6-25-2008

Thomas Ruffin: Of Moral Philosophy and Monuments

Alfred L. Brophy
University of Alabama - School of Law, abrophy@law.ua.edu

Thomas Ruffin: Of Moral Philosophy and Monuments

Alfred L. Brophy[1]

Abstract

"Thomas Ruffin: Of Moral Philosophy and Monuments" returns to Justice 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. Anti-slavery 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 *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 non-slavery 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 Stowe called "cold legal logic."

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 UNC 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.

---

1 Reef C. Ivey II Professor of Law, University of North Carolina.

I would like to thank Pamela Bridgewater, Adrienne Davis, Sally Greene, Sanford Levinson, Eric Muller, Donald Tibbs, Mark Tushnet, and the audience at the Southeastern Association of Law Schools conference in August 2007 for their assistance with thinking through these ideas. In the Hoole Special Library at the University of Alabama, Merrily Harris and Jessica Lacher-Feldman were exceptionally helpful.

Justice Thomas Ruffin's contemporaries realized that they could not judge his work fully. John Hill Wheeler wrote in 1851 in a brief biographical sketch of the justice that, "Like the Colossus of Rhodes, living characters are best viewed at a distance." Wheeler feared that he was too close to take a full measure of the justice. "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 service, 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 here. For perhaps it is only now, 150 years later, that we can see Justice 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 (he had rented her). Mann was successfully prosecuted at trial but on appeal the court concluded that he was not liable for the abuse. The opinion began with a reflection on the "struggle…in the Judge's own breast between the feeling of the man, and the duty of the magistrate is a severe one." Ruffin, though, separated his feelings from the law; that theme runs throughout Ruffin's opinions. Indeed, that makes Ruffin representative of nineteenth century jurists.

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? Ruffin rejected analogies

[2] JOHN HILL WHEELER, HISTORICAL SKETCHES OF NORTH CAROLINA 20 (1851).

3 14 N.C. (2 Dev.) 263 (Dec. Term 1829).

to the relationship of parents and children. For slavery sought profit for the master, as well as "security and public safety." 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." That absolute power resulted from the master's "uncontrolled authority over the body." 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; 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.

State v. Mann became, rather rapidly, a famous opinion – famous for its honesty.[4]

Harriett Beecher Stowe, using *Mann* as evidence of the mechanism behind the slave code in 1853 in *A Key to Uncle Tom's Cabin*, 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. Stowe believed that no one could "read this decision, so firm and so clear in expression, so dignified and solemn in its earnestness, and so dreadful in its results, without feeling at once respect for the man and horror for the system."[5]

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."[6] One commentator on *Uncle Tom's Cabin* recognized that a master might protest "against slavery during the innocent part of life

---

4 The *New Berne Register* reprinted the opinion in its entirety shortly after it was issued (and then that was reprinted in the Fayetteville *Carolina Observer* on June 24, 1830, with the observation that "having ourselves been struck no less with the novelty of the discussion, than with forcible views of the case taken by the Judge, and the beauty and fitness with which they have been clothed, we have thought that 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."

5 A KEY TO UNCLE TOM'S CABIN 78-79 (Boston, Jewett, Proctor & Worthington, 1853).

6 *Id.* at 77.

when his soul belongs to God alone." But later, "when society takes him, the law chases away God, and interest deposes conscience." 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 is."

She held out hope that Ruffin might modify the law--that he might "begin to listen to the voic[e] of [his] honorable nature, and . . . soften [the slave-code's] necessary severities."[7] He didn't. Ruffin's unfailing 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 the law."[8]

Ruffin policed the boundary between cold legal logic and the warm sentiments of the heart, which might have yielded a more human 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 under 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.[9]

Like others, Stowe respected Ruffin's mind:

> He has, too, that stable 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.[10]

Readers who wondered with Stowe "[h]ow could such a man, with such a mind, have issued such a ruling?" received her answer in her 1856 novel, *Dred: A Tale of the Great Dismal*

---

7 *Id.* at 71.
8 *Id.* at 79.
9 *Id.* at 71.
10 *Id.* at 79.

Swamp. In *Dred*, Stowe has a fictional judge who issues a decision closely based on *State v. Mann*. 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. Thus, Stowe set up a conflict between cold legal logic and warm sentiments of the heart. It was part of her religiously inspired critique of law, which expanded on the critique in *Uncle Tom's Cabin*.[11]

The lawsuit—this time a civil suit, rather than a criminal prosecution—was instigated by the slaveowner Cora Gordon, who was horrified by the treatment of Milly and sued to recover for Milly's injuries.[12] Edward Clayton, the son of Judge Clayton and a young and idealistic lawyer, argued the case for Cora. "Reading the theory is always magnificent and grand," Edward recalled. He quoted Richard Hooker's aphorism that "'Law hath her seat in the bosom of God; her voice is the harmony of the world.'" 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.[13]

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 consciousness, urging him always to rise above the commonly received and

---

11 *See* 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); 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).

12 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 1852 *Jones v. Glass*, 35 N.C. 308 (1852), that a renter's severe abuse of a slave in his custody would lead to civil liability. In that case, the majority spoke of the overseer in charge of the slave, Willie, as the "judge and at that time the sole judge" of Willie. It is testimony to the ways that North Carolina law relegated control over slaves to individuals that the court spoke of overseers as "judges." And perhaps this says something about the adjudication of property rights between white property owners.

13 1 DRED at 16.

so-called practical in morals." While Edward relished the "the theory of the law," he failed in the application of legal principles. 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 regard to what they are." Because of the differences in conscience, Edward and Judge Clayton "could never move in the same orbit."[14]

Judge Clayton, constructed by Stowe, as she tells us "according to artistic fit," reveals why Ruffin was merely an expositor.[15] 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 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.[16]

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. The judge admits that he had thought about retreating from slave society when he was young, but rejected that path. The reason 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."[17] Here Stowe identifies Judge Clayton with the antebellum moral philosophers

---

14 1 DRED at 27.
15 1 DRED, at xiv.
16 1 DRED, at 438, 440.
17 1 DRED, at 450.

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. Justice 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.

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?"[18] Stowe's answer maps in wonderful detail why the judges could not break out of their logical, formalistic reasoning. Judge Clayton could not 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.[19] Moreover, Judge Clayton believed he was not "gifted with the talents of a reformer."[20] 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. Jeckyl, 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. Jeckyl poses a different set of questions from Judge Clayton, for we might expect lawyers to be advocates of their causes. However, the juxtaposition with antislavery Edward Clayton suggests the ways that proslavery advocacy bends a person's judgment and highlights

18 1 DRED, at 450.
19 2 DRED at 16-17.
20 1 DRED at 451.

the power of considerations of expediency over humanity.[21] 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. Jeckyl also points up the ways that Stowe believed law served the interests of the slaveowner; as a lawyer he did the bidding of slaveowners. Jeckyl even seemed to believe that what he was doing was right. *Dred*, thus, fits, expanded on a theme of one of her first short stories, entitled "Love versus Law," which explored a property dispute between neighbors. The dispute was settled through love, rather than through a lawsuit. Lawsuits, law, lawyers, legal reasoning; all were opposed to and got in the way of 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. For she 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.[22]

Stowe followed other abolitionists who used *Mann* to point up the conflict between humane sentiments and cold legal logic. *State v. Mann* was a useful—perhaps even critical--

---

21 *See* 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 Jeckyl 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 as they supported zealously the rights (usually of property owners), they helped to prevent radical change. *See, e.g.,* 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, AT THEIR ANNIVERSARY MEETING, JULY 30, 1851 (1851).

22 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 the church's opinion. The relationship between post-war formalism and pro- and anti-slavery 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 explains much of the post-war formalism and retreat from issues of politics, towards business. *See, e.g.,* DAVID BLIGHT, RACE AND REUNION (2001) (tracing the origins of post-war formalism in literature); DANIEL AARON, THE UNWRITTEN WAR: AMERICAN WRITERS AND THE CIVIL WAR (1962).

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 law. For many abolitionists attacked the law of slavery as well as the institution. "Such is American Slavery, not as abused by the cruel and lawless, but as established by legislative enactments and maintained by judicial decisions," wrote Samuel Wilberforce in 1846.[23] William Goodell wrote in *American Slave Code in Theory and Practice* that *State v. Mann* illustrated the complete removal of liability of slaveowners for abuse of enslaved people.[24] 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*, quoted extensively from *Mann* to support the statement that "none 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…."[25] 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":

> According to the decision of a Southern judge, extorted from him by the inexorable necessity of his legal logic, in opposition to his humane feelings, the *relationship* 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.*, the relation could

23 SAMUEL WILBERFORCE, A REPROOF OF THE AMERICAN CHURCH 17 (1846).

24 WILLIAM GOODELL, AMERICAN SLAVE CODE IN THEORY AND PRACTICE 165, 175 (American and Foreign Anti-Slavery Society, New York, 1853).

25 CHARLES ELLIOTT, SINFULNESS OF AMERICAN SLAVERY: PROVED FROM ITS EVIL SOURCES 296-97 (Cincinnati: L. Swormstedt & J.H. Power, 1851). *See also Authority of Masters over Slaves*, VERMONT CHRONICLE, April 16, 1845 at 62; *American Slavery,* FREDERICK DOUGLASS' PAPER July 24, 1851 (reprinted from *London Inquirer*).

> not exist as it is now legally constituted. No sin in such relation? Then there is no sin, a Carolina jurist being judge, for doing whatever is necessary (be it stripes, torture, or death) to preserve this sinless, lawful relation![26]

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 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 back of the Supreme Court."[27]

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.[28] He also wrote about torts, like the fellow servant rule,

---

26 JONATHAN BLANCHARD & N. LEWIS RICE, A DEBATE ON SLAVERY: HELD IN THE CITY OF CINCINNATI … OCTOBER 1845 134 (Wm. H. Moore & Co., Cincinnati, 1845).

27 *See* Edward Josiah Stearns, *Notes on Uncle Tom's Cabin: Being a Logical Answer to Its Allegations and Inferences against Slavery as an Institution* 194 (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. Morrison v. Connelly, 14 N.C. (2 Dev.) 233 (N.C. 1829). In the next succeeding case after *Mann*, Ruffin justified (perhaps gratuitously) the legislative's policy of excluding illegitimate children from inheritance from their mothers if there were any legitimate children. *See* Flintham v. Holder, 1 Dev. Eq. 345 (Dec. Term 1829). *Flintham* permitted legitimate children of the decedent's mother to inherit, even though the illegitimate child could not inherit through those children. The answer turned on the interpretation of a 1799 statute; however, Ruffin dealt with the spirit of the act, which was to encourage marriage.

Before he went on the Supreme Court, Ruffin served as a trial judge, where he had ample opportunity to see the brutality of slavery and the North Carolina code. The sentence of death he imposed of a free black youth for breaking into a house occasioned an editorial opposing the severe sentence and encouraging construction of a penitentiary. *See Raleigh Register, and North-Carolina Gazette* April 27, 1827.

28 For biographical sketches of Ruffin, see Mark Tushnet, *Slave Law in the American South: State v. Mann in History and Literature* (2004); Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890* 130-59 (1998). Amy Dru Stanley contrasts Ruffin with another prominent contemporary – Lemuel Shaw of the Massachusetts Supreme Judicial Court. *See* Amy Dru Stanley, *Dominion and Dependence in the Law of Slavery*, 28 L. & SOC. INQ. 1127 (2003). Both 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, e.g.,* A.W.Brian Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHICAGO L. REV. 533 (1979) (arguing that the common law of contracts had supported the market for generations before Horwitz' 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 earlier, though somewhat morally less difficult case *Commonwealth v. Aves*). *See* ROBERT S. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS at 77-78n.*, 94 (1975); Brook Thomas, *The*

about nuisance, and about evidence. Where many see American jurisprudence beginning in the years after the Civil War,[29] slavery generated a rich antebellum debate on 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 ways legal doctrine mixed with history and morals. *State v. Mann* is one such example.[30]

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, who took the world as it was. Sometimes he spoke of concern for

---

Legal Fictions of Herman Melville and Lemuel Shaw, 11 CRITICAL INQUIRY 24 (1984); Alfred Konefsky, *The Accidental Legal Historian: Herman Melville and the History of American Law*, 52 BUFFALO L. REV. 1179 (2004).

Ruffin correlates highly with the picture presented by Morton Horwitz' *Transformation of American Law* of a judiciary that employed precedent to maintain vested rights, and also remade it to promote economic growth. *Cf.* Charles Sellers, *The Market Revolution* (1997). This is related to the affection for "progress" historians have identified in antebellum culture. *See*, *e.g.*, RUSH WELTER, THE MIND OF AMERICA, 1820-1860 (1975); and we can see the great conflict between conservation and innovation so central to the South as well as to law in this period.

Other commentary on Ruffin includes Walter F. Pratt, *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 L. & HIST. REV. 126 (1986); Julius Yanuck, *Thomas Ruffin and North Carolina Slave Law*, 21 J. S. HIST. 456 (1955); JAMES OAKES, SLAVERY AND FREEDOM 160-62 (1990); Stanley N. Katz, *Opening Address*, 17 CARDOZO L. REV. 1689 (1996); 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 L. & HIST. REV. 81 n.5 (1996); Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207 (1992); *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112 (1986) (discussing Ruffin's preference for contract instead of applying a new tort rule); Alan Watson, *Slave Law: History and Ideology*, 91 YALE L. J. 1034 (1982).

29 *See, e.g.*, Robert Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC'Y REV. 9 (1975); David M. Rabban, *The Historiography of Late-Nineteenth Century American Legal History*, 4 THEORETICAL INQUIRES L. 541 (2003). For some of literature on antebellum jurisprudence, *see* HOWARD SCHWEBER, THE CREATION OF THE COMMON LAW, 1850–1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP (2004); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U.L. REV. 1161 (1999); Michael Hoeflich, *Law and Geometry: Legal Science from Liebniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

30 For more on these rich sources, see Perry Miller, *The Life of the Mind in America: From Revolution Through Civil War* (1965); Robert W. Ferguson, *Law and Letters in American Culture* (1984); Alfred L. Brophy, *The Fugitive Slave Act in Antebellum Jurisprudence*, forthcoming in THE TRANSFORMATION OF AMERICAN LEGAL HISTORY (Daniel W. Hamilton & Alfred L. Brophy eds., 2008); Alfred L. Brophy, The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise Through Civil War (Ph.D. diss., Harvard University, 2001).

economic growth, but he was cautious, in the mold of Chancellor Kent and conservative thinkers like Edmund Burke rather than even Justice Story.[31] Indeed, the antebellum era idealized a jurisprudence of conservatism—a concern for economic growth, a respect for contracts and individualism. Henry St. George Tucker told students at the University of Virginia law school in 1841, "lawyers are bred to a love of order."[32] In fact, Daniel Lord's 1851 Phi Beta Kappa address at Yale University, "The Extra-Professional Duties of Bar and Pulpit," focused on the role that lawyers, like ministers, serve in stabilizing society.[33]

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. "Cicero wondered how two soothsayers could look each other in the face," Sampson said. "I wonder how the two learned expounders of the common law opposed to us can do so without

---

31 Ruffin warned in dissent in *State v. Caesar*, 31 N.C. (9 Ired.) 391 (1849), 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.

32 HENRY ST. GEORGE TUCKER, AN INTRODUCTORY LECTURE GIVEN TOTHE LAW CLASS AT THE UNIVERSITY OF VIRGINIA 7-8 (Charlottesville, VA, 1841).

33 LORD, *supra* note 20. 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 Greene*, 31 CUMB. L. REV. 231-85 (2001). Other evidence of what the common law meant comes from southern literary journals. A tiny and eclectic sample includes *Slavery and the Abolitionists*, 15 SOUTHERN Q. REV.165-223 (1849); *The Judiciary System of South Carolina*, 2 N.S. S.Q. REV. 464-485 (1850); *Law and Lawyers*, 6 S.Q.Rev. 370-427 (1844); *The Roman Law*, 8 S.Q. REV. 93-117 (1845); W. G. M., *Law Reform in Missouri; Law of the State of Missouri, regulating pleadings &c., by R. W. Wells, reviewed*, 1 N.S. S.Q. Rev. 1-18 (1850); *Lecture to Law Students by Professor B. Tucker*, 1 S.LIT. MESS. 145-154 (1834); A Virginian, *Remarks on a Note to Blackstone's Commentaries*, 2 S. LIT. MESS. 266-270 (1835).

laughing."[34] 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.[35]

In an address entitled "The Reform Spirit of the Day," Timothy Walker of Cincinnati warned at the Harvard Phi Beta Kappa Society in the wake of the Fugitive Slave Act of 1850, 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."[36] 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, -- not of gold, or of silver, or of iron, but an age of emancipation. We will upheave 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

34 People v. Martin, 2 Wheeler C.C. 262, Yates Sel.Cas. 112, N.Y.Sup. 1810.

35 WILLIAM SAMPSON, AN ANNIVERSARY DISCOURSE ON THE COMMON LAW 17 (New York, 1824).

36 TIMOTHY WALKER, THE REFORM SPIRIT OF THE DAY, AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF HARVARD UNIVERSITY 36-37 (1850).

> 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.[37]

Ruffin's Slavery Jurisprudence

Let us turn, then, to some of the cases that illustrate Ruffin's jurisprudence and his moral philosophy. Those cases bear several hallmarks of a conservative jurisprudence: reasoning from the world as it is; looking to what he believed to be the nature of enslaved people, as people who were ignorant and must be made to bear the burden of their enslavement. 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. He might reason from analogy, but the new principles must be "clearly deducible" from precedent.[38] Unless they could see their way "clear as a sun beam," he believed judges should hesitate to depart from the common law precedent, for it "sheds a steady light upon the path of the jurist, and gives him a safe guide, to wander in the mazes of judicial discretion…."[39]

In some cases Ruffin continued with the approach he took in *State v. Mann* to set law in distinction to humanity. In a criminal case in 1839 a decade after *Mann*, *State v. Hoover*, Ruffin was again remarkably frank. Again, he confronted a criminal prosecution of a white person for abusing a slave. The result was different from *Mann*, however, for *Hoover* upheld the conviction of a slave-owner for the murder of a pregnant slave, Mira. Ruffin spoke of his "deep sorrow." *Hoover* acknowledges *State v. Mann* generally allowed decisions about the severity of punishment to "his own judgment and humanity." "In the nature of things" owners have a degree of latitude that non-owners did not. But it is "self-evident" that such circumstances

37 WALKER, *supra* note 35.
38 *See State v. Caesar*, 31 N.C. 391, 403 (1849).
39 *Id*. at 411.

would not relieve the owner of all legal culpability here. It was the court's "duty" to explain the circumstances why this owner was liable for homicide. "The acts imputed to this unhappy man do not belong to a state of civilization." Then, in language easily prescient – for Stowe uses similar language regarding Ruffin less than a decade and a half later -- he says, "they are barbarities which could only be prompted by a heart in which every 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."[40]

In other cases, Ruffin turned to his understanding of slaves' behavior to decide the appropriate legal response. In, *State v. Caesar*,[41] he confronted the question of what constituted provocation in the context of homicide. 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. Where the majority of the court found that mitigation was possible, Ruffin dissented. He urged attention to precedent and explained why precedent is important:

> The dissimilarity in the condition of slaves from any thing known at the common law cannot be denied; and, therefore, as it appears to me, the rules upon this, and 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.

Ruffin spoke of previous courts' employment of "practical reason" of the common law and their application of general rules as well as their "guarded … respect to the rules themselves in detail." For precedent "as far as it goes … affords a sole footing upon firm ground gained in a morass." And then Ruffin reasoned from his observance about the behavior of slaves and from

40 Tushnet (discussing Ruffin's reliance on common law).

41 31 N.C. 391 (1849).

this particular case that there should be no mitigation. He reasoned from what he believed to be the state of things: Every 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."[42] 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.[43] 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* on "general principles" when he could find no precedent. *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. Ruffin would not permit a master to testy 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. Chief Justice Henderson's concurrence shed different light, however. Henderson thought that masters' testimony about slaves' confessions should not be admitted, for "the master has an almost absolute control over both the body and mind of his slave. The master's will is his slave's will."[44] Moreover, Henderson thought masters should be protectors of their slaves and, thus, not compelled to testify against them. Ruffin and Henderson arrived at the same result though from very different angles.

Justice Ruffin relied on his understanding of slave personality in civil cases as well. In *Heathcock v. Pennington*, 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

42 31 N.C. at 422-23 (quoting State v. Tuckett, 8 N.C. 210, 217 (1820)).
43 *Id*. at 423.
44 2 Dev. 543 (1831).

preservation as other persons. Hence, the same constant oversight and control are not requisite for his preservation, as for that of a lifeless thing, or of an irrational animal." 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. *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 at those times":

> 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.[45]

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

> We 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 if 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,

---

45 33 N.C. (11 Ired.) 640 (1850). In dissent in *Wiswall v. Brinson*, 32 N.C. (10 Ired.) 554 (1849), Ruffin tried to limit the liability of a property owner for the damage caused by one of his employees to a neighbor's horse. The property owner, Wiswall, contracted to have a Gaskill move a house two hundred yards, from one of his properties to another and Gaskill dug a whole on a public road, as part of the moving. 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 Gaskill's negligence.

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

no good will to them, to ruin them.[46]

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

Emancipation Cases

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

Southern states varied in their approaches to emancipation via will and by trust. An 1830 act of the North Carolina legislature largely prohibited emancipation via wills; emancipation was largely limited to cases where the county court found there had been meritorious service.[47] Likewise, Alabama and Mississippi, for instance, emancipation was prohibited via will. However, Southern courts were surprisingly willing to accept trusts for emancipation. Even Mississippi, which statutorily prohibited emancipation by will, gave effect to a trust that resulted in freedom for the testator's slaves.[48] However, an owner could emancipate use a testamentary trust to take the slaves outside of the state and emancipate them.

Ruffin's first opinion on emancipation via will, *Sorrey v. Bright*, 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. A testator bequeathed several slaves to John Simmons with the restriction that the "negroes to have the result of their own labor, but ever to be under

---

46 30 N.C. (8 Ired.) 446. Moreover, he drew upon the common proslavery argument that compared poor whites with slaves and argued that slaves were treated better. 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."

47 1 Rev. State. Chap. 111, sec. 57.

48 *See* Garrett v. Cowles, 1860 W.L. 4328 (Miss. Err. App. 1860); Read v. Manning, 1 George 308 (Miss. Err. App. 1855).

[Simmons] care and protection…."[49] Ruffin refused to give effect to this, for "every trust for emancipation, and every direction in a will to that end, where the emancipation is to be absolute or qualified, is illegal and void."

Ruffin construed powers of emancipation fairly broadly and upheld a claim of a person that he had been freed against a claim of a creditor of the slave's former owner's estate.[50] The North Carolina legislature had reversed the common law preference for inferring intent for emancipation. Still, Ruffin found that the owner had completed the acts for emancipation and, thus, the slave was free. And in *White v. Green*, 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. *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. Ruffin characterized them as property of the estate rather than the surviving spouse and then made them liable to pay the debts of the estate.[51]

Ruffin's series of opinions regarding Sarah Freeman's estate beginning in 1844 and running through 1851,[52] 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. The former were acceptable; the later, prohibited. The first appearance of Freeman's will before the North Carolina Supreme Court, in *Thompson v. Newlin*, dealt with whether an executor must investigate allegations that there was a secret trust to hold slaves in quasi-freedom. The intestate

---

49 Sorrey v. Bright, 21 N.C. (1 Dev. & Bat. Eq) 113 (1835).

50 Sampson v. Burgwin, 20 N.C. (3&4 Dev. & Bat.) 21 (1838).

51 White v. Green, 36 N.C. (1 Ired. Eq.) 45 (1840).

52 Thompson v. Newlin, 38 N.C. (3 Ired. Eq.) 338 (Fall term 1844), 39 N.C. (4 Ired. Eq.) 312, 41 N.C. (6 Ired. Eq.) 380; 43 N.C. (8 Ired. Eq.) 32 (Dec. Term 1851). *See also* Lemmond v. Peoples, 41 N.C. (6 Ired. Eq.) 137 (1849) (invalidating secret trust for quasi-slavery).

heirs of a Quaker, Sarah Freeman, alleged that she had created a secret trust another Quaker, John Newlin, who would transport her nearly thirty slaves to a free state and emancipate them. (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. 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 "the law will not allow itself to be baffled, and its policy evaded by secret agreements, the very objects of which are the evasion of the law itself." Ruffin's prior opinion in the case refused to give effect to a secret trust that would have essentially emancipated slaves (he referred to it as a state of quasi-slavery) and kept them within North Carolina.[53]

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 there. Ruffin upheld that emancipation—perhaps he could do nothing else at that point, although he might have held Newlin civilly liable, one supposes. And on a petition for rehearing in 1851, he similarly upheld the secret trust. Ruffin cited other cases, like *Cameron v. Commissioners of Raleigh*,[54] that permitted transportation outside of the state for emancipation. He characterized *Cox v. Williams*,[55] 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." 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." In the pages of

53 *Contra Redmond v. Coffin*, 17 N.C. (2 Dev. Eq.) 437, 440-41 (1833). 3 Ire. Eq. 338 (1844).
54 1 Ired. Eq. 436.
55 39 N.C. (4 Ired. Eq.) 15 (1845).

other states' reporters he found precedent for relief: *Frazier v. Frazier* from South Carolina, *Ross v. Vertress* and *Ross v. Duncan* 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.

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. *Cox v. Williams*, coming in the midst of the *Newlin* saga, clarified the rights of the master to emancipate, as long as the slaves left the state.[56] The right was based on the 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." 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." That 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." 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. "That was surely a regulation of police, and for the promotion of the security and quiet of the people of this state…. Emancipation was not prohibited merely for the sake of keeping persons in servitude in the State, and increasing the number of slaves, for the law never restrained their exportation…."[57] Of course, the slaves could not be freed unless there were money in the estate, for "justice stands," Ruffin wrote, "before generosity."[58]

---

56 39 N.C. (4 Ired. Eq.) 15 (1845). Memory F. Mitchell, *Off to Africa with Judicial Blessing*, 53 N.C. HIST. REV. 265-87 (1976).

57 *Id.*

58 *Id.* (citing Haywood v. Craven, 2 N.C. L. Rep. 557; Cameron v. Commissioners of Raleigh, 1 Ired. Eq. 436;

Green v. Lane, coming at the end of the *Newlin* saga, illustrates distinction between a trust to remove slaves and free them and to hold them in semi-freedom (or quasi-slavery) in North Carolina. 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 (he had already apparently taken them to Pennsylvania and freed them, then returned to North Carolina in 1828 and, thus, likely held them in quasi-freedom during his life). A subsequent codicil directed that that his executors keep the slaves and hold them in quasi-freedom in North Carolina. Thus, the attempted emancipation was void.[59] Ruffin saw the obvious parallels to the infamous case of *Hinds v. Brazealle*, one of the few cases that rivaled *State v. Mann* in the abolitionist repertoire, and he cited Hinds for further support. For Ruffin cited *Hinds* in *Green*.

It took relatively, however, little 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* "to permit the negroes to live together on [the donee's] land and to be industriously employed and continue to exercise a controlling power over their moral condition, and furnish them with the necessaries and comforts of life."[60] Yet, in other instances, the restraints on the donee were slight. Thus, in *Huckaby v. Jones*, the four donees were given the slaves "to be their lawful property, for them to keep and dispose of, as they shall judge most for

---

Thompson v. Newlin, 38 N.C. (3 Ired. Eq.) 338). *See also* Thompson v. Newlin, 43 N.C. (8 Ired. Eq.) 32 (1851) ("[T]he power of the owner to five, and the capacity of the slave to receive, freedom, exist in nature, and therefore may be used in every case and in 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), "every country has the right to protect itself from a population, dangerous to its mortality or peace; and hence the policy of the law of this State prevents the emancipation of slaves."

59 43 N.C. (8 Ired. Eq.) 70 (1851).

60 1 Dev. Eq. 493.

the glory of God, and the good of the said slaves."[61] In those instances, the gifts for quasi-freedom were open and obvious and, obviously, invalid.

Lemmond v. Peoples likewise prohibited a secret trust to hold slaves for benefit of the slaves, rather than the donee. "The donee of the legal title cannot, in conscience, hold the negroes as property for himself, but must execute it for someone, and, as there is no one else who can claim, it must be for the donor."[62] *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. The slaves were to be held as property; they were not to be freed. But Ruffin used that 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." If the slaves were to receive the kindness of the donees, "How and why were the defendants to have this absolute property?" 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 labour 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 property conduct and maintenance." 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."

One of his last decisions reaffirmed the right to remove slaves for emancipation. And he even upheld the right to place the choice of slavery or freedom in the slaves. Anne L. Woods placed three slaves in trust for her (Woods' life), with Osmond F. Long as trustee. Upon Anne

61 2 Hawks 120.

62 Lemmond v. Peoples, 41 N.C. (6 Ired. Eq.) 137 (1849) (citing Stevens v. Ely, 1 Dev. Eq. 493; Thompson v. Newlin, 3 Ired. Eq. 338).

Woods' death, the slaves had the choice of going to Liberia or remaining in slavery in North Carolina. It was by 1858 well-established that a donor could free slaves after transporting them outside the state. 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 freedom, and thus, by nature, they are competent to give or withhold their assent to things that concern their state.[63]

Again, he employed a natural law sense 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."[64]

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. 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* 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. Polly's owner, John Munroe, had executed a deed of manumission in 1805 that would give Polly her freedom in April 1814. Around 1810, Polly had a daughter. Both Polly and her daughter lived as

63 Redding v. Long, 57 N.C. (4 Jones Eq.) 216 (1858).
64 *Id.*

freed people after 1814. That daughter in turn had a son about 1830. And then in 1838, Munroe sold Polly's grandson. So Ruffin confronted a question of whether Polly's daughter (and grandson) were the property of Munroe, because the daughter had been born before Polly was free. Ruffin spoke in terms reminiscent of his moral quandary in *State v. Mann*:

> There is a natural inclination in the bosom of every judge who favors the side of freedom and a strong sympathy with the plaintiff, and the other persons stated as he is, who have been allowed to think themselves free and act for so long as if they were. [65]

But Ruffin would not act on his "feelings." For he concluded "the court is governed by a different rule, the impartial and unyielding rule of law … in law the condition of the plaintiff is that of slavery." 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 we are." 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*.[66]

In 1833 in *Redmond v. Coffin*, 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 donors 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."[67] At the margins, then, sympathy might

---

65 25 N.C. (3 Ired.) 224 (1842).

66 Another opinions along these lines is *State v. Williams*, 39 N.C. (4 Ired. Eq.) 15 (1845).

67 *Redmond v. Coffin*, 17 N.C. (Dev. Eq.) 437 (1833). *Redmond* cited, among other precedent, Trustees of Quaker Society of Contentnea v. Dickinson, 1 Dev. 189 (1827), which had prohibited a trust of slaves. *Dickinson* derived in part from suspicion of religious trusts, as well as opposition to emancipation. *See also* White v. White, 18

affect legal doctrine. *Common v. Jenkins* 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 interests he stands charged."[68] It usually did not, however.[69]

Ruffin's ability to "see through" led him to understand and acknowledge slaves' powers of reasoning as humans, though not their humanity. 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. "It 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…"[70] Ruffin understood the difference between legal capacity and mental ability. "From the nature of slavery, they are denied a legal capacity to make contracts or acquire property … 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 freedom, and thus, by nature, they are competent to give or withhold their assent to things that concern their state."[71] Ruffin was more willing to accept the freedom of choice than were courts in other states.[72]

One of Ruffin's most revealing discussions of slavery came in the obscure 1845 *Waddill v. Martin*, which excluded slaves' property from an estate's claim. *Waddill* posed the problem of whether an executor had to collect the property owned by slaves to satisfy debts against an

---

N.C (1 Dev. & Bat.) 260 (1833) (refusing to give relief to claim that Quakers held slaves in quasi-freedom).

68 Common v. Jenkins, 1 Dev. Eq. 422 (1830). *See also* Tarkinton v. Guyther, 35 N.C. 100 (1851).

69 *See, e.g.*, Griffin v. Simpson, 33 N.C. (11 Ired.) 126 (1850).

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

71 *Id*.

72 15 Ark. 151 (1854) (citing *Parham v. Blackwelder*, [actually *Thompson v. Newlin*], 43 N.C. (8 Iredell) 44 (1852)).

estate; the executor had not collected the property and a co-executor charged that he should have. 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."[73] Second, it was desirable to allow the slaves to keep such little property.

> An 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. … the slight indulgences 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.

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

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* 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.[74]

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. Or as he wrote in interpreting a statute, "all the considerations that can weigh with a court, the just principles of interpretation of statutes, the

73 38 N.C. (3 Ired. Eq.) 562 (1845).

74 White v. White (1 Dev. & Bat.) 260 (1833). *White* distinguished between legal title to a slave and moral right.

authority of adjudications, and ancient writers on the law, and a regard to sound policy and good morals – concur."

Ruffin illustrates the moral philosophy of his era.[75] He reasoned from precedent,[76] and added considerations of expediency (utility), as informed by his understanding of history. 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." 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."[77] Discretion was not merely personal, "whether wild or sober." 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." That is, Ruffin saw strict boundaries on judges' discretion.

One of Ruffin's most famous opinions, *Hoke v. Henderson*, upheld a sheriff's property right in his office. It found the official had a constitutional right to his office, which he had held since 1806. The legislature passed an act in 1832 to use an election to fill the position. *Hoke*, thus, struck down on constitutional grounds, an act of the North Carolina legislature. Ruffin dealt with 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 constitutional enactments be clear to the court." He contrasted the "comparatively humble" judicial function

---

75 On the nature of antebellum moral philosophy, see Maurice S. Lee, *Slavery, Philosophy, and American Literature, 1830–1860* (2005).

76 *See, e.g.*, Jackson v. Hampton, 32 N.C. 417, 425 (1849) ("the precedents from time immemorial cannot be safely departed from. I own indeed, what I think the precedents right in themselves, and that it would lead to great mischiefs to disregard them."); *Contra* Green v. Cole, 35 N.C. 291, 294 (1852). "It is a … a bad and hazardous assumption in judges, to change and upset settled law, under the pretext that it was so adopted in a state of society to which it was suitable, but that circumstances have no so varied … that the rule … ought therefore to be altered." State v. Ephram, 19 N.C. 162, 166-67 (1836).

77 Scroggins v. Scroggins, 14 N.C. (3 Dev.) 535 (1832).

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." 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 statue 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.[78]

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. *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." Ruffin explored the right of property based on the American Revolution, as well as from the North Carolina Constitution. Ruffin found that the legislation 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. And he found that the holder of the office, Henderson, had a property right in it. While the legislature might abolish the office entirely, while Henderson was performing the office, he could not be removed arbitrarily. 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.[79]

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 R.R. Co. v. Davis*.[80] Ruffin placed the right of condemnation at the center of the state's rights—

78 *Hoke*, 15 N.C. (4 Dev.) 1 (1833).
79 Hoke, *12.
80 19 N.C. (2 Dev. & Bat.) 451 (1837).

"universally acknowledged" by "writers upon the laws of nature and nations… as a right inherent in society." 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," which the public will have access to. 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." 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 possible"--that they would take property without providing just compensation. Property rights, Ruffin believed, "have never been more respected than in this country, where it is carried to an extent, perhaps injurious, of successfully opposing great political reforms." And he concluded with his confidence in the role of private businesses "in an immense and beneficial revolution 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 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." 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. Ruffin took the characteristically Whig approach that internal

improvements brought about technological and economic progress—and that the government and law ought to encourage more of them.[81]

Ruffin might wield (on rare occasions) treatises for some point of law's theory; 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 speculatists 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." 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 "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."[82]

In *Scroggins v. Scroggins*, Ruffin denied a request for a divorce. He quite simply (and

---

81 On Whig political thought more generally, see Lawrence Kohl, *The Politics of Individualism: Parties and the American Character in the Jacksonian Era* (1989).

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 anti-slavery sentiments starts from the understanding that as capitalism advanced, so did anti-slavery sentiment. One explanation is that as people become more understanding of their connections to others through the market, they became more sympathetic to the plights of others. See Thomas Haskell, *Capitalism and the Origins of Humanitarian Sensibility, in* THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION 107-60 (1992). Haskell's positive view of capitalism runs counter to, perhaps, the majority of sentiment unleashed through capitalism. That is, while anti-slavery sentiment grew along side the market, so did sentiments regarding workers that is 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, 41 N.C. 640 (1850); Parham v. Blackwelder, 30 N.C. 446; Mayho v. Sears, 25 N.C. 224 (1842); Redmond v. Coffin, 17 N.C. 437 (1827); Scroggins v. Scroggins, 14 N.C. 535 (1832). 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 Civil War.

82 Raleigh & Gaston R.R. v. Davis, 19 N.C. 451.

coldly, as Stowe would say), tells people to bear their burden and learn to like it. *Scroggins*—where a husband sought divorce when it became apparent that his wife's child was part African American—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 difference would grow into lasting dissentions, 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 parties….[83]

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 unassayed, though the struggle might be violent, if by possibility it could be successful.
>
> Our restless 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…?[84]

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,

---

83 3 Dev. 535, 547 (1832). But the Court allowed, the same term, divorce for interracial marriage. Barden v. Barden, 14 N.C. (3 Dev.) 548 (1832).

84 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 further action, in a rule prescribed definitely by the legislature itself.

more conservative on alteration of the common law than some other judges. Concerns with individualism and property rights are central to his thinking.

Ruffin noted in *Morrison v. Connelly*, the second case he decided as a justice, the limited role for judges to take account of changes in circumstances in adapting the law. *Morrison* dealt with conflicting claims to land. About the statute of limitations for adverse possession, Ruffin observed that "a century ago, the period of seven years was probably wisely fixed upon. 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 since things have much altered. And it is likely, that the conviction of that led the Court to create the doctrine of *color of title*, with the year of rendering the statute less effectual and injurious. It is to be doubted, whether the remedy is not the greater of two evils." In *Tate v. Conner*, Ruffin relied on basic equity principles:

> Equity itself respects time when the trust is not express; because it is difficulty 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.[85]

In many cases, Ruffin looked to practicalities to cut off further claims, "time 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 too uncertain and obscure a twilight, to be sufficiently clear for judicial action."[86]

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).

---

85 2 Dev. Eq. 244 (1832).

86 Villines v. Norfleet, 2 Dev. Eq. 167 (1831).

Eason v. Perkins, denied an injunction when a neighbor claimed that a mill in existence for decades had created a private nuisance (throwing off "destructive vapors"). 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." In *Eason*, however, there was only "a single individual, to weigh against public utility." Moreover, the legislature had authorized the construction of mills unless the mill created a public nuisance.[87]

In 1836 in *Pugh v. Wheeler*, Ruffin upheld the right of upstream mill owners to preserve their right to use water, independent of previous, adverse uses by downstream owners. He, thus, entered the contentious area of water rights and concluded that prior owners could not pre-empt the rights of subsequent users. 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."

In *Adams v. Turrentine*,[88] Ruffin interpreted the liability of a jailor to a creditor for allowing a debtor to escape from prison. In the face of an argument that English precedents on liability for allowing prisons to escape should not be followed because the United States is less protective of creditors' rights than England. He acknowledged that "the world is making an experiment, law for the morals of mankind may be preserved, which persons shall be exempted from bodily restraint or punishment for such delinquencies. Our legislature … has ventured on this experiment." Ruffin countered that creditors' rights are more important in a republican government than a monarchy, "for its stability and wholesome operation depend essentially on the nature of the people, and noting is more speedily or certainly destructive of private and of public virtue than to relax the obligations of contracts and render the rights of creditors

87 17 N.C. (2 Dev. Eq.) 38 (1831).

88 Adams v. Turrentine, 30 N.C. (8 Ired.) 147 (1847).

insecure."[89] And 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 suggestions 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 hurry of action. Stability is given to the public institutions – and, above all, there is that recurrence to fundamental principles, which is enjoined in our constitution, and is essential for the preservation of liberty and order.[90]

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 mother's cousin – emerged from an Enlightenment tradition that aspired to end

---

89 30 N.C. (8 Ired.) 147 (1847).

90 State v. Miller, 18 N.C. (1 Dev. & Bat.) 500 (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, 3 Dev. 284 (1831). In other cases, Ruffin parsed wills and precedents closely, drawing upon cases, reason, and "slight and verbal" clues as well. He found in one wills case, for instance, granting a legacy to a daughter "if my said daughter arrives to the age of eighteen" that a somewhat ambiguous devise should vest absolutely in the testator's daughter. Ruffin looked to the prevailing circumstances to "govern" him and asked, rather matter-of-factly, would a father intend to disinherit his infant daughter? See *Cooper v. Pridgeon*, 3 Dev. Eq. 98 (1831). *See also* Cox v. Hogg, 2 Dev. Eq. 121 (1831) (interpreting will that disinherited some as vested immediately in those who were included in the will). Green v. Collins, 6 Ired. 139 (1845) (construing will as creating a trust with surviving spouse as beneficiary). Beal v. Darden, 4 Ired. Eq. 76 (1845) (interpreting executor's obligations in light of "plain justice and plain policy"); Justice v. Scott, 4 Ired. Eq. 108 (1845) (distinguishing deeds and testamentary twists). He rejected an attempt to establish what we now call a spend-thrift trust in *Mebane v. Mebane*, 4 Ired. Eq. 131 (1845):

> 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 there out or the like, and at the same time defy his creditors and deny them satisfaction thereout. The thing is impossible.

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

slavery and that interpreted property law to end vestiges of feudalism.[91] Southern jurists expressed concern for slaves. In an earlier era, they had even embraced enlightenment ideas of freedom. St. George Tucker had taken steps to make emancipation easier and proposed a gradual abolition plan.[92] 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.[93]

Even in his 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. Gaston told the students:

> Disguise truth as we may, and throw 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 fountainhead. How this evil is he encountered, how subdued, is indeed a difficult and delicate enquiry….[94]

---

91 *See* Huebner, *supra* note 27, 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*.

92 *See* Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157 (2006). State v. Miller, 1 Dev. 2 Bat. 500 (1836) ("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.").

93 Charles Elliott's *Sinfulness of American Slavery*, *supra* note 24, 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 Collton* (Charleston, 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 action of the citizens 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 of the state.

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 BRUCE KUKLICK, CHURCHMAN AND PHILOSOPHERS: FROM JONATHAN EDWARDS TO JOHN DEWEY 89-92 (1985); E. BROOKS HOLIFIELD, THE GENTLEMAN THEOLOGIANS: AMERICAN THEOLOGY IN SOUTHERN CULTURE 1795-1860, at 98 (1978).

94 WILLIAM GASTON, ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES AT CHAPEL HILL, JUNE 20, 1832 14 (Raleigh, Jos. Gales & Son, 1832). Hinton Helper commented in *The Impending Crisis of the South* of Gaston's address 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,

Gaston had, moreover, advised at least one client how to use a trust to free slaves by will.[95] Ruffin was even further from other members of the generation before him like George Wythe who employed the language of republicanism and republics. Where others might seem 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.

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.[96] Other treatises like Thomas Cobb's *Inquiry into the Law of Negro Slavery in the United States* link moral philosophy with judicial action.

The core elements of Ruffin's philosophy were to take the world as it is; a natural rights view of property; and liberalism.[97] His opinions give us some sense of why such a man could

---

> from time to time, made strenuous efforts to expunge the sentiments of freedom which now adorn the works of noble men from the noble Gaston, may, perhaps, fully account for the oblivious state into which this patriotic address seems to have fallen.

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

95 In *Green v. Lane*, 53 N.C. (8 Ired. Eq.) 70 (1851), Ruffin struck an attempted quasi-emancipation. 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.

96 *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 (1852) (reprinting Dew's *Review of the Debates*). For a description of the key tenants of antebellum moral philosophy, see Daniel Walker Howe, *The Political Culture of the American Whigs* (1984); Wilson Smith *Professors and Public Ethics: Studies of Northern Moral Philosophers* (1956). Among the leading works on moral philosophy in the old south included Albert Taylor Bledsoe, *An Essay on Liberty and Slavery* (Lippincott, Philadelphia, 1856); JOHN LEADLEY DAGG, THE ELEMENTS OF MORAL SCIENCE (Sheldon & Co., New York, 1860); R.H. RIVERS, MORAL PHILOSOPHY (Nashville, 1861); WILLIAM A. SMITH, LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY (A.A. Stitt, Nashville, 1850); JASPER ADAMS, ELEMENTS OF MORAL PHILOSOPHY (Cambridge, 1837). Francis Wayland's college text, *Elements of Moral Philosophy* (1835), maintained its popularity, despite Wayland's growing anti-slavery sentiments. *See also* Alfred L. Brophy, *Considering William and Mary's History with Slavery: The Case of President Thomas R. Dew*, 16 WM & MARY BILL RIGHTS J. 1091-1139 (2008) (discussing Dew's proslavery thought).

97 We can use Ruffin to test historians' theories about how law functioned. Primary among the paradigms is

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 run for President in 1860, said during 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

---

Morton Horwitz' theory that there emerged an instrumental conception of law, in which judges self-consciously remade law to promote economic growth and its predecessor, formulated by Willard Hurst that antebellum law encouraged the "release of energy." 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 slaveowners. One finds, indeed, some important parallels between how Goodell and proslavery treatise authors, like T.R.R. Cobb, *Inquiry into the Law of Negro Slavery in the United States* (1858) view the evolution and goals of slave law. Thomas R. Dew, similarly, links slavery with the market and sees slavery as a central element of the market.

Horwitz' picture is focused largely on the northeast and, therefore, may have somewhat different application in the south. Stanley, *Dominion and Dependence in the Law of Freedom and Slavery*, *supra* note 27, at 1127-28, 1130(discussing Horwitz' 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."); Wythe Holt, *Morton Horwitz and the Transformation of American Legal History,* 23 WM & MARY L. REV. 663 (1982) (similar). Peter Karsten presents a frontal challenge to Horwitz, claiming that while judges wielded an instrumental conception, it was to inject sentiments of the heart. Unsurprisingly, Ruffin appears nowhere in Karsten's account.

Other accounts include Perry Miller's 1963 *The Mind in America: From Revolution Through Civil War*, which emphasized both intellectual elegance of law and its connections to romanticism. And more recently, William Fisher, joined by historians of Jacksonian America more generally, emphasizes 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 LAW JOURNAL 65 (1990); Alfred L. Brophy, *Necessity No Law: Vested Rights and Styles of Reasoning in the Confederate Conscription Cases*, 69 MISS. L.J. 1123 (2000). Similarly, G. Edward White has interpreted one kind of ideology—republicanism—as central to the Marshall Court. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE (1988); Stephen Siegel, *The Marshall Court and Republicanism*, 67 TEX. L. REV. 603 (1988) (discussing White's vision of republicanism).

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 fit quite any of those models; none of the boxes quite fit him. 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 (1836).

This article, then, is part of an emergence 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.

both master and slave."[98]

Judicial Opinions as Monuments

The antebellum era was a great one of monuments. There is the Bunker Hill Monument, the Washington Monument, and much talk of funeral monuments[99] at cemeteries throughout the country.[100] The monuments Justice Thomas Ruffin left us are his judicial opinions. So Ruffin's 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 were landmarks. Timothy Walker told a graduating class at the Cincinnati's Law School of the charges 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."[101] 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

98 CONG. GLOBE, 31st Cong., 1st Sess. at 1106.

99 *See, e.g.*, Lund v. Lund, 41 N.H. 355 (N.H. 1860); Mecker v. Boylan, 28 N.J.L. 274 (N.J.Sup. 1860) (first item of testator's will is order "to erect a suitable monument to my memory"); Fink v. Fink, 12 La. Ann. 301 (La. 1857); Cleland v. Waters, 19 Ga. 35 (1855); Success of Franklin, 7 La. Ann. 395 (1852) ("that the great monument of wisdom and benevolence which he attempted to erect, should be left to perpetuate his memory"); Tuttle v. Robinson, 33 N.H. 104 (N.J. 1856); Burr's Exis v. Smith, 7 Vt. 241 (1835). Monuments on the land defined its boundaries. *See, e.g.*, Icehour v. Rives, 32 N.C. (10 Ired.) 256 (1832) (noting in syllabus on the case; *Literacy Fund v. Clark*, 9 Ired. 58 (1848) ("the 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, 8 Ired. 147 (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."); Kellogg v. Smith, 61 Mass. 375 (1851); Brown v. Allen, 43 Me. 590 (Me. 1857) ("if parties, after the conveyance, erect monuments, the monuments control the description"). Of course, monuments might be odious to equality, for they might preserve wealth and prestige. *See Warner & Roy v. Beers*, 23 Wend. 103 (NY 1840). Still, monuments were important, for memories might fade. Curtis v. King, 5 Me. (5 Greenl.) 482 (1829).

100 JOSEPH STORY, AN ADDRESS DELIVERED ON THE DEDICATION OF CEMETARY AT MT AUBURN, SEPTEMBER 24, 1831 (Joseph T. & Edward Buckingham, Cambridge, 1831); DANIEL BARNARD, ADDRESS, DEDICATION OF ALBANY, NEW YORK CEMETERY.

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

disturbed."[102] Or, as Justice Johnson wrote in *Green v. Biddle*, "I am groping my way through a labyrinth, trying to lay hold of sensible objects to guide me."[103]

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 … Our 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.[104]

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

> Mr. Justice Blackstone (63d page of the first vol. of his commentaries), 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.[105]

At other times, judges 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

---

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

103 Green v. Biddle, 21 U.S. (8 Wheat.) 1, 101 (1823). Other cases spoke of judicial opinions as monuments as well. *See, e.g.*, *Pollard's Heirs v. Kibble*, 39 U.S. 14 Pet. 353 (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…").

104 *In re* Opinion of the Justices, 81 Mass. 599 (1861).

105 3 Mo. 540, 1834

> 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.

Judicial, in short, opinions served as intellectual monuments for the future.[106]

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.[107] 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*.[108] He is remembered in law as an expert legal mind. And perhaps even someone who is antislavery in private, if we believe Stowe's characterization. Indeed, given how important *State v. Mann* is in exposing the system of slavery – and this in undermining it – 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*. Story's opinion there was, perhaps slightly more plausibly anti-slavery because is limited states'

---

106 *See also* Warner v. Com., 4 Va. 95 (Va.Gen.Ct., November Term 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 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…"); Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (August Term 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.").

107 In a sketch that a lawyer prepared of Justice 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 2, at 20.

108 BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 243-51 (characterizing Ruffin as judge who wrote in the "grand style").

power to support slavery even as it upheld the Fugitive Slave Act of 1793.[109] Nevertheless, as Barbara Holden-Smith has effectively shown, there is little reason to think Story was antislavery.[110]

Nevertheless, we owe Ruffin a great deal for having made the abolitionists' case easier. And, quite probably, for contributing to jurisprudence as well. For when William Goodell wrote *The American Slave Code in Theory and Practice* in 1853, he drew frequently upon reported cases. Not only did opinions like *State v. Mann* provide the substantive evidence of the inhumanity of slavery. They taught lessons about the sources of law and the moral 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' pragmatism or Llewellyn's realism might find it in the vibrant antislavery writings like Goodell, Theodore Dwight Weld, *One Thousand Lashes For Freedom* (which in turn relied on Joseph Priestley's four volume legal history of western civilization), as well as in proslavery legal thought.[111] 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. Some have located formalism as the

---

109 James Boyd White, *Constructing a Constitution: "Original Intention in The Slave Cases*, 47 MARYLAND L. REV. 239, 263 (1992).

110 Barbara Holden-Smith, *Lords of Loom, Lash, & Law: Justice Story, Slave, and Prigg v. Pennsylvania*, 82 CORNELL L. REV. 1086 (1992); Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L. J. 605 (1993).

111 *See, e.g.*, THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY (T & J.W. Johnson & Co., Philadelphia, 1858); GEORGE S. SAWYER, SOUTHERN INSTITUTES: OR, AN INQUIRY INTO THE ORIGIN AND EARLY PREVALANCE OF SLAVERY AND THE SLAVE TRADE (J. Lippincott, Philadelphia, 1859) Brophy, *History and Utility in the Fugitive Slave Act of 1850*, *supra* note 29. One might also tie those treatises together with religious proslavery works. *See, e.g.,* HOWELL COBB, A SCRIPTURAL EXAMINATION OF THE INSTITUTION OF SLAVERY IN THE UNITED STATES (1856); JOSIAH PRIEST, BIBLE DEFENSE OF SLAVERY; AND THE ORIGINS, FORTUNES, AND HISTORY OF THE NEGRO RACE (Glasgow, Ky, 1852); WILLIAM HAMILTON, THE DUTIES OF MASTERS AND SLAVES, RESPECTIVELY: OR DOMESTIC SERVITUDE AS SANCTIONED BY THE BIBLE (Mobile, F.A. Brooks, 1845); 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, Walker & James, 1850).

successor to abolitionist thought, which in one strain retreated to a mechanistic interpretation of the Constitution.[112] 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 in the slave code inhumanity. William Goodell wondered whether: "the wise legislator, civilian, or jurist, does not see and condemn, in the slave code, the opprobrium of legislation, the disgrace of jurisprudence, the subversion of equity, the promotion of lawlessness, the element of social insecurity, and the seeds of every crime which legislative and jurisprudence should suppress or restrain."[113] 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. He boldly asked "would we wish to honor him by placing his portrait in American law schools as a personal inspiration to future generations of law students as to what it means to be a 'distinguished' lawyer or judge?" [114] Levinson thought that there should be nothing named after Ruffin in any law school in the country.

Similar issues of memory crop up frequently in discussions of Civil War memory.[115] First, should each generation be bound by the naming decisions of past generations? One of

---

112 William E. Nelson, *The Impact of the Antislavery Movement Upon Judicial Styles of Reasoning*, 87 HARV.L.REV. 513 (1974).

113 GOODELL, SLAVE CODE, *supra* note 21, at 405, 407.

114 Sanford Levinson, *Allocating Honor and Acting Honorably: Some Reflections Provoked by the Cardozo Conference on Slavery*, 17 CARDOZO L. REV. 1969, 1969 (1996). 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*, WASHINGTON POST (July 23, 2007).

115 *See, e.g.*, SLAVERY AND AMERICAN MEMORY: THE TOUGH STUFF OF AMERICAN HISTORY (James Horton & Lois Horton eds., 2006); Sally Greene, *Judge Thomas Ruffin and the Shadows of Southern History*, forthcoming __ N.C. L. REV. __ (2008). 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* ALFRED L. BROPHY, REPARATIONS PRO AND CON (2006).

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. 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."[116]

Yet at other times, however, Emerson acknowledged the importance of names:

> 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 the 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.[117]

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. Tradition is an important value, for we cannot remove names without a loss.

Other issues to consider include the meaning of a monument to the people who put it up, who had a say in naming or placing the monument, and what is the monument's meaning 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 re-write names now.[118]
(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.[119]
(3) removal is divisive.

---

116 *American Scholar*, 5 WORKS OF RALPH WALDO EMERSON 69, 76 (1880).

117 *The Conservative*, in *id.* at 237, 245.

118 *Cf.* Justice Kennedy in *Palazzolo* (suggesting value of long-term expectations).

119 Kirk Semple, *The Struggle for Iraq; Iraq Confronts Hussein Legacy Cast in Bronze*, NEW YORK TIMES (April 8, 2007). For a larger view of these issues of cultural destruction, see Robert Bevan, *The Destruction of Memory: Architecture at War* (2006).

(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).[120]

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 presents a two-by-two table that classifies the purposes served by removal and by maintenance of monuments.

Table 1

Motivations and Considerations in Renaming

	Remove Monument	Keep Monument
	forgetting	Tradition;

120 *See* United Daughters of the Confederacy v. Vanderbilt University, 174 S.W.Sd 98 (Tenn. Ct. App. 2005). Monument law appears in cases interpreting a name on a building (*United Daughters of the Confederacy*) in a park or access to a park (*Evans v. Abney*) and the display of a monument on public property. *See* Mary Johnson, *An "Ever Present Bone of Contention:" The Heyward Shepherd Memorial*, 56 W. VA. HIST. 1 (1997) (discussing UDC's memorial to a "faithful slave," Heyward Shepherd, who was the first person killed at Harper's Ferry); JIM WEEKS, GETTYSBURG: MEMORY, MARKET, AND AN AMERICAN SHRINE 116 (2003) (discussing Sickles Act); JOHN B. NEFF, HONORING THE CIVIL WAR DEAD: COMMEMORATION AND THE PROBLEM OF RECONCILIATION (2005); Ann Bartow, *Naming Rights and the Physical Public Domain*, 40 U.C. Davis L. Rev. 919 (2007); Peter Byrne "Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law", available at: http://www.law.georgetown.edu/faculty/documents/byrnegettysburgchapter.pdf It is related to the important literature on the Antiquities Act of 1906. *See* Christine Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333 (2002). It is also related to first amendment concerns related to public monuments. *See* Van Orden v. Perry, 545 U.S. 677 (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* Charles P. Lord, *Stonewalling the Malls: Just Compensation and Battlefield Protection*, 77 VA. L. REV. 1637 (1991). It addresses the meta-issues of memorials and how the law treats controversies around them. *See generally* SANFORD LEVINSON, WRITTEN IN STONE (1999). And it is well past time that we have a biography of him. For, as John Reid wrote in 1995, "Ruffin's opinions bring us face to face with some of the implications of slavery in ways few other sources can …. American history needs a biography of him – and of Joseph Henry Lumkpkin – more than it needs a biography of any United States Court Justice who remains to be studied." John Reid, *Beneath the Titans*, 70 N.Y.U. L. REV. 653, 676 (1995).

Non-Reformers		honor the past
Reformers	Stop honoring the dishonorable	remind 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?[121] 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 Statute of Saddam Hussein toppled in Baghdad in April 2003 and our own country faced this when we toppled the statute 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.[122]

Perhaps Ruffin was believed to be great because of his honesty in *Mann*, which was of great assistance to the abolitionists. North Carolina Chief Justice Walter Clark—a progressive late nineteenth and early twentieth century jurist—did not mention it 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: "he is thought much the greatest judge who has ever sat upon the bench in North Carolina. Should any one be found who may deny him this

121 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. So, will the costs of removal outweigh the benefits?

122 Some sense of the meaning emerges from Walter Clark's work. *See* WALTER CLARK, ADDRESSES AT THE UNVEILING AND PRESENTATION OF THE STATE OF THE STATUE OF THOMAS RUFFIN (1915); Walter Clark, *Thomas Ruffin*, 4 GREAT AMERICAN LAWYERS: … 279 (1907-09).

Decisions about placement of monuments or buildings are political decisions, as Ruffin himself recognized in a case involving the relocation of courthouses. They are "matters of political arrangement and expediency, and necessarily the subjects of legislative discretion." *State v. Jones*, 1 Ired. 414 (1841).

honor, he will admit at least that Ruffin has no superior."[123] 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? Willard Hurst included Ruffin as one of 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."[124] 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, most opinion faltered and took refugee in vague generalities from the moralists."[125] So, first, in memoralizing 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 century that Ruffin's connections to slavery (or maybe even antislavery) were forgotten.

One tiny, further piece of this comes from Justice Hugo Black's copy of a biography of Walter Clark published during World War II. Underlined in pencil is a quotation from Clark's opinion in *State v. Abbott*: "Whatever tends to increase the power of the judiciary over the

123 Clark, Great American Lawyers, at 297.
124 WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 18 (1950).
125 *Id.* at 141.

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."[126] Black—and others—might also appreciate Ruffin's sense of the need for humility among judges in *Hoke v. Henderson*, 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 do…."[127]

***

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. Thus, it was removed not because it was a monument to the era of white supremacy, but because it was wrongfully implicated Yale. And, although the portrait was in the *Hartford Courant*, it 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.

We saw a somewhat different version of this from the University of Virginia in 2007, when its board of visitors (its trustees) hastily and without public discussion, issued an apology

126 State v. Abbott, 34 S.E. 412, 422 (N.C. 1899).

127 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.)

for the University's connections to slavery. 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.

At the University of Alabama, the school whose history I know best, the decisions about naming are many: Manly Hall was named after Basil Manly, president of the University from 1837 to 1855, who swore in Jefferson Davis as President of the Confederacy. Manly's extensive diaries record events on the campus, including beating a slave in the presence of the faculty and the prostitution of a young enslaved girl to students. That girl, Luna, was owned by … F.A.P. Barnard. Barnard was the science professor at the University from 1838 to 1854, who owned human beings. After leaving the University of Alabama, Barnard was chancellor of the University of Mississippi. While at the University of Mississippi, Barnard expelled a student who attacked one of his slaves. He was subsequently tried for the offense of taking testimony of a slave against the student. Then—following the Civil War—was president of Columbia University. Barnard College, the distinguished women's college, is also named after him.[128]

Nott Hall (formerly the biology building) was named after Josiah Nott, a Mobile physician who believed that the races of humans had separate origins and coauthored an important treatise on *Types of Mankind* in 1854;[129] Garland Hall was named after Landon Cabell Garland, the University's president from 1855 to 1865, who owned several dozen people and

---

128 Alfred L. Brophy, The Chancellor, The Student, and the Slave: Frederick Barnard and the Legacy of Slavery (discussing RECORD OF THE TESTIMONY AND PROCEEDINGS, IN THE MATTER OF THE INVESTIGATION, BY THE TRUSTEES OF THE UNIVERSITY OF MISSISSIPPI … (Jackson, 1860)).

129 J.C. NOTT & GEORGE R. GLIDDON, TYPES OF MANKIND: OR, ETHNOLOGICAL RESEARCHES (Philadelphia, Lippincott, 1854); JOSIAH C. NOTT, TWO LECTURES ON THE CONNECTION BETWEEN THE BIBLICAL AND PHYSICAL HISTORY OF MAN…. (New York, Bartlett and Welford, 1849).

delivered a series of proslavery speeches at the Tuscaloosa YMCA on the eve of Civil War. Morgan Hall was named after United States Senator John Tyler Morgan who was a leading secessionist before the Civil War and after the war justified the annexation of Hawaii.

There are other physical connections of the University to the era of slavery: the grand President's mansion was built by slaves and there are slave quarters behind it (which have not been restored); there is a granite monument to confederate soldiers on the University's Quad in front of the University's main library; there are two plaques on that library commemorating alumni who fought for the Confederacy. There are intellectual monuments as well. The writings of the faculty frequently supported the institution of slavery in the antebellum period.[130]

There are traditions of powerful history professors in the Alabama history department like Frank Owsley, Albert Moore, and James Sellers – who did much to preserve a favorable interpretation of the Old South.[131] In this way, the Alabama faculty is joined by many other schools. Perhaps – indeed probably – more destructive than the campus buildings named after people like Ruffin and Nott, are the books left to us by historians who are defenders of the South.[132] Thus, we have J. G. de R. 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* (published in 1942 by the University of Chicago Press), William Archibald Dunning's *Reconstruction, Political and Economic* (1907) and U. B. Philips' *American Negro Slavery*. One might also cite Allen Johnson's 1921 article in the *Yale Law Journal* on "The Constitutionality of the Fugitive Slave Acts," which rehabilitated

130 *See*, *e.g.*, JAMES SELLERS, SLAVERY IN ALABAMA 353-54 (1950).

131 *See* Frank L. Owsley, *The Fundamental Cause of the Civil War: Egocentric Sectionalism*, 7 J.S. Hist. 3 (1941); Albert B. Moore, *One Hundred Years of Reconstruction of the South*, 9 J.S. Hist. 153 (1943); MICHAEL O'BRIEN, THE IDEA OF THE AMERICAN SOUTH, 1920-1941, 162-84 (1978) (discussing Owsley).

132 *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 140 (W. Fitzhugh Brundage ed. 2000).

antebellum Southern thinking on the Act.[133] Johnson's strange article represents yet another monument to the era of Jim Crow, which sought reconciliation through interpretations of history favorable to the South.

J. G. de Roulhac Hamilton headed the history department at the University of North Carolina from 1908 to 1931. And, of course, as followers of Southern history know, he also founded the Southern Historical Collection at UNC, one of the great collections of Southern, even American, history available anywhere.[134] 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 paper 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.[135] 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 UNC history professor who left the University of North Carolina because his view was too controversial—and, we might add now, correct.[136]

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.[137] 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

---

133 31 YALE L.J. 161 (1921).
134 *See* W. FITZHUGH BRUNDAGE, THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY at 105 (2005).
135 *See* DREW FAUST, DESIGN FOR MASTERY: JAMES HENRY HAMMOND AND THE OLD SOUTH (1982).
136 *See* Howard K. Beale, *On Rewriting Reconstruction History*, 45 AM. HIST. REV. 807-27 (1939-40).
137 Eric L. Muller, *Fixing a Hole: How the Criminal Law Can Bolster Reparations Theory*, 47 B.C.L. REV. 659 (2006).

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. Moreover, Ruffin's clarity of thought made it possible to critique the proslavery legal system. Beginning with Theodore Weld's *One Thousand Lashes for Freedom,* running to Williams Goodell's *American Slave Code in Theory and Practice*, and to Stowe's *A Key To Uncle Tom's Cabin*, abolitionists mined Ruffin's opinion, along with other proslavery opinions, to critique and undo the system of slave law. In fact, Ruffin may – by exposing the system – have done more to undermine it than many abolitionists.

* * *

The problem with continuing a name is that it continues an honor – and might then be the basis for further incorrect histories. We need to make sure that the prestige of a public institution does not continue an incorrect history. Of course, issues of names are symbols for larger questions about memory and power. At Alabama, the power of precedent is too strong; there will be no renaming. And, indeed, there probably ought not to be. For renaming might be the opportunity for forgetting. In this world where we are constantly forgetting the connections of the past to slavery, we probably should not make that process of forgetting any easier. For we are only now beginning to remember the connections of our great and powerful institutions like J.P. Morgan Chase, Aetna, USX, the *Hartford Courant*, the *Mobile Register*, Brown University and William and Mary to the institution of slavery – to say nothing of the Universities of Alabama, Mississippi, North Carolina, South Carolina, and Virginia, and Transylvania University.

On the University of Alabama's campus we will remember that the founder of our medical school believed that black and white people had separate origins. The destruction that

Josiah Nott did to the truth will likely not be forgotten as long as there is a building on campus named after him. There is even the possibility of a flip here: That in remembering the dark past we begin to see how far we have traveled. Building names – and the stories of past injustice that they tell – remind us how far we have come as a nation. They are reminders that the process of remaking our world is continuing and that in that march of progress, we have come a long way. It is up to the faculty and students to keep alive the memory of what those names mean for us at the University and for those enslaved. As long as names like Manly and Nott are on buildings, there will be people who ask who were those people? And I believe the same to be true of Thomas Ruffin.

An incorrect history, which is memorialized through building names, is what we are up against. These issues of memory and monuments are appearing everywhere -- at Harvard, Yale, Samford University, UVA, Ole' Miss, UNC, Alabama, University of North Alabama, Sewanee: The University of the South, Vanderbilt, William and Mary, and in the cities of Birmingham, Richmond and Memphis, even Penny Lane in Liverpool, named after a slave trader, James Penny.

Monuments are so often created in a politically changed 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,* D.W. Griffith's *Birth of A Nation*, Edward Josiah Stearns' *Notes on Uncle Tom's Cabin*, and Chief Justice Roger B. Taney's opinion *Dred Scott v. Sandford,* 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 may respect Thomas Ruffin's mind and we may 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.