847).
State v. Fleming, 33 S.C.L. 219, 2 Strob. 464 (1848).
State v. Bowen, 34 S.C.L. 299, 3 Strob. 573 (1849).
State v. Posey, 35 S.C.L. 54, 4 Strob. 103 (1849).
State v. Boozer, 36 S.C.L. 11, 5 Strob. 21 (1850).
State v. Harlan, 39 S.C.L. 189, 5 Rich. 470 (1852).
State v. Motley, 41 S.C.L. 128, 7 Rich. 327 (1854).
State v. Bradley, 43 S.C.L. 57, 9 Rich. 168 (1855).
State v. Winningham, 44 S.C.L. 86, 10 Rich. 257 (1857).

TENNESSEE

Britain v. State, 22 Tenn. 203 (1842).
Worley v. State, 30 Tenn. 172 (1850).
Rowe v. State, 30 Tenn. 491 (1851).

TEXAS

Chandler v. State, 2 Tex. 305 (1847).
Nix v. State, 13 Tex. 575 (1855).
State v. Stephenson, 20 Tex. 151 (1857).
Westbrook v. State, 24 Tex. 563 (1859).