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THOMAS RUFFIN: OF MORAL PHILOSOPHY AND MONUMENTS*

ALFRED L. BROPHY**

“Thomas Ruffin: Of Moral Philosophy and Monuments” returns to Judge Thomas Ruffin’s opinions, particularly on slavery, to excavate his jurisprudence and to try to assess what Ruffin’s legacy means for us today. It begins with an exploration of Ruffin’s 1830 opinion in State v. Mann where he self-consciously separated his feelings from his legal opinion to release a man who abused a slave from criminal liability. Antislavery activists frequently wrote about Mann, because of its brutal honesty about the harsh nature of slavery. After discussing Harriet Beecher Stowe’s fictional account of Ruffin and State v. Mann in Dred: A Tale of the Great Dismal Swamp, which further developed the theme of separation of law and morals, the paper turns to some of Ruffin’s other opinions. It looks to slavery opinions including Heathcock v. Pennington, which released a renter of a slave from liability for the boy’s death in a coal mine, and Green v. Lane, which dealt with a trust to give “quasi-freedom” to slaves, as well as nonslavery cases like Scroggins v. Scroggins, which argued against granting judicial divorces because that would encourage more of them.

Ruffin’s jurisprudence took the world as it was, or as he phrased it, looked to the “nature of things.” His judicial opinions—the monuments he left to us—illustrate a world of proslavery moral philosophy. That thought separated humanity from law and then decided cases based on precedent and considerations of utility to society. Ruffin was a great expositor of the system of slavery, as well as a great wielder of what Harriet Beecher Stowe referred to

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as the “cool, logical, and practical” reasons of the Anglo-Saxon race.

What should we make of this legacy today? Perhaps Ruffin aided the cause of antislavery through his honesty in State v. Mann. And, thus, perhaps we should honor him for that. Moreover, perhaps the honor he received in the early twentieth century (when a dormitory was named in part for him on the University of North Carolina campus) derives from his facility with legal reasoning outside of the slavery context. However, honoring him also runs the risk of honoring proslavery values. Conversely, removing his name from a building now runs the risk of concealing the prevalence of proslavery thought in the nineteenth century. That is, removing a name might facilitate a process of forgetting when universities should be trying to provide a proper context for viewing our past.

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INTRODUCTION

Judge Thomas Ruffin’s contemporaries realized that they could not judge his work fully. In 1851, John Hill Wheeler wrote, in a brief biographical sketch of the judge, “[l]ike the Colossus of Rhodes, living characters are best viewed in the distance.”¹ Wheeler feared that he was too close to take a full measure of the judge.

We must not be too near the massy statue to admire its symmetrical proportions. When death and time have softened down by their mellow hand any shadow that may in life obscure our vision, and hallowed their services, talents, and virtues, then may their biographies, with their epitaphs, be written.²

In his time, Ruffin was revered by many and reviled by many others. Wheeler’s statement about the need for distance is particularly apt

1. JOHN HILL WHEELER, HISTORICAL SKETCHES OF NORTH CAROLINA 20 (Philadelphia, Lippincott, Grambo & Co. 1851).

2. *Id.*

here. For perhaps it is only now, 150 years later, that we can see Judge Ruffin's full silhouette on the landscape.

Chief Justice Thomas Ruffin, now remembered on the University of North Carolina campus for a dormitory named after him and his son, was famous in his time for his 1830 opinion in *State v. Mann*.³ *Mann* addressed a criminal prosecution of a man who shot a slave, Lydia, who was in his possession (that is, he had rented her).⁴ Mann was successfully prosecuted at trial, but on appeal the court concluded that he was not liable for the abuse.⁵ The opinion began with a reflection on the "struggle . . . in the Judge's own breast between the feelings of the man and the duty of the magistrate is a severe one."⁶ Ruffin, though, separated his feelings from the law; that theme runs throughout Ruffin's opinions. Indeed, that makes Ruffin representative of nineteenth century jurists.⁷

The decision in *State v. Mann* is brief but revealing. Ruffin recognized the question at the center of the case: can the state limit the owner's power over slaves?⁸ Ruffin rejected analogies to the relationship of parents and children.⁹ For slavery sought profit for the master, as well as "security and the public safety."¹⁰ Slaves were "doomed" to never be able to own anything of value; they had to work for others. The slave, to be an effective slave, must give up her will to her owner. "The power of the master must be absolute to render the submission of the slave perfect."¹¹ That absolute power resulted from the master's "uncontrolled authority over the body."¹² Ruffin understood and was willing to discuss in his opinion the conflicted moral world of slavery and freedom. That honesty and insight are rare in antebellum jurisprudence. Ruffin concluded:

We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master;

3. 13 N.C. (2 Dev.) 263 (1829).

4. *Id.* at 263.

5. *Id.* at 268.

6. *Id.* at 264.

7. TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890*, at 130–59 (1999).

8. *See infra* notes 11–13, 108–15.

9. *See, e.g., infra* notes 59–60 and accompanying text.

10. *Mann*, 13 N.C. (2 Dev.) at 266.

11. *Id.*

12. *Id.*

that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God.¹³

State v. Mann became, rather rapidly, a famous opinion—famous for its honesty.¹⁴

Harriett Beecher Stowe, using *Mann* as evidence of the mechanism behind the slave code in 1853 in *A Key to Uncle Tom's Cabin*,¹⁵ said the opinion cut to the heart of slavery. For it demonstrated that the slave code was about protecting the property rights of owners, not the slaves.¹⁶ Stowe believed that no one could “read this decision, so fine and clear in expression, so dignified and solemn in its earnestness, and so dreadful in its results, without feeling at once deep respect for the man and horror for the system.”¹⁷

Stowe detected in the opinion “the conflict between the feelings of the humane judge and the logical necessity of a strict interpreter of slave-law.”¹⁸ One commentator on *Uncle Tom's Cabin*¹⁹ recognized that a master might protest “against slavery during that innocent part of life when his soul belongs to God alone.”²⁰ But later, “when society takes him, the law chases away God, and interest deposes conscience.”²¹ Stowe was particularly concerned with discovering why sentiments failed to overcome reason—for she had written *Uncle Tom's Cabin* with the idea that the propriety of the Fugitive Slave Act of 1850 “could never be open for discussion” if Americans only knew “what slavery [was].”²²

13. *Id.* at 267.

14. The *New Berne Register* reprinted the opinion in its entirety shortly after it was issued (and then that was reprinted in the *Carolina Observer* on June 24, 1830), with the observation:

having ourselves been struck no less with the novelty of the discussion, than with the forcible views of the case taken by the Judge, and the beauty and fitness in which they are clothed, we have thought we could not, at this time, render a more acceptable service to our professional readers at home and abroad, than to rescue it from a mass of reports seldom read by general readers.

CAROLINA OBSERVER (Fayetteville, N.C.), June 24, 1830 (reprinting undated article from NEW BERNE REG.).

15. HARRIET BEECHER STOWE, *A KEY TO UNCLE TOM'S CABIN* (Boston, Jewett, Proctor & Worthington 1853).

16. *Id.* at 78–79.

17. *Id.* at 78.

18. *Id.* at 77.

19. HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN; OR, LIFE AMONG THE LOWLY* (Boston, John P. Jewett 1852).

20. *Id.* at xxxi.

21. *Id.*

22. *Id.* at 493.

She held out hope that Ruffin might modify the law—that he might “begin to listen to the voice of [his] more honorable nature, and . . . soften [the slave-code’s] necessary severities.”²³ He didn’t. Ruffin’s unflinching separation of his legal mind from his feelings led Stowe to conclude: “There is but one sole regret; and that is that such a man, with such a mind, should have been merely an *expositor*, and not a *reformer* of law.”²⁴

Ruffin policed the boundary between cold legal logic and the warm sentiments of the heart, which might have yielded a more humane result for the slaves. Stowe knew this to be true:

In the perpetual reaction of that awful force of human passion and human will, which necessarily meets the compressive power of slavery,—in that seething, boiling tide, never wholly repressed, which rolls its volcanic stream underneath the whole frame-work of society so constituted, ready to find vent at the least rent or fissure or unguarded aperture,—there is a constant necessity which urges to severity of law and inflexibility of execution.²⁵

Like others, Stowe respected Ruffin’s mind:

He has, too, that noble scorn of dissimulation, that straightforward determination not to call a bad thing by a good name, even when most popular and reputable and legal, which it is to be wished could be more frequently seen, both in our Northern and Southern States.²⁶

Readers who wondered with Stowe how “such a man, with such a mind,” could have issued such a ruling received their answer in her 1856 novel, *Dred: A Tale of the Great Dismal Swamp*.²⁷ In *Dred*, Stowe created a fictional judge who issues a decision closely based on *State v. Mann*.²⁸ The fictional Judge Clayton of the North Carolina Supreme Court did not want to issue the decision. Yet, he felt compelled to do so because it was his legal duty.²⁹ Thus, Stowe set up a conflict between cold legal logic and the warm sentiments of the

23. STOWE, *supra* note 15, at 71.

24. *Id.* at 79.

25. *Id.* at 71.

26. *Id.* at 78–79.

27. 1–2 HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* (Boston, Phillips, Sampson and Co. 1856).

28. *Id.* at 40–42.

29. *Id.*

heart. It was part of her religiously inspired critique of law, which expanded on her critique in *Uncle Tom's Cabin*.³⁰

The lawsuit—this time a civil suit rather than a criminal prosecution—was instigated by the slave owner Nina Gordon, who was horrified by the treatment of Milly and sued to recover for Milly's injuries.³¹ Edward Clayton, the son of Judge Clayton and a young and idealistic lawyer, argued the case for Nina. "Reading the theory is always magnificent and grand," Edward recalled.³² He quoted Richard Hooker's aphorism that "Law hath her seat in the bosom of God; her voice is the harmony of the world."³³ But in discussion with a friend, lawyer Frank Russell, Edward Clayton worried what practice would do to his conscience. "Does not an advocate commit himself to one-sided views of his subject, and habitually ignore all the truth on the other side," the young lawyer asked.³⁴

The influence of Edward's conscience on his legal training was particularly evident when Stowe contrasted him with his father. Edward "was ideal to an excess; ideality colored every faculty of his mind, and swayed all his reasonings, as an unseen magnet will swerve the needle. Ideality pervaded his conscientiousness, urging him always to rise above the commonly received and so-called practical in morals."³⁵ While Edward relished the "the theory of law," he failed in the application of legal principles.³⁶ Edward's father was "obliged constantly to point out deficiencies in reasonings, founded more on a keen appreciation of what things ought to be, than on a practical

30. For further discussion of Stowe's views on the law as expressed in *Dred*, see generally Alfred L. Brophy, *Harriet Beecher Stowe's Interpretation of the Slavery of Politics in Dred: A Tale of the Great Dismal Swamp*, 25 OKLA. CITY U. L. REV. 63, (2000); Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thoughts: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113 (1998).

31. Ruffin left open the question of Mann's civil liability, which is where Stowe's Judge Clayton picked up. Nevertheless, by the time Stowe wrote *Dred*, Ruffin had already held, in *Jones v. Glass*, 35 N.C. (13 Ired.) 305, 308–09 (1852), that a renter's severe abuse of a slave in his custody would lead to civil liability. *Id.* at 306. In that case, the majority spoke of Massey, the overseer in charge of the slave Willie, as the "judge, and, at the time, the sole judge" of Willie. *Id.* at 307. It is testimony to the ways that North Carolina law relegated control over slaves to individuals that the court spoke of overseers as "judges." *Id.* And perhaps this says something about the adjudication of property rights between white property owners.

32. 1 STOWE, *supra* note 27, at 21.

33. *Id.*

34. *Id.*

35. *Id.* at 31.

36. *Id.*

regard to what they are.”³⁷ Because of the differences in conscience, Edward and Judge Clayton “could never move harmoniously in the same practical orbit.”³⁸

Judge Clayton, constructed by Stowe, as she tells us according to artistic fit, reveals why Ruffin was merely an expositor.³⁹ Peer behind Judge Clayton’s mask and listen to a conversation he has with his wife regarding Milly’s case. In response to his wife’s question concerning whether he must decide against Milly, the judge responds:

Yes, I must A Judge can only perceive and declare. What I see, I must speak, though it go against all my feelings and all my sense of right I sit in my seat, not to make laws, nor to alter them, but simply to declare what they are. However bad the principle declared, it is not so bad as the proclamation of a falsehood would be.⁴⁰

Stowe was perceptive in her interpretation of Ruffin, for Judge Clayton represented what Stowe and other abolitionists had come to despise: an unflinching support of law over humanity, an ideology that had taken strong hold in the antebellum judicial culture.

Judge Clayton emphasizes duty in a discussion he has with his son Edward after the verdict.⁴¹ The judge admits that he had thought about retreating from slave society when he was young, but he rejected that path. The reason he offers for supporting the law is the security it provides to North Carolina society. “Human law is, at best, but an approximation, a reflection of many of the ills of our nature. Imperfect as it is, it is, on the whole, a blessing. The worst system is better than anarchy.”⁴² Here Stowe identifies Judge Clayton with the antebellum moral philosophers who emphasized the need for order in society. He defends what we have come to call formalism—and Stowe allows him to make the classic defense of legal formalism—that one must support law, no matter how unjust the results in individual cases appear, in order to avoid anarchy. Judge Ruffin and the fictional Judge Clayton spoke of the imperative duty that law imposed upon them, and after doing so for a time, it became impossible for them to adopt any other mode of reasoning.⁴³

37. *Id.*

38. *Id.*

39. *Id.* at iv.

40. 2 STOWE, *supra* note 27, at 99–100.

41. *Id.* at 108–10.

42. *Id.* at 109.

43. *See id.* at 108–10 (illustrating this mode of reasoning through Judge Clayton’s musings).

Towards the end of the conversation, Edward asks the same question that Stowe asked about Judge Ruffin in *A Key to Uncle Tom's Cabin*: “[M]y father, why could you not have been a reformer of the system?”⁴⁴ Stowe’s answer maps in wonderful detail why the judges could not break out of their logical, formalistic reasoning. Judge Clayton could not do so because of his abstract duty to the law, symbolized by his oath to protect the Constitution, because of his belief that society was actually better off with the decision he rendered than by doing individual justice to individual slaves, and because no piecemeal reforms would work.⁴⁵ Moreover, Judge Clayton believed he was not “gifted with the talents of a reformer.”⁴⁶ He was not gifted with those talents because he thought in legal terms, which recognized only analytical reasoning, not humanity.

Another character in *Dred*, a lawyer named Mr. Jekyl, was the vehicle for putting a family back into slavery after the will of their husband and father, who was their owner, said they should be free.⁴⁷ Jekyl poses a different set of questions from Judge Clayton, for we might expect lawyers to be advocates of their causes.⁴⁸ However, the juxtaposition with antislavery Edward Clayton suggests the ways that proslavery advocacy bends a person’s judgment and highlights the power of considerations of expediency over humanity.⁴⁹ For the lawyer Edward Clayton sees law as a way of bringing about justice. Yet, Edward also realizes the limits of law and, thus, at the end of the novel Edward resigns from the practice of law and moves to Canada with Cora and Cora’s slaves, whom she had freed.⁵⁰ Jekyl also points out the ways that Stowe believed law served the interests of the slave owner; as a lawyer he did the bidding of slave owners.⁵¹ Jekyl even seemed to believe that what he was doing was right. *Dred*, thus,

44. *Id.* at 109.

45. *Id.* at 109–10.

46. *Id.* at 110.

47. *Id.* at 139–42.

48. *Id.*

49. See generally Norman Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397 (2003) (identifying zealous advocacy as a key theme in antebellum legal ethics). Stowe’s Jekyl fits well into the zealous advocacy picture. I would modify this theme somewhat and suggest that lawyers were seen as stabilizers of the community and by supporting zealously the rights recognized by the status quo (usually the rights of property owners) they helped to prevent radical change. See generally DANIEL LORD, *ON THE EXTRA-PROFESSIONAL INFLUENCE OF THE PULPIT AND THE BAR: AN ORATION DELIVERED AT NEW HAVEN, BEFORE THE PHI BETA KAPPA SOCIETY OF YALE COLLEGE* (New York, S.S. Chatterton 1851).

50. 2 *STOWE*, *supra* note 27, at 330–31.

51. *Id.* at 139–42, 202–05.

expanded on a theme of one of Stowe's first short stories, entitled *Love Versus Law*, which explored a property dispute between neighbors.⁵² The dispute was settled through love, rather than through a lawsuit.⁵³ Stowe's literature expressed an opposition to lawsuits, law, lawyers and legal reasoning, all of which she felt obstructed humane sentiments.

Dred was an important precursor to post-war critiques of legal formalism and a precursor to Herman Melville's *Billy Budd* as well.⁵⁴ For Stowe explored in detail what kind of person would issue a proslavery decision even though he knew and felt that it was inhuman. What kind of person would do that? A person upon whom legal reasoning had left such deep ruts that he could no longer tap the warm sentiments of the heart.⁵⁵

Stowe followed other abolitionists who used *Mann* to point out the conflict between humane sentiments and cold legal logic. *State v. Mann* was a useful—perhaps even critical—piece of evidence about the nature of proslavery legal thought. Indeed, abolitionists used *State v. Mann* as a centerpiece of their attack on slavery and the law. Many abolitionists attacked the law of slavery as well as the institution: “Such is American Slavery, not as abused by the cruel and the lawless, but as established by legislative enactments and maintained by judicial decisions,” wrote Samuel Wilberforce in 1846.⁵⁶ William Goodell wrote in *American Slave Code in Theory and Practice*⁵⁷ that *State v. Mann* illustrated the complete removal of

52. HARRIET BEECHER STOWE, *Love Versus Law*, in *THE MAYFLOWER OR, SKETCHES OF SCENES AND CHARACTERS AND THE DESCENDANTS OF THE PILGRIMS 19* (New York, Harper & Brothers 1843).

53. *Id.* at 76.

54. See generally HERMAN MELVILLE, *BILLY BUDD* (Raymond W. Weaver ed., 1924).

55. Stowe also critiqued religious formalism in the novel. The character Reverend Packthread, like Judge Clayton, refused to take action against slavery within the church, citing his lack of power to change opinion. See 2 STOWE, *supra* note 27, at 196–97. The relationship between post-war formalism and pro and antislavery thought is, to say the least, complex. But perhaps it is more related to reaction against instrumentalism and a retreat from the fanaticism that brought the nation to Civil War. At least we seem to think that such a reaction explains much of the post-war formalism and retreat from issues of politics, towards business. See generally DANIEL AARON, *THE UNWRITTEN WAR: AMERICAN WRITERS AND THE CIVIL WAR* (1973); DAVID W. BLIGHT, *RACE AND REUNION* (2001) (tracing the origins of post-war formalism in literature).

56. SAMUEL WILBERFORCE, *A REPROOF OF THE AMERICAN CHURCH* 17 (New York, W. Harned 1846).

57. WILLIAM GOODELL, *AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (New York, American and Foreign Anti-Slavery Society 1853) [hereinafter *SLAVE CODE*].

liability of slave owners for the abuse of enslaved people.⁵⁸ Goodell's volume was an important precursor to post-war realism in jurisprudence. It utilized case reports as a rich source of data on the legal system's relationship with slavery and pioneered the exploration of the effect of legal rules on society.

Abolitionists used *State v. Mann* profitably as evidence of slavery's inhumanity. Charles Elliott's *Sinfulness of American Slavery: Proved from Its Evil Sources*,⁵⁹ quoted extensively from *Mann* to support the statement that "[n]one who are duly enlightened on slavery will ever contend, except sophistically, that the relation of parent and child, of husband and wife, of master and servant, are the same with, or even similar to, the relation between the master and slave. This is put beyond all doubt, by Judge Ruffin . . ."⁶⁰ Edward Beecher, Harriet Beecher Stowe's brother, invoked *Mann* before the Massachusetts Abolition Society to show that "*the master must have unlimited control over the body of his slaves, OR THE SYSTEM CANNOT STAND*":⁶¹

According to the decision, then, of a southern judge, extorted from him by the inexorable necessity of his legal logic, in opposition to his humane feelings, the *relation* of slavery, as constituted *by law*, is, *in itself*, cruel, authorizing the unlimited control of the master over the body of his slave, *life not excepted*. Why? Because without such control, the system could not stand; *i. e.* [sic] the relation could not exist, as it is now legally constituted. No sin in such a relation? Then there is no sin, a Carolina jurist being judge, for doing whatever is

58. *Id.* at 169–75. Goodell observed about *State v. Mann*:

Here is a document that will repay profound study. The moral wrong of slavery is distinctly and repeatedly admitted, along with the most resolute determination to support it, by not allowing the rights of the master to come under judicial investigation, betraying a consciousness that they would not abide the test of the first principles of legal science. The struggle between the man and the magistrate, implying that slavery requires of its magistrates to trample upon their own manhood; the cool and deliberate decision to do this, and to elevate the law of slavery above the law of nature and of nature's God, are painful but instructive features of the exhibition.

Id. at 174–75.

59. 1 CHARLES ELLIOTT, *SINFULNESS OF AMERICAN SLAVERY: PROVED FROM ITS EVIL SOURCES* (Cincinnati, L. Swormstedt & J.H. Power 1850).

60. *Id.* at 296–97; see also *Authority of Masters over Slaves*, VT. CHRON., Apr. 16, 1845, at 62 (citing Judge Ruffin's rejection of the analogy that slaves are to masters as children are to parents).

61. N. L. Rice, *Mr. Rice's Fifth Speech* (Oct. 1845), in *A DEBATE ON SLAVERY* 124, 134 (Cincinnati, Wm. H. Moore & Co. 1846).

necessary (be it stripes, torture, or death,) to preserve this sinless, lawful relation!⁶²

The fact that *Mann* was one of Ruffin's first opinions as a justice may account for his honesty. At least some of Ruffin's defenders thought so. After defending Ruffin's opinion and pointing out the limitations the law placed on owners, Edward Josiah Stearns commented, "In justice to the Judge, I should state that this opinion was delivered more than twenty-three years ago, and was among the first, perhaps the very first, delivered by him on the bench of the Supreme Court."⁶³

After *State v. Mann*, Ruffin wrote of slavery in more than 425 cases involving such issues as criminal prosecutions of slaves, emancipation, slaves as workers, rights among owners and renters, and sale and demise of slaves.⁶⁴ He also wrote about nuisance,

62. *Id.*

63. See E. J. STEARNS, NOTES ON UNCLE TOM'S CABIN: BEING A LOGICAL ANSWER TO ITS ALLEGATIONS AND INFERENCES AGAINST SLAVERY AS AN INSTITUTION 194 (Philadelphia, Lippincott, Granbo & Co. 1853). Only five opinions by Ruffin appeared in the North Carolina Reports before *Mann*, and although they dealt with narrow, technical issues, he had already expressed skepticism about reform—even modest reform of property law—in one of them. Cf. *Morrison v. Connelly*, 13 N.C. (2 Dev.) 233, 238 (1829) (doubting whether the remedy imposed was harsh, but noting that the legislature may change the law).

In the case after *Mann*, Ruffin justified (perhaps gratuitously) the legislative policy of excluding illegitimate children from inheritance through their mothers if there were any legitimate children. *Flintham v. Holder*, 16 N.C. (1 Dev. Eq.) 345, 347–48 (1829). Flintham permitted legitimate children of the decedent's mother to inherit, even though the illegitimate child could not inherit through those children. *Id.* at 348. The answer turned on the interpretation of a 1799 statute; however, Ruffin dealt with the spirit of the act, which was to encourage marriage. *Id.*

64. For biographical sketches of Ruffin, see HUEBNER, *supra* note 7, at 130–59 (1999). See generally MARK TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: *STATE V. MANN* IN HISTORY AND LITERATURE (2003) (discussing Ruffin's view of the "logic of slavery"); Amy Dru Stanley, *Dominion and Dependence in the Law of Freedom and Slavery*, 28 LAW & SOC. INQUIRY 1127 (2003) (contrasting Ruffin with another prominent contemporary—Lemuel Shaw of the Massachusetts Supreme Judicial Court). Both Shaw and Ruffin were representative of a conservative legal order that was in transition towards a vigorous support of capitalism—or at least was supportive of capitalism (it may have been supportive of it for a long time). See generally A.W. Brian Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) (arguing that the common law of contracts had supported the market for generations before Horwitz's identification of changes in antebellum contracts law). Robert Cover has also dealt with those two judges, for Shaw—like Ruffin—dealt with the conflict between law and morality at the center of *State v. Mann* in Thomas Simms' case (and in the earlier, though somewhat morally less difficult case of *Commonwealth v. Ames*, 35 Mass. (18 Pick.) 193 (1836)). See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 77 n.* (1975); Alfred Konefsky, *The Accidental Legal Historian: Herman Melville and the History of American Law*, 52 BUFF. L. REV. 1179, 1222, 1270, 1272–76 (2004). See generally Brook

evidence, and about torts, like the fellow servant rule. Where many see American jurisprudence beginning in the years after the Civil War,⁶⁵ slavery generated a rich antebellum debate over the relationship of legal rules to culture and vice versa. We are only now beginning to explore that literature in depth, which includes novels, debates in Congress, judicial opinions, and speeches to literary societies, as well as more traditional sources, like treatises. Both sides of the debate—antislavery and proslavery—realized the multiple

Thomas, *The Legal Fictions of Herman Melville and Lemuel Shaw*, 11 CRITICAL INQUIRY 24 (1984) (using critical legal studies to analyze “Melville’s relationship with his father-in-law, Lemuel Shaw”).

Ruffin correlates highly with the picture presented by Morton Horwitz of a judiciary that employed precedent to maintain vested rights, and also remade it to promote economic growth. MARTIN HORWITZ, TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 24–28, 63–108 (1977); cf. CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICAN 1815–1846, at 396–97 (1991) (noting the contradiction between liberty and slavery in the antebellum capitalist economy). See generally RUSH WELTER, THE MIND OF AMERICA 1820–1860 (1975) (studying the social and political attitudes of the Americans and the formation of a national character). We can see the great conflict between conservation and innovation so central to the South as well as to law in this period.

For more commentary on Ruffin, see JAMES OAKES, SLAVERY AND FREEDOM 160–62 (1990); Laura F. Edwards, “*The Marriage Covenant Is at the Foundation of All Our Rights*”: *The Politics of Slave Marriages in North Carolina After Emancipation*, 14 LAW & HIST. REV. 81, 85 n.5 (1996); Stanley N. Katz, *Opening Address*, 17 CARDOZO L. REV. 1689, 1690, 1692–93 (1996); Walter F. Pratt, *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129, 129, 143–44, 148–59 (1986); Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1237–41 (1992); Alan Watson, *Slave Law: History and Ideology*, 91 YALE L. J. 1034, 1037–44 (1982); Julius Yanuck, *Thomas Ruffin and North Carolina Slave Law*, 21 J. S. HIST. 456, 459–75 (1955); Frederick Wertheim, Note, *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112, 1133–47 (1986) (discussing Ruffin’s preference for contract instead of applying a new tort rule).

65. See generally Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC’Y REV. 9 (1975) (describing the period from 1800–1900 as a “classical period” in American Law); David M. Rabban, *The Historiography of Late-Nineteenth Century American Legal History*, 4 THEORETICAL INQUIRIES IN LAW 541 (2003) (drawing from primary sources to achieve a holistic view of “late nineteenth-century American legal scholarship”). For some of the literature on antebellum jurisprudence, see HOWARD SCHWEBER, THE CREATION OF THE COMMON LAW, 1850–1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP 168–225 (2004). See generally Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (discussing Peter Karstan’s interpretation of judicial reasoning and antebellum legal thoughts in PETER KARSTAN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA (1997)); Michael Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986) (discussing “the Langdellian notion of law as science”).

ways legal doctrine mixed with history and morals. *State v. Mann* is one such example.⁶⁶

I. STABILITY AND ANTEBELLUM JURISPRUDENCE

Ruffin's opinions collectively portray him as a representative of the antebellum era: a conservative judge who separated law from morality, who revered precedent and feared departure from precedent, and who took the world as it was. Sometimes he spoke of concern for economic growth, but he was cautious, in the mold of Chancellor Kent and conservative thinkers like Edmund Burke rather than even Justice Story.⁶⁷ Indeed, the antebellum era idealized a jurisprudence of conservatism—a concern for economic growth, a respect for contracts and individualism.⁶⁸ Henry St. George Tucker told students at the University of Virginia Law School in 1841 that lawyers are “bred up to a love of order.”⁶⁹ In fact, Daniel Lord's 1851 address at Yale University focused on the role that lawyers, like ministers, serve in stabilizing society.⁷⁰

66. For more on these rich sources, see generally ROBERT W. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM REVOLUTION THROUGH CIVIL WAR* (1965); Alfred L. Brophy, *The Fugitive Slave Act*, in *ANTEBELLUM JURISPRUDENCE IN TRANSFORMATIONS IN AMERICAN LEGAL HISTORY* 109–28 (Daniel W. Hamilton & Alfred L. Brophy eds., forthcoming 2009); Alfred L. Brophy, *The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise Through Civil War*, 109–25 (2001) (unpublished Ph.D. dissertation, Harvard University) (on file with Davis Library, University of North Carolina at Chapel Hill).

67. Ruffin warned in dissent in *State v. Caesar*, 31 N.C. (9 Ired.) 394, 415 (1849) (per curiam), about the need for caution in departing from or extending precedent:

Judges cannot, indeed, be too sensible of the difficulty and delicacy of the task of adjusting the rules of law to new subjects; and therefore they should be and are proportionally cautious against rash expositions, not suited to the actual state of things and not calculated to promote the security of persons, the stability of national institutions and the common welfare. It was but an instance of the practical wisdom which is characteristic of the common law and its judicial ministers as a body, that the courts should in those cases, have shown themselves so explicit in stating the general principle on which the rules of law on this subject must ultimately be placed, and yet so guarded in respect to the rules themselves in detail.

Id.

68. *Id.*

69. HENRY ST. GEORGE TUCKER, *INTRODUCTORY LECTURE GIVEN TO THE LAW CLASS AT THE UNIVERSITY OF VIRGINIA* 7–8 (Charlottesville, Va., Hagruder & Noel 1841).

70. Lord, *supra* note 49, at 7 (stating that the bar is the more “practical counselors of society on its general interests”). In fact, college literary addresses frequently emphasized law's ability to stabilize American society and the need for it to do so. See Alfred L. Brophy, *The Rule of Law in Antebellum College Literary Addresses: The Case of William*

No one, then, would expect to find Ruffin to be anything more than an expositor of the system. By nature of his position, one could hardly expect him to be a reformer—for reformers had, most often, to be critics of the common law. They might be like William Sampson, who boldly criticized the common law with a reference to the corrupt soothsayers of ancient Rome.⁷¹ “Cicero wondered how two soothsayers could look each other in the face,” Sampson said.⁷² “I wonder how the two learned expounders of the common law opposed to us can do so without laughing.”⁷³ Or, as Sampson later referred to it, the common law was like a pagan god to whom devotees offered incense:

[L]ong after [Americans] had set the great example of self-government upon principles of perfect equality, had reduced the practice of religion to its purest principles, executed mighty works, and acquired renown in arts and arms, had still one pagan idol to which they daily offered up much smoky incense. They called it by the mystical and cabalistic name of Common Law. A mysterious essence. Like the Dalai Lama, not to be seen or visited in open day; of most indefinite antiquity; sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still the same that was, and was to be, and evermore to sit cross-legged and motionless upon its antique altar, for no use or purpose, but to be praised and worshipped by ignorant and superstitious votaries.⁷⁴

Greene, 31 CUMB. L. REV. 231, 231–85 (2001). Other evidence of what the common law meant comes from southern literary journals. See, e.g., *The Judiciary System of South Carolina*, 2 S.Q. REV. 464, 464–85 (1850); *Law and Lawyers*, 6 S.Q. REV. 370, 370–427 (1844); *Law Reform in Missouri*; *Law of the State of Missouri, Regulating Pleadings and Practice in Courts of Justice*, 1 S.Q. REV. 1, 1–18 (1850); *The Roman Law*, 8 S.Q. REV. 93, 93–117 (1845); *Slavery and the Abolitionists, Address from the Southern Delegates in Congress*, 15 S.Q. REV. 165, 165–223 (1849); Nathaniel Beverley Tucker, *Lecture to Law Students by Professor B. Tucker*, 1 S. LITERARY MESSENGER 145–54 (1834); A Virginian, *Remarks on a Note to Blackstone’s Commentaries*, 2 S. LITERARY MESSENGER 266–70 (1835).

71. *People v. Melvin*, 1 Yates Sel. Cas. 112, 153 (N.Y. Sup. Ct. 1809); see also *The Trial of James Melvin and Others for Conspiracy to Raise Wages, New York City, 1810*, in XIII AMERICAN STATE TRIALS 576, 615 (John D. Lawson ed., 1921) (chronicling the trial of James Melvin and others for a conspiracy to raise wages).

72. See AMERICAN STATE TRIALS, *supra* note 71, at 615.

73. *Id.*

74. William Sampson, *An Anniversary Discourse Delivered Before the New York Historical Society, (Dec. 6, 1823)*, in SAMPSON’S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS UPON THE HISTORY OF THE LAW 11–12 (New York, E. Bliss & E. White 1824).

In Timothy Walker's address, given in the wake of the Fugitive Slave Act of 1850, he warned of the dangers of the extremities of reform, such as women's rights and the abolition of slavery and the death penalty: "[T]he great want of our age is Moderation. The lesson we should draw, from the survey we have taken, is neither to be obstinately conservative, nor rashly progressive."⁷⁵ He perceived the agitation for change, which was sweeping the United States:

Everywhere, on every matter, and in all ways, the great heart of humanity throbs for reform. The shout that goes up from myriad voices, all over the globe, is,—Let old things be done away, and all things become new; let the old landmarks be obliterated. We will no longer walk in the ancient paths; no longer work with the ancient tools; no longer think in the ancient formulas; no longer believe the ancient creeds. The times are sadly out of joint. We must reform them altogether. To this end, we pronounce antiquity a humbug, precedent a sham, prescription a lie, and reverence folly. We have been priest-ridden, and king-ridden, and judge-ridden, and school-ridden, and wealth-ridden, long enough. And now the time is come to declare our independence in all these respects. We cannot, indeed, change the past,—that is for ever immutably fixed; but we can repudiate it, and we do. We can shape our own future, and it shall be a glorious one. Now shall commence a new age,—of gold, or of silver, or of iron, but an age of emancipation. We will up heave society from its deepest foundations, and have all but a new creation. In religion and politics, medicine and law, morals and manners, our mission is to revolutionize the world. And therefore we wage indiscriminate war against all establishments. Our ancestors shall no longer be our masters. We renounce all fealty to their antiquated notions. Henceforth to be old is to be questionable. We will hold nothing sacred which has long been worshiped, and nothing venerable which has long been venerated.⁷⁶

II. RUFFIN'S SLAVERY JURISPRUDENCE

Perhaps no cases better illustrate Ruffin's jurisprudence and his moral philosophy better than those in which the institution of slavery was, even if tangentially, part of the court's inquiry. Those cases bear several hallmarks of a conservative jurisprudence: reasoning from the

75. TIMOTHY WALKER, *THE REFORM SPIRIT OF THE DAY, AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF HARVARD UNIVERSITY* 36–37 (Boston, James Munroe & Co. 1850).

76. *Id.* at 5–6.

world as it is and looking to what he believed to be the nature of enslaved people who Ruffin believed were ignorant and must be made to bear the burden of their enslavement.⁷⁷ He was wedded to precedent when available but willing to reason his way to a solution (often using principles of utility) when precedent was unavailable.⁷⁸ He might reason from analogy, but the new principles had to be clearly deducible from precedent.⁷⁹

And when an intelligible principle is explicitly laid down in an adjudication, or necessarily results from it, every consideration of judicial prudence, of the security of the citizen, and of that quiet of mind which a known law inspires in contradistinction to unknown and uncertain opinions, which successive judges may individually entertain, should impart to such principle the authority of law.⁸⁰

In some cases Ruffin continued with the approach he took in *State v. Mann* to set law in distinction to humanity. In the criminal case of *State v. Hoover*,⁸¹ decided a decade after *Mann* in 1839, Ruffin was again remarkably frank. Again, he confronted a criminal prosecution of a white person for abusing a slave.⁸² The result was different from *Mann*, however, for *Hoover* upheld the conviction of a slave-owner for the murder of a pregnant slave, Mira.⁸³ Ruffin spoke of his “deep sorrow.”⁸⁴ Ruffin’s decision in *Hoover* acknowledges the assumption in *State v. Mann* that a slave owner could punish his slave in a manner limited only by “his own judgment and humanity.”⁸⁵ “[I]n the nature of things” owners have a degree of latitude that non-owners did not.⁸⁶ But it is “self-evident” that such circumstances would not relieve the owner of all legal culpability here.⁸⁷ It was the court’s “duty” to explain the circumstances why this owner was liable

77. See, e.g., *State v. Mann*, 13 N.C. (2 Dev.) 263, 266–67 (1830).

78. *Id.*

79. See *State v. Cæsar*, 31 N.C. (9 Ired. Eq.) 391, 415 (1849) (stating the importance and “pressing necessity” of following precedent so that people can understand their rights and obligations in the context of their interactions with others, especially when these interactions become violent).

80. *Id.* at 416.

81. 20 N.C. (3 & 4 Dev. & Bat.) 500, 503 (1839).

82. See generally *id.*

83. *Id.* at 500–01; see also *id.* at 503 (“But it is almost self-evident that this prisoner can claim no extenuation of his guilt below the highest grade.”).

84. *Id.* at 502.

85. *Id.* at 503.

86. *Id.*

87. *Id.*

for homicide.⁸⁸ “The acts imputed to this unhappy man do not belong to a state of civilization.”⁸⁹ Then, in language easily prescient—for Stowe uses similar language regarding Ruffin less than a decade and a half later—he says, “[t]hey are barbarities which could only be prompted by a heart in which every humane feeling had long been stifled; and indeed there can scarcely be a savage of the wilderness so ferocious as to not shudder at the recital of them.”⁹⁰

In other cases, Ruffin turned to his understanding of slaves’ behavior to decide the appropriate legal response. In *State v. Cæsar*⁹¹ he confronted the question of what constituted provocation in the context of homicide.⁹² Essentially, the question was how much abuse would slaves have to endure at the hands of white men before they could fight back and claim they had been so provoked that a homicide was reduced from murder to manslaughter.⁹³ Where the majority of the court found that mitigation was possible, Ruffin dissented.⁹⁴ He urged attention to precedent and explained why precedent is important:

The dissimilarity in the condition of slaves from anything known at the common law cannot be denied; and, therefore, as it appears to me, the rules upon this, as upon all other kinds of intercourse between white men and slaves, must vary from those applied by the common law Judges cannot, indeed, be too sensible of the difficulty and delicacy of the task of adjusting the rules of law to new subjects; and therefore they should be and are proportionally cautious against rash expositions, not suited to the actual state of things and not calculated to promote the security of persons, the stability of national institutions and the common welfare.⁹⁵

Ruffin spoke of previous courts’ employment of “practical wisdom” of the common law and their application of general rules as well as their “guarded . . . respect to the rules themselves in detail.”⁹⁶ For precedent “as far as it goes . . . affords a safe footing upon firm ground gained in a morass.”⁹⁷ Ruffin then reasoned from his

88. *Id.*

89. *Id.*

90. *Id.*

91. 31 N.C. (9 Ired.) 391 (1849) (per curiam).

92. *Id.* at 391.

93. *Id.*

94. *Id.* at 405.

95. *Id.* at 415.

96. *Id.*

97. *Id.* at 417.

observance about the behavior of slaves and from this particular case that there should be no mitigation. He reasoned from what he believed to be the state of things:

[E]very individual in the community feels and understands that the homicide of a slave may be extenuated by acts which would not constitute a legal provocation if done by a white person.⁹⁸

So, it follows, as certainly as day follows night, that many things which drove a white man to madness will not have the like effect if done by a white man to a slave.⁹⁹

Ruffin was trying to make what he wished—a world of subservience—a reality.

In other slave cases, Ruffin turned again to his understanding of human nature. He decided an evidentiary question in *State v. Charity*¹⁰⁰ on “general principles” when he could find no precedent.¹⁰¹ *Charity* involved the trial of a slave for a capital crime (the murder of her child) and whether her owner could be compelled to testify against her.¹⁰² Ruffin would not permit a master to testify in favor of a slave (the master’s pecuniary interest was too great); consequently, in a form of equality of treatment, Ruffin would not compel a master to testify *against* a slave.¹⁰³ Chief Justice Henderson’s concurrence shed different light, however. Henderson thought that masters’ testimony about slaves’ confessions should not be admitted because “[t]he master has an almost absolute control over both the body and mind of his slave. The master’s will is the slave’s will.”¹⁰⁴ Moreover, Henderson thought masters should be protectors of their slaves and, thus, not compelled to testify against them.¹⁰⁵ Ruffin and Henderson arrived at the same result though from very different angles.

Judge Ruffin relied on his understanding of slave personality in civil cases as well. In *Heathcock v. Pennington*,¹⁰⁶ Ruffin wrote of the ordinary duty of care required of people who rented slaves: “a slave, being a moral and intelligent being, is usually as capable of self-preservation as other persons. Hence, the same constant oversight and control are not requisite for his preservation as for that of a

98. *Id.* at 422–23 (quoting *State v. Tackett*, 8 N.C. (1 Hawks) 210, 217 (1820)).

99. *Id.* at 423.

100. 13 N.C. (2 Dev.) 543 (1830).

101. *Id.* at 543.

102. *Id.*

103. *Id.* at 543–45.

104. *Id.* at 548 (Henderson, C.J., concurring).

105. *Id.* at 549.

106. 33 N.C. (11 Ired.) 640 (1850) (*per curiam*).

lifeless thing, or of an irrational animal.”¹⁰⁷ Ruffin, then, absolved an operator of a mine shaft of liability to his owner for the death of a young slave who was employed there and had, late at night, fallen into the shaft and died.¹⁰⁸ *Heathcock* was part of the emergence of a modern tort law, which left the owner of a slave with a limited remedy and facilitated the operation of the mine at a low cost. The mine had to keep operating twenty-four hours a day and “some one had necessarily to perform this service at those times”.¹⁰⁹

No one could suppose that the boy, knowing the place and its dangers, would incur the risk of stumbling into the shaft by not keeping wide awake. It was his misfortune to resemble the soldier sleeping at his post, who pays the penalty by being surprised and put to death. The event is to be attributed to one of those mischances, to which all are more or less exposed, and not, in particular, to want of care by the defendant.¹¹⁰

Similarly, in *Parham v. Blackwelder*,¹¹¹ Ruffin further explored the nature of slaves’ personality and the law’s need to decouple an owner’s liability from torts committed by her slaves.¹¹² *Parham* arose when a slave owned by Amelia Parham cut wood and carried it away from Elizabeth Blackwelder’s property.¹¹³ There was no precedent supporting an owner’s liability for the intentional torts of their slaves.¹¹⁴ Ruffin found that there was no liability given the nature and extent of slavery:

107. *Id.* at 643.

108. *Id.* at 646.

109. *Id.* at 645.

110. *Id.* at 646. In dissent in *Wiswall v. Brinson*, 32 N.C. (10 Ired.) 554, 563–79 (1849) (per curiam), Ruffin tried to limit the liability of a property owner for the damage caused by one of his employees to a neighbor’s horse. *Id.* The property owner, Wiswall, contracted to have a house moved two hundred yards, from one of his properties to another the contractor and dug a hole on a public road as part of the moving. *Id.* at 554. Later that evening, as Brinson was driving a coach over the road, one of his horses was injured by the hole. Over a vigorous and lengthy dissent by Ruffin, the supreme court concluded that Wiswell was liable for the negligence of the contractor. *Id.* at 563–79.

Limitation of the liability of owners and employers was important to Ruffin. He dissented in *Hunter v. Jameson*, 28 N.C. (6 Ired.) 252 (1846), from the North Carolina Supreme Court’s imposition of a warranty of fitness. *Id.* at 259–67. The seller’s agent had warranted the goods, without the seller’s permission. *Id.* at 252–53. Taken together, these illustrate Ruffin’s desire to limit liability, in contract, tort, and property cases, especially when humans (free or slave), other than the person held liable, were the agents of the damage.

111. 30 N.C. (8 Ired.) 446 (1848).

112. *Id.* at 447.

113. *Id.*

114. *Id.* at 447 (discussing whether slave owners should be legally responsible for their slaves’ trespasses).

[W]e believe the law does not hold one person answerable for the wrongs of another person. It would be most dangerous and unreasonable if it did, as it is impossible for society to subsist without some persons being in the service of others, and it would put employers entirely in the power of those who have, often, no good-will to them, to ruin them.¹¹⁵

Ruffin took the realities and needs of the slave system into account.

III. EMANCIPATION CASES

One way of gauging Ruffin's views is through an examination of his opinions on emancipation by will. Attempts of emancipation by will took several primary forms—immediate emancipation by will, establishment of a trust for emancipation, or establishment of a trust to hold the slaves in quasi-slavery.¹¹⁶ Ruffin interpreted these doctrines over several decades and nearly two dozen cases.

Southern states varied in their approaches to emancipation by will and via trust. An 1830 act of the North Carolina legislature largely prohibited emancipation via wills;¹¹⁷ emancipation was largely limited to cases where the county court found there had been meritorious service.¹¹⁸ Likewise, in Alabama¹¹⁹ and Mississippi,¹²⁰ emancipation was prohibited via will.¹²¹ However, southern courts were surprisingly willing to accept trusts for emancipation. Even Mississippi, which statutorily prohibited emancipation by will,¹²² gave

115. *Id.* Moreover, he drew upon the common proslavery argument that compared poor whites with slaves and argued that slaves were treated better. *Id.* at 448. In this case, Ruffin thought that poor free workers would have little resources: "For, in general, the pecuniary responsibility of menials, though so by contract, is but nominal, and, in cases of aggravated injuries, it is altogether inadequate." *Id.*

116. *See, e.g.,* *Sorrey v. Bright*, 21 N.C. (Dev. & Bat. Eq.) 113, 115 (1835) (striking down an attempt to gain quasi-freedom).

117. 2 N.C. Rev. Stat. ch. 111, § 59 (1837) (stating multiple conditions to freeing a slave by will, including not interfering "with the claims of creditors").

118. 2 N.C. Rev. Stat. ch. 111, § 60 (1837) (defining meritorious service as "more than mere general performance of duty").

119. *See, e.g.,* *Creswell's Executor v. Walker*, 37 Ala. 229, 238 (1861); *Carroll v. Brumby*, 13 Ala. 102, 105 (1848).

120. *See* MISS. CODE ch. 37, § 11 (1848).

121. *See generally* Stephen D. Davis II & Alfred L. Brophy, "The Most Esteemed Act of My Life": Family, Property, Will, and Trust in the Antebellum South (unpublished manuscript) (on file with author) (discussing empirical study of patterns of testation, particularly as they related to slaves, in antebellum Alabama).

122. *See* MISS. CODE ch. 37, § 11 (1848) ("[I]t shall be unlawful for any person, by last will or testament, to make any devise or bequest of any slave . . . for the purpose of emancipation."); *Garnett v. Cowles*, 39 Miss. (10 George) 60, 60 (1860)

effect to a trust that resulted in freedom for the testator's slaves.¹²³ An owner could emancipate using a testamentary trust to take the slaves outside of the state and emancipate them.¹²⁴

Ruffin's first opinion on emancipation via will, *Sorrey v. Bright*,¹²⁵ decided in 1835, struck down what became known as a trust for quasi-freedom, in essence giving slaves their freedom while still holding them as property.¹²⁶ A testator bequeathed several slaves to John Simmons with the restriction that the "negroes [were] to have the result of their own labor, but ever to be under [Simmons'] care and protection . . ."¹²⁷ Ruffin refused to give effect to this, for "every trust for emancipation, and every direction in a will to that end, whether the emancipation is to be absolute or qualified, is illegal and void."¹²⁸

Ruffin construed powers of emancipation fairly broadly and upheld a claim of a person alleging that he had been freed against a claim of a creditor of the slave's former owner's estate.¹²⁹ The North Carolina legislature had (seemingly) reversed the common law preference for inferring intent for emancipation.¹³⁰ Still, Ruffin found that the owner had completed the acts for emancipation and, thus, the slave was free.¹³¹ And in *White v. Green*,¹³² Ruffin found that two slaves who were to have been freed via will and provided with a small plot of land and a few animals, were—instead of becoming free—part of the general estate and thus subject to be used to satisfy the estate's debts.¹³³ *White* relied heavily upon English precedent in interpreting how to characterize the two slaves who were to be freed, but were not: as property of the surviving spouse or as residual (called surplus) property of the estate.¹³⁴ Ruffin characterized them as property of the

123. See *Garnett v. Cowles*, 39 Miss. (10 George) 60, 64 (1860); *Read v. Manning*, 30 Miss. 308, 317–18 (1855).

124. See *supra* note 123.

125. 21 N.C. (1 Dev. & Bat. Eq) 113 (1835).

126. *Id.* at 114–15.

127. *Id.* at 113.

128. *Id.* at 115.

129. *Sampson v. Burgwin*, 20 N.C. (3 & 4 Dev. & Bat.) 28, 30 (1838).

130. *Id.* at 31 (noting the North Carolina legislature's additional requirements for emancipation).

131. *Id.* at 32.

132. 36 N.C. (1 Ired. Eq.) 45 (1840).

133. *Id.* at 52.

134. *Id.* at 50–51 (discussing "estates by implication" as explained in *Hutton v. Simpson*, 2 Vern. 723 (1716) and *Willis v. Lucas*, 1 P. Wms. 472 (1718)).

estate rather than the surviving spouse and then made them liable to pay the debts of the estate.¹³⁵

Ruffin's opinions regarding Sarah Freeman's estate began in 1844 and ran through 1851.¹³⁶ His opinions distinguished between trusts to take people outside of the state and free them and those that held slaves in a state of qualified slavery (or quasi-freedom) in the state.¹³⁷ The former were acceptable; the later, prohibited.¹³⁸ The first appearance of Freeman's will before the North Carolina Supreme Court, in *Thompson v. Newlin*,¹³⁹ dealt with whether an executor must investigate allegations that there was a secret trust to hold slaves in quasi-freedom.¹⁴⁰ The intestate heirs of a Quaker, Sarah Freeman, alleged that she had created a secret trust for another Quaker, John Newlin, who would transport her nearly thirty slaves to a free state and emancipate them.¹⁴¹ (The idea behind a secret trust is that a donor gives a donee property. It looks like the gift is outright, but there is a secret agreement between the donor and the donee about what the donee will do with the property.) Ruffin ordered an investigation of whether there was such a secret agreement in this case.¹⁴² He demanded an answer to the question of what the purpose of the secret trust was—to transport and emancipate them or hold them in quasi-freedom in North Carolina, for “[t]he law will not allow itself to be baffled, and its policy evaded, by secret agreements, the very objects of which are to defeat the law itself.”¹⁴³ Ruffin's opinion in the case refused to give effect to a secret trust that would have

135. *Id.* at 51–54.

136. *See generally* *Thompson v. Newlin*, 43 N.C. (8 Ired. Eq.) 32 (1851) (affirming the validity of trusts providing for removal of slaves from North Carolina in order to emancipate them); *Thompson v. Newlin*, 41 N.C. (6 Ired. Eq.) 380 (1849); *Newlin v. Freeman*, 39 N.C. (4 Ired. Eq.) 312 (1846) (holding that land bought by the wife could not be disposed of by her will if the articles of marriage did not provide for its disposal); *Thompson v. Newlin*, 38 N.C. (3 Ired. Eq.) 338 (1844) (alleging a secret trust for the benefit of slaves); *see also* *Lemmond v. Peoples*, 41 N.C. (6 Ired. Eq.) 137, 139 (1848) (per curiam) (invalidating secret trust for quasi-slavery).

137. *See Thompson*, 38 N.C. (3 Ired. Eq.) at 338 (upholding the right to remove slaves from the state and free them); *Sorrey v. Bright*, 21 N.C. 113, 115 (1835) (invalidating a trust for quasi-freedom or quasi-slavery).

138. *See supra* note 137.

139. 38 N.C. (3 Ired. Eq.) 338.

140. *Id.* at 340.

141. *Id.* at 338–39.

142. *Id.* at 340.

143. *Id.* at 342.

essentially emancipated slaves (he referred to it as a state of quasi-slavery) and kept them within North Carolina.¹⁴⁴

By 1850, the case was again before the North Carolina Supreme Court, and the donee, John Newlin, had sent Sarah Freeman's thirty-five to forty slaves to Ohio and emancipated them.¹⁴⁵ Ruffin upheld that emancipation—perhaps he could do nothing else at that point, although he might have held Newlin civilly liable. And on a petition for rehearing in 1851, he similarly upheld the secret trust.¹⁴⁶ Ruffin cited other cases, like *Cameron v. Commissioners of Raleigh*,¹⁴⁷ that permitted transportation outside of the state for emancipation.¹⁴⁸ He characterized *Cox v. Williams*¹⁴⁹ as holding that “the policy of our law, as collected from the only legitimate source—our Legislature—was said to be opposed to the residence of freed negroes in this State.”¹⁵⁰ But, it did nothing to prevent emancipation outside the state. He thought it a duty to turn to other states “similarly situated with ourselves for aid in sustaining our judgments.”¹⁵¹ In the pages of other states' reporters he found precedent for relief: *Frazier v. Frazier*¹⁵² from South Carolina, as well as *Ross v. Duncan*¹⁵³ and *Ross v. Vertner*¹⁵⁴ from Mississippi, supported the position that slaves might be sent from a state and emancipated, even if they could not be emancipated within the state.¹⁵⁵

So, while North Carolina restricted emancipation of slaves via will, they could be put in trust to someone who would free them in another state. In *Cox v. Williams*,¹⁵⁶ coming in the midst of the *Newlin* saga, Ruffin clarified the rights of the master to emancipate, as long as the slaves left the state.¹⁵⁷ The right was based on the

144. *Id.* at 341; see also *Redmond v. Coffin*, 17 N.C. (2 Dev. Eq.) 437, 440–41 (1833) (holding that an estate bequeathing slaves for the purpose of emancipation is void in North Carolina).

145. *Thompson*, 43 N.C. (8 Ired. Eq.) at 33–35.

146. *Id.* at 46–47.

147. 36 N.C. (1 Ired. Eq.) 436 (1841).

148. *Thompson*, 43 N.C. (8 Ired. Eq.) at 45.

149. 39 N.C. (4 Ired. Eq.) 15 (1845).

150. *Thompson*, 43 N.C. (8 Ired. Eq.) at 45 (citing *Cox v. Williams*, 39 N.C. (4 Ired. Eq.) 15 (1845)).

151. *Id.* at 48.

152. 11 S.C. Eq. (2 Hill Eq.) 304 (1835).

153. 1 Freem. Ch. 587 (Miss. ca. 1840).

154. 6 Miss. (5 Howard) 305 (1840).

155. *Thompson*, 43 N.C. (8 Ired. Eq.) at 48–49.

156. 39 N.C. (4 Ired. Eq.) 15 (1845).

157. *Id.* at 16–18; see also Memory F. Mitchell, *Off to Africa with Judicial Blessing*, 53 N.C. HIST. REV. 265, 269–71 (1976) (discussing the background and opinion of *Cox v. Williams*, and highlighting the distinctions between valid and invalid bequests of slaves).

natural right of property owners to dispose of property. "In the nature of things, the owner of a slave may renounce his ownership, and the slave will thereby be manumitted, and that natural right continues until restrained by positive statutes."¹⁵⁸ Ruffin attributed the legislative policy against emancipation to the finding that they were "a charge on the community" and a "common nuisance" because of their "idleness and dishonesty."¹⁵⁹ Police power regulation that prohibited emancipation by any means other than by leave of a court on showing of meritorious service "was not intended to impose any restriction on the natural right of an owner to free his slaves."¹⁶⁰ If the slaves were removed from the state before being freed, that was perfectly acceptable. Ruffin attributed the legislative preference against emancipation to a concern over the burden that emancipation imposed on the community:

[T]hat was purely a regulation of police, and for the promotion of the security and quiet of the people of this State. . . . Emancipation was not prohibited for the sake merely of keeping persons in servitude in this State, and increasing the number of slaves, for the law never restrained their exportation"¹⁶¹

Of course, the slaves could not be freed unless there was money in the estate, for "[j]ustice stands," Ruffin wrote, "before generosity."¹⁶² *Green v. Lane*,¹⁶³ coming at the end of the *Newlin* saga, illustrates the distinction between a trust to remove slaves and free them and a trust to hold them in semi-freedom (or quasi-slavery) in North Carolina.¹⁶⁴ The testator, William Morris, executed a will in 1831 (written by William Gaston, later a justice of the North Carolina Supreme Court) directing his executors to take his slaves out of the state and freedom free them (he had already apparently taken them

158. *Cox*, 39 N.C. (4 Ired. Eq.) at 17.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 19 (citing *Thompson v. Newlin*, 38 N.C. (3 Ired. Eq.) 338, 343 (1844)); *Cameron v. Comm'rs of Raleigh*, 36 N.C. (1 Ired. Eq.) 436, 439–40 (1841); *Haywood v. Craven*, 4 N.C. (Car. L. Rep.) 360, 363–64 (1816)); *see also* *Thompson v. Newlin*, 43 N.C. (8 Ired. Eq.) 32, 46 (1851) ("[T]he power of the owner to give, and the capacity of the slave to receive, freedom, exist in nature, and therefore may be used in every case and every way, except those in which it is forbidden by law."). Or, as Ruffin phrased it in *Lemmond v. Peoples*, 41 N.C. (6 Ired. Eq.) 137 (1849), "[e]very country has the right to protect itself from a population, dangerous to its morality or peace; and hence the policy of the law of this State prevents the emancipation of slaves." *Id.* at 140.

163. 43 N.C. (8 Ired. Eq.) 70 (1851).

164. *Id.* at 78–79.

to Pennsylvania and freed them, then returned to North Carolina in 1828 and, thus, likely held them in quasi-freedom during his life).¹⁶⁵ A subsequent codicil directed that his executors keep the slaves and hold them in quasi-freedom in North Carolina.¹⁶⁶ Thus, the attempted emancipation was void.¹⁶⁷ Ruffin saw the obvious parallels to the infamous case of *Hinds v. Brazealle*,¹⁶⁸ one of the few cases that rivaled *State v. Mann* in the abolitionist repertoire, and he cited *Hinds* for further support.¹⁶⁹

It took relatively little, however, to trigger a finding that the trust was for the slaves. In some cases, the bequest was quite patently for the benefit of the slaves. Thus, the donee was instructed in *Stevens v. Ely*¹⁷⁰ to “permit the said negroes and their increase to live together, upon [the donee’s] land and to be industriously employed, and continue to exercise a controlling power over their moral condition, and to furnish [them] with the necessaries and comforts of life.”¹⁷¹ Yet, in other instances, the restraints on the donee were slight. Thus, in *Huckaby v. Jones*,¹⁷² the four donees were given the slaves “to be their lawful property, and for them to keep or dispose of as they shall judge most for the glory of God and good of [the] said slaves.”¹⁷³ In those instances, the gifts for quasi-freedom were open and obvious and, obviously, invalid.

*Lemmond v. Peoples*¹⁷⁴ likewise prohibited a secret trust to hold slaves for the benefit of the slaves, rather than the donee.¹⁷⁵ “[T]he donee of the legal title cannot, in conscience, hold the negro as property for himself, but must execute it for some one, and, as there is no one else who can claim, it must be for the donor.”¹⁷⁶ *Lemmond* addressed the meaning of slavery, for the donees in *Lemmond* claimed that the gift of slaves was to them and that the donor gave the slaves to them because they would treat the slaves kindly.¹⁷⁷ The slaves were to be held as property; they were not to be freed. But

165. *Id.* at 74, 76–77.

166. *Id.* at 75.

167. *Id.* at 70.

168. 3 Miss. (2 Howard) 837 (1838).

169. 43 N.C. (8 Ired. Eq.) 74 (1851).

170. 16 N.C. (1 Dev. Eq.) 493 (1830).

171. *Id.* at 493.

172. 9 N.C. (2 Hawks) 120 (1822).

173. *Id.* at 121.

174. 41 N.C. (6 Ired. Eq.) 137 (1849).

175. *Id.* at 139–40 (citing *Stevens v. Ely*, 16 N.C. (1 Dev. Eq.) 493, 494–95 (1830) and *Thompson v. Newlin*, 38 N.C. (3 Ired. Eq.) 338, 341–42 (1844)).

176. *Lemmond*, 41 N.C. (6 Ired. Eq.) at 137.

177. *Id.* at 139.

Ruffin used this conclusion as evidence of what distinguished slavery and freedom. Such holding of slaves “would not come up to the claim of the property, absolute and unconditional.”¹⁷⁸ If the slaves were to receive the kindness of the donees, “How, then and why, were the defendants to have this absolute property?”¹⁷⁹ The donees were:

to provide for the protection, comfort, and happiness of the woman and her children, and that was to be effected, not by exacting moderate labor from them as humane masters, but by the [donees'] placing them, upon a colorable contract for a small consideration, . . . [with] no control being exercised over them by the [donees] but such as might be necessary for their proper conduct and maintenance.¹⁸⁰

This was a plain case of quasi-freedom, for—in language reminiscent of *State v. Mann*—Ruffin found “the family is only required to maintain themselves and the authority to be exercised over the children is that, not of owners, but of parents.”¹⁸¹

One of Ruffin’s last decisions reaffirmed the right to remove slaves for emancipation.¹⁸² Further, he even upheld the right to place the choice of slavery or freedom with the slaves.¹⁸³ Anne L. Woods placed three slaves in trust for her (Woods’) life, with Osmond F. Long as trustee.¹⁸⁴ Upon Anne Woods’ death, the slaves had the choice of going to Liberia or remaining in slavery in North Carolina.¹⁸⁵ It was, by 1858, well established that a donor could free slaves after transporting them outside the state.¹⁸⁶ However, Ruffin confronted the question whether the slaves could be given the choice of freedom or not. Here he recognized—as he did in tort and criminal law cases—their humanity, even if considerations of humanity would not motivate him to take action to protect them:

From the nature of slavery they are denied a legal capacity to make contracts or acquire property while remaining in that State; but they are responsible human beings, having intelligence to know right from wrong, and perceptions of pleasure and pain, and of the difference between bondage and

178. *Id.* at 141.

179. *Id.*

180. *Id.* at 142 (internal quotations omitted).

181. *Id.*

182. *See* Redding v. Findley, 57 N.C. (4 Jones Eq.) 216, 217 (1858).

183. *Id.* at 218–19.

184. *Id.* at 215–16.

185. *Id.* at 216.

186. *Id.* at 217.

freedom, and thus, by nature, they are competent to give or withhold their assent to things that concern their state.¹⁸⁷

Again, Ruffin employed natural law to decide the case. For he believed that there was no need to have a “municipal law” to have the right to manumission or to accept emancipation: “They pre-exist, and are founded in nature just as other capacities for dealings between man and man.”¹⁸⁸

To some extent, Ruffin was pragmatic when interpreting owners’ attempts to free slaves via will (or trust created through a will). He was willing to interpret, at least somewhat broadly, the owners’ power to free via will.¹⁸⁹ At some times, when Ruffin issued a decision that resulted in continued slavery, he revealed something like sympathy. For instance, his 1842 decision in *Mayho v. Sears*¹⁹⁰ bears striking resemblance to the self-reflection that made *Mann* famous. In *Mayho*, Ruffin confronted a claim to freedom by the grandson of a freed slave, Polly.¹⁹¹ Polly’s owner, John Munroe, had executed a deed of manumission in 1805 that would give Polly her freedom in April 1814.¹⁹² Around 1810, Polly had a daughter.¹⁹³ Both Polly and her daughter lived as freed people after 1814.¹⁹⁴ That daughter in turn had a son around 1830.¹⁹⁵ Then in 1838, Munroe sold Polly’s grandson.¹⁹⁶ So, Ruffin confronted the question of whether Polly’s daughter (and grandson) were the property of Munroe, because the daughter had been born before Polly was free.¹⁹⁷ Ruffin spoke in terms reminiscent of his moral quandary in *State v. Mann*:

There is a natural inclination in the bosom of every Judge to favor the side of freedom, and a strong sympathy with the plaintiff, and the other persons situated as he is, who have been allowed to think themselves free and act for so long a time as if they were.¹⁹⁸

But Ruffin would not act on his “feelings.” For he concluded “the Court is to be governed by a different rule, the impartial and

187. *Id.* at 218–19.

188. *Id.* at 219.

189. *See Cox v. Williams*, 39 N.C. (4 Ired. Eq.) 15, 17 (1845).

190. 25 N.C. (3 Ired.) 224 (1842).

191. *Id.* at 224, 231.

192. *Id.* at 224–25.

193. *Id.* at 225.

194. *Id.*

195. *Id.*

196. *Id.* at 225–26.

197. *Id.* at 226–27.

198. *Mayho v. Sears*, 25 N.C. (3 Ired.) 224, 226 (1842).

unyielding rule of the law . . . in law, the condition of the plaintiff is that of slavery.”¹⁹⁹ He concluded the opinion “it becomes our duty to affirm the judgment; consoling ourselves that the sentence is not ours, but that of the law, whose ministers only we are.”²⁰⁰ Ruffin largely abandoned talk of the disjunction between his feelings and his duty as a magistrate after *Mayho*; in fact, he largely abandoned the talk after *Mann*.²⁰¹

Earlier, in the 1833 case of *Redmond v. Coffin*,²⁰² Ruffin emphatically denied the power of a testator who died in 1816 to leave his slaves to the New Garden Quaker Meeting, so that they might be freed. But *Redmond*—like *Mann* and *Mayho*—recognized that emancipation was a sentiment that pulled at the heart and was viewed as just:

However praiseworthy the motive for accepting such a trust, or however benevolent the will of the donor may be, it cannot be supported in a court of justice. A stern necessity arising out of the safety of the commonwealth forbids it That is not an odious, but it is a dangerous and unlawful species of mortmain; and a trust results to the next of kin, where there is no residuary clause.²⁰³

At the margins, then, Ruffin hinted that sympathy might affect legal doctrine. *Cannon v. Jenkins*²⁰⁴ allowed an executor to sell as estates slaves in family groups, rather than singly (where they would return greater value), because “the Court would not punish [the executor] for acting on the common sympathies of our nature unless in so doing he hath plainly injured those with whose interest he stands charged.”²⁰⁵ It usually did not, however.²⁰⁶

Ruffin’s ability to “see through” led him to understand and acknowledge slaves’ powers of reasoning as humans, though not their

199. *Id.* at 226.

200. *Id.* at 232.

201. For another opinion along these lines, see generally *State v. Williams*, 39 N.C. (4 Ired. Eq.) 15 (1845).

202. 17 N.C. (2 Dev. Eq.) 437 (1833).

203. *Id.* at 440–41. *Redmond* cited, among other precedent, *Trustees of Quaker Society of Contentnea v. Dickenson*, 12 N.C. (1 Dev.) 189 (1827), which had prohibited a trust of slaves. *Dickenson* derived in part from suspicion of religious trusts, as well as opposition to emancipation. *Id.* at 189; see also *White v. White*, 18 N.C. (1 Dev. & Bat.) 260, 268–69 (1833) (refusing to give relief to a claim that Quakers held slaves in quasi-freedom).

204. 16 N.C. (1 Dev. Eq.) 422 (1830).

205. *Id.* at 426; see also *Tarkinton v. Guyther*, 35 N.C. (13 Ired. Law) 100, 101–02 (1851).

206. See, e.g., *Griffin v. Simpson*, 33 N.C. (11 Ired. Eq.) 126, 129–30 (1850) (holding a widow accountable to her husband’s estate for money used to pay his funeral costs).

humanity.²⁰⁷ In upholding a trust for emancipation established by will that freed a testator's slave if—and only if—they agreed to leave the state, Ruffin addressed the argument that slaves should not have the legal capacity to choose between staying in slavery in North Carolina and becoming free by leaving the state. “[I]t is not true in point of fact or law that slaves have not a mental or a moral capacity to make the election to be free”²⁰⁸ Ruffin understood the difference between legal capacity and mental ability.²⁰⁹ So he was more willing to accept the freedom of choice than were courts in other states.²¹⁰

One of Ruffin's most revealing discussions concerning slavery came in the obscure of 1845 case *Waddill v. Martin*,²¹¹ which excluded slaves' property from an estate's claim.²¹² *Waddill* posed the problem of whether an executor had to collect the property owned by slaves to satisfy debts against an estate; the executor had not collected the property and a co-executor charged that he should have.²¹³ Ruffin thought that appropriate, for several reasons. First, no one had previously collected “the little crops of cotton, corn, potatoes, ground peas and the like, made by slaves by permission of their deceased owners.”²¹⁴ Second, it was desirable to allow the slaves to keep such little property.

[A]n executor is not bound to strip a poor negro of the things his master gave him, nor to take away his petty profits from a patch, with the proceeds of which the slave, with the ordinary precaution of a prudent and humane master, may be induced, and in a measure compelled, to buy those needful comforts of food and raiment, over and above the allowances of the owner, which promote his health, cheerfulness and contentment, and enhance his value. . . . [T]hese slight indulgencies are repaid by the attachment of the slave to the master and his family, by exerting his industry and honesty, and a spirit to make and save for the master as well as for himself.²¹⁵

There was a combination of universal community sentiment and economy that evoked the rule Ruffin applied.

207. See *Kissam v. Edmundson*, 36 N.C. (1 Ired. Eq.) 180, 185 (1840) (employing imagery of the court's ability to “see through”).

208. *Redding v. Long*, 57 N.C. (4 Jones. Eq.) 216, 218 (1858).

209. *Id.* at 218–19.

210. See, e.g., *McConnell v. Hardeman*, 15 Ark. 151, 154–56 (1854).

211. 38 N.C. (3 Ired. Eq.) 562 (1845).

212. *Id.* at 563–64.

213. *Id.* at 562–64.

214. *Id.* at 564.

215. *Id.* at 564–65.

And then there was one case in which Ruffin upheld—for procedural reasons—a trust for quasi-freedom. His 1833 opinion in *White v. White*²¹⁶ refused to undo a trust of slaves given to a Quaker meeting that was to keep slaves in quasi-freedom, because the settlor's heirs who would take the slaves if the trust were struck down failed to sue within the statute of limitations.²¹⁷

Ruffin's opinions involving slavery demonstrate his commitment to a well-ordered and hierarchical society.²¹⁸ Ruffin's vision left owners with extraordinary control over the people they owned, except when the state had an interest in protecting the institution of slavery from being undermined by individual slave owners.²¹⁹ In cases where individual slave owners might give their slaves too much freedom, the state had the interest, indeed obligation, to re-establish control and again impose order.²²⁰ Ruffin's opinions here are particularly valuable because of their extraordinary candor and clarity. His jurisprudential traits—of order and hierarchy through common law and statute and of considerations of utility and natural law—appear in opinions outside of slavery as well.

IV. RUFFIN'S JURISPRUDENCE MORE GENERALLY

In his opinions across the spectrum from railroads and fellow servant to private property to slavery, Ruffin worked within a framework established by moral philosophy: respect for precedent, reasoning by analogy, and reasoning based on understanding of history and an understanding of “the nature of things” as they are.²²¹ Or, as he wrote in interpreting a statute, “[a]ll the considerations, then, that can weigh with a court, the just principles for the interpretation of statutes, the authority of adjudications, and ancient writers on the law, and a regard to sound policy and good morals, concur.”²²²

216. 18 N.C. (1 Dev. & Bat.) 260 (1833).

217. *Id.* at 271. White distinguished between legal title to a slave and moral right. *Id.* at 268–69.

218. See *supra* notes 156–88 and accompanying text.

219. See *supra* notes 87–90 and accompanying text.

220. See *supra* notes 166–73.

221. Ruffin employed the phrase “nature of things” in twenty-nine opinions, perhaps most famously in *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 500, 503 (1839).

222. *Adams v. Turrentine*, 30 N.C. (8 Ired.) 147, 162 (1847).

Ruffin's opinion illustrates the moral philosophy of his era.²²³ He reasoned from precedent,²²⁴ and added considerations of expediency (utility), as informed by his understanding of history.²²⁵ He feared doing anything that would upset or unsettle society or property. He wrote often of "the nature of things" and was critical of reforms. Instead, he looked to the impact of rules on "the actual state of things."²²⁶ Ruffin referred to the pleasurable duty of following directions from the legislature, but worried that in some instances judges might be "lost in the mazes of discretion."²²⁷ Discretion was not merely personal, "whether wild or sober."²²⁸ Instead, it "must from the nature of things be confined to the cases for which provision was before made by law, or for those of a like kind."²²⁹ That is, Ruffin saw strict boundaries on judges' discretion.

One of Ruffin's most famous opinions, *Hoke v. Henderson*,²³⁰ upheld a sheriff's property right in his office.²³¹ It found the official

223. On the nature of antebellum moral philosophy, see generally MAURICE S. LEE, *SLAVERY, PHILOSOPHY, AND AMERICAN LITERATURE, 1830–1860* (Ross Posnock ed., 2005).

224. See, e.g., *Jackson v. Hampton*, 32 N.C. (10 Ired.) 579, 590 (1849) ("The precedents from time immemorial cannot be safely departed from. I own, indeed, that I think the precedents right in themselves, and that it would lead to great mischiefs to disregard them."); see also *State v. Ephraim*, 19 N.C. (2 Dev. & Bat.) 162, 166–67 (1836) ("It is . . . a bold and hazardous assumption in judges, to change and upset settled law, under the pretext that it was adopted in a state of society to which it was suitable, but that circumstances have now so varied . . . that the rule . . . ought therefore to be altered."); *Contra Green v. Cole*, 35 N.C. (13 Ired.) 425, 430 (1852).

225. See, e.g., *Scroggins v. Scroggins*, 14 N.C. (3 Dev.) 535, 540–41 (1832) (refusing divorce on grounds that it would perpetuate more divorces and thus result in more harm than it solved).

226. See, e.g., *State v. Cæsar*, 31 N.C. (9 Ired.) 391, 415 (1849) (Ruffin, J., dissenting); see also *State v. Boyce*, 32 N.C. (10 Ired.) 536, 541 (1849) (reversing conviction for keeping a "disorderly house"):

When the law tolerates such merry makings among these people, it must be expected, in the nature of things, that they will not enter into them with the quiet and composure which distinguish the gaities of a refined society, but with somewhat of that hearty and boisterous gladsomeness and loud laughs which are usually displayed in rustic life, even where the peasantry are much in advance of our negroes in the power and habit of restraining the exhibition of a keen sense of such pleasures. . . . If slaves would do nothing tending more to the corruption of their morals or to the annoyance of the whites than seeking the exhilaration of their simple music and romping dances, they might be set down as an innocent and happy class.

Id. at 541.

227. *Scroggins*, 14 N.C. (3 Dev.) at 540.

228. *Id.*

229. *Id.*

230. 15 N.C. (4 Dev.) 1 (1833).

had a constitutional right to his office, which he had held since 1806.²³² The legislature passed an act in 1832 to use an election to fill the position.²³³ *Hoke*, thus, struck down on constitutional grounds an act of the North Carolina Legislature.²³⁴ Ruffin addressed the difference between legislators and judges: legislators set policy and judges followed their instructions. That called for great deference to legislation; judges should only strike down legislation when “the repugnance between the legislative and the constitutional enactments [is] clear to the Court.”²³⁵ He contrasted the “comparatively humble” judicial function with legislation, which “ought to embrace a knowledge” of the interests of society and “a just estimate of their relative importance to individual happiness and the common weal.”²³⁶ And where legislators would consider the expediency of a measure, courts had a more limited role—to decide what rules the Constitution and legislature have laid down and to apply those rules to the parties:

To a Court, the impolicy, the injustice, the unreasonableness, the severity, the cruelty of a statute by themselves merely, are and ought to be urged in vain. The judicial function is not adequate to the application of those principles, and is not conferred for that purpose.²³⁷

Despite that limited scope for review and high burden to declare an act unconstitutional, Ruffin struck down the legislature’s removal of a sheriff after his appointment.²³⁸ *Hoke* emphasized the importance of the protection of property from even taking by the government. “The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle.”²³⁹ Ruffin explored the right of property based on the American Revolution, as well as from the North Carolina Constitution.²⁴⁰ Ruffin found that the legislature had in essence taken over the judicial function of adjudicating cases, by removing the holder of the office and mandating an election to find a replacement.²⁴¹ And he found that the holder of the office, Henderson, had a property right in

231. *Id.* at 26–28.

232. *Id.*

233. *Id.* at 3.

234. *Id.* at 26–28.

235. *Id.* at 8.

236. *Id.*

237. *Id.* at 6.

238. *Id.* at 26–28.

239. *Id.* at 12.

240. *Id.*

241. *Id.* at 12–13.

it.²⁴² While the legislature might abolish the office entirely while Henderson was performing the office, he could not be removed arbitrarily.²⁴³ For there were both public and private interests at stake in his office—the public’s interest in having the position performed well and the private interest in the salary from the office.²⁴⁴

We see again Ruffin’s deference to legislative decisions in upholding the legislature’s right to condemn property for use by a railroad in his 1837 decision in *Raleigh & Gaston Railroad v. Davis*.²⁴⁵ Ruffin placed the right of condemnation at the center of the state’s rights—“universally acknowledged” by “[w]riters upon the laws of nature and nations . . . as a right inherent in society.”²⁴⁶ Condemnation was permitted for a public use, which he defined as something “of a nature calculated to promote the general welfare” or “necessary to the common convenience,” to which the public will have access.²⁴⁷ Ruffin did not want to engage in debate over the exact origin of the right and the theoretical justifications in the transcendent right of sovereigns. For, “practically . . . its existence in every state is indispensable and incontestable.”²⁴⁸ The legislature had the power to order condemnation; the judiciary’s role was merely to make sure that just compensation was paid. For he saw no interference with the great rights of property. And he placed such confidence in legislators that he thought it unlikely—in fact, he found it only “with difficulty conceived to be possible”—that they would take property without providing just compensation.²⁴⁹ Property rights, Ruffin believed, “have never been more respected than in [this] country, where it is carried to the extent, perhaps, injurious, of successfully opposing great political reforms”²⁵⁰ And he concluded with his confidence in the role of private businesses:

[a]n immense and beneficial revolution [that] has been brought about in modern times, by engaging individual enterprise, industry, and economy, in the execution of public works of internal improvement. The general management has been left to individuals, whose private interests prompt them to conduct it beneficially to the public; but it is not entirely confided to

242. *Id.* at 13, 20.

243. *Id.* at 26.

244. *Id.* at 20–21.

245. 19 N.C. (2 Dev. & Bat.) 451 (1837).

246. *Id.* at 455–56.

247. *Id.* at 456.

248. *Id.*

249. *Id.* at 461.

250. *Id.* at 463.

them. From the nature of their undertaking and the character of the work, they are under sufficient responsibilities to insure the construction and preservation of the work, which is the great object of the government. The public interest and control are neither destroyed nor suspended.²⁵¹

Because it was a constitutional opinion—and one on which there was little constraining precedent—we can see Ruffin's world of deference to the legislature and his belief in the market to provide economic progress.²⁵²

On rare occasions, Ruffin might wield treatises to support the theory underlying a point of law; however, he matched theoretical discussions with practical experience. He was skeptical of areas in which reasonable minds might differ—places where law and morality did not admit of a ready answer. Thus, in rejecting a claim for divorce, Ruffin thought judges particularly lost “when the subject is one upon which it is known that specialists and moralists have much disputed, differing as to the policy of divorces and their influence upon the parties themselves, during their union, and after their separation.”²⁵³ And this concern for divergent opinions led to further skepticism of natural law as a basis for relief. For he questioned those rights in *Raleigh and Gaston Railroad* by observing that

251. *Id.* at 469.

252. One might even test the various hypotheses about the connections of slavery to capitalism through Ruffin's opinions. The debate about the relationship between capitalism and antislavery sentiments starts from the understanding that as capitalism advanced, so did antislavery sentiment. One explanation is that as people became more understanding of their connections to others through the market, they also became more sympathetic to the plights of others. See Thomas Haskell, *Capitalism and the Origins of the Humanitarian Responsibility*, in *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION* 107, 107 (Thomas Bender ed., 1992). Haskell's positive view of capitalism runs counter to, perhaps, the majority of sentiment unleashed through capitalism. That is, while antislavery sentiment grew along side the market, so did sentiments regarding workers that were not particularly solicitous of their well-being. Ruffin's opinions disclose a broad liberalism—each person bears her own costs—alongside a focus on certain aspects of the public good at the expense of private rights. See, e.g., *Heathcock v. Pennington*, 33 N.C. (11 Ired.) 640, 646 (1850); *Parham v. Blackwelder*, 30 N.C. (8 Ired.) 446, 450 (1848); *Mayho v. Sears*, 25 N.C. (3 Ired.) 224, 228 (1842). See generally *Redmond v. Coffin*, 17 N.C. (2 Dev. Eq.) 437 (1833) (holding the executor liable for the value of slaves freed by an illegal trust); *Scroggins v. Scroggins*, 14 N.C. (3 Dev.) 535 (1832) (refusing to grant a divorce). Ruffin's slavery jurisprudence highlights the connections of the market's emphasis on profit, makes individuals bear their own losses, and promotes public order over individual rights. While capitalism may have led some to develop humanitarian sentiments, it led others (and perhaps the majority) to an increasing individualism. There is, thus, a question of historical interpretation about the market and proslavery thought. That problem was cut short, obviously, by the Civil War.

253. *Scroggins*, 14 N.C. (3 Dev.) at 540–41.

the sense of right and wrong varies so much in different individuals, and the principles of what is called natural justice are so uncertain, that they cannot be referred to as a sure standard of constitutional power. It is to the Constitution itself we must look, then, and not merely to its supposed general complexion.²⁵⁴

Besides cases where corporations' and individuals' property rights clashed, Ruffin dealt with the interest of families and the state. Divorce implicated many of the same issues—of utility, of the balancing of individuals' rights and the state's considerations—that appeared in slavery cases. In fact, *Scroggins v. Scroggins*,²⁵⁵ where Ruffin denied a request for a divorce,²⁵⁶ parallels *State v. Mann* in many ways. He quite simply (and coldly, as Stowe would say), tells people to bear their burden and learn to like it.²⁵⁷ *Scroggins*—where a husband sought divorce when it became apparent that his wife's child was part African American²⁵⁸—presents an important parallel to *Mann* in that it takes the world as it is and expects individuals to bear a burden so that *overall* a better result emerges. For in *Scroggins*, Ruffin denies a divorce on the grounds that if divorces become too easy to obtain, that will undermine marriage and affect society more generally:

If the consequence of dissolving the union entirely stopped with those parties, and conferred on them peace instead of the pain they suffered, it were but cruelty not to unloose the chain. But the knowledge that when this last stage of distress arrived, it would of itself bring relief, would precipitate its approach. Slight differences would grow into lasting dissensions, and a single act of unfaithfulness could easily be converted into habitual adultery. These evils are, in a great measure, avoided by the principle of our law, which declares the marriage contract to make a perfect union between the parties²⁵⁹

For Ruffin reasoned,

We reconcile ourselves to what is inevitable. Experience finds pain more tolerable than it was expected to be, and habit makes even fetters light. Exertion, when known to be useless, is

254. *Raleigh & Gaston R.R.*, 19 N.C. (2 Dev. & Bat.) at 459–60.

255. 14 N.C. (3 Dev.) 535 (1832).

256. *Scroggins*, 14 N.C. (3 Dev.) at 547.

257. *Id.* at 545–47.

258. *Id.* at 539.

259. *Id.* at 541. But the Court allowed, in the same term, divorce for interracial marriage. See *Barden v. Barden*, 14 N.C. (3 Dev.) 548, 550 (1832).

unassayed, though the struggle might be violent if by possibility it could be successful. . . . Our restless dispositions and capricious tastes and tempers require these checks and restraints. Why shall they be removed? Why give way to those very propensities in our nature, which it is in our interest to repress? Is it not wiser, better, kinder to the parties themselves and their issue to declare the engagement to be unsusceptible of modification . . . ?²⁶⁰

Economic growth—known at the time as improvement—was critical to his world view; he opposed change on the basis of its likely effect on expectations or the economy. At other times, he wrote of the legislature's attempts to promote economic growth. He was, it seems, more conservative on alteration of the common law than some other judges. Concerns with individualism and property rights were central to his thinking.

Ruffin noted in *Morrison v. Connelly*,²⁶¹ the second case he decided as a justice, the limited role for judges to take account of changes in circumstances in adapting the law.²⁶² *Morrison* dealt with conflicting claims to land.²⁶³ Regarding the statute of limitations for adverse possession, Ruffin observed that

[a] century ago the period of seven years was probably wisely fixed on. The state of the country required that titles should be settled by a short possession; and wild lands being abundant, not much was lost to the true owner. But things have since much altered. And it is likely that the conviction of that led the Courts to create the doctrine of *color of title*, with the view of rendering the statute less effectual and injurious. It is to be doubted whether the remedy is not the greater of the two evils.²⁶⁴

260. *Scroggins*, 14 N.C. (3 Dev.) at 542. Ruffin concluded with an invitation to the legislature to give further guidance:

The full discussion thus entered into has been deemed due to the legislature and the court itself, that the principles which will guide the Court may be plainly known. It is proper that they should be placed before the legislature, that if thought wrong by them, the Court may be spared from running further into error by having an authoritative guide to future action in a rule prescribed definitely by the legislature itself.

Id. at 547.

261. 13 N.C. (2 Dev.) 233 (1829).

262. *Morrison*, 13 N.C. (2 Dev.) at 237–39.

263. *Id.* at 238.

264. *Id.* (emphasis added).

In *Tate v. Conner*,²⁶⁵ Ruffin relied on basic equity principles:

[E]quity itself respects time when the trust is not express, because it is difficult to ascertain the truth of old transactions, and therefore parties capable of acting shall not be allowed to impose that difficulty upon courts; and because acquiescence for a long period, according to the ordinary experience of the actions of mankind, raises a presumption of performance or satisfaction. . . . The party who wishes to repel the effect of time must furnish the means of doing [so].²⁶⁶

In many cases, Ruffin looked to practicalities to cut off further claims:

[t]ime is evidence, from acquiescence in the exercise by another of an adverse right, of the grant of that right. But it is further respected upon a principle of public policy, as a bar to the investigation of that right, because the truth cannot be discovered. . . . Transactions of that period are seen by two uncertain and obscure a twilight to be sufficiently clear for judicial action.²⁶⁷

Several opinions on mills illustrate Ruffin's deference to the legislature, as well as subordination of private rights to public rights (at least when there was adequate compensation). *Eason v. Perkins*²⁶⁸ denied an injunction when a neighbor claimed that a mill in existence for decades had created a private nuisance (by throwing off "vapours destructive").²⁶⁹ Ruffin permitted only an injunction for a private nuisance when there was "a clear right long previously enjoyed" or if there would be "irreparable mischief, which makes immediate action a duty founded on imperious necessity."²⁷⁰ In *Eason*, however, there was only "a single individual to weigh against public utility."²⁷¹ Moreover, the legislature had authorized the construction of mills unless the mill created a public nuisance.²⁷²

In 1836 in *Pugh v. Wheeler*,²⁷³ Ruffin upheld the right of upstream mill owners to preserve their right to use water,

265. 17 N.C. (2 Dev. Eq.) 224 (1832).

266. *Tate*, 17 N.C. (2 Dev. Eq.) at 226.

267. *Villines v. Norfleet*, 17 N.C. (2 Dev. Eq.) 167, 172-73 (1831) (emphasis added).

268. 17 N.C. (2 Dev. Eq.) 38 (1831).

269. *Eason*, 17 N.C. (2 Dev. Eq.) at 41.

270. *Id.* at 40.

271. *Id.* at 41.

272. 17 N.C. (2 Dev. Eq.) 38 (1831).

273. 19 N.C. (2 Dev. & Bat.) 50 (1836).

independent of previous, adverse uses by downstream owners.²⁷⁴ He, thus, entered the contentious area of water rights and concluded that prior owners could not preempt the rights of subsequent users.²⁷⁵ For it was a “clear doctrine of the common law” that the owners of property through which water flowed “may apply it to the purposes of profit.”²⁷⁶

Next, in *Adams v. Turrentine*,²⁷⁷ Ruffin interpreted the liability of a jailor to a creditor for allowing a debtor to escape from prison.²⁷⁸ In the face of an argument that English precedents on liability for allowing prisoners to escape should not be followed because the United States is less protective of creditors’ rights than England, Ruffin acknowledged that “[t]he world is making an experiment how far the morals of mankind can be preserved, while persons shall be exempted from bodily restraint or punishment for such delinquencies. Our Legislature . . . has . . . ventured . . . on this experiment.”²⁷⁹ Ruffin countered that creditors’ rights are more important in a republican government than a monarchy, “for [a republic’s] stability and wholesome operation depend more essentially on the virtue of the people, and nothing is more speedily or certainly destructive of private and of public virtue than to relax the obligation of contracts and render the rights of creditors insecure.”²⁸⁰ Further, when Ruffin overturned a capital conviction based on improper jury deliberations, he concluded:

One of the duties of Judges is to hand down the deposit of the law as they have received it, without addition, diminution or change. It is a duty the faithful performance of which is exceedingly difficult. They must refrain from all tempting novelties, listen to no suggestion of expediency, give in to no plausible theories, and submit to be deemed old-fashioned and bigoted formalists, when all around are running on in the supposed career of liberal improvement. . . . A pause is thus created for thought amid the hurry of action. Stability is given to the public institutions, and, above all, there is that recurrence

274. *Pugh*, 19 N.C. (2 Dev. & Bat.) at 54–56.

275. *Id.*

276. *Id.* at 54.

277. 30 N.C. (8 Ired.) 147 (1847).

278. *Id.* at 149–553.

279. *Id.* at 157.

280. *Id.*

to fundamental principles which is enjoined in our Constitution and is essential for the preservation of liberty and order.²⁸¹

Some sense of Ruffin's world or order and hierarchy, while also promoting economic growth, appears in contrast with the jurisprudential world of just a generation before. Spencer Roane—Ruffin's maternal cousin—emerged from an Enlightenment tradition that aspired to end slavery and that interpreted property law to end vestiges of feudalism.²⁸² Southern jurists expressed concern for slaves.

281. *State v. Miller*, 18 N.C. (1 Dev. & Bat.) 500, 526 (1836). As Ruffin wrote in discussion of a bond:

It was of such consequence, and the rule is likely to produce such mischief, that we have been willing to re-examine it and override it if possible. But that case stands upon ground that cannot be shaken. It is the gross injustice that is done by the rule which makes one hesitate, not the doubt of the law.

Justices of Cumberland v. Armstrong, 14 N.C. (3 Dev.) 284, 287 (1831).

In other cases, Ruffin parsed wills and precedents closely, drawing upon cases, reason, and "slight and verbal" clues. *Cooper v. Pridgeon*, 17 N.C. (2 Dev. Eq.) 98, 100 (1831). He found in the case of one will, for instance, that granting a legacy to a daughter "if my said daughter arrive[s] to the age of 18 years" was a somewhat ambiguous devise that should vest absolutely in the testator's daughter. *Id.* at 99. Ruffin looked to the prevailing circumstances to "govern" him and asked, rather matter-of-factly, would a father intend to disinherit his infant daughter? *Id.*; see also *Beall v. Darden*, 39 N.C. (4 Ired. Eq.) 76, 82 (1845) (interpreting executor's obligations in light of "plain justice and plain policy"); *Justice v. Scott*, 39 N.C. (4 Ired. Eq.) 108, 114–17 (1845) (distinguishing deeds and testamentary twists); *Green v. Collins*, 28 N.C. (6 Ired.) 139, 143–44 (1845) (construing will as creating a trust with surviving spouse as beneficiary); *Cox v. Hogg*, 17 N.C. (2 Dev. Eq.) 121, 136–37 (1831) (interpreting a will that disinherited some as vested immediately in those who were included in the will). He rejected an attempt to establish what we now call a spend-thrift trust in *Mebane v. Mebane*:

[By] the use of no terms or art can property be given to a man, or to another for him, so that he may continue to enjoy it, or derive any benefit from it, as the interest, or his maintenance thereout or the like, and at the same time defy his creditors and deny them satisfaction thereout. The thing is impossible.

39 N.C. (4 Ired. Eq.) 131, 136 (1845).

In other instances, Ruffin sought to establish rules for open dealings with creditors and debtors. See *Hawkins v. Alston*, 39 N.C. (4 Ired. Eq.) 137, 151 (1845) ("These facts . . . raise a conclusive presumption in a mind, at all familiar with real fair dealings among mankind, that the conveyance was made for the purpose of turning over the debtor's property without an adequate consideration . . ."); *Palmer v. Clarke*, 13 N.C. (2 Dev.) 354, 357 (1830) (causing a creditor who places a lien on property but does not ask a sheriff to execute on it to lose priority, Ruffin stated "the law does not encourage all men to try experiments, how long they may indulge their debtors in safety to themselves, when in so doing they give them a delusive credit, at the expense of others").

282. See HUEBNER, *supra* note 67, at 10–39. If anything, Huebner may underestimate Roane's intellectual connections to the Enlightenment, as is illustrated in his dissent in *Pleasants v. Pleasants*, 6 Va. (2 Call.) 319, 340 (1800) (Huebner, J., dissenting) (questioning whether the doctrine of perpetuities can be applied to "cases in which human liberty is challenged").

In an earlier era, they had even embraced enlightenment ideas of freedom. For example, St. George Tucker had taken steps to make emancipation easier and proposed a gradual abolition plan.²⁸³ Ruffin's sentiments were more in keeping with Chancellor Harper of South Carolina—and other moral philosophers like Thomas Dew, Albert Taylor Bledsoe, George Frederick Holmes, and William Gilmore Simms—though he wrote before all of them.²⁸⁴

Even in Ruffin's own place and time, there were alternative visions of slavery. A colleague and friend on the North Carolina Supreme Court, William A. Gaston, spoke against slavery in a speech at the University of North Carolina in 1832.²⁸⁵ Gaston told the students:

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 enterprise—it is fatal to economy and providence—it discourages skill—impairs our strength as a community, and poisons morals at the fountain head. How this evil is to be

283. See *Miller*, 18 N.C. (1 Dev. & Bat.) 507–08 (“It is obvious, upon a slight acquaintance with the history of the law, that there has been, in different ages, a great difference in the degree of strictness practiced towards jurors.”); Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157, 1164–71 (2006).

284. Charles Elliott's SINFULNESS OF AMERICAN SLAVERY, *supra* note 59, at 32, quoted extensively from WHITEMARSH B. SEABROOK, AN ESSAY ON THE MANAGEMENT OF SLAVES, AND ESPECIALLY, ON THEIR RELIGIOUS INSTRUCTION, READ BEFORE THE AGRICULTURAL SOCIETY OF ST. JOHN'S COLLETON (Charleston, S.C., A.E. Miller 1834). Seabrook employed an argument similar to Ruffin's—the authority of the master must be absolute in the nature of things:

As slavery exists in South-Carolina, the actions of the citizen should rigidly conform to that state of things. If abstract opinions of the rights of man are allowed in any instance to modify the police system of a plantation, the authority of the master, and the value of his estate, will be as certainly impaired, as that the peace of the blacks themselves will be injuriously affected. Whoever believes slavery to be immoral or illegal, and, under that belief, frames a code of laws for the government of his people, is practically an enemy to the State.

SEABROOK, *supra*, at 6.

Ruffin fits with the context of his education at Princeton in the late eighteenth century and of Whig thought in the early nineteenth century. See E. BROOKS HOLIFIELD, *THE GENTLEMAN THEOLOGIAN: AMERICAN THEOLOGY IN SOUTHERN CULTURE 1795–1860*, at 118–19 (1978); BRUCE KUKLICK, *CHURCHMAN AND PHILOSOPHERS: FROM JONATHAN EDWARDS TO JOHN DEWEY* 69–72 (1985).

285. For a transcript of the speech, see WILLIAM GASTON, ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES AT CHAPEL HILL, June 20, 1832, at 14 (Raleigh, N.C., Jos. Gales & Son 1832).

encountered, how subdued, is indeed a difficult and delicate enquiry²⁸⁶

Gaston had, moreover, advised at least one client how to use a trust to free slaves by will.²⁸⁷ Ruffin was even further from other members of the generation before him, like George Wythe, who employed a language of republicanism as well as of freedom.²⁸⁸ Where others might see some dissonance in talk of freedom and of the practice of slavery in the Revolutionary era, by Ruffin's time it was well accepted that slavery was part of the promotion of "freedom" among white Southerners.²⁸⁹

For a fuller picture of that moral philosophy we can turn to Ruffin's contemporary William and Mary President Thomas Roderick Dew, who wrote a widely read defense of slavery in the early 1830s.²⁹⁰ Other treatises like Thomas Cobb's *An Inquiry into the*

286. *Id.* Hinton Helper commented of Gaston's address in *The Impending Crisis of the South* which he evidently had not seen, that Gaston "was an avowed abolitionist." Helper went on to ask:

Where is that address? Has it been suppressed by the oligarchy? The fact that slaveholders have, from time to time, made strenuous efforts to expunge the sentiments of freedom which now adorn the works of nobler men than the noble Gaston, may, perhaps, fully account for the oblivious state into which his patriotic address seems to have fallen.

HINTON ROWAN HELPER, *THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT* 225 (New York, A.B. Burdick 1860). A subsequent edition quoted Gaston's speech and an 1830 oration by North Carolina lawyer Benjamin Swaim. See HINTON ROWAN HELPER, *COMPENDIUM OF THE IMPENDING CRISIS* 108 (New York, A.B. Burdick 1860). Representative Thomas Clingman of North Carolina spoke in favor of Gaston on December 20, 1847.

287. In *Green v. Lane*, 43 N.C. (8 Ired. Eq.) 70 (1851), Ruffin struck down an attempted quasi-emancipation. *Id.* at 70, 78. Judge (then lawyer) Gaston had counseled the testator on how to emancipate his slaves; however, the testator subsequently altered the will to change from an out-of-state emancipation (which would have been valid) to an invalid form of quasi-slavery. *Id.* at 75–76.

288. Wythe Holt, *George Wythe: Early Modern Judge*, 58 ALA. L. REV. 1009, 1025–38 (2007).

289. See, e.g., Abel Upshur, *Domestic Slavery*, 5 S. LITERARY MESSENGER 667, 678–79 (1839).

290. See Thomas R. Dew, *Professor Dew on Slavery*, in *THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES* 287, 287 (Philadelphia, Lippincott, Grambo, & Co. 1853) (reprinting Dew's review of the debate in the Virginia Legislature, 1831–1832). For a description of the key tenets of antebellum moral philosophy, see generally JASPER ADAMS, *ELEMENTS OF MORAL PHILOSOPHY* (Cambridge, Folsom, Wells, & Thurston 1837); DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 9, 16, 28–29, 32 (1979); WILSON SMITH, *PROFESSORS AND PUBLIC ETHICS: STUDIES OF NORTHERN MORAL PHILOSOPHERS BEFORE THE CIVIL WAR* (1956). For the leading works in moral philosophy in the old south, see generally ALBERT TAYLOR BLEDSOE, *AN ESSAY ON*

Law of Negro Slavery in the United States link moral philosophy with judicial action.²⁹¹

To summarize, the core elements of Ruffin's philosophy were a commitment to take the world as it is, a natural rights view of property, and liberalism.²⁹² His opinions give us some sense of why

LIBERTY AND SLAVERY (Philadelphia, J.B. Lippincott & Co. 1856); JOHN LEADLEY DAGG, *THE ELEMENTS OF MORAL SCIENCE* (New York, Sheldon & Co. 1860) (1859); R.H. RIVERS, *ELEMENTS OF MORAL PHILOSOPHY* (Nashville, Tenn., S. Methodist Publ'g House 1860); WILLIAM A. SMITH, *LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY AS EXHIBITED IN THE UNITED STATES: WITH THE DUTIES OF MASTERS TO SLAVES* (Nashville, Tenn., Stevenson & Evans 1850). Francis Wayland's college text maintained its popularity despite Wayland's growing antislavery sentiments. FRANCIS WAYLAND, *THE ELEMENTS OF MORAL SCIENCE* (Boston, Gould & Lincoln 1862) (1835); see also Alfred L. Brophy, *Considering William and Mary's History with Slavery: The Case of President Thomas R. Dew*, 16 WM. & MARY BILL RTS. J. 1091–1139 (2008) (discussing Dew's intellectual contributions to proslavery thought).

291. THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES* clxix–clxxxiii (Philadelphia, T. & J.W. Johnson & Co. 1858).

292. We can use Ruffin to test historians' theories about how law functioned. Primary among the paradigms is Morton Horwitz's theory that there emerged an instrumental conception of law, in which judges self-consciously remade law to promote economic growth. HORWITZ, *supra* note 64, at 9–32. There are important historical parallels to those arguments, including William Goodell's *American Slave Code in Theory and Practice*, which presents a detailed critique of the way that slave law had emerged to promote the interests of slave owners. See WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 287–89, 353–89 (New York, Negro Universities Press 1968) (1853). One finds, indeed, some important parallels between how Goodell and proslavery treatise authors, like Thomas R.R. Cobb, view the evolution and goals of slave law. See COBB, *supra* note 291, *passim*.

Horwitz's picture of slavery is focused largely on the northeast and, therefore, may have a somewhat different application in the south. Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663, 678 (1982) (“Most of Horwitz's research into changing legal doctrine demonstrates that the new rules attempted to favor . . . capitalist growth-oriented interests by altering traditional notions of liability so as apparently to reallocate much of the cost of enterprise to others . . .”); Stanley, *supra* note 64, at 1127–28, 1130 (discussing Horwitz's limited use of cases involving slavery, but at the same time pointing out that Horwitz relies on a number of southern cases and its relevance to subsequent research on “the problem of reconciling a new order of capitalist commodity relations with an older order in which social relations of dominion and subordination were the rule rather than the exception”).

Other accounts include MILLER, *supra* note 66, at 99–206 (emphasizing both intellectual elegance of law and its connections to romanticism). Recently, William Fisher, joined by historians of Jacksonian America more generally, emphasized political ideology as a way of explaining differences in reasoning style of judges. See William W. Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760–1860*, 39 EMORY L. J. 65, 71–75 (1990). Similarly, G. Edward White has interpreted one kind of ideology—republicanism—as central to the Marshall Court. 3–4 G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835*, at 11–75 (1988). See generally Stephen A. Siegel, *The Marshall Court and Republicanism*, 67 TEX. L. REV. 903 (1988) (discussing White's vision of republicanism).

such a man could think as he did: he thought in terms of a moral philosophy that emphasized separation of considerations of individual humanity from larger considerations of duty to law and of considerations of utility to the society as a whole. Those values were central to political and legal discussions. And the dominant moral philosophy of the 1800s concluded that slavery was sanctioned by long-term use in history and by present necessity. Senator John Bell of Tennessee, who ran for President in 1860, said during a debate over the Fugitive Slave Act of 1850 that the “three millions of the African race, whose labor is subject to the will of masters,” could not be freed, even if their owners wished it, without “destruction alike to the interests and welfare of both master and slave.”²⁹³

V. JUDICIAL OPINIONS AS MONUMENTS

The antebellum era was replete with monuments. For example, there are the Bunker Hill Monument, the Washington Monument, and much talk of funeral monuments²⁹⁴ at cemeteries throughout the

A jurisprudential-biographical sketch of Ruffin permits us to see how all of those considerations fit together. We can see someone concerned with the transition to a market economy, amidst technological and moral progression. Ruffin does not quite fit any of those models. However, he is interested in deference to legislatures, in taking the world as it is. He understood that he would be viewed as “old fashioned” but he embraced that. *State v. Miller*, 18 N.C. (1 Dev. & Bat.) 500, 526 (1836).

This Article, then, is part of an emerging synthesis of antebellum legal thought that emphasizes the ways that the common law is rooted in tradition, especially respect for property rights and accepting of the distribution of wealth and power, while accommodating the expanding market economy and the needs of the community.

293. CONG. GLOBE, 31st Cong., 1st Sess. App. 1106 (Aug. 14, 1850).

294. *See, e.g.*, *Cleland v. Waters*, 19 Ga. 35, 54 (1855); *Fink v. Fink*, 12 La. Ann. 301, 301, 306 (1857); *Succession of Franklin*, 7 La. Ann. 395, 440 (1852); *Lund v. Lund*, 41 N.H. 355, 358–59, 362–63 (1860); *Tuttle v. Robinson*, 33 N.H. 104, 117 (1856); *Meeker v. Boylan*, 28 N.J.L. 274, 350 (1860) (noting that the first item of testator’s will is an order “to erect a suitable monument to my memory”); *Burr’s Ex’rs v. Smith*, 7 Vt. 241, 241 (1835). Monuments on the land defined its boundaries. *See, e.g.*, *Brown v. Allen*, 43 Me. 590, 597–98 (1857) (“[I]f parties, after the conveyance, erect monuments, the monuments control the description.”); *Kellogg v. Smith*, 61 Mass. (1 Cush.) 375, 376–78 (1851); *Icehour v. Rives*, 32 N.C. (10 Ired.) 256, 256 (1849); *Literacy Fund v. Clark*, 31 N.C. (9 Ired.) 58, 59 (1848) (“[T]he mathematical calls in a deed must give way to those for visible objects capable of being identified; as, for example, marked trees, and, with yet more reason, natural boundaries, as they are called, such as rivers or other streams, mountains, rocks, or other enduring monuments.”); *Adams v. Turrentine*, 30 N.C. (8 Ired.) 147, 157 (1847) (“The statute now under consideration is, on the contrary, an honorable monument to the purpose of sustaining the modes derived from our forefathers of enforcing the satisfaction of recoveries by judgment.”). Of course, monuments might be odious to equality, for they might preserve wealth and prestige. *See Warner & Roy v. Beers*, 23 Wend. 103, 128–29 (N.Y. 1840). Still, monuments were important, for memories might fade. *Cutts v. King*, 5 Me. 482, 487 (1829).

country.²⁹⁵ The monuments Judge Thomas Ruffin left us are his judicial opinions. So Ruffin's jurisprudential legacy is part of what we remember when we name a building after him. Part of the calculation of what we are to make of a building named after him requires us to assess how we view Ruffin.

At the time, jurists understood the opinions as landmarks. Timothy Walker told a graduating class at the Cincinnati College's Law School of the changes in law at the time: "Questions are now agitated, which may shake its deepest foundations Well tried opinions are paling before new lights. Vested rights are trembling before false doctrines. Ancient landmarks are swept away by the rushing torrent of innovation."²⁹⁶ Some parts of the federal law, reformers wrote at the time, are so well entrenched that they "have become landmarks of property, and cannot be disturbed."²⁹⁷ Or, as Justice Johnson wrote in *Green v. Biddle*,²⁹⁸ "I am groping my way through a labyrinth, trying to lay hold of sensible objects to guide me."²⁹⁹

In a tribute to Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court, one justice spoke of Shaw's fame:

His fame will not be evanescent. The enduring monuments of his judicial learning, his intellectual grasp, his sound judgment, and his unceasing labor, will be found in the published reports of the judicial decisions of this court. To these he will be found to have contributed to an amount much beyond any one of his associates, far more than his illustrious predecessors, Parsons and Parker. . . . [O]ur late venerable chief has had the singular fortune of a judicial life protracted to thirty years, continuing in his full vigor of mind and entire capacity for the duties of his office; and the results of his labors are to be found in forty nine already published volumes, to which will soon be added seven more to complete the series.³⁰⁰

295. See, e.g., JOSEPH STORY, AN ADDRESS DELIVERED ON THE DEDICATION OF THE CEMETERY AT MOUNT AUBURN, SEPTEMBER 24, 1831 (Cambridge, Joseph T. & Edward Buckingham 1831).

296. Timothy Walker, *Advice to Law Students*, 1 W.L.J. 481, 482 (1844).

297. *Bosley v. Wright*, 55 U.S. (14 How.) 390, 397 (1853).

298. 21 U.S. (8 Wheat.) 1 (1823).

299. *Id.* at 101. Other cases spoke of judicial opinions as monuments as well. See, e.g., *Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 415 (1840) ("Whether that case, standing solitary and alone, shall stand in its glory or its ruins, a judicial monument, or a warning beacon, is not dependent on any opinion . . .").

300. *In re Opinion of the Justices*, 81 Mass. 599, 600-01 (1861).

The Missouri Supreme Court wrote of Blackstone's *Commentaries* as monuments in the 1834 slavery case, *Marguerite v. Chouteau*.³⁰¹

Mr. Justice Blackstone . . . tells us that the monuments and evidences of the legal customs of England are contained in the Records of the several Courts of Justice, in books of reports and judicial decisions, and in the treaties of the learned sages of the profession, preserved and handed down to us from the highest antiquity.³⁰²

At other times, lawyers used monuments to slavery as evidence of slavery's validity and ubiquity:

If it be one of those just and moral precepts and injunctions, which are discoverable by the light of reason, that no man may make his fellow-being his slave, it is one of those precepts, or injunctions, which every man, and every community, have interpreted and applied for themselves. Whatever the precept may be, by whomsoever, and wheresoever pronounced, it has always encountered the fact, that mankind have always been divided into masters and slaves. Whatever changes the world and society have undergone in other respects, thus far it has undergone none in this; excepting in some few communities, where slavery has ceased. This lamented Africa, to which we are now called upon to make retribution on claims, which have been accumulating for ages, if she was the first, in time, in arts, in science, and refinement (which may well be doubted), was also the first to show the division of mankind into master and slave. The monuments of northern Africa, which have survived all history and tradition, prove nothing so distinctly as their own antiquity, and that they were raised by the toil of slaves. The same distinction is found among Jews and Gentiles; among Greeks, and barbarians; among Romans, and strangers.³⁰³

Judicial opinions, in short, served as intellectual monuments for the future.³⁰⁴

301. 3 Mo. 540 (1834).

302. *Id.* at 560 (internal citation omitted) (citing page sixty-three of the first volume of his commentaries).

303. *U.S. v. La Jeune Eugenie*, 26 F. Cas. 832, 836 (C.C. Mass. 1822) (No. 15551).

304. See *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 140 (1795) (writing of monuments, "progress of inconceivable difficulty, settled in the dominions of the Emperor of China, who hospitably received them, and erected a monument on the spot, to commemorate the event. *Col. Mag.* for Feb. 1788."); *Warner v. Commonwealth*, 4 Va. (2 Va. Cas.) 95, 103 (1817) ("There is little reason to doubt, but that in all civilized States, some written monument is preserved of all their important Officers, whether Judicial, Executive, or Ecclesiastical. But that the case is so, cannot be Judicially known to a Foreign Court

Precedent formed intellectual monuments—but there were also physical monuments. The Ruffin monuments—in judicial opinions and in stone on the face of Ruffin Hall—represent the separation of law from politics. He is remembered outside of the context of law as an ancient, venerable man—if he is remembered at all.³⁰⁵ Dean Roscoe Pound included Ruffin on his list of the best judges in American history in his 1938 book *The Formative Era of American Law*, and later Ruffin appeared in Bernard Schwartz's *Main Currents in America's Legal Thought*.³⁰⁶ He is remembered in law as an expert legal mind. Ruffin may have also been antislavery in private, if we believe Stowe's characterization.³⁰⁷ Indeed, given how important *State v. Mann* is in exposing the system of slavery, we might think of him as an antislavery judge who undermined slavery with what appears to be a proslavery opinion. Such has often been said about Justice Joseph Story's opinion in *Prigg v. Pennsylvania*.³⁰⁸ Story's opinion there was perhaps slightly more plausibly antislavery, because it limited states' power to support slavery even as it upheld the Fugitive Slave Act of 1793.³⁰⁹ Nevertheless, as Barbara Holden-Smith has effectively shown, there is little reason to think Story was antislavery.³¹⁰

Nevertheless, we owe Ruffin a great deal for having made the abolitionists' case easier and quite probably, for contributing to jurisprudence as well.³¹¹ Not only did opinions like *State v. Mann* provide the substantive evidence of the inhumanity of slavery but they also taught lessons about the sources of law and the moral

without proof. Much less can it be known, or assumed, that these monuments are open to, or that authenticated copies thereof can be had by, a stranger . . .").

305. In a sketch that a lawyer prepared of Judge Ruffin—commenting on Ruffin's birth in Virginia—he wrote that “Napoleon was born in Corsica, but France, the scene of his glory, always claimed him as her son.” WHEELER, *supra* note 1, at 20. Thus, Ruffin was remembered for his contributions to law, though not for *State v. Mann*.

306. BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 243–51 (1993) (characterizing Ruffin as judge who wrote in the “grand style”).

307. See *supra* notes 27–41 and accompanying text (discussing Stowe's characterization of Ruffin in both *A KEY TO UNCLE TOM'S CABIN* and *DRED: A TALE OF THE GREAT DISMAL SWAMP*).

308. James Boyd White, *Constructing a Constitution: “Original Intention” in The Slave Cases*, 47 MD. L. REV. 239, 263 (1992).

309. *Id.*

310. See generally Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L. J. 605 (1993) (characterizing the decision as proslavery); Barbara Holden-Smith, *Lords of Loom, Lash, & Law: Justice Story, Slave, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1091 (1993) (“Story's antislavery reputation is seriously overblown.”).

311. For when William Goodell wrote *The American Slave Code in Theory and Practice* in 1853, he drew frequently upon reported cases. GOODELL, *supra* note 61, at 90–92 (relying upon cases to depict slaves' lack of property rights).

calculations judges employed. They conveyed the pragmatic considerations that laid the groundwork for post-war critique of law. One looking for the intellectual antecedents of Holmes's pragmatism or Llewellyn's realism might find it in the vibrant antislavery writings of Goodell, Theodore Dwight Weld's *American Slavery As It Is*,³¹² and in proslavery legal thought as well.³¹³ There is much to be debated about where realism came from; it is at least plausible that it derives from Holmes, who in turn descended from the Transcendentalists and abolitionists who studied the slave law and its correlation with Southern culture.³¹⁴ Some have characterized formalism as the successor to abolitionist thought, which in one strain retreated to a mechanistic interpretation of the Constitution.³¹⁵ However, we see in antislavery literature an engagement with the ways that slave law reflected attitudes—and how the slave law related to how the slave system worked.

There were, to be sure, people who saw inhumanity in the slave code. William Goodell wondered how

the wise legislator, civilian, or jurist, [could] not see and condemn, in the Slave code, the opprobrium of legislation, the

312. THEODORE DWIGHT WELD, *AMERICAN SLAVERY AS IT IS: A TESTIMONY OF A THOUSAND WITNESSES* (New York, American Anti-Slavery Society 1839).

313. See, e.g., COBB, *supra* note 291, at clxix–clxxiii (describing the abolition of slavery in the United States); GEORGE S. SAWYER, *SOUTHERN INSTITUTES: OR, AN INQUIRY INTO THE ORIGIN AND EARLY PREVALENCE OF SLAVERY AND THE SLAVE TRADE* 293–332 (Philadelphia, J. Lippincott 1859); Alfred L. Brophy, *Utility, History, and the Rule of Law: The Fugitive Slave Act of 1850 in Antebellum Jurisprudence*, in *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF MORTON J. HORWITZ* 109, 113–22 (Alfred L. Brophy & Daniel W. Hamilton eds., 2009). One might also tie those treatises together with religious proslavery works, such as HOWELL COBB, *A SCRIPTURAL EXAMINATION OF THE INSTITUTION OF SLAVERY IN THE UNITED STATES, WITH ITS OBJECTS AND PURPOSES* (Books for Libraries Press 1972) (1856); WILLIAM HAMILTON, *THE DUTIES OF MASTERS AND SLAVES, RESPECTIVELY: OR DOMESTIC SERVITUDE AS SANCTIONED BY THE BIBLE* (Mobile, Ala., F.A. Brooks 1845); JOSIAH PRIEST, *BIBLE DEFENSE OF SLAVERY; AND THE ORIGINS, FORTUNES, AND HISTORY OF THE NEGRO RACE* (Scholarly Press 1951) (1853); and JAMES HENLEY THORNWELL, *RIGHTS AND DUTIES OF MASTERS: A SERMON PREACHED ON THE DEDICATION OF A CHURCH ERECTED IN CHARLESTON FOR THE BENEFIT AND INSTRUCTION OF THE COLOURED POPULATION* (Charleston, S.C., Walker & James 1850).

314. On the origins of realism, see MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 109–43, 169–92 (1992). We perhaps ought to be hearing more about the antislavery origins of legal realism, which can be seen in works like Goodell.

315. See generally William E. Nelson, *The Impact of the Antislavery Movement Upon Judicial Styles of Reasoning*, 87 HARV. L. REV. 513 (1974) (analyzing the effect of the antislavery movement on judicial decision making).

disgrace of jurisprudence, the subversion of equity, the promotion of lawlessness, the element of social insecurity, and the seeds of every crime which legislation and jurisprudence should suppress or restrain.³¹⁶

That brings us to a series of questions about monuments and to the issue of honoring Mr. Justice Thomas Ruffin himself. Sanford Levinson provocatively addressed the problems with a building named after Ruffin in 1996.³¹⁷ He boldly asked, “[w]ould . . . we wish to honor him by placing his portrait in American law schools as a presumed inspiration to future generations of law students as to what it means to be a ‘distinguished’ lawyer or judge?”³¹⁸ Levinson thought that there should be nothing named after Ruffin in any law school in the country.³¹⁹

Similar issues of memory crop up frequently in discussions of Civil War memory.³²⁰ First, should each generation be bound by the naming decisions of past generations? One of Ruffin’s contemporaries, Ralph Waldo Emerson, like Thomas Jefferson a generation before, suggested that each new generation ought to make sense of this past for themselves.³²¹ Such were common beliefs among antebellum Americans. In his 1837 address, *The American Scholar*, Emerson asked for a break from past precedents: “Each age, it is found, must write its own books The books of an older period will not fit this.”³²² Yet at other times, Emerson acknowledged the importance of names:

316. GOODELL, *supra* note 57, at 405, 407.

317. Sanford Levinson, *Allocating Honor and Acting Honorably: Some Reflections Provoked by the Cardozo Conference on Slavery*, 17 *CARDOZO L. REV.* 1969 (1996).

318. *Id.* at 1969. At the time Levinson was writing, Harvard had recently taken down its portrait of Roger Taney, author of the *Dred Scott* decision. See Rosalind S. Helderman, *Dealing with Sins of the Forefathers: Md. Torn over Statues of Justice in Dred Scott Case*, *WASH. POST*, July 23, 2007, at B1.

319. See generally Levinson, *supra* note 317.

320. See, e.g., *SLAVERY AND PUBLIC HISTORY: THE TOUGH STUFF OF AMERICAN MEMORY* 1–35 (James Horton & Lois Horton eds., 2006). See generally Sally Greene, *State v. Mann Exhumed*, 87 *N.C. L. REV.* 701 (2009) (characterizing *State v. Mann* as “part of a broader pattern” of thought indicative “of an increasingly defensive slaveholding elite”). And the questions of memory continue to appear in discussions of racial politics today. For instance, the movement for reparations revolves in large part around how we view the ways our past is connected to our present. Is the United States a place of opportunity or oppression? See generally ALFRED L. BROPHY, *REPARATIONS PRO AND CON* (2006) (discussing the major arguments of both sides of the reparations debate).

321. 1 RALPH WALDO EMERSON, *The American Scholar*, in *NATURE, ADDRESSES, AND LECTURES* 52, 56 (Alfred R. Ferguson ed., 1971).

322. *Id.*

The system of property and law goes back for its origin to barbarous and sacred times; it is the fruit of the same mysterious cause as the mineral or animal world. There is a natural sentiment and prepossession in favor of age, of ancestors, of barbarous and aboriginal usages, which is a homage to this element of necessity and divinity which is in them. The respect for the old names of places, of mountains and streams, is universal. The Indian and barbarous name can never be supplanted without loss.³²³

At other times, Emerson spoke of the value of property and the system of precedent. And while Emerson may have been skeptical of those values himself, he catalogs their importance to Americans generally.³²⁴ Tradition is an important value, so we cannot remove names without a loss.

Other issues to consider include the meaning of a monument to the people who erected it, who had a say in naming or placing the monument, and what is the meaning of the monument today? The arguments for keeping names include:

(1) Tradition. We have called a building by this name all along, and it is improper to go back and rewrite names now.³²⁵

(2) Revision is a political act of cultural destruction or erasure of memory. We are engaged with similar questions now in Iraq, where we ask whether we should remove monuments erected by Saddam Hussein.³²⁶

(3) Removal is divisive.

(4) A name is morally owed as a tribute for past good deeds. The names were given as a tribute for good deeds and we should keep them. Sometimes, as in the case of “Confederate Memorial Hall” at Vanderbilt University, the name was paid for (or so it appears).³²⁷

323. RALPH WALDO EMERSON, *The Conservative*, in NATURE, ADDRESSES, AND LECTURES, *supra* note 321, at 184, 188–89.

324. *Id.*

325. *Cf.* Palazzolo v. Rhode Island, 533 U.S. 606, 616–35 (2001) (suggesting value of long-term expectations).

326. See Kirk Semple, *Iraq Confronts Hussein Legacy Cast in Bronze*, N.Y. TIMES, Apr. 8, 2007, at 1. For a larger view of these issues of cultural destruction, see generally ROBERT BEVAN, *THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR* (2006).

327. See *United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 104 (Tenn. Ct. App. 2005). “Monument law” appears in many places, such as in cases like *United Daughters of the Confederacy*, where the court interpreted a name on a building

There are competing considerations among the reasons for preservation or removal of names. In some ways, removal of names serves the purposes of interests of the powerful: it allows erasure of past injustices. That forgetting can allow the powerful to escape liability for the past. However, one might also keep the name because it is part of a tradition, and we want to continue to honor that tradition. Among the “reformers,” the impulse to rename (and thus stop honoring the dishonorable) is counter-balanced by the desire to keep people from forgetting. Table 1 classifies the purposes served by removal and by maintenance of monuments.

and returned a park named after the donor to the donor's family when the park was ordered integrated. It also appears in cases over access to a park such as *Evans v. Abney*, 396 U.S. 435 (1970), and the display of a monument on public property. See JOHN B. NEFF, HONORING THE CIVIL WAR DEAD: COMMEMORATION AND THE PROBLEM OF RECONCILIATION (2005); JIM WEEKS, GETTYSBURG: MEMORY, MARKET, AND AN AMERICAN SHRINE 116 (2003) (discussing Sickles Act); Ann Bartow, *Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 953–56 (2007); Mary Johnson, *An “Ever Present Bone of Contention”: The Heyward Shepherd Memorial*, 56 W. VA. HIST. 1, 1–26 (1997) (discussing the University of D.C.'s memorial to a “faithful slave,” Heyward Shepherd, who was the first person killed at Harper's Ferry); Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law* 32 (Dec. 8, 2008) (unpublished manuscript), available at <http://lsr.nellco.org/georgetown/fwps/papers/91> (noting that the Gettysburg Battlefield was seen as recognition of veterans' contributions in the Civil War). It is related to the important literature on the Antiquities Act of 1906. See generally Christine Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333 (2002) (arguing in favor of setting aside “monumental landscapes” as antiquities). It is also related to first amendment concerns surrounding public monuments, see *Van Orden v. Perry*, 545 U.S. 677, 686–92 (2005) (turning to history and context to settle controversy over display of Ten Commandments on public property), and to just compensation for historic preservation. See generally SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998) (addressing the meta-issues of memorials and how the law treats controversies around them); Charles P. Lord, *Stonewalling the Malls: Just Compensation and Battlefield Protection*, 77 VA. L. REV. 1637 (1991) (discussing the costs of preserving historic sites).

| Table 1 | | |
|--|--------------------------------|---------------------------------|
| <u>Motivations and Considerations in Renaming</u> | | |
| | Remove Monument | Keep Monument |
| Non-Reformers | Forgetting | Tradition; Honoring the Past |
| Reformers | Stop Honoring the Dishonorable | Reminding of the Past |

The key question becomes the value of the monument to its proponents: does it still have value as a rallying point? Does it yet serve a function of memorializing?³²⁸ And if the monument is still serving some function, is the removal more about who is in power now? We see such issues with the statue of Saddam Hussein toppled in Baghdad in April 2003, and our own country faced this when we toppled the statue of King George III in New York City in 1777. To the extent that monument removals are undertaken by the people in power now, this is just another form of politics. Who can speak for the community, so that there can be some kind of consensus on what should be done with the monument? The context of how the monument was put up and its meaning today define the boundaries of the debate.³²⁹

328. Phrased in other ways: Does the monument serve the same function it did when it was put up? What conflicts were present when it was put up? Who participated in the naming decision? Is there a continuing obligation—such as arises when there is payment of money for naming—or was the naming gratuitous? Are private parties trying to dictate terms to the public? And at some point we need to realize this is a political decision. That means there ought to be some sense of the cost of removing or of keeping a name. So, will the costs of removal outweigh the benefits?

329. Some sense of the meaning emerges from Walter Clark's work. See WALTER CLARK, *Thomas Ruffin*, in 4 GREAT AMERICAN LAWYERS: THE LIVES AND INFLUENCE OF JUDGES AND LAWYERS WHO HAVE ACQUIRED PERMANENT NATIONAL REPUTATION, AND HAVE DEVELOPED THE JURISPRUDENCE OF THE UNITED STATES: A HISTORY OF THE LEGAL PROFESSION IN AMERICA 279, 279 (William Draper Lewis ed., 1908) [hereinafter GREAT AMERICAN LAWYERS]; Walter Clark, Chief Justice of North Carolina, Address Delivered in the Hall of the House of Representatives (Feb. 1,

Perhaps Ruffin was believed to be great because of his honesty in *Mann*, which was of great assistance to the abolitionists. North Carolina Supreme Court Chief Justice Walter Clark—a progressive late nineteenth and early twentieth century jurist—did not mention this honesty in his extensive article on Ruffin in the multi-volume series *Great American Lawyers* published between 1907 and 1909. Chief Justice Clark concluded with typical praise: “[H]e is [thought] by much [sic] the greatest judge who has ever sat upon the bench in North Carolina. Should any one be found who may deny him this honor, he will admit at least that Ruffin has had no superior.”³³⁰ The absurdly laudatory entries in *Great American Lawyers* are themselves ripe for historical examination. What, for instance, do they say about the deference accorded judges in public and the self-congratulatory treatments of lawyers in the early twentieth century? But until we have that analysis, it may suffice to note that Ruffin’s opinions are praised in general terms, not for their recognition of slave law, but for more general qualities. What were those qualities? James Willard Hurst included Ruffin as one of a handful of antebellum judges who deserve praise in *The Growth of American Law: The Lawmakers*: “Generally what has made men ‘great’ in our law has been that they saw better where the times led and took their less imaginative, less flexible, or less courageous brethren in that direction faster and with a minimum of waste and suffering.”³³¹ But those qualities are vague, at best. “One difficulty,” Hurst acknowledged, “in appraising the quality of the bench in the United States was the lack of agreement, or even of any considerable thought, on the qualities which made a good judge. . . . Asked to specify wherein lay the greatness, . . . opinion faltered and took refuge in vague generalities from the moralists.”³³² So, first, in memorializing Ruffin, we may be (inadvertently) memorializing his contribution to the antislavery cause; or, at least, we may be memorializing qualities other than those for which we criticize him today. The process of forgetting (and denial) may have taken such a course already by the early twentieth

1915) in ADDRESSES AT THE UNVEILING AND PRESENTATION OF THE STATE OF THE STATUE OF THOMAS RUFFIN 7–23 (1915). Decisions about placement of monuments or buildings are political decisions as Ruffin himself recognized in a case involving the relocation of courthouses. See *State v. Jones*, 23 N.C. (1 Ired.) 414, 414–16 (1841). They are “matters of political arrangement and expediency, and necessarily the subjects of legislative discretion.” *Id.* at 415.

330. CLARK, GREAT AMERICAN LAWYERS, *supra* note 329, at 297.

331. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 18 (1950).

332. *Id.* at 141.

century that Ruffin's connections to slavery (or maybe even antislavery) were forgotten.

Advocates of judicial restraint, such as Justice Hugo Black,³³³ would have held Walter Clark in high esteem for Clark's opinions such as *Abbott v. Beddingfield*,³³⁴ in which Clark noted:

Whatever tends to increase the power of the judiciary over the legislature diminishes the control of the people over their government, negatives the free expression of their will, is in conflict with the spirit and the express letter of the organic law, and opposed to the manifest movement of the age.³³⁵

Black—and others—might also appreciate Ruffin's sense of the need for humility among judges in *Hoke v. Henderson*,³³⁶ which seems to have been a precursor of Clark's ideas, for Clark cited it in *Abbott*:

Neither the reasons which determined the will of the people on the one hand, nor the will of the representatives on the other, can be permitted to influence the mind of the Judge His task is the humbler and easier one of instituting a naked comparison between what the representatives of the people have done, with what the people themselves have said they might do, or should not do³³⁷

We had an example of this in Spring 2007, when Yale University announced it would take down the portrait of its namesake Elihu Yale, which depicted him being waited on by an enslaved child. (The boy has a tell-tale metal color, which seems to indicate a slave—although it *may* indicate he is an East Indian servant.) The reason the university did this was—in the words of one of its vice-presidents—that it was misleading, for Elihu Yale did not actually own people.³³⁸ Thus, it was removed not because it was a monument to the era of white supremacy, but because it was wrongfully implicated Yale. The

333. See generally Howard Ball, HUGO L. BLACK: COLD STEEL WARRIOR (2006) (detailing Justice Hugo Black's key role in implementing the doctrine of judicial restraint).

334. 125 N.C. 256, 34 S.E. 412 (1899).

335. *Id.* at 291, 34 S.E. at 422–23.

336. 15 N.C. (4 Dev.) 1 (1833), *overruled in part by* Mial v. Ellington, 134 N.C. 131, 46 S.E. 961 (1903).

337. *Id.* at 8. Of course, that humility might be more believable if Ruffin had not declared the legislature's act unconstitutional (and in a case where he was far, far ahead of his time in protecting a property right in a government office).

338. Kim Martineau, *Yale Portrait Coming Down; Painting Suggests Link to Slavery*, HARTFORD COURANT, Feb. 8, 2007, at A1.

portrait³³⁹ is nowhere to be found on their website; in fact, it's not easily found anywhere on the internet. Ah, the era of forgetting is upon us.

A somewhat different version of this manufactured forgetfulness was practiced by the University of Virginia in 2007, when its Board of Visitors (its trustees) hastily, and without public discussion, issued an apology for the University's connections to slavery.³⁴⁰ In many ways, the apology was a positive step forward, taken in the wake of the Virginia legislature's apology for slavery. However, the University, thus, missed a chance to have a serious discussion about the University's culpability in extending the institution of slavery and the benefits the University received. The apology happened and then it could be forgotten.

Perhaps—indeed probably—more destructive than the campus buildings named after people like Ruffin are the books left to us by historians who are defenders of the South.³⁴¹ Thus, we have J. G. de Roulhac Hamilton's *Reconstruction in North Carolina*, Claude Bower's *The Tragic Era* (a book I purchased as a high school student at a book sale and read), Avery O. Craven's *The Coming of Civil War*, William Archibald Dunning's *Reconstruction, Political and Economic*, U. B. Philips' *American Negro Slavery*, and Allen Johnson's 1921 article in the *Yale Law Journal* on "The Constitutionality of the Fugitive Slave Acts," which rehabilitated antebellum Southern thinking on the Act.³⁴²

J. G. de Roulhac Hamilton headed the history department at the University of North Carolina from 1908 to 1931.³⁴³ And, of course, as

339. *Id.*

340. See Press Release, University of Virginia's Board of Visitors Passes Resolution Expressing Regret for Use of Slaves (April 24, 2007), <http://www.virginia.edu/uvatoday/newsRelease.php?id=1933>.

341. See Catherine W. Bishir, *Landmarks of Power: Building a Southern Past in Raleigh and Wilmington, North Carolina, 1885–1915*, in *WHERE THESE MEMORIES GROW: HISTORY, MEMORY AND SOUTHERN IDENTITY* 139, 139–68 (W. Fitzhugh Brundage ed., 2000).

342. CLAUDE G. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN* (1929); AVERY CRAVEN, *THE COMING OF THE CIVIL WAR* (The Univ. of Chicago Press 1957) (1942); JOSEPH G. DE ROULHAC HAMILTON, *RECONSTRUCTION IN NORTH CAROLINA* (Books for Libraries Press 1971) (1914); WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC: 1865–1877* (Harper Bros. 1962) (1907); ULRICH BONNELL PHILIPS, *AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION REGIME* (D. Appleton & Co. 1966) (1908); Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 *YALE L.J.* 161 (1921).

343. Documenting the American South, Joseph Gregoire de Roulhac Hamilton, 1878–1961, www.docsouth.unc.edu/nc/hamilton/bio.html (last visited Feb. 10, 2009).

followers of Southern history know, he also founded the Southern Historical Collection at the University of North Carolina, one of the greatest collections of Southern, even American, history available anywhere.³⁴⁴ So, we realize how complex the world is—and how even events started as exercises of ancestor-worship can, over time, change character. One only need think of Drew Faust's use of the Senator James Henry Hammond's papers at the University of South Carolina's archives to understand the way that tools contained in the archives can be used to construct a new history of slavery.³⁴⁵ Yet, we may, indeed, be talking about the wrong building. Perhaps we should be renaming the history department's building from Hamilton Hall. I might suggest a more appropriate name is Beale Hall, after the University of North Carolina history professor who left the university because his view was too controversial—and, we might add now, correct.³⁴⁶

What, then, we may ask is the value of remembering Ruffin? Ruffin poses the problem of how we are to think about someone who is a part of a system of evil. As Eric Muller has pointed out, historians are often not ideally equipped to make moral judgments.³⁴⁷ Our task is more frequently to contextualize and understand than to make moral decisions. There are multiple ways to view Ruffin, if we are to hazard a moral judgment. Of course, he was a supporter of slavery. There is little evidence that he voted to free enslaved people. The few instances when he found in favor of freedom were when the person was *de facto* free already.³⁴⁸ Moreover, Ruffin's clarity of thought made it possible to critique the proslavery legal system. Beginning with Theodore Weld's *American Slavery As It Is*,³⁴⁹ running to William Goodell's *American Slave Code in Theory and Practice*,³⁵⁰ and to Stowe's *A Key To Uncle Tom's Cabin*,³⁵¹ abolitionists mined Ruffin's opinion, along with other proslavery opinions, to critique and undo the system of slave law. In fact, Ruffin

344. See W. FITZHUGH BRUNDAGE, *THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY* 105 (2005).

345. See DREW FAUST, *JAMES HENRY HAMMOND AND THE OLD SOUTH: A DESIGN FOR MASTERY* passim (1982).

346. See Howard K. Beale, *On Rewriting Reconstruction History*, 45 *AM. HIST. REV.* 807, 807–27 (1940).

347. Eric L. Muller, *Fixing a Hole: How the Criminal Law Can Bolster Reparations Theory*, 47 *B.C. L. REV.* 659, 659 (2006).

348. See *Thompson v. Newlin*, 43 N.C. (8 Ired. Eq.) 32, 37–38, 50–51 (1851).

349. WELD, *supra* note 312.

350. GOODELL, *supra* note 57.

351. STOWE, *supra* note 15.

may—by exposing the system—have done more to undermine it than many abolitionists.

CONCLUSION

Monuments are so often created in a politically charged atmosphere. It is hard to give much weight to a name imposed as part of a political motive. The intellectual monuments that Chief Justice Thomas Ruffin left to us continue in existence; they are in the North Carolina Reports. And, much like other intellectual monuments—Thomas Dixon's novel, *The Clansman*,³⁵² D.W. Griffith's *Birth of A Nation*,³⁵³ and Chief Justice Roger B. Taney's opinion *Dred Scott v. Sandford*,³⁵⁴ for instance they cannot be erased, only repudiated. Ideas in books are there forever; they must be overcome by our daily labors. And in this, we face a challenge that is more difficult and more important, than a simple change of a name. For these implicate such decisions as the value of precedent, money, respect for the past, statement of our current beliefs, and continuing statements about past beliefs so one may respect Thomas Ruffin's mind and be thankful for his honesty. We ought, as historians, to look deeply at his ideas, for what he can teach us about that very different world that he inhabited. However, in naming a building after him, we say there is something to hold up about him that is, well, worth remembering. And in talking about this, we learn about his world and ours.

352. THOMAS DIXON, JR., *THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN* (1905).

353. *BIRTH OF A NATION* (Griffith Feature Films 1915).

354. 60 U.S. (19 How.) 393 (1857).