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CALLED TO DUTY: JUSTICE WILLIAM J. GASTON*

JUSTICE BARBARA A. JACKSON**

This Article examines the jurisprudence of Justice William J. Gaston (1778–1844), a revered member of the Supreme Court of North Carolina, who is best known for two opinions that furthered the rights of slaves. Previous scholars have written about Justice Gaston’s focus on the rights and humanity of slaves, but they have not looked deeply at Justice Gaston’s religious ideas and the support those ideas provided to his jurisprudence. Notably, Justice Gaston was Catholic during a time when there were very few Catholics and no cathedral in the state. This Article explores the extent to which Gaston’s Catholic faith informed his judicial decision making, as well as what to make of the apparent contradiction between his public position against slavery and his personal slave ownership. As such, this Article uses judicial biography to study in detail the interaction of religious and legal thought in a period of dramatic conflict.

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INTRODUCTION

In modern society, questions about the role of faith and religion as they relate to public life abound. Candidates for office are routinely grilled about their adherence—or lack thereof—to a particular religion. Their answers may either be genuine or carefully calculated to energize supporters or placate critics. Similarly, members of the judiciary are not immune from questions regarding their faith.¹

The pre-Civil War era was a period of extraordinary faith and interest in religion. Scholars of American religion have demonstrated the vitality and diversity of religious beliefs and practices before the Civil War.² In particular, the Second Great Awakening of the 1830s saw religious enthusiasm grow as new religious sects, such as Mormons,³ began and as more established churches, such as Baptists, Lutherans, Presbyterians, and Methodists,⁴ expanded.⁵ Similarly, legal thought often borrowed from religious doctrine during this time. For example, revivalist Charles Grandison Finney, the person most associated with the Second Great Awakening, was a lawyer before he turned to religion.⁶ Finney was a prolific writer who relied upon his legal education in presenting the case for his theology, “the natural

1. See, e.g., Michelle L. Jones, Note, *Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification*, 88 IND. L.J. 1089, 1089 (2013) (suggesting that judges’ religious beliefs sometimes may be cause for recusal or disqualification).

2. See generally JON BUTLER, *AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE* (1990) (discussing the growth of denominational religions prior to the Civil War).

3. *Id.* at 68–70, 242–47 (discussing the growth of Mormonism in the 1830s).

4. *Id.* at 269–70.

5. RICHARD J. CARWARDINE, *EVANGELICALS AND POLITICS IN ANTEBELLUM AMERICA* 1 (1993) (“[I]n the 1830s and 1840s, hundreds of thousands of new converts became full members of the Protestant churches. By mid-century evangelical Protestantism was the principal subculture in American society.”).

6. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 338 (2014) (characterizing Finney as a “recovering lawyer”).

basis for morality and moral government.”⁷ Because religious thought was so closely connected to the secular world, the controversies around this subject matter appeared frequently in law, from the selection of judges to their decisions.

In addition to the important writing linking religious thought to legal thought in the pre-Civil War era,⁸ there is extensive literature that examines the conflicts—and correlations—between judges’ internal moral compasses and their judicial decisions. For example, Robert M. Cover’s book *Justice Accused: Antislavery and the Judicial Process* describes how judges who were anti-slavery in private often manipulated their decisions to conform to a pro-slavery law.⁹ It appears that the law often allowed insufficient leeway for judges to insert their own views about slavery. Other research suggests that judges may have been less ardently anti-slavery than Cover suggests.¹⁰ But important questions remain about just how much moral thought—theological moral thought in particular—correlated with judicial opinions.¹¹

7. Nelson P. Miller, *The Nobility of the American Lawyer: The Ennobling History, Philosophy, and Morality of a Maligned Profession*, 22 T.M. COOLEY L. REV. 209, 297 (2005).

8. See, e.g., William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760–1860*, 39 EMORY L.J. 65, 66 (1990) (arguing that religious ideas affected political outlooks in North America before and after the Revolutionary War).

9. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 119–23 (1975); Adam Shinar, *Dissenting From Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 607 n.21 (2013) (citing Cover for the proposition that “[p]erhaps the most extreme case of role conception is the willingness of antislavery judges to uphold fugitive slave laws”). Subsequent research has called into question some of Cover’s thesis. See, e.g., Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797, 801–02 (2011) (discussing how a conventional account of the antislavery judge, such as Cover’s, ignores the importance of the Fugitive Slave Act and its vulnerability to legitimate constitution-backed legal attacks); James W. Ely Jr., Book Review, 1975 WASH. U. L. Q. 265, 270 (1975) (reviewing ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975)) (discussing how Cover selectively ignored several primary sources about certain judges in his analysis and omitted analysis of other relevant judges altogether).

10. Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1147 (1993) (arguing that Justice Story’s “antislavery reputation” may not be accurate).

11. This same dichotomy has been observed in North Carolina’s Justice Ruffin. See MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* 38 (2003). Ruffin, who authored *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829), wrote in his letter of resignation, “I have administered the law as I understood it, and to the ends of suppressing crime and wrong, and upholding virtue, truth, and right.” TUSHNET, *supra*.

Another line of inquiry into pre-Civil War legal thought links judicial philosophy to political ideology. Inspired by work on political ideology in the Jacksonian period which demonstrated that Democrats differed in significant ways from Whigs (the forerunners of Republicans) on such issues as state power, property rights, and sometimes slavery, this literature finds that Democratic jurists employed different styles of reasoning from those who were Whigs.¹²

Scholars delving into the nature of judicial thought in the pre-Civil War period often turn to judicial biography to see how disparate elements of thought—from religious sentiment to economic and political ideology—fit together. Building on such pioneering studies as Richard Hofstadter's *The American Political Tradition*¹³ and then G. Edward White's *The American Judicial Tradition*,¹⁴ legal historians employed jurisprudential studies of individual judges with great effectiveness. Recently, for instance, Timothy Huebner's *The Southern Judicial Tradition* studied a handful of southern judges in the nineteenth century to provide insight into the ways they were constrained by precedent and how they nonetheless changed the law to promote economic growth and evangelical Protestant ideas.¹⁵ This method of judicial biography yielded important insights for northern judges, too, as demonstrated by Kent Newmyer's biography of Justice Joseph Story and Leonard Levy's biography of Lemuel Shaw, Chief Justice of the Supreme Court of Massachusetts.¹⁶

This Article employs that well-tested approach to biographical study of a key North Carolina jurist, William J. Gaston. While studies of Gaston are not new to academic literature, he often serves as a foil

12. See LAWRENCE FREDERICK KOHL, *THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 145–85* (1989) (explaining how Democrats and Whigs took different approaches to the rule of law). See generally G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835* (1988) (discussing the development of the Supreme Court at the beginning of the nineteenth century).

13. See generally RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* (1948) (looking at the lives of numerous leading politicians in American history, from the Founding Fathers through Franklin Delano Roosevelt).

14. See generally G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* (3d ed. 2007) (profiling leading judges of the nineteenth century).

15. See generally TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890* (1999) (recounting the histories of six Southern judges, including Chief Justice Ruffin of the Supreme Court of North Carolina).

16. See generally LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957) (describing Shaw's belief in the law as a system of scientific principles of logic and reason); R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* (1985) (reviewing Story's jurisprudence).

for his more famous colleague, Thomas Ruffin.¹⁷ Previous studies have often focused on Gaston's personal and family life without an intensive study of his jurisprudence; others only paid attention to parts of his character, such as his political ideology or his representation of Quakers in their anti-slavery mission.¹⁸ By contrast, Gaston's religion is my primary variable for analysis. I place Gaston's religious beliefs at the center of analysis and work outward from those beliefs to see how they ripple through his personal papers, then to his extra-judicial writings, and finally to how they appear in a select set of his most important judicial decisions. This Article is an attempt to understand how those religious ideas interacted with other parts of Gaston's thought and his legal philosophy.

To that end, I begin with Gaston's personal papers and an extraordinary—and until now unused—set of documents held by the Gaston family.¹⁹ Building on these documents, I further elucidate Gaston's deeply held religious sentiments using his papers at the University of North Carolina's Southern Historical Collection, his extra-judicial writings and oratory, and several of his more important judicial opinions.

Coming from the vantage of religious thought, through the approach of judicial biography, I am able to highlight the ways that Gaston's writings and judicial opinions drew upon his religious beliefs to emphasize the humanity of all people, including the enslaved, and how he sought to subordinate everyone—including slaveowners—to the rule of law. This relocates religious thought, and especially

17. See, e.g., Alfred L. Brophy, *Thomas Ruffin: Of Moral Philosophy and Monuments*, 87 N.C. L. REV. 799, 838 (2009) (pointing to Gaston as an example of how “[e]ven in Ruffin’s own place and time, there were alternative visions of slavery”).

18. See Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 89 N.C. L. REV. 1879, 1883–84 (2011) (using Gaston's oratory as one of several examples to provide an understanding of “southern thought”); Timothy C. Meyer, *Slavery Jurisprudence on the Supreme Court of North Carolina, 1828–1858: William Gaston and Thomas Ruffin*, 33 CAMPBELL L. REV. 313, 334 (2011) (noting the “fundamental difference[s]” between Gaston's and Ruffin's jurisprudence on slavery); Laura F. Edwards, *The Forgotten Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law*, 87 N.C. L. REV. 855, 872–73 (2009) (discussing Gaston's critical role in the history of the Supreme Court of North Carolina); Gary R. Govert, *Something There Is That Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office*, 64 N.C. L. REV. 1071, 1081 (1986) (examining, inter alia, the role the Protestant oath played in Gaston's career).

19. These documents are part of the Gaston-Hawks Collection gifted to Tryon Palace, located in New Bern, North Carolina, in 2013. The collection has been in the continuous possession of descendants of the Gaston family and consists of Justice Gaston's personal correspondence with his daughter, Catherine Jane, as well as the correspondence of other Gaston family members, and various other biographical information.

Catholic thought, to the center of analysis of Justice Gaston's jurisprudence.

Part I follows this introduction with an examination of Gaston's background, education, and the early public life that first brought him to prominence. The Article continues in Part II with a discussion of some of the initial criticism Gaston received due to his Catholic faith. From there, the Article moves into Part III, a discussion of Gaston's service on the Supreme Court of North Carolina, beginning with a critique of *State v. Mann*,²⁰ a controversial opinion authored by his contemporary, Thomas Ruffin. The Article then discusses three of Gaston's own significant cases affecting the legal status of slaves and free blacks: *State v. Negro Will*,²¹ *State v. Manuel*,²² and *State v. Jarrott*.²³

I. GASTON'S BACKGROUND

As one of the few Gaston family members remaining after the Revolutionary War, Justice Gaston achieved success through means other than family notoriety. United States District Court Judge H.G. Connor recounted the story of Gaston's father, a leading patriot of New Bern, who was publicly murdered during the Revolution.²⁴ Although Gaston was identified often as a minority party member, his identity was more tightly bound to his Catholic faith:

On a notable occasion he said: "Having been trained from infancy to worship God according to the usages, and carefully instructed in the creed, of the most ancient and numerous society of Christians in the world, after arriving at mature age, I deliberately embraced, from conviction, the faith which had been instilled into my mind by maternal piety. Without, I trust, offensive ostentation, I have felt myself bound, outwardly, to profess what I inwardly believe, and am, therefore, an avowed, though unworthy, member of the Roman Catholic Church."²⁵

20. 13 N.C. (2 Dev.) 263 (1829).

21. 18 N.C. (1 Dev. & Bat.) 121 (1834).

22. 20 N.C. 144, 3 & 4 Dev. & Bat. 20 (1838).

23. 23 N.C. (1 Ired.) 76 (1840), *overruled by* *State v. Watson*, 287 N.C. 147, 214 S.E.2d 85 (1975).

24. Henry G. Connor, William Gaston (Nov. 24, 1914), in NORTH CAROLINA BAR ASS'N, ADDRESSES AT THE UNVEILING AND PRESENTATION OF THE BUST OF WILLIAM GASTON 5, 6 (1915).

25. *Id.* at 6; *see also* William Gaston, Debates of the Convention of North Carolina to Amend the Constitution (June 30, 1835), in PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA, CALLED TO AMEND THE CONSTITUTION OF THE STATE, WHICH ASSEMBLED AT RALEIGH, JUNE 4, 1835, at 264, 265 (1836).

Judge Connor quoted a portion of Gaston's speech given during the 1835 convention to amend the Constitution of North Carolina, during which Gaston spoke eloquently in opposition to the Protestant oath of office.²⁶

Justice Gaston's mother, who was intensely devoted to him, ensured that "above all cares," she "deeply instilled into his young heart, the dogmas of her faith."²⁷ She first sent William Gaston "to Philadelphia to study under a priest," and subsequently enrolled him as the first student at Georgetown.²⁸ Although poor health forced him to return to New Bern to complete his studies, he was able to matriculate at Princeton, "graduating with highest honors in 1796."²⁹ In New Bern, Gaston studied law with "the erudite French Catholic legal scholar F. X. Martin," who subsequently became Chief Justice of the Supreme Court of Louisiana.³⁰ Gaston then took over his brother-in-law's legal practice.³¹

Gaston's Catholic upbringing and connection to New Bern likely framed his attitudes towards the State's black community. While Gaston lived and practiced law in New Bern, the town "was a majority-black community in which people of every color and condition interacted daily."³² New Bern's population grew from about 2,500 in 1800 to over 3,700 in 1830, making it the state's largest city.³³ Craven County, in which the town is located, "had a substantial black population that included both slaves and an unusually large number of free people of color,"³⁴ with "337 free people of color, 3,440 whites, and 3,858 slaves" in 1790.³⁵ Later records separate the town of New

26. See Gaston, *supra* note 25, at 264–65 (transcribing Gaston's speech); Robert J. Breckinridge, *Judge Gaston of N.C.—Religious Liberty—Mental Reservation*, in PAPIISM IN THE XIX. CENTURY, IN THE UNITED STATES 80, 83 (1841) (describing how the judges' oath required judges to maintain the Protestant religion). See generally Govert, *supra* note 18, at 1074 (noting that the 1776 Constitution of North Carolina "permitted only Protestants to hold office").

27. Breckinridge, *supra* note 26, at 81.

28. David M. Rooney, *William Gaston: Ante-Bellum Southern Catholic Conservative (1778–1844)*, in CATHOLIC MAKERS OF AMERICA, at 95, 97 (Stephen M. Krason ed., 2006).

29. *Id.*

30. *Id.* at 98. This tradition of studying law in a law office followed the study of law in a private home but predated the private law schools in North Carolina. Albert Coates, *The Task of Legal Education in the South*, 16 A.B.A. J. 464, 464 (1930).

31. Rooney, *supra* note 28, at 98.

32. CATHERINE W. BISHIR, CRAFTING LIVES: AFRICAN AMERICAN ARTISANS IN NEW BERN, NORTH CAROLINA, 1770–1900, at 20 (2013).

33. *Id.* at 23.

34. *Id.* at 24.

35. *Id.*

Bern's population from the county's, showing growth from 2,467 total residents in 1800 with 144 free people of color and "a slight majority of slaves over white residents," to "268 free blacks . . . [,] 1,475 whites and 1,920 slaves" by 1820.³⁶

Among his activities as a lawyer, Gaston "advised at least one client how to use a trust to free slaves by will."³⁷ Gaston created a template that the Quakers used in the early nineteenth century "for transferring slaves to the trustees of the Society of Friends."³⁸ Additionally, Gaston actively participated in public life. He was first elected to the state Senate in 1800, followed by election to the House of Commons in 1807, where he served briefly as Speaker.³⁹ During the next legislative session, he famously defended the right of Jacob Henry, who was Jewish, to be sworn into the legislature.⁴⁰ Although his effort was unsuccessful, Gaston's argument for religious liberty and tolerance was considered "one of the best ever heard in a state legislature to this time,"⁴¹ and foreshadowed his later eloquent indictment of the Protestant oath during the 1835 North Carolina Constitutional Convention.⁴² After serving four terms in the North Carolina General Assembly, Gaston ran for United States Congress in 1810 as a Federalist.⁴³ Although he lost this election, he returned to the state senate in 1812, before his eventual election to Congress in 1813.⁴⁴ He served in Congress until 1817, before returning to North

36. *Id.* at 24–25.

37. Brophy, *supra* note 17, at 839. In 1809, Gaston advised the Quakers that "donations of personal property, such as . . . slaves . . . may be received to any amount." JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA, 1790–1860*, at 23 (1943).

38. COVER, *supra* note 9, at 76.

39. Joseph Herman Schauinger, *William Gaston: Southern Statesman*, 18 N.C. HIST. REV. 99, 104–06 (1941). At the time, officeholders were precluded from holding office if they "den[ie]d the Being of God or the truth of the Protestant religion . . ." N.C. CONST. of 1776, § 32. Although "Catholics were the principal targets of the religious test[. . .] Jews, atheists, and others were consigned to the political wilderness" because of similar fears that, like Catholics, they lacked the "internal sanction of conscience and thus [were] capable of anything." Govert, *supra* note 18, at 1078; *see infra* Part III.

40. Schauinger, *supra* note 39, at 106.

41. *Id.*

42. Gaston, *supra* note 25, at 285 ("Religion is exclusively an affair between man and his God . . . Let not religion be abused for . . . impious tyranny—religion has nothing to do with it.").

43. Gaston's loyalty to the Federalist Party was so strong that he has been referred to as "[a] Federalist who stubbornly remained a Federalist long after his party had died." Oliver H. Orr Jr., *A Principle in Faith for North Carolinians*, RALEIGH NEWS & OBSERVER, Nov. 6, 1960 (on file with Wilson Library, University of North Carolina at Chapel Hill, in the North Carolina Collection).

44. Schauinger, *supra* note 39, at 107.

Carolina to serve two additional terms in the state senate.⁴⁵ During his last term in the senate, “[h]e framed the law establishing the present supreme court of the state; and the liberal basis upon which it is established, [was] to be ascribed to his zealous and efficient support.”⁴⁶ Gaston was also a revered and sought-after speaker.⁴⁷ He delivered an important address at the University of North Carolina in 1832;⁴⁸ he was invited to give an address to Whigs in Montgomery around the same time;⁴⁹ he and delivered an address at Princeton in 1835.⁵⁰

Gaston’s steadfast commitment to his Catholic faith throughout his career remains particularly remarkable given the religious backgrounds of North Carolinians at the time.⁵¹ Writing in response to an invitation from the Reverend Monsignor Ryder, President of the College of Georgetown, to give an address at Gaston’s alma mater, Justice Gaston stated:

45. See *id.* at 113, 115. In total, he served four terms in the state senate and seven in the house of commons. Orr, *supra* note 43.

46. Address from the National Portrait Gallery of Distinguished Americans (1835) (on file in the Gaston-Hawks Collection, Box 4, Folder 15, Tryon Palace, New Bern, N.C.); see also Schauinger, *supra* note 39, at 115 (discussing how Gaston wrote a report about the “evils of the judiciary” in North Carolina and proposed the supreme court as a way to control inferior courts).

47. One commentator cites to Gaston’s addresses, as well as his “large network of well-placed friends, acquired in college, in Congress, and in law practice and carefully nourished over the years,” as underlying reasons why he was “widely urged for appointment as Chief Justice of the United States Supreme Court on John Marshall’s death.” JOHN L. SANDERS, JUDGE WILLIAM GASTON 1778–1884, at 15 (Sept. 22, 1978) (on file with Wilson Library, University of North Carolina at Chapel Hill, in the North Carolina Collection).

48. William Gaston, Address Delivered Before the Philanthropic and Dialectic Societies at Chapel Hill, N.C. (June 20, 1832), in ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES AT CHAPEL HILL (Thomas W. White ed., 2d ed. 1832).

49. William Gaston, Address to Montgomery, Ala. Whigs (October 3, 1832), (transcript on file with Wilson Library, University of North Carolina at Chapel Hill, in the William Gaston Papers of the Southern Historical Collection).

50. William Gaston, An Address Delivered Before the American Whig and Clisophic Societies of the College of New Jersey (Sept. 29, 1835), in AN ADDRESS DELIVERED BEFORE THE AMERICAN WHIG AND CLIOSOPHIC SOCIETIES OF THE COLLEGE OF NEW JERSEY (2d ed. 1835).

51. Members of the Catholic faith remained a small minority in North Carolina during Gaston’s lifetime. “[A]s late as 1833, Bishop England counted only 500 Catholics in North Carolina . . .” Orr, *supra* note 43. This may have been the reason Gaston contemplated moving north, “probably to Baltimore,” where his children could receive “proper religious training.” SANDERS, *supra* note 47, at 16. This plan appears to have been thwarted by the rapid ascendancy of his political career, as well as the untimely death of his wife. *Id.*

As a Catholic, I am proud of the heroism of that noble band who, adhering with inflexible fidelity to the sacred Faith once delivered to the Saints, and carefully transmitted unchanged through ages by the commissioned witnesses of truth, did not hesitate to prefer exile, privation, danger and death, to a hypocritical profession of conformity to the Church by law established; and as an American citizen I can never cease to be grateful for the glorious precedent which they were the first to establish and by which it was shown that all undoubting conviction of the truth of ones [sic] own Religion is perfectly compatible with tenderness for the rights of conscience in others.⁵²

Gaston's assessment of his faith squares well with Alexis de Tocqueville's observations of American Catholics. During a trip to the United States in the 1830s, Tocqueville noted without surprise how faithful Catholics were to their religion as he observed that "Protestantism promoted independence, while Catholicism emphasized human equality . . ."⁵³ Gaston himself spoke to this theme in his address at Princeton,⁵⁴ concluding that "[p]ublic virtue is the only solid basis which can uphold the glorious structure of public freedom; and public virtue is not to be found when the quarry of personal integrity has been worked off and exhausted."⁵⁵

Gaston's role as a rare champion of slaves' rights during the pre-Civil War era may be better understood in the greater context of the Catholic Church, specifically with respect to its view on the institution of slavery and how it may have informed Justice Gaston's views on the matter. In his apostolic letter condemning the slave trade, Pope Gregory XVI acknowledged the danger slavery poses to religion, but

52. Letter from William J. Gaston, Justice of the Supreme Court of N.C., to Reverend Monsignor James A. Ryder, President of College of Georgetown (November 21, 1841), in J. Fairfax M'Laughlin, *William Gaston: The First Student at Georgetown College*, 6 RECORDS AM. CATH. HIST. SOC'Y PHILA. 225, 246-47 (1895). Gaston's professed faith was not mere lip service. In 1824, Gaston was instrumental in purchasing the property for St. Paul's Roman Catholic Church—the first in the state—contributing \$700 of \$2,000 raised for that purpose. U.S. Dept. of the Interior, Nat'l Park Serv., NATIONAL REGISTER OF HISTORIC PLACES INVENTORY-NOMINATION FORM: ST. PAUL'S ROMAN CATHOLIC CHURCH (1971), <http://www.hpo.ncdcr.gov/nr/CV0031.pdf> [<https://perma.cc/UE8G-Q542>] (documenting Gaston's role in the purchase of the property for the church).

53. JAMES HENNESEY, *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* 145 (1981).

54. Gaston, *supra* note 50, at 16-17.

55. *Id.* at 17.

stopped short of calling for its abolition.⁵⁶ Instead, he urged the faithful to look at their slaves as family and to consider freeing those slaves who were deserving.⁵⁷ According to one commentator, although Pope Gregory XVI condemned the slave trade, he failed to condemn slavery itself.⁵⁸ The Pope's reservations filtered down to his bishops, who were largely silent in the face of mounting opposition to slavery.⁵⁹

Although the Pope refrained from a full condemnation of slavery, he recognized the grave problems stemming from the institution, not least of all for his Church. The Pope was not alone in his approach. Bishop John England, who had North Carolina within his jurisdiction as Bishop of Charleston, privately “‘abhorred the condition of the slaves’ . . . and called slavery ‘the greatest moral evil that can desolate any part of the civilized world.’ ”⁶⁰ Although Bishop England's approach to confronting slavery did not bear “Gaston's directness and boldness,” his private views were likely known to Gaston, especially considering the close relationship that England and Gaston shared.⁶¹ Another commentator summarizes the general Catholic position on slavery in the United States as follows: “the system was not looked upon as intrinsically immoral, but as a social blight which should be done away with gradually, so that both the Southern whites and blacks would not suffer the dislocating effects of sudden total emancipation.”⁶²

Here, Justice Gaston was ahead of his Catholic contemporaries. Gaston, in the year prior to his election to the Supreme Court of North Carolina, cautioned the Dialectic and Philanthropic Societies at the University of North Carolina at Chapel Hill that they would soon confront the mitigation and eventual end of slavery in North Carolina. Calling slavery “the worst evil that afflicts the Southern part of our confederacy[,]” Gaston viewed the institution as a stumbling

56. Pope Gregory XVI, Apostolic Letter *In Supremo Apostolatus* (Dec. 3, 1839), in PAPAL ENCYCLICALS ONLINE, <http://www.papalencyclicals.net/Greg16/g16sup.htm> [<https://perma.cc/38V3-C9F5>].

57. *Id.*

58. HENNESEY, *supra* note 53, at 145.

59. *Id.* (“No Catholic bishop spoke for abolition in the prewar years.”).

60. MAX LONGLEY, *FOR THE UNION AND THE CATHOLIC CHURCH: FOUR CONVERTS IN THE CIVIL WAR* 51–52 (2015).

61. *Id.* at 52.

62. Rooney, *supra* note 28, at 110.

block for progress, accusing it of poisoning the “morals at the fountain head.”⁶³

Gaston’s condemnation of slavery is even more compelling considering its timing, as it came in the year following Nat Turner’s dramatic rebellion in southeastern Virginia.⁶⁴ In the immediate wake of the Turner rebellion, fear of slave rebellion reached Gaston’s New Bern community and spread throughout much of North Carolina, even to Chapel Hill.⁶⁵ Thus, Gaston’s audience included many of the same people who previously implored the governor to take further steps to protect against slave rebellion.⁶⁶

In 1928, Josephus Daniels noted that when Justice Gaston spoke of slavery, he “astounded a large portion of his audience He fully understood he was speaking to young men from families whose chief accumulations were in slave property. But that did not deter him.”⁶⁷ Daniels emphasized Gaston’s indictment of slavery as an impairment of progress, noting that Gaston “went on to say what many, years afterward, learned to be the truth” in his pointed criticism of the institution.⁶⁸ In Daniels’s view, Gaston’s address was the most severe indictment ever made of the slave system. Daniels found this indictment particularly compelling in light of its source: a justice native to North Carolina, a slaveholder himself, who existed within a system entirely based on the slave economy.⁶⁹

Daniels’s analysis here is perhaps one of the more helpful examinations of this address. He noted Gaston’s stature, his audience, and their mutual reliance upon the institution, and then correctly observed that Gaston’s words still set forth an extraordinary indictment of slavery, notwithstanding the potential repercussions. It is perhaps more remarkable that the audience cheered him and that the address, in fact, did not result in any readily apparent diminution

63. HENNESEY, *supra* note 53, at 146–47 (quoting *Judge Gaston on Slavery*, 8 AM. CATH. HIST. RESEARCHES 71, 71 (1891)).

64. Alfred L. Brophy, *The Nat Turner Trials*, 91 N.C. L. REV. 1817, 1825–31 (2013) (describing the violence of Nat Turner’s Rebellion).

65. *Id.* at 1868–69.

66. *Cf. id.* (describing the reactions of Chapel Hill residents to Nat Turner’s Rebellion).

67. *What Caused Judge Gaston to Write “Old North State”*, RALEIGH NEWS & OBSERVER, Mar. 28, 1928, at 18 (on file in the Gaston-Hawks Collection, Box 1, Folder 20, Tryon Palace, New Bern, N.C.) (stating that “outside the Quakers and other religious men, slavery was an acceptable institution” with few calling for its abolition).

68. *Id.*

69. *Id.*

in his public standing.⁷⁰ In fact, Chief Justice John Marshall praised Gaston's speech, stating that the principles Gaston espoused were "the 'true basis of the character to which statesmen in a republic ought to aspire.'" ⁷¹

II. EARLY CRITICISM OF GASTON'S CATHOLICISM

A letter that Justice Gaston wrote to his daughter Susan near the end of his life may provide some insight as to the role his faith had in his view of the law. The letter links Gaston's religious beliefs to his jurisprudence, which would bring everyone into the protection of the law as it subjected everyone to the control of law. In this letter, Gaston emphasized the particular role of a jurist in administering justice, connecting that role to a "holy office":

To administer justice in the last resort, to expound and apply the laws for the advancement of right and the suppression of wrong, is an ennobling and indeed a holy office, and the exercise of its functions, while it raises my mind above the mists of the earth, above cares and passions, into a pure and serene atmosphere, always seems to impart fresh vigor to my understanding and a better temper to my whole soul.⁷²

Justice Gaston's adherence to his faith and sense of duty likely figured prominently in his path to serving as a justice of the Supreme Court of North Carolina. Though he was twice approached to take the place of original justices of the court that he had been a central force in fashioning, Gaston twice declined these opportunities.⁷³ His reasons for declining are somewhat unclear, though they may have been related to Gaston's financial responsibilities to his family. North Carolina justices were notoriously poorly compensated, and Gaston had both a large debt to retire and a large income as a lawyer.⁷⁴ In Gaston's stead, Justice Thomas Ruffin and Justice Joseph J. Daniel

70. Connor, *supra* note 24, at 25 ("Dr. Battle says: 'It is remarkable that when the public mind was inflamed peculiarly on account of the bloody insurrection of Nat Turner in the preceding year, the orator should have frankly acknowledged himself an advocate of the ultimate abolition of slavery and that the audience cheered the utterance. . . . This bold language did not weaken his standing in the State.'").

71. Brophy, *supra* note 18, at 1881 (quoting Letter from John Marshall, Chief Justice, Supreme Court of the United States, to Thomas W. White (Aug. 9, 1832), in 12 THE PAPERS OF JOHN MARSHALL 232 (Charles F. Hobson, ed., 2012)).

72. Rooney, *supra* note 28, at 118 (referencing a letter Gaston wrote to his daughter Susan towards the end of Gaston's life).

73. Schauinger, *supra* note 39, at 123.

74. See *infra* text accompanying notes 87–90.

joined the court.⁷⁵ However, in 1833, Gaston was persuaded to join the court upon the death of the third original justice, Leonard Henderson.⁷⁶ Both Governor Swain and Justice Ruffin implored him to do so, making the argument that absent William Gaston, the Supreme Court of North Carolina would cease to exist.⁷⁷ Perhaps this is why Gaston stated to the Convention for Revisiting the Constitution of North Carolina⁷⁸ that acceptance of this position was based upon the fact that, “in [his] judgment, they made out a *plain case of duty* not to decline the appointment, unless the Constitution excluded [him] from it because of [his] religious opinions.”⁷⁹

Despite strong backing for Gaston’s taking a seat on the court, he faced very real opposition for his Catholic views. Henry Seawell, a prominent lawyer of the time, stated “his concern that ‘the integrity of the Protestant religion would be seriously affected by Gaston’s election to the bench.’”⁸⁰ He also received particular criticism for taking what was commonly referred to as the Protestant oath when he joined the court.⁸¹ The Presbyterian minister Robert Breckinridge, author of the essay, “Judge Gaston of N.C.—Religious Liberty—Mental Reservation,”⁸² used the oath’s supposed support of

75. Schauinger, *supra* note 39, at 123.

76. *Id.*

77. *Id.*

78. Gaston’s speech to the Convention lasted for a full day and fills forty pages of transcript in the Convention’s proceedings. SANDERS, *supra* note 47, at 10. Sanders notes that Gaston used “learned historical references and close legal reasoning,” as well as “solemnity and sarcasm” to entreat the assembly to eliminate “all religious tests for public office.” *Id.* Gaston concluded as follows:

The question before us is one, not of practical convenience, but of fundamental principles. He who would sacrifice such principles to the passion or caprice or excitement of the moment, may be called a politician, but he is no Statesman. We are now examining into the soundness of the foundation of our institutions. If we rest the fabric of the Constitution upon prejudices, unreasoning and mutable prejudices, we build upon sand; but let us lay it on the broad and firm basis of natural right, equal justice and universal freedom—freedom of opinion—freedom, civil and religious—freedom as approved by the wise, and sanctioned by the good—and then may we hope that it shall stand against the storms of faction, violence and injustice, for *then* we shall have founded it upon a ROCK.

Gaston, *supra* note 25, at 304–05; see SANDERS, *supra* note 47, at 10.

79. Gaston, *supra* note 25, at 265.

80. Meyer, *supra* note 18, at 337 (quoting Joseph Herman Schauinger, *William Gaston and the Supreme Court of North Carolina*, 21 N.C. HIST. REV. 97, 105 (1944)).

81. See Breckinridge, *supra* note 26, at 80, 83.

82. *Id.* at 80. Specifically, the author states, *inter alia*, that “Mr. Gaston has been for many years one of the most distinguished citizens of North Carolina.” *Id.* at 81; see also Rooney, *supra* note 28, at 112 (identifying Breckinridge as the author of the piece).

Protestant religion to call into question Gaston's integrity for swearing the oath as a Catholic.⁸³

The controversy involving Justice Gaston and the oath also implicated concerns about whether he had obtained some "ecclesiastical dispensations or permission to hold an office under the State of North Carolina."⁸⁴ Justice Gaston responded to the charge in a letter to the editor of the *Lexington Gazette*, in which he declared that the accusation was "wholly false."⁸⁵ Justice Gaston explained that many respected state officials encouraged his acceptance of the appointment.⁸⁶ He further explained there were "difficulties in the way of an immediate determination" of his acceptance of the position, but dispelled any rumors that this delay was in any way connected to "constitutional scruples."⁸⁷ He reassured the public that, after seeking counsel, he was "satisfied that [his] religious principles did not incapacitate [him] from taking the office."⁸⁸ It is likely that the "difficulties" that postponed Gaston's acceptance of the position were due to his financial situation, which was likely a far greater barrier to his service on the court.⁸⁹ In what would be a very unusual—if not unethical—arrangement today, Gaston was provided with the means to pay off his debts and was elected to the vacancy.⁹⁰

Prior to the adoption of the 1866 and 1868 constitutions, members of the Supreme Court of North Carolina were called "judge," rather than "justice." See James Logan Hunt, *Private Law and Public Policy: Negligence Law and Political Change in Nineteenth-Century North Carolina*, 66 N.C. L. REV. 421, 426 n.69 (1988) (citing N.C. CONST. of 1865, art. IV, § 2 (1866); N.C. CONST. of 1868, art. IV, § 8; Kemp P. Battle, *An Address on the History of the Supreme Court* (Feb. 4, 1889), in 103 N.C. 339, 362 (1889)). This Article uses the modern term "justice" for purposes of clarity.

83. Breckinridge, *supra* note 26, at 82 ("Before he took his seat on the bench, he took an oath in some usual form, to support the constitution of that state. Part of that constitution asserts and assumes the truth of the Protestant religion. But Mr. Gaston is an avowed and most decided papist!"). Gaston also held forth on this subject at some length during the Constitutional Convention of 1835, explaining that Catholics owed no "allegiance" to the Pope, but instead were connected to him by a "spiritual tie." Gaston, *supra* note 25, at 293.

84. Breckinridge, *supra* note 26, at 91.

85. *Id.* at 92.

86. *Id.*

87. *Id.*

88. *Id.*

89. Schauinger, *supra* note 35, at 124.

90. *Id.* Unfortunately, this was not the end of Gaston's financial difficulties. At various times, he wrote to his daughters Eliza and Catherine Jane about the issue. First, in 1835, he wrote to Eliza that he was "greatly pleased" with her "remarks about economy, . . . hav[ing] a large debt contracted from a disregard to that virtue which it is my purpose to pay off in three annual installments." Letter from William J. Gaston to Eliza G. (Jan. 11, 1835) (on file with Wilson Library, University of North Carolina at Chapel Hill, in the Gaston Papers of the Southern Historical Collection, Folder 68). He also was very

III. GASTON AND THE SUPREME COURT

On the Supreme Court of North Carolina, many of Gaston's views appear in relief against those of Democratic jurist Thomas Ruffin. In a series of cases involving such issues as the criminal prosecution of slaves⁹¹ and the rights of owners,⁹² Gaston's ideology departed in significant ways from the Democrats'.⁹³ Gaston sought to place definite limits on the power of slaveowners to punish enslaved humans and thus sought to bring everyone within the rule of law. He also sought to protect private property from intrusion by the state government. Due to these views, historians have viewed his life and jurisprudence primarily through his political identity and ideology as a Whig.⁹⁴ While Gaston was indeed a Federalist⁹⁵ and later a Whig,⁹⁶ the focus of this Article instead shifts the emphasis from his political ideology to his Catholic faith, a faith which sought to raise the humanity of enslaved people and to bring everyone within the control of religious tenets.

A. *Ruffin's Slavery Jurisprudence: Entrenching Oppression in North Carolina's Case Law*

Although Justice Gaston is recognized for his own cases involving the lives of slaves, those cases still must be viewed in context. In 1830, just three years before Gaston would join the court,

candid in addressing his continuing financial struggles in a letter to his daughter, Catherine Jane, written in 1842. Letter from William J. Gaston to Catherine Jane Washington (Dec. 21, 1842) (on file with the Gaston-Hawks Collection, Box 1, Folder 40, Tryon Palace, New Bern, N.C.). He explained his history of indebtedness, and noted that it had caused him "mortification and humiliation," but that he was back in debt \$5000—in part to finish "our church." He had a plan for paying it off, but his crop was not as successful as he had hoped, and his debt increased to \$6000. He proposed a scheme of economies and proposed that Catherine Jane keep a memorandum of her expenses. He also laid out his plan to pay off \$3000 of his debt in the next year. *Id.*

91. See, e.g., *State v. Negro Will*, 18 N.C. (1 Dev. & Bat.) 121 (1834).

92. See, e.g., *State v. Manuel*, 20 N.C. 144, 3 & 4 Dev. & Bat. 20 (1838).

93. Cf. Brophy, *supra* note 64, at 1822–23 (noting how Ruffin, a Democrat, and Gaston, a Whig, had different visions about the role of the law with regards to slavery).

94. *Id.*

95. Memorializing Gaston, R.D.W. Connor noted that Gaston likely "would have much preferred to be called 'Last of the Federalists.'" R.D.W. Connor, *William Gaston: A Southern Federalist of the Old School and His Yankee Friends—1778–1844*, 43 PROC. AM. ANTIQUARIAN SOC'Y 381, 381 (1933).

96. Because of his "strong convictions and party loyalty" to the Federalists, Gaston's religious ideology is likely a better measure than his later political affiliation as a Whig. See James Hugh Slaughter, *The Lonely Federalist: William Gaston in Congress, 1813–1817* at 74 (1986) (unpublished B.A. thesis, University of North Carolina at Chapel Hill) (on file with Knapp Library, University of North Carolina School of Government).

Justice Ruffin authored *State v. Mann*⁹⁷—a case generally regarded as a low point in North Carolina jurisprudence.⁹⁸ In *Mann*, the issue before the court was whether a master who had hired a slave was liable for a battery committed upon her—specifically, whether the hiring master could shoot the slave when she was fleeing him while being punished for an offense.⁹⁹ Although Ruffin acknowledged his concerns about addressing the institution of slavery in this context, he recognized that the court could not avoid the matter.¹⁰⁰

Ruffin reiterated the same message at the end of the opinion. His words were harsh, noting “the imperative 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.”¹⁰¹ Ruffin deemed this exercise “essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.”¹⁰²

Notwithstanding his stated concerns, Justice Ruffin meted out harsh justice for the slave, Lydia, the victim of defendant Mann’s wrath, entering judgment in Mann’s favor.¹⁰³ Harriet Beecher Stowe utilized this conflicted language, as well as the remainder of the opinion, in support of her second novel, *The Key to Uncle Tom’s Cabin*.¹⁰⁴ She used Ruffin to her advantage therein, characterizing him

97. 13 N.C. (2 Dev.) 263 (1830).

98. See Edwards, *supra* note 18, at 895 (referring to *Mann* as Ruffin’s “most infamous ruling”); Sally Greene & Eric L. Muller, *Introduction: State v. Mann and Thomas Ruffin in History and Memory*, 87 N.C. L. REV. 669, 669 (2009) (referring to *Mann* as “notorious”); John V. Orth, *When Analogy Fails: The Common Law and State v. Mann*, 87 N.C. L. REV. 979, 979 (2009) (referring to *Mann* as “notorious”); Judge James A. Wynn Jr., *State v. Mann: Judicial Choice or Judicial Duty?*, 87 N.C. L. REV. 991, 991 (2009) (“Ruffin made the judicial choice to preserve the relational status quo between master and slave rather than recognize slaves as sentient beings entitled to rights afforded by the rule of law.”).

99. *Mann*, 13 N.C. (2 Dev.) at 263.

100. *Id.* at 264 (“A Judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist and are thoroughly understood. The struggle, too, in the Judge’s own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible.”).

101. *Id.* at 268.

102. *Id.*

103. *Id.*

104. HARRIET BEECHER STOWE, *THE KEY TO UNCLE TOM’S CABIN* (1853); see also THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 190 (1996); TUSHNET, *supra* note 11, at 2; Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe’s Vision in Dred: A Tale of the Great Dismal*

as “among the ‘men of honor, men of humanity, men of kindest and gentlest feelings’ who were ‘obliged to interpret these severe laws with inflexible severity.’”¹⁰⁵ Ruffin’s opinion was “so characteristic, and so strongly express[ed] the conflict between the feelings of the humane judge and the logical necessity of a strict interpreter of slave-law.”¹⁰⁶ In Ruffin, Stowe found “the unflinching calmness with which a man, evidently possessed of honorable and human intentions, walks through the most extreme and terrible results and conclusions, in obedience to the laws of legal truth.”¹⁰⁷ This is but one view of *Mann*—that its stark presentation of slavery juxtaposed against the legal imperatives by which the justice was bound would likely lead to the institution’s demise.¹⁰⁸

Ruffin acknowledged that the decision, which asks whether slaves could have any legal recourse against their master, was one of first impression.¹⁰⁹ His view of the relationship between master and slave, while likely that of many of his contemporaries, was stark and rested upon his analysis of the nature of slavery.

Ruffin viewed slavery as serving several purposes—the profit of the master, the master’s security, and public safety. In asking what moral considerations were due to a slave, Ruffin emphasized that the system depended upon slaves having “no will of [their] own[,]” a lack of will predicated on “uncontrolled authority over the body” of the slave by the slaveholder. Famously stating that “[t]he power of the master must be absolute, to render the submission of the slave perfect[,]” Ruffin eliminated any hope that the judiciary might rein in abusive slaveholders through criminal punishment. Conceding that what he wrote was harsh, Ruffin justified his position by claiming that it was necessary for the survival of a slave-based society.¹¹⁰

Despite being confronted with a case of first impression regarding an admittedly harsh regime, Ruffin still elected to allow a battery to go unpunished, even after a jury found the defendant

Swamp, 78 B.U. L. REV. 1113, 1132 (1998) (discussing Stowe’s interpretation of *State v. Mann* in both *The Key to Uncle Tom’s Cabin* and *Dred*).

105. TUSHNET, *supra* note 11, at 2 (quoting STOWE, *supra* note 104, at 133).

106. *Id.* (quoting STOWE, *supra* note 104, at 145).

107. *Id.*

108. Brophy, *supra* note 17, at 800 (“Perhaps Ruffin aided the cause of antislavery through his honesty in *State v. Mann*.”).

109. *State v. Mann*, 13 N.C. (2 Dev.) 263, 265 (1830) (“[W]hether the owner is answerable *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the Court entertains but little doubt.—That he is so liable, has never yet been decided . . . There have been no prosecutions of the sort.”).

110. *Id.* at 266–67.

guilty.¹¹¹ Not only did the jury's decision give Ruffin some sense of the ideals in the community, but the Attorney General also prosecuted the case on behalf of the State. Yet Ruffin and the concurring justices then on the court chose to overrule both. Further in support of an alternative holding, an English court employed "the same absence of analogy . . . in favor of freedom for a slave."¹¹² One commentator concisely described *Mann's* harsh holding as follows: slaveholders could not be prosecuted for assaults on their own slaves, and "slavery required for its maintenance that slaves be aware that they were subject to their owners' complete and total control and that they had no place to appeal when they believed their owners had abused them . . ." ¹¹³ As another judge writing about *Mann* has suggested, this was indeed a matter of "judicial choice," rather than "judicial duty."¹¹⁴

This unyielding fidelity to his interpretation of the relationship between master and slave was a position Ruffin consistently held throughout his tenure on the court. In a much later case, *State v. Caesar*,¹¹⁵ in which a slave who was a third party to a dispute received a manslaughter charge, Ruffin accused Justice Pearson, and perhaps Gaston, indirectly, of holding naïve views about the state of southern society. Ruffin chastised Justice Pearson for not being as cautious as he should be, accusing him of failing to promote public security and the common welfare. Emphasizing adherence to existing law, Ruffin admonished a decision that many would view as compassionate.¹¹⁶

One commentator suggests that underpinning Ruffin's analysis is an "incessant focus on the public safety of the white community, rather than a consistent justification based on statutes or common law."¹¹⁷ Ruffin's focus "even went so far [as] to suggest that [*Mann*], which merely reversed a murder conviction on the grounds that there might have been sufficient provocation to mitigate the charge to manslaughter, would sow the seeds of a slave revolt . . ."¹¹⁸ In

111. See *id.* at 268 (reversing the judgment and directing the entry of judgment for the defendant).

112. See Orth, *supra* note 98, at 979 (2009). In fact, "Ruffin's conclusion that the common law provided no analogy for the master-slave relation found ironic support in a celebrated English case that Ruffin almost certainly knew but did not cite: *Somerset's Case* from 1772." *Id.* at 986 (citing *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772)).

113. TUSHNET, *supra* note 11, at 1.

114. Wynn, *supra* note 98, at 991 (2009).

115. 31 N.C. (9 Ired.) 391 (1849).

116. Meyer, *supra* note 18, at 322–23 (quoting *Caesar*, 31 N.C. (9 Ired.) at 415).

117. *Id.* at 323.

118. *Id.*

contrast, another commentator cites to Ruffin's opinion in *State v. Hoover*,¹¹⁹ which acknowledged that *Mann* had gone too far.¹²⁰ The unfortunate irony of Ruffin's decisions is that he "transformed the common law of North Carolina into an instrument of economic change,"¹²¹ yet "showed a remarkable reluctance in *State v. Mann* to utilize the common law to move society forward in its attitude toward the treatment of slaves."¹²²

While Justice Gaston is commonly viewed as a foil to Justice Ruffin, his jurisprudence is better understood by comparison to his contemporaries. Gaston's notable slavery and race-related opinions, which challenged ideas held by Ruffin and others, disclose a richer understanding of Gaston's views on the inherent equality of all humankind, regardless of the color of one's skin.

B. *Tempering Ruffin's Harsh Treatment of Slaves: Gaston's Slavery and Race-Related Jurisprudence*

As noted above, Gaston is well-known for his opinions dealing with slaves. During his tenure on the Supreme Court of North Carolina, approximately 100 of his 474 opinions dealt with slavery.¹²³ Many involved contract¹²⁴ or will¹²⁵ disputes, but three of the most significant opinions he authored dealt with criminal law: *State v. Negro Will*,¹²⁶ *State v. Manuel*,¹²⁷ and *State v. Jarrott*.¹²⁸

1. *State v. Negro Will*: Gaston Makes an Early Statement of Judicial Independence

The first of these, *State v. Negro Will*, came before the court in 1834, not long after Gaston took the bench.¹²⁹ With *State v. Mann* as

119. 20 N.C. 500, 3 & 4 Dev. & Bat. 365 (1839).

120. Brophy, *supra* note 18, at 1892 n.54. Brophy observed that Ruffin retreated from his previous idea regarding the master's unbridled authority over the body of the slave through his language in *Hoover*. *Id.*

121. Wynn, *supra* note 98, at 994 (quoting Martin H. Brinkley, *Supreme Court of North Carolina: A Brief History*, ARCHIVE.ORG, <https://web.archive.org/web/20100628025422/http://www.aoc.state.nc.us/www/copyright/sc/facts.html> [https://perma.cc/C83J-FM2U]).

122. *Id.*

123. Brophy, *supra* note 18, at 1889.

124. *See, e.g.*, *Hatchell v. Odom*, 19 N.C. (2 Dev. & Bat.) 302, 302 (1837).

125. *See, e.g.*, *Payne v. Sale*, 22 N.C. (2 Dev. & Bat. Eq.) 455, 455–56 (1839).

126. 18 N.C. (1 Dev. & Bat.) 121 (1834).

127. 20 N.C. 144, 3 & 4 Dev. & Bat. 20 (1838).

128. 23 N.C. (1 Ired.) 76 (1840), *overruled by* *State v. Watson*, 287 N.C. 147, 214 S.E.2d 85 (1975).

129. *See* Judge Battle's Address, in 1 THE NORTH CAROLINA UNIVERSITY MAGAZINE II, at 53 (April, 1844) (noting that after a summer 1833 vacancy on the Court,

precedent, Gaston confronted the issue of whether a slave who killed his overseer, while in fear for his life, was guilty of murder or manslaughter.¹³⁰ Specifically, Will, the defendant and a slave, had a dispute with another slave, Allen, who was also the foreman of the plantation, about the use of a hoe.¹³¹ After Allen informed the overseer, Baxter, of the exchange, Baxter pursued Will with his gun, shooting Will in the back.¹³² Will escaped and Baxter put down his gun while pursuing Will. When Baxter caught up with Will, they scuffled and Baxter was killed as a result of a knife wound inflicted to the arm.¹³³ Will was indicted for murder.¹³⁴

Notwithstanding the indictment, the jury returned a special verdict requesting that the court decide on their behalf whether Will was guilty.¹³⁵ As in *Mann*, the sense of the community, as expressed through the jury, clearly evinced some sense that a slave shared some of the rights of general society. This history of mitigation by jury is rich throughout American jurisprudence,¹³⁶ and it is a credit to Justice Gaston that he had the wisdom to follow the lead of the jury in this case, rather than thwart it, as Justice Ruffin had done in *Mann*.

Will's attorney, Bartholomew Figures Moore, made a strong argument against *Mann*, while simultaneously endeavoring to respect its author, Chief Justice Ruffin, who continued to serve on the court.¹³⁷ Cautioning that his argument was not "intended to combat the correctness of the decision in *State v. Mann*,"¹³⁸ Moore established that the principles in *Mann* "were never intended to cover the entire relation between master and slave."¹³⁹ More narrowly, he expressed

Gaston's "name was . . . brought before the Legislature in the winter of 1833-4 [sic], and he was elected by a large majority on the first ballot").

130. See *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 121.

131. See *id.* at 121-22.

132. See *id.* at 122.

133. See *id.* at 123-24.

134. See *id.* at 124.

135. See *id.*

136. See *Jones v. United States*, 526 U.S. 227, 245 (1999) ("Even in this system, however, competition developed between judge and jury over the real significance of their respective roles. The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part.").

137. See *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 124-54.

138. *Id.* at 126.

139. *Id.* at 127.

concern that the power a master wields over his slave should only be that to effectuate “securing the services and labors of the slave, and no farther.”¹⁴⁰ Throughout his argument, Moore developed compelling reasoning that would become the basis of Gaston’s opinion, drawing both from the court’s own precedents in *State v. Reed*¹⁴¹ and *State v. Hale*,¹⁴² and generally denouncing the dangers of absolute power.¹⁴³

Notwithstanding his statement of deference to the *Mann* court, Moore offered a powerful indictment of its reasoning by stating that the case used language that “not only represses thought, and extinguishes all power to deliberate on any command of his master, however repugnant to natural justice it may be, and whether its execution is to affect himself or others; but it professes to control into perfect tameness the instinct of self-preservation.”¹⁴⁴ Moore aptly observed that human nature would not be denied, even if the individual expression of that human nature was made by a slave. Moore also subtly suggested that the *Mann* holding may have the opposite result that was intended in tamping down potential slave rebellion.¹⁴⁵ He argued that punishing a person for acting on the instinct of self-preservation “can serve no purpose but to gratify the revengeful feelings of one class of people and to inflame the hidden animosities of the other.”¹⁴⁶ From this argument, he immediately moved into a criticism of *Mann*, noting that those who were enslaved were most likely to learn from their masters.¹⁴⁷ Moreover, since most slaveowners chose not to exercise the absolute power sanctioned by *Mann*, even more severe consequences could result as a response to the unusual occasion of its exercising. By arguing that *Mann* could have precisely the opposite intended effect, Moore incorporated public safety as a valid concern.

Moore also noted the basic legal precept, applicable to members of law enforcement, that “[t]he law has so high a regard for human life, that it directs the officer to permit an escape rather than kill.”¹⁴⁸

140. *Id.*

141. 9 N.C. (2 Hawks) 454 (1823).

142. 9 N.C. (2 Hawks) 582 (1823).

143. *See Negro Will*, 18 N.C. (1 Dev. & Bat.) at 126–28.

144. *Id.* at 129.

145. *See id.* at 130 (“With great deference to the opinion already commented on, it would appear to me that a conclusion directly the reverse, as to the necessity of absolute power in the master, should have been drawn from the premises.”).

146. *Id.*

147. *Id.*

148. *Id.* at 133.

Here, Moore argued, Will was engaged “in the act of *disobedience*, and not of *resistance*, between which there is a substantial difference.”¹⁴⁹ He went on to take the position that the courts have advanced the condition of the slave and legislation gradually evolved to improve the existence of slaves, both through the influence of Christian precepts and the improvement of civilization.¹⁵⁰

Moore was joined in his thoughts by his co-counsel, George Washington Mordecai. Though Mordecai made a more workmanlike argument, he ably pointed out that the General Assembly passed many acts in the early nineteenth century that improved the status of slaves; however, he noted that before 1817 there was still no lesser offense than “wilful and malicious killing of slaves.”¹⁵¹ This unequal system of punishment ended in 1817, finally placing the killing of a slave on the “same footing” as the killing of a white person in similar circumstances. The court later mirrored the legislature’s direction, holding in *Reed* and *Hale* that the murder of a slave and the battery of a slave committed by a free man other than the master were indictable, respectively.¹⁵² Mordecai used these cases and other progressions in the law to demonstrate that slaves “are now viewed, both in the eye of the law and of society, as *human beings*, liable to be operated upon by the same passions, subject to the same infirmity, and under the protection of the same laws with the white man.”¹⁵³ In this, he characterized *Mann* as an outlier.¹⁵⁴

Most importantly, the arguments of Moore and Mordecai sought to bring everyone within the control of the law. At a time when the fear of slave rebellion was great, the defense made the argument that there were limits on the overseer’s power over Will. These limits had the effect of protecting slaves through law and limiting the authority of owners (and their assistants, by extension) over slaves. This was a controversial and high order, but it was also consistent with the Whig

149. *Id.* at 143.

150. *Id.* at 141–42.

151. *Id.* at 156.

152. *Id.* at 147–48.

153. *Id.* at 148.

154. *See id.* at 152 (“If the Court intended, as it is believed they did, to say that the master possessed full and complete power and authority to secure the services and insure the obedience of the slave, this is admitted; but if this power and authority were held to extend so far as to take the life of the slave, or even to place it in jeopardy, except in the cases before mentioned, it is submitted that no such power is necessary or ought to be granted to the master, that no such authority is conferred by any legislative enactment or judicial determination; but that all our modern legislation and adjudication previously to the case of *State v. Mann*, have had a directly contrary tendency.”).

ideology that sought to impose the constraints of law on everyone,¹⁵⁵ and was consistent with Gaston's own views.¹⁵⁶

Attorney General John Reeves Jones Daniel argued the case for the state, conceding "that the master has no right to take the life of the slave under such circumstances as would indicate that malice essential to murder or a felonious intent."¹⁵⁷ Like Mordecai, Daniel felt it important to trace the legal history of the relationship between master and slave.¹⁵⁸ However, he took exception to the opinions in *State v. Boon*¹⁵⁹ and *State v. Reed*, arguing that if they were "correct, absolute slavery has never existed in this State—indeed [it] could not."¹⁶⁰ Daniel principally criticized *Reed* for its reliance upon the Common Law of England, which was governed by a king, where slavery was unlawful, and where the subject of the killing was a "villain," rather than a slave.¹⁶¹ Daniel's argument proceeded in clinical fashion, asking the court whether a slave who has been subject to the absolute authority of a master at the time the slave trade was in full effect is entitled to the protection of the law.¹⁶² Even more callously—at least to the modern reader—Daniel continued by indicating that "to insist upon such an application of the principles of the common law would be to annihilate all right to this species of

155. See generally KOHL, *supra* note 12 (discussing in depth the societal transformations associated with the Jacksonian period in American history); see also DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 141 (2007) ("Where Whigs voiced reverence for the supremacy of the law, Democrats more typically celebrated the autonomy of the sovereign people.").

156. Wm. H. Battle, *William Gaston*, in LIVES OF DISTINGUISHED NORTH CAROLINIANS 148, 158 (W.J. Peele ed., 1898) ("Another eminent quality which illustrated the whole life of Judge Gaston was the constant love of order and a devoted and almost sacred regard for the Constitution and laws of his country.")

157. *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 153.

158. See *id.* at 153–59.

159. 1 N.C. (Tay.) 191 (1801). Although the defendant in *Boon*, who had been found guilty of killing a slave, ultimately had his judgment arrested by the Court, based upon its concern that the language in the charging statute was "uncertain," the opinion is significant because it was the language of the statute, rather than the killing of the slave, that undermined the verdict. Justice Taylor, who—like all the justices—wrote separately, opined, "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." *Id.* at 199.

160. *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 154.

161. *Id.* at 162–63. Daniel notes specifically that "a villain was regarded as a subject of the crown; and, though the lord had an interest in his services, yet for many purposes he was a freeman[.]" a legal status distinguishable from that of a slave. *Id.* at 163. In fact, Chief Judge Taylor stated in *Reed*, regarding the murder of a slave, that "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." 9 N.C. (2 Hawks) 454, 455.

162. *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 155.

property”¹⁶³ In reaching this conclusion, he relied upon cases from the time of William and Mary that concluded “one could not have such property in a negro”¹⁶⁴

Notwithstanding his other arguments, Daniel also conceded that “[i]t is true that absolute slavery is inconsistent with the moral law,”¹⁶⁵ but qualified this statement to the point of eviscerating its meaning. He argued that society’s political laws “should, as far as can be, conform to the moral law, but some must, in the nature of things, rest for their justification, or excuse, in principles of policy.”¹⁶⁶ He illustrated this point by noting, for example, that “[m]any municipal regulations are arbitrary in reference to the natural or moral law,”¹⁶⁷ enacted instead “with a view to the great ends for which civil government was instituted.”¹⁶⁸ Bringing the argument to the instant case, he noted differences of opinion on whether “property” should be subject to natural law or political law.¹⁶⁹

To the extent that Daniel engaged in these strained justifications, he impaired his stronger argument. This stronger argument relied upon the legal precedents then in place to emphasize the fact that—contrary to Moore’s argument that *Mann* was the outlier—*Reed* was in fact the outlier, as was some of the reasoning set forth in *Boon*.¹⁷⁰ Daniel also defied credulity when he claimed that there could be no legal provocation in this scenario that would justify reducing the murder charge to manslaughter when the law recognized an absolute right of the master over the slave under *Mann*.¹⁷¹ Daniel contended that, despite how repugnant the right may be to morals or to Christianity, slaves must submit to the absolute authority of their masters.¹⁷² To Daniel, any other holding would be contradictory. He believed the case would inevitably result in the conclusion that any provocation by a master could not constitute a “legal provocation” necessary to mitigate a murder charge against a slave to manslaughter in light of the master’s absolute authority.¹⁷³ It is difficult to conceive

163. *Id.*

164. *Id.* (citing *Smith v. Gould* (1705) 91 Eng. Rep. 567; 2 Salk. 666; *Chamberlain v. Harvey* (1697) 91 Eng. Rep. 994; 1 Ld. Raym. 146).

165. *Id.*

166. *Id.*

167. *Id.* at 155–56.

168. *Id.* at 156.

169. *See id.*

170. *Id.* at 154–55.

171. *Id.* at 160.

172. *Id.*

173. *Id.*

how anyone—at any time—could make the argument that being shot in the back was “a lawful correction” for refusing to use a particular hoe.

In Daniel’s view, there was no logical way to apply white society standards to determine the “capability of the slave to submit to correction[.]” for he believed that slavery was worse than death for a free man, but for a person born into slavery, the situation was met with contentment and often preferred to freedom. Daniels posited that, for a slave who accepted himself or herself as property of the master, there were no feelings of degradation that a white person might experience were they similarly punished:

To withhold from a slave, therefore, who has slain his master, that extenuation due to the passions of a white man, would not be too much for human nature inured to slavery, to submit to; and while it would detract nothing from the security of the slave, it would add to that of the master.¹⁷⁴

This portion of Daniel’s argument is simply difficult to fathom in its heartlessness and complete absence of humanity. Daniel argued that a ruling in favor of the slave in this instance would “increase the importance of the slave” and inspire insurrection.¹⁷⁵ Employing fear tactics and imagining what might happen, Daniel painted a picture of society’s destruction at the hands of a newly self-important slave, who would stop at nothing short of absolute emancipation after experiencing their master’s restrained authority.¹⁷⁶

Similar to *Mann* and other instances, Daniel appealed to fear in the community at the end of his argument, focusing on the fear of servile rebellion that had grounding in recent reality.¹⁷⁷ It was a classic argument among Democrats that law should not constrain owners’ authority over slaves. This was the ultimate demonstration of the spirit of Democratic ideas, from President Andrew Jackson’s treatment of Native Americans to the spirit of mob rule in Northern cities where mobs attacked free African Americans and Catholics.¹⁷⁸ Similarly, this fear-based mentality of controlling “property” served

174. *Id.* at 161–62.

175. *Id.* at 162.

176. *Id.* at 162–63.

177. See L. Maren Wood & David Walbert, *Nat Turner’s Rebellion*, LEARN NC, <http://www.learnnc.org/lp/editions/nchist-newnation/4574> [<https://perma.cc/Q46W-LTN7>].

178. See *Jacksonian Democracy*, HISTORY.COM, <http://www.history.com/topics/jacksonian-democracy> [<https://perma.cc/L3UT-5VPP>].

as the foundation for Justice Ruffin's opinion in *Mann* and was generally a recurring theme in cases dealing with slavery.¹⁷⁹

While the callousness of his argument perplexes the modern reader, Daniel's argument is perhaps even more perplexing in light of his audience—Justice Gaston was a member of his panel. Legal arguments obviously are intended to secure the votes of the persons to whom they are directed, whether it be a jury or a judge. Since Daniel's audience was the Supreme Court of North Carolina, and particularly Justice Gaston, he should have considered Gaston's address at the University of North Carolina in which he expressed a readily apparent disdain for the institution of slavery.¹⁸⁰ Accordingly, it is difficult to understand why Daniel would have strayed so far from the strength of legal precedent, when Gaston's opposition to slavery—made crystal clear in his address at the University of North Carolina—would preclude the effectiveness of any emotional or policy pleas.

To his credit, Justice Gaston did not succumb to this argument; instead, he handled the case with relative dispatch, especially given the complexity of the arguments presented to the court. After establishing the legal definitions of murder and manslaughter, Gaston recounted the facts of the case before him—stating that the overseer intended to “corporal[ly] chastise[]” the prisoner. Knowing the punishment that would follow, the prisoner fled, and the overseer subsequently shot the prisoner in the back. Gaston described the resulting wound as one “likely to occasion death.”¹⁸¹ The prisoner nonetheless continued his retreat but was overcome by the overseer and other nearby slaves. In the proceeding scuffle, the overseer was mortally wounded.¹⁸²

Gaston conceded that the same fact pattern between two freemen would present a clear outcome: “the homicide could not have been more than manslaughter,” regardless of their relative

179. See Michael P. Mills, *Slave Law in Mississippi from 1817–1861: Constitutions, Codes, and Cases*, 71 MISS. L.J. 153, 236 (2001) (“The opinions of [several justices of Mississippi's highest court] substantiate the reality that from the early 30s until 1862, slave-owners feared slave insurrections and loss of their privileged way of life.”); Judith K. Schafer, “*Details are of a Most Revolting Character*”: *Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, 68 CHI.-KENT L. REV. 1283, 1297 (1993) (noting that “although the justices ordinarily ruled in favor of slave owners,” “[t]he court was willing to allow a slaveholder to suffer a loss of property for the general safety of the community”).

180. Gaston, *supra* note 48, at 14.

181. *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 164.

182. *Id.* at 164–65.

stations in life.¹⁸³ As an example, he used the relationship between a master and an apprentice.¹⁸⁴ However, Gaston acknowledged what appeared to be well-accepted doctrine: “[u]nconditional submission is the *general* duty of the slave; unlimited power is, in general, the *legal* right of the master.”¹⁸⁵ Furthermore, he cautioned that this right did not include a master’s “*right to slay his slave,*” and the obligation of submission did not preclude the slave’s “*right to defend himself against the unlawful attempt of his master to deprive him of life.*”¹⁸⁶ Significantly, Gaston viewed both the slave’s protection from harm and ability to defend himself as matters of right, common to the human condition.

In his opinion, Gaston suggested an indictment of slavery generally when he stated:

There is no *legal* limitation to the master’s power of *punishment*, except that it shall not reach the life of his offending slave. It is for the Legislature to remove this reproach from amongst us if, consistently with the public safety, it can be removed. *We* must administer the law, such as it is, confided to our keeping.¹⁸⁷

His approach was cautious, though, deferring to the legislature on whether the institution of slavery should survive.

Gaston summarized the court’s agreement that the overseer was within his right to question Will regarding his “offense” and to “inflict such chastisement as, according to the usages of discipline and his sound discretion, was proper to enforce subordination.”¹⁸⁸ He added that Will’s attempt to evade the punishment “was a breach of duty,” but one that did not rise to the level of “*resistance* nor *rebellion*, and it certainly afforded no justification nor excuse for the barbarous act which followed. Had the prisoner died of the wound which the

183. *Id.* at 165.

184. *Id.* (“Take the case of a master and apprentice, where the latter flies to avoid correction which the master has a right to inflict. If the master were to shoot at him, engage in hot pursuit, overtake him, and in the immediate struggle the master was killed, the deed could not be attributed to downright wickedness, but to passion suddenly and violently excited, to that ‘*fervor brevis*’ which leaves not to the mind the calm exercise of its faculties, and which the law must regard, not indeed as excusing the act, but as extenuating the degree of guilt.”).

185. *Id.*

186. *Id.* (emphasis added).

187. *Id.* at 165–66.

188. *Id.* at 166.

overseer inflicted, the latter would have been guilty of manslaughter at least—probably of murder.”¹⁸⁹

Utilizing tautology, Gaston empathized outright with Will:

[A]fter the gun was fired, *all* must see that a vast change was effected in the situation of the prisoner; and that new and strong impulses to action *must* have been impressed upon his mind. Suffering under the torture of a wound likely to terminate in death, and inflicted by a person having, indeed, authority over him, but wielding power with the extravagance and madness of fury; chased in hot pursuit; baited and hemmed in like a crippled beast of prey that cannot run far; it became instinct, almost uncontrollable instinct, to fly; it was human infirmity to struggle; it was terror or resentment, the strongest of human passions, or both combined, which gave to the struggle its fatal results; and this terror, this resentment, could not but have been excited in *any one* who had the *ordinary feelings and frailties of human nature*. But will the law permit human infirmity to extenuate a homicide from murder to manslaughter, in any case where the slayer is a slave, and the slain is the representative of his master? Will it allow in such a case *any* passions, however common to human beings, and however strongly provoked into action, to repel the allegation of malice?¹⁹⁰

In this argument, with the possible exception of his reference to being “baited and hemmed in liked a crippled beast of prey,”¹⁹¹ Gaston set forth a scenario that anyone could understand and with which anyone could, like him, empathize. He questioned what the law would do, but just as easily could have questioned what any person in Will’s place would have done. As we saw in his speech at Princeton, Gaston was concerned with the moral application of the rule of law.

Left with a conundrum, Gaston posited:

What, then, is the true *principle* which characterizes the various adjudications on the subject of provocation and excited passion? I am compelled to say that no other is to be found but what is contained in the primary rule itself, applied from time to time by wisdom and experience to cases as they occurred, until, in a vast majority of the cases that can occur, the existing tribunals of justice find a safe guide in the undisputed decisions of their predecessors. Where they have not this guide, they are

189. *Id.*

190. *Id.* at 167 (emphasis added).

191. *Id.*

bound to act as those acted who had no precedent to direct them. We have no adjudged case that determines this question, or presents us with a precise rule by which to determine it.¹⁹²

Instead of leaning on *Mann* as precedent, which would have bolstered the case against Will, Gaston reframed *Mann*'s holding in humanistic terms, stating that *Mann* "decides, indeed, that the master or temporary owner is not indictable for a cruel and unreasonable battery of his slave," but "[n]one could feel more strongly the harshness of the proposition than those who found themselves obliged to declare it a proposition of law."¹⁹³ He perceived that *Mann* was the result of "those who found themselves obliged to declare it a proposition of law. Not that they for one moment admitted that cruelty was rightful, but they found no law by which to ascertain what was cruelty in the master, so as to render it punishable as a public offense."¹⁹⁴

Gaston did use *Mann* to underscore that the court there "pronounced, what was indeed beyond question, that the law protects the life of the slave against the violence of his master, and that the homicide of a slave, like that of a freeman, is murder or manslaughter."¹⁹⁵ As such, he concluded, an attempt on a slave's life is an act that "may rightfully be resisted."¹⁹⁶

In closing, Gaston returned to the notion of humanity, albeit cloaked as "inhumanity," questioning, "if the passions of the slave be excited into unlawful violence by the inhumanity of his master or temporary owner, or one clothed with the master's authority, is it a *conclusion of law* that such passions must spring from diabolical malice?"¹⁹⁷

Gaston then turned to a personal appeal, employing the pronoun "I" to make a moral argument, as opposed to a legal one. Only three times prior to this paragraph in the opinion had he used this personal pronoun, and those dealt with his general "reproach" of slavery.¹⁹⁸ Here, his plea was not of legal, but of Christian import:

Unless I see my way clear as a sunbeam, I cannot believe that this is the law of a civilized people and of a Christian land. I will not presume an arbitrary and inflexible rule so sanguinary in its

192. *Id.* at 170–71.

193. *Id.* at 171.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *See id.* at 165–66.

character and so repugnant to the spirit of those holy statutes which “rejoice the heart, enlighten the eyes, and are true and righteous altogether.”¹⁹⁹

Gaston quoted *Psalms* 19 in support of his decision, clearly one of personal significance given his use of the personal pronoun. He remained deferential to the legislature in its ability to “prescribe such a law,” despite criticizing such a law as “repugnant.”²⁰⁰ Yet he was clear that the court’s jurisdiction over this matter was proper, given the common law implications of the case. Unlike Ruffin in *Mann*, Gaston took note that the jury found no express malice.²⁰¹ And again, unlike Ruffin in *Mann*, he made a decision in keeping with the jury’s finding. He concluded:

From the facts, I am satisfied, as a man, that in truth malice did not exist, and I see no law which compels me, as a Judge, to infer malice contrary to the truth. Unless there be malice, express or implied, the slaying is a felonious homicide, but it is not murder.²⁰²

Ruffin was under no obligation in *Mann* to conclude that a master may shoot his slave who is fleeing from punishment. He had ample room to maneuver to a different result, not the least of which—as Gaston observed—was affirming the jury verdict convicting Mann. When faced with similar legal choices involving a slave’s right to defend himself from undue punishment, Ruffin and Gaston made divergent decisions: Ruffin, in overruling the jury and meting out

199. *Id.* at 171 (quoting *Psalms* 19:8–9). This is the only citation to this version of the *Psalms* 19:8–9 in a reported case, although four courts have quoted a portion of *Psalms* 19:8–9 to which Gaston refers in cases involving religious freedom: “the judgments of the Lord are true and righteous altogether.” *Engel v. Vitale*, 370 U.S. 421, 446 n.3 (1962) (quoting President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865)); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986) (quoting President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865)); *Mudd v. Caldera*, 26 F. Supp. 2d 113 (D.D.C. 1998) (quoting President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865)); *Reed v. Van Hoven*, 237 F. Supp. 48, 55 n.7 (W.D. Mich. 1965) (quoting President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865)). It cannot be overlooked that all four of these courts invoked the quotation from President Lincoln’s Second Inaugural Address—an address that emphasized reconciliation, but was clear in its mission to carry out the Civil War to its conclusion, as he alluded to when quoting *Psalms* 19:8–9.

200. *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 171–72; see also WILLIAM E. WIETHOFF, *A PECULIAR HUMANISM: THE JUDICIAL ADVOCACY OF SLAVERY IN HIGH COURTS OF THE OLD SOUTH, 1820–1850*, at 88 (1996) (“Availing himself of rhetorical question and simile, Judge Gaston contributed one of the rare appeals to morality . . . that were substantially developed in antebellum slavery cases. Hardly an accident of composition, the appeal is made within a shower of consciously rhetorical devices.”).

201. *Negro Will*, 18 N.C. (1 Dev. & Bat.) at 172.

202. *Id.*

harsh legal precedent, chose the short-sighted option. Gaston, on the other hand, chose wisely, using the humanity that unites us all—an idea surely inspired by his Catholic faith—as a means of justifying a more reasonable and fair outcome.

Gaston's decision in *Negro Will* was quickly lauded as an important case in undermining the foothold of slavery in the law, and Gaston himself was praised for his bravery and boldness. While opinions are often not recognized for their importance until decades later, Gaston's opinion in *Negro Will* was acknowledged for its pivotal role in chipping away at the legal underpinnings of slavery as early as 1893. While addressing the Supreme Court at the dedication of Gaston's portrait, Mr. Fabius H. Busbee recognized the importance and essential humanity of *Negro Will*. Busbee stated:

It is difficult for the present generations fully to appreciate the merits and the courage of the opinion in [*Negro Will*]. We must fully realize in our minds the condition of a slave-holding people. The fear of negro insurrection always vaguely apprehended, and ever and anon becoming an imminent danger or a dread reality, the necessity upon the part of those who administered the law to relax no proper rule of restraint, and at the same time the equal necessity of imposing some check upon the brutality of cruel masters or reckless overseers, the sensitiveness of the public mind upon the subject in its political as well as in its legal and social aspects, combined to render the task of laying down the law in this case one of extreme delicacy. The inherent evils of slavery, which it were worse than folly to deny, were fully understood by this humane slave-holder, and it was his high mission and earnest desire to mitigate every remediable hardship. This great opinion of *Judge Gaston*, in its clear analysis of the respective legal rights and duties of master and slave, its condemnation of the brutality too often shown towards the helpless, its sublime compassion for the hunted and terrified slave, sounded the keynote that never ceased to ring in North Carolina.²⁰³

Busbee's remarks bring to mind the words Gaston wrote to Reverend Monsignor James A. Ryder at Georgetown, regarding the challenges of being a member of his faith.²⁰⁴ Clearly, Gaston was familiar with being an outsider, and given his written expression of compassion, it should come as no surprise that he was able to view this case through a different lens than his contemporaries.

203. Fabius H. Busbee, Portrait of Judge William Gaston, 113 N.C. 737, 741–42 (1893).

204. Letter from William J. Gaston, *supra* note 52, at 246, 247.

2. State v. Manuel: Gaston Reemphasizes the Protections Afforded to Freeman as Citizens

Several years later, Justice Gaston authored the opinion in *State v. Manuel*.²⁰⁵ In *Manuel*, Gaston addressed the issue of citizenship for free persons of color in North Carolina. Again, both his religion and his upbringing in New Bern likely influenced his view of the subject. He succinctly determined that

[a]ccording to the laws of this State, all human beings within it who are not slaves, fall within one of two classes. . . . Foreigners until made members of the State continued aliens. Slaves manumitted here become free-men—and, therefore, if born within North Carolina are citizens of North Carolina—and all free persons born within the State are born citizens of the State.²⁰⁶

This straightforward analysis set the stage for the outcome in *Manuel*, as well as advancing Gaston’s argument for the end of slavery.²⁰⁷

In *Manuel*, the precise legal issue before the court was whether the defendant—“a free person of colour”²⁰⁸—could be hired out based upon his inability to pay a fine.²⁰⁹ The term of service for the indebtedness was not to exceed five years, and the debtor’s relationship with the individual who hired him was to be under the same conditions as those required between master and apprentice.²¹⁰ William Manuel, the defendant, objected to the arrangement on constitutional grounds, arguing that the act conflicted with constitutional provisions that “protect[] the person of a debtor after ascertained insolvency from imprisonment for debt” as well as the provisions that prohibit excessive fines, the imposition of cruel or unusual punishment, and the “destruction or the deprivation of life, liberty, or property of a free-man otherwise than by the law of the land.”²¹¹

205. 20 N.C. 144, 3 & 4 Dev. & Bat. 20 (1838).

206. *Id.* at 151, 3 & 4 Dev. & Bat. at 24–25.

207. Notwithstanding Gaston’s point about the manumission of slaves, there were increasing barriers to manumission that the general assembly had put in place since the state’s inception. See generally FRANKLIN, *supra* note 37, at 27 (asserting that because the laws “concerning manumission were rather generally disregarded . . . the General Assembly was moved to strengthen its laws and tighten its requirements”).

208. *Manuel*, 20 N.C. at 147, 3 & 4 Dev. & Bat. at 20.

209. *Id.*

210. *Id.* at 148, 3 & 4 Dev. & Bat. at 21–22.

211. *Id.* at 149, 3 & 4 Dev. & Bat. at 22.

The Attorney General, arguing for the state, countered the constitutional argument was frivolous because the defendant was not a citizen of the state. Essentially, his argument was twofold: first, the Constitutional provisions “were designed exclusively for the benefit of those who were constituent members of that State,” and second, “persons of color, whether born free or emancipated from slavery, were not originally members of that political body and never since have been incorporated into it.”²¹²

The court rejected both arguments.²¹³ Instead, Gaston wrote that the protections of the Constitution extended to all “citizens or foreigners dwelling amongst us.”²¹⁴ He summarized: “[t]hey are so many safeguards against the violation of civil rights and operate for the advantage of all by whom these rights may be lawfully possessed.”²¹⁵ Therefore, Justice Gaston concluded, the constitutional prohibition against the imprisonment of debtors applies to all—both citizens and foreigners—recognizing that both categories of persons are “entitled to liberty, and permitted the enjoyment of property.”²¹⁶

As he did in *Negro Will*, Gaston painted civil rights with a broad brush. Gaston reasoned that since “justice is the great object, highest duty and best interest of every community,” those who “ordained” the Constitution thought it necessary to “consecrate by their most solemn sanctions” certain fundamental principles and protect “any who might be entrusted under the Constitution” from violation thereof.²¹⁷ He set out the rights afforded to “*all prisoners*,”²¹⁸ and to “*all men*.”²¹⁹ Gaston then employed a series of rhetorical questions leading to the inevitable conclusion that the Framers of the Constitution intended that these rights be afforded to *all citizens*.²²⁰ His questions emphasized the Constitution’s “many safeguards against the violation of civil rights” which “operate for the advantage of all by whom these rights may be lawfully possessed.”²²¹ Gaston concluded his general discussion of the Constitution and its objective as follows: “[n]o doubt, the primary purpose of the Constitution was the well being of the people, by whom it was ordained, and the

212. *Id.* at 149, 3 & 4 Dev. & Bat. at 23–24.

213. *Id.*

214. *Id.* at 150, 3 & 4 Dev. & Bat. at 24.

215. *Id.* at 150–51, 3 & 4 Dev. & Bat. at 24.

216. *Id.* at 150, 3 & 4 Dev. & Bat. at 24.

217. *Id.* at 149–50, 3 & 4 Dev. & Bat. at 23.

218. *Id.* at 150, 3 & 4 Dev. & Bat. at 23.

219. *Id.*

220. *See id.* at 150, 3 & 4 Dev. & Bat. at 24.

221. *Id.* at 150–51, 3 & 4 Dev. & Bat. at 24.

political powers reserved or granted thereby must be understood to be reserved or granted to that people collectively, or to the individuals of whom it was composed.”²²² Gaston linked this primary purpose—protecting North Carolina’s citizens—with Constitutional provisions that Devereaux and Battle characterize as applying to both citizens and foreigners.²²³

Gaston then dismissed the state’s argument that the defendant could not be afforded the protections of citizenship.²²⁴ To be fair, Gaston’s argument is a bit more expansive than is required, given that Manuel was a freeman; nonetheless, this is not surprising given the premium Gaston placed upon freedom. In 1835—after he wrote *Negro Will*, but prior to *Manuel*—Gaston gave a speech to the Whig and Cliosophic Literary Societies at Princeton, his alma mater.²²⁵ There, he asserted that

without freedom, man is a poor, miserable, abject thing, the sport and victim of his fellow man’s rage, caprice and cruelty, having neither vigour of thought, motive for exertion, nor rational hope to gratify. But there can be no freedom without law. Unrestrained liberty is anarchy; domination in the strong; slavery in the weak; outrage and plunder in the combined oppressors; helpless misery in the oppressed; insecurity, suspicion, distrust, and fear to all.²²⁶

Given Gaston’s specific comments at Princeton and the general importance placed by his Catholic faith on human equality, it is not surprising that he then writes in *Manuel* the following:

Upon the Revolution, no other change took place in the law of North Carolina, than was consequent upon the transition from a colony dependent on an European King to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina free-men. Foreigners until made members of the State continued aliens. Slaves manumitted here become free-men—and therefore if born within North Carolina are citizens of North Carolina—and all free persons born within the State are born citizens of the State.²²⁷

222. *Id.* at 149, 3 & 4 Dev. & Bat. at 23.

223. *See id.* at 150–51, 3 & 4 Dev. & Bat. at 24.

224. *Id.* at 151–52, 3 & 4 Dev. & Bat. at 25.

225. Brophy, *supra* note 18, at 1886–87.

226. *Id.* at 1887 (quoting Gaston, *supra* note 50, at 24).

227. *Manuel*, 20 N.C. at 151, 3 & 4 Dev. & Bat. at 24–25.

Manuel remains significant in the pantheon of civil rights jurisprudence because of the importance of Gaston's recognition of citizenship. Almost twenty years later, Justice Curtis's dissenting opinion in *Dred Scott v. Sandford*²²⁸ mirrored Justice Gaston's logic regarding the citizenship of freemen in North Carolina.²²⁹ Relying upon the reasoning employed by Justice Gaston, he stated that, in determining the citizenship status of free persons who descended from African slaves, the central inquiry was whether they were citizens of the States when the Articles of Confederation and Constitution were adopted. Curtis then concluded that free persons undoubtedly must be citizens because, upon adoption of the Articles of Confederation, free, native-born descendants of African slaves in many states—including North Carolina—were citizens, often with equal rights, including the right to vote.²³⁰

While the defendant in *Manuel* ultimately lost, in the larger picture, Gaston's inclusive interpretation of citizenship carried tremendous import.²³¹ Writing early in the twentieth century, one commentator echoed Gaston, observing that upon independence, the law recognized two classes of people—"the slave and the free"—with only the free considered citizens and the slaves titled "other person[s]" by a Constitution unwilling to explicitly list slavery within its provisions.²³² The refusal of the Framers to use the term slave in the founding text demonstrated their hope to, within their own time, end both slavery and class-based distinctions.²³³ In a footnote, the author cited Gaston's discussion of emancipation in *Manuel*, which he stated depends on state regulations, whereas citizenship

228. 60 U.S. 393 (1856).

229. Compare *id.* at 572–73 (Curtis, J., dissenting) (arguing all African American freemen at the time of ratification of the Constitution should be considered citizens of their respective states), with *Manuel*, 20 N.C. at 151, 3 & 4 Dev. & Bat. at 24–25 (holding that all free persons born within the North Carolina are citizens of the state).

230. *Dred Scott*, 60 U.S. at 572–73.

231. Wiethoff suggests that Gaston may not have been "comfortable . . . issuing moral appeals." WIETHOFF, *supra* note 200, at 88. He observes that Gaston opened *Manuel* with the cautionary statement that the opinion had "been reached through 'diligence and care, and if the conclusion to which we have arrived be not right, the error will not have resulted from the omission of our best efforts to form a correct judgment.'" *Id.* (quoting *Manuel*, 20 N.C. at 147, 3 & 4 Dev. & Bat. at 21). Wiethoff continues that Gaston makes a "moral appeal" by stating "the principles of humanity sanctioned and enjoined [in the bill of rights] ought to command the reverence and regulate the conduct of *all* who owe obedience to the Constitution." *Id.* (quoting *Manuel*, 20 N.C. at 162, 3 & 4 Dev. & Bat. at 35).

232. Gordon E. Sherman, *Emancipation and Citizenship*, 15 YALE L.J. 263, 263 (1906).

233. *Id.*

naturalization was within the power of the federal government; furthermore, the Supreme Court, in *Dred Scott*, incorrectly confounded the two and ignored evidence that many freed slaves were citizens in many states, causing the decision to be incorrectly decided.²³⁴ Had the *Dred Scott* Court viewed “the removal of the incapacity of slavery”²³⁵ as conveying full citizenship—which Gaston appears to have done²³⁶—it would have been far more difficult to reach the conclusion that “enslaved people in the United States had never been entitled to citizenship,”²³⁷ “at precisely the moment that antislavery writers were advancing the citizenship rights of enslaved people.”²³⁸

3. State v. Jarrott: Gaston in Conflict

Gaston’s analysis in *State v. Jarrott*,²³⁹ authored in 1840, sustains his reputation for progressive thought in protecting the civil rights of slaves in criminal trials. In *Jarrott*, the defendant slave was indicted for killing a young white man, Thomas Chatham.²⁴⁰ Jarrott was engaged in a card game with a freeman when a dispute arose between them over Jarrott’s money.²⁴¹ During the dispute, Jarrott “told [the deceased] if he did not give it up, he would kill him—and brandished a stick over” his head.²⁴² Even after retrieving his money, there was some evidence that Jarrott continued to verbally abuse the deceased, “using very indecent and insolent language towards him.”²⁴³ Chatham obtained a knife and threatened to “stick” Jarrott if he did not “hush.”²⁴⁴ Jarrott insulted the deceased and began chasing him until the deceased lunged at him with a knife in one hand and a rail in the other.²⁴⁵ Witnesses reported hearing two blows and subsequently finding the deceased on the ground.²⁴⁶ Several witnesses generally

234. *Id.* at 264 n.2.

235. *Manuel*, 20 N.C. at 151, 3 & 4 Dev. & Bat. at 24–25.

236. *See id.* at 151–152, 3 & 4 Dev. & Bat. at 25–26 (“The possession of political power is not essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes are not citizens . . .”).

237. Alfred L. Brophy, *Anti-Slavery, Women, and the Origins of American Jurisprudence*, 94 TEX. L. REV. 115, 137 (2015) (reviewing SARAH N. ROTH, *GENDER AND RACE IN ANTEBELLUM POPULAR CULTURE* (2014)).

238. *Id.*

239. 23 N.C. (1 Ired.) 76 (1840).

240. *Id.* at 77.

241. *Id.*

242. *Id.* at 77–78.

243. *Id.* at 78.

244. *Id.*

245. *Id.*

246. *Id.*

confirmed this account, some noting that there was “a cessation in the quarrel, and that the deceased renewed it”; that Chatham was described variously “as small and slender for a boy of his age; and . . . as not tall, but stoutly built”;²⁴⁷ that Jarrott, in contrast, was described as “about six feet high, and of the ordinary size of negroes of that height”;²⁴⁸ and that Jarrott had not shaken a stick over the deceased’s head.²⁴⁹ One witness said that the deceased “swore he would kill the prisoner that night,” or, in the alternative, would have Jarrott’s master whip him Monday morning “to his satisfaction,” and “then waylay him and shoot him with a rifle.”²⁵⁰

On these facts, Jarrott’s counsel made four requests of the trial judge. First, “to instruct the jury, ‘[t]hat, in trials affecting life, a negro slave should not be convicted of murder, unless a white man would be convicted on the same evidence.’”²⁵¹ Second, that if the jury believed the deceased stole from Jarrott, “the deceased had no right to strike the prisoner, for insulting language, in consequence of it; and in that aspect of the case, the prisoner was entitled to be regarded as a white man on this trial.”²⁵² Third, if the deceased struck Jarrott with the rail prior to the deceased striking Jarrott with his stick, that it was then “a case of mutual combat; and although the prisoner might have courted the conflict, the killing would be only manslaughter.”²⁵³ And, finally, “[t]hat the deceased had no right to correct the prisoner, with the piece of rail or the knife, for insolent language; but ought to have applied to his master, or to a justice of the peace, for redress.”²⁵⁴ The trial court declined all four requested instructions, instead charging the jury as follows:

[I]f the prisoner used the insolent language, to the deceased, deposed to by the witnesses, the deceased had a right to correct him, although such language was used by the prisoner, upon the supposition that the deceased had stolen his money. That if they were satisfied that the prisoner used the provoking language, to the deceased, as stated by the witnesses, the deceased had a right to whip him; and if, in the exercise of this right, the prisoner killed him, it would be murder, unless the prisoner had good reason to believe that the deceased would

247. *Id.* at 79.

248. *Id.*

249. *Id.*

250. *Id.* at 80.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 80–81.

kill him, or do him some great bodily harm. And, for the purpose of ascertaining whether the prisoner had good reason to apprehend death, or great bodily harm, at the hands of the deceased, it was proper for them to take into consideration the comparative size and bodily powers of the parties, and their weapons. That if the prisoner had good reason to apprehend either death or great bodily harm, it would extenuate the killing to manslaughter; but if not, it would be murder.²⁵⁵

Jarrott was subsequently found guilty of murder.²⁵⁶

Writing for the court on appeal, Justice Gaston determined that the trial judge did not err in refusing to give the first two of the four requested instructions.²⁵⁷ He began by stating, “[i]t is not questioned but that the prisoner was entitled to the benefit of all those humane principles of the common law, which, in indulgence to the frailties of human nature, extenuate the guilt of homicide from murder to manslaughter.”²⁵⁸ However, Gaston was unwilling to extend the same latitude to a slave as to a white man. Despite his usually progressive philosophy, Gaston declined to view the deceased—a white man—and Jarrott—a slave—as equals under the law.²⁵⁹

In rejecting Jarrott’s first requested jury instruction, Gaston stated that the principles must be applied differently due to the “*vast* difference which exists” between the social conditions of whites and slaves.²⁶⁰ This difference made what might be the “grossest degradation” to one only a “slight injury” to the other.²⁶¹ Therefore, Gaston believed that what amounted to a provocation for a white person would not necessarily a provocation for a slave, “whose passions are, or ought to be tamed down to his lowly condition.”²⁶² Gaston reasoned that these common law principles were merely adjusted to “the actual conditions of human beings in our society.”²⁶³ It is admittedly difficult to reconcile this harsh language with the far more open-minded Gaston of *Negro Will* and *Manuel*.²⁶⁴ Although there he was willing to extend legal protections to enslaved persons

255. *Id.* at 81.

256. *Id.*

257. *Id.* at 81–82.

258. *Id.*

259. *See id.* at 82–83.

260. *Id.* at 82.

261. *Id.*

262. *Id.*

263. *Id.*

264. *See supra* Sections III.B.1–2.

and free blacks, as a man of the early nineteenth century, it seems he still could not view them as equals here by virtue of their race.

As to the second instruction, Gaston stayed with the same theme, noting “the difference of condition between the white man and the slave—as recognized by our legal institutions—and not the difference between personal merit and demerit—which creates a legal distinction between the sufficiency and insufficiency of the alleged provocation.”²⁶⁵ He also relies on the familiar “safety” argument, notably used by Daniel arguing in *Negro Will*:²⁶⁶ “[t]his distinction, therefore, must be as broad as *that* difference, or it would not only be unsuited to the state of our society—and incompatible with the subordination of ranks *essential to the safety of the State*—but would be too vague to be admissible as a legal rule.”²⁶⁷ Gaston continued on to state, “the distinction of castes yet remains, and with it remain all the passions, infirmities, and habits, which grow out of this distinction.”²⁶⁸ Here, although Gaston acknowledged that the deceased may have been inferior to Jarrott as a human being, he was still hesitant to upset the social order of the day as to this portion of Jarrott’s appeal.

With respect to the fourth requested jury instruction, Gaston held that the trial judge did err by refusing to give this instruction.²⁶⁹ Gaston noted that in *State v. Hale*,²⁷⁰ the court held “that the battery of a slave, by any other than his master, was *per se* a public offence; but, at the same time it was declared that, such a battery might be justified . . . by circumstances which would form no justification for the battery of a white man.”²⁷¹ In *Hale*, the court had wrestled with defining those circumstances, determining it was “*impossible* to do so with precision.”²⁷² Here again, the court reverted to the need to avoid a “breach of the public peace, ‘under the habits and feelings of society, securing at the same time the white [man] from injury and insult, and the slave from needless violence and outrage.’”²⁷³ Gaston expressed that the court felt bound to hold that excessive battery against the slave was not justified in the present case.²⁷⁴

265. *Jarrott*, 23 N.C. (1 Ired.) at 82–83.

266. *See supra* notes 174–177 and accompanying text.

267. *Jarrott*, 23 N.C. (1 Ired.) at 83 (third emphasis added).

268. *Id.*

269. *Id.*

270. 9 N.C. (2 Hawks) 582 (1823).

271. *Jarrott*, 23 N.C. (1 Ired.) at 83.

272. *Id.*

273. *Id.*

274. *Id.*

Holding that an assault of this nature is an attempt to commit an excessive battery, Gaston emphasized that the instruments brandished by the deceased—a three-inch knife and fence railing—were unlawful tools for a master to use to “correct insolence.”²⁷⁵ Gaston acknowledged that the trial court’s directive acknowledging the right of the deceased to “whip” Jarrott under verbal provocation would be correct under this framework; however, Gaston explained that a whipping with a piece of fence rail, as the witnesses testified, would be unlawful.²⁷⁶

Gaston then questioned the amount and extent of Jarrott’s verbal provocations, and whether they ceased prior to Chatham attacking him.²⁷⁷ Gaston declared that such factual determinations were within the province of the jury.²⁷⁸ Relying again upon *Hale*, Gaston concluded his discussion of the matter by noting that it is unnecessary for a person who is injured by a slave to carry out their own justice. He emphasized that “the law has made ample and summary provision for the punishment of all trivial offenses committed by slaves, by carrying them before a Justice, who is authorised to pass sentence for their being publicly whipped.”²⁷⁹ His holding intended not only to remove the necessity of private vengeance, but also to “forbid its legality” by effectively protecting all people from slave misbehavior.²⁸⁰

This statement afforded a broad protection for all slaves—perhaps more so than the precedents upon which Gaston relied. The statement is also characteristic of Gaston’s approach in both *Negro Will* and *Manuel*. In each of these cases, Gaston subtly shifts the bar forward, providing more legal protection for North Carolina’s slave population. This shift ultimately is in keeping with the Catholic emphasis on human equality. By gradually granting more legal protections to slaves, Gaston helped to advance slaves to a position of equality in society’s eyes. Though equality would not be substantially achieved until many decades later, the legal underpinnings laid here by Gaston accelerated the process.

Finally, Gaston addressed the third jury instruction given by the trial judge. This third instruction—that “where parties become suddenly heated, and engage immediately in mortal conflict, fighting

275. *Id.* at 84.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* (citing *State v. Hale*, 9 N.C. (2 Hawks) 582, 585 (1823)).

upon equal terms, and one killeth the other,” the case is one of manslaughter²⁸¹—was the rule of law in a dispute between two white men.²⁸² Gaston determined that Jarrott did not fall within that rule because of his status as a slave.²⁸³ Therefore, the case was remanded and Jarrott was awarded a new trial.²⁸⁴ Although much of Gaston’s jurisprudence substantially advanced the cause of those who were enslaved, this portion of *Jarrott* demonstrates that even he was limited by the time in which he lived.

Read together, Gaston’s jurisprudence demonstrates a sensitivity to North Carolina’s slave population that does not exist in the writings of his peers. He understood “that the judicial resolution of conflicts must be guided by ‘[j]ustice, which it is the first object of every well-regulated society to establish, and the repose of the community, an object second only in importance to justice.’ ”²⁸⁵ It would be fair to conclude that Gaston sought “maximum justice for slaves,”²⁸⁶ while adhering to acceptable legal norms.²⁸⁷ Any judge has enormous discretion to influence the jurisprudence in his jurisdiction. Of course, if he serves on a multi-member court, he must persuade his colleagues of the legitimacy of his opinions. Gaston’s background as a very successful legislator is additional evidence of his ability to bring his colleagues along to his way of thinking. Chief Justice Ruffin, who authored *Mann* in 1830, signed on to *Negro Will* a scant four years later. By pushing back against this recent precedent, Gaston masterfully negotiated the boundaries of his office.

Gaston’s objective is also consistent with the Catholic view emphasizing human equality. Both his writings²⁸⁸ and his public addresses²⁸⁹ make clear both the depth of his fidelity to his faith and his strong views in opposition to slavery. The nexus between these

281. *Id.* at 85.

282. *Id.*

283. *Id.*

284. *See id.*

285. Meyer, *supra* note 18, at 338 (citing *Craven v. Craven*, 17 N.C. (2 Dev. Eq.) 338, 347 (1833)).

286. *Id.*

287. *See id.*

288. Letter from William J. Gaston, *supra* note 52, at 247 (noting his gratitude for the Catholic religion’s “compatib[ility] with tenderness for the rights of conscience in others”).

289. Gaston, *supra* note 48, at 16–17 (“Public virtue is the only solid basis which can uphold the glorious structure of public freedom; and public virtue is not to be found when the quarry of personal integrity has been worked off and exhausted.”); *see also* HENNESEY, *supra* note 53, at 146–47 (quoting Judge Gaston on Slavery, 8 AM. CATH. HIST. RESEARCHES 71, 71 (1891)) (calling slavery “the worst evil that afflicts the Southern part of our confederacy”).

two can be seen in the cases he authored, which afforded both slaves and free blacks a measure of compassion that generally had been absent from the case law.

CONCLUSION

On the occasion of Justice Gaston's death, many testimonials were published throughout North Carolina. One of these, "read by representatives of the black community of New Bern . . . gives ample evidence of the esteem in which he was held among them."²⁹⁰ It stated:

Judge Gaston was an example in word and conversation, in spirit and purity. He was a friend of the widow and the orphan. He was a kind and indulgent master—the most of his servants can read and write, the consequence is they are a most intelligent set of people. Judge Gaston was a friend of emancipation, he not only emancipated several of his own people, but he bought others and set them free. He was a Christian in deed and truth; his religion was not a thing of form and decencies, it was a pervading principle that entered into all his concerns, all his thoughts and all his hopes.²⁹¹

That extraordinary testimony, coming from the free African American community, exemplifies the sophisticated ideas about justice and law that circulated in North Carolina before the Civil War. It also invites further, deep investigation of that community that parallels the recent research into the free African American communities in Virginia in the pre-Civil War era.²⁹²

290. Rooney, *supra* note 28, at 109.

291. *Id.* It is of particular interest that Gaston's "servants," or slaves, were able to read and write, since it was illegal to teach them to do so at the time of his death. See Brophy, *supra* note 64, at 1837 n.141 ("North Carolinians feared slave literacy, and by the time of Nat Turner, North Carolina had already taken steps to limit slaves from learning to read and write.") (citing An Act to Prevent All Persons from Teaching Slaves to Read or Write, The Use of Figures Excepted, 1830–1831 N.C. Sess. Laws 11). The law prohibited teaching a slave to read or write, as well as selling books or pamphlets to them, because "the teaching of slaves to read and write, has a tendency to excite dissatisfaction in their minds, and to produce insurrection and rebellion . . ." An Act to Prevent All Persons from Teaching Slaves to Read or Write, The Use of Figures Excepted, 1830–1831 N.C. Sess. Laws 11; see also Sarah Jane Forman, *Ghetto Education*, 40 WASH. U. J.L. & POL'Y 67, 83 (2012) (citing the North Carolina law as a representative example of laws outlawing the education of slaves within slaveholding states).

292. See generally MELVIN ELY, *ISRAEL ON THE APPOMATTOX: A SOUTHERN EXPERIMENT IN BLACK FREEDOM FROM THE 1790S THROUGH THE CIVIL WAR* (2005) (documenting the free African American community that was established in Israel Hill prior to the Civil War); KIRT VON DAACKE, *FREEDOM HAS A FACE: RACE, IDENTITY, AND COMMUNITY IN JEFFERSON'S VIRGINIA* (2012) (discussing the free African

The New Bern freed people clearly paid close attention to the role of judges in framing the law that governed them and their enslaved brethren. This suggests the important role that Justice Gaston played in the formation of slave jurisprudence.²⁹³ Thomas Ruffin, a Democrat, had a vision that property owners should have uncontrolled authority over the body of their enslaved property.²⁹⁴ That was seen most clearly in Ruffin's *Mann* decision.²⁹⁵ Following extensive criticism²⁹⁶ and the ascension of William Gaston to the Supreme Court of North Carolina, both Ruffin and the Court moderated that extreme view.²⁹⁷

In an address to the state agricultural society in 1855, one commentator observed that Ruffin viewed slavery as a "not pure and unmixed good" and truly believed instances of great severity in punishment were an exception to the otherwise moderate treatment of slaves. Characterizing Ruffin's view of slavery as "humane" and mutually beneficial to both slave and slaveholder, this commentator reinforced Ruffin's idealized view of slavery in which the slaveholder and the enslaved had "a perfect knowledge of each other, and a mutual attachment."²⁹⁸ The commentator inferred from Ruffin's address that Ruffin believed "good slaves obeyed because they were protected and cared for, not because they were subject to the absolute power of their masters."²⁹⁹

The commentator made a similar observation of Gaston based on an undated, unpublished writing contained within his papers. He concluded, "Judge Gaston...spoke with the same voice."³⁰⁰ In support of this statement, he cited the following:

It is difficult to imagine a state of slavery to exist more mitigated than that which prevails in North Carolina.... Slavery is regarded as an evil not to be removed, but as susceptible of mitigation. The Laws are continually contributing

American communities within Albemarle County and challenging previous assumptions about the integration of free African Americans in the rural South during the pre-Civil War era).

293. See BISHIR *supra* note 32, at 106–07 (noting Gaston's influence and efforts by the New Bern freed people to commemorate his death); *supra* notes 123–28 and accompanying text (discussing Gaston's slavery jurisprudence).

294. See *supra* Section III.A.

295. See *id.*

296. See *supra* text accompanying notes 117–22.

297. See *supra* Section III.B.1.

298. MORRIS, *supra* note 104, at 191.

299. *Id.*

300. *Id.*

to this result—but public opinion and enlightened self interest contribute far more efficaciously.³⁰¹

The difficulty in juxtaposing these two statements, though, is that we have a date and a place for Justice Ruffin’s address, and are therefore able to put it into context; however, Justice Gaston’s is an undated writing, providing no ability to evaluate when he had these thoughts or whether he had made them publicly known. Through Justice Gaston’s published writing, we see—on multiple occasions—how his approach to and repudiation of slavery are the opposite of what is described by the commentator. Moreover, Gaston’s death had to be recognized as a significant loss, “reduc[ing] the influence of those who sought to ameliorate conditions for enslaved and free blacks.”³⁰² It is simply impossible to read both *Mann*, authored by Ruffin, and *Negro Will*, authored by Gaston, and conclude that they spoke with the same voice.

Justice Gaston’s isolated writing on the relatively “mitigated” institution of slavery stands in stark contrast to his well-publicized condemnation of the institution of slavery in his address at the University of North Carolina³⁰³—an address well over twenty years before the Ruffin address to a very different audience. It may suggest that Gaston—like the fictional Judge Clayton in Harriet Beecher Stowe’s novel *Dred: A Tale of the Great Dismal Swamp*³⁰⁴—understood the economic and demographic reality that slavery would not end in North Carolina voluntarily. It may also suggest that what hope there was would have to come from the gradual warming of public sentiment towards decent treatment of enslaved people. Nonetheless, we do know that Gaston, like Ruffin, was a slaveholder, owning approximately 160 slaves at the time of his death.³⁰⁵ There is no evidence that he took any extraordinary steps to manumit these

301. *Id.*

302. BISHIR, *supra* note 32, at 106–107 (characterizing Gaston as New Bern’s free people of color’s “most powerful friend and protector”).

303. Compare MORRIS, *supra* note 104, at 191 (“Slavery is regarded as an evil not to be removed, but susceptible of mitigation.”) (citing undated, untitled paper from Gaston Papers, Southern Historical Collection) with Gaston, *supra* note 48, at 19 (“Disguise the truth as we may, and throw the blame where we will, it is Slavery which, more than any other cause, keeps us back in the career of improvement. It stifles industry and represses enterprize—it is fatal to economy and providence—it discourages skill—impairs our strength as a community, and it poisons morals at the fountain head.”).

304. HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* (1856).

305. Rooney, *supra* note 28, at 109.

individuals, even though he had assisted others in doing so during his legal career, and had freed at least a few people during his life.³⁰⁶

Gaston's jurisprudence, though, was a departure from Ruffin's. By holding Gaston in contrast with Ruffin and by focusing on his religious beliefs, this Article links Gaston's morality with his jurisprudence. He remained committed to the universality of the law; everyone—including slaveowners—were subject to its tenets. His analysis injected empathy and some sense of humanity into the prosecution of enslaved people, recognizing the very human reactions that they—or anyone—would have when their lives were threatened. In the face of concerns among the slaveowning community about the very real threat of slave rebellion, Gaston's religion-inspired jurisprudence cabined violence against slaves and reduced legal retribution against those slaves who resisted extreme punishment by their owners. This helps us see Gaston as an extraordinary jurist, whose work mitigated the brutality of slavery. Thus, he appears as an answer to Robert Cover's condemnation of anti-slavery jurists who operated in a pro-slavery world.³⁰⁷ He incrementally bent the law towards justice for all, which was the best that could be accomplished only by the boldest of judges in the antebellum period. Where Ruffin had the choice in *Mann* to accept a jury verdict that was favorable to treatment of slaves, he rejected it.³⁰⁸ In contrast, Gaston moved the law forward on several occasions in favor of expansion of civil rights for slaves.³⁰⁹ His writings make clear his devotion to his faith, an important distinction between the two men. Gaston was, in many ways, a man of his time; however, in so many ways, he courageously far exceeded his time.

306. *Id.*; see Will of William Gaston (Dec. 8, 1843) (on file with N.C. State Archives).

307. See *supra* notes 9–11 and accompanying text (discussing Robert Cover's work and subsequent literary critiques).

308. Ruffin's address to the state Agricultural Society in 1855 is telling regarding his general views on the relationship between masters and slaves, even going so far as to extol the Christian virtues of slavery. Thomas Ruffin, Address of Thomas Ruffin Delivered Before the State Agricultural Society of North Carolina (Oct. 18, 1855), in 4 THE PAPERS OF THOMAS RUFFIN 323, 332–337 (J.G. de Rouilhac Hamilton ed., 1920). “Indeed, slavery in America has not only done more for the civilization and enjoyments of the African race than all other causes, but it has brought more of them into the Christian fold than all the missions to that benighted continent from the Advent to this day have, or, probably, those for centuries to come would . . .” *Id.* at 333.

309. See, e.g., State v. Jarrott, 23 N.C. (1 Ired.) 76, 83–84 (1840) (holding that a slave's insolence does not justify the excessive battery that was deemed to have occurred); State v. Manuel, 20 N.C. 144, 151, 3 & 4 Dev. & Bat. 20, 25 (1838) (holding that manumitted slaves should be considered citizens of North Carolina if they were born in the state); State v. Negro Will, 18 N.C. (1 Dev. & Bat.) 131, 172 (1834) (holding slave who killed master in self-defense did not possess the requisite intent to commit murder).