



# ADVISORY COMMISSION ON PORTRAITS

REPORT AND RECOMMENDATION TO THE SUPREME COURT OF NORTH  
CAROLINA

DECEMBER 14, 2020



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## **About the North Carolina Judicial Branch**

The mission of the North Carolina Judicial Branch is to protect and preserve the rights and liberties of all the people as guaranteed by the Constitutions and laws of the United States and North Carolina by providing a fair, independent and accessible forum for the just, timely and economical resolution of their legal affairs.

## **About the North Carolina Administrative Office of the Courts**

The mission of the North Carolina Administrative Office of the Courts is to provide services to help North Carolina’s unified court system operate more efficiently and effectively, taking into account each courthouse’s diverse needs, caseloads, and available resources.



# INTRODUCTION

The Advisory Commission on Portraits was created by order of the Supreme Court of North Carolina on October 25, 2018. The Commission was charged with considering “matters related to portraits of former justices of the Supreme Court of North Carolina” and with promulgating a report and recommendation to the Court.

In June of 2019, Chief Justice Cheri Beasley appointed the membership of the Commission; the group met for the first time on August 15, 2019. The Commission met six times over the course of the ensuing year to discuss portraiture in the Supreme Court.

As part of the Commission’s work, Commissioners viewed the Court’s artwork collection, gathered information on portraiture policies of other state supreme courts, and shared news and scholarly articles relevant to the topic. In particular, the Commissioners read extensively about Chief Justice Thomas Ruffin’s complicated historical legacy as both a respected jurist and a proponent of racist ideologies.

The Commission completed its work on September 22, 2020 by adopting the recommendations set forth in this report.

## Commission Membership

The following individuals were appointed to serve on the Advisory Commission on Portraits:

- Catherine Bishir
- Dr. Paul Bitting
- Rachel Blunk
- Shelley Lucas Edwards
- James Ferguson
- Hon. Robert N. Hunter
- Michelle Lanier
- Danny Moody
- Bree Newsome Bass
- Dr. E.B. Palmer
- R.E. “Steve” Stevenson, III
- Hon. Patricia Timmons-Goodson
- Dr. Darin Waters
- Hon. Willis Whichard
- Dr. Lyneise Williams

The Commission was co-chaired by Michelle Lanier and Danny Moody.



## Summary of Contents

This report contains the final recommendation of the Advisory Commission on Portraits as well as letters to the Court from individual members of the Commission and an appendix of the documents considered by the Commission.

Further information about the Commission's work, including the agenda and minutes for each meeting and a video recording of the final three meetings, can be found at the [NC Courts website](#).



# PORTRAIT COLLECTION

The art collection currently housed in the Justice Building consists of approximately 150 portraits, busts, photographs, and other pieces. The majority of the collection is made up of portraits of former justices of the Supreme Court of North Carolina, with portraits of former associate justices displayed in the third-floor corridor and portraits of former chief justices displayed in the courtroom.

In 1999, the Supreme Court of North Carolina entered into a Memorandum of Understanding (“MOU”) transferring ownership of the Court’s artwork to the North Carolina Museum of History, Department of Cultural Resources. According to the terms of the MOU, “the physical location of the artwork shall remain at the Supreme Court building and shall not be removed from the Court without the Court’s written approval of its removal.”

## THOMAS RUFFIN

Much of the Commission’s discussion and its ultimate recommendation focus on the portrait of Chief Justice Thomas Ruffin. Ruffin’s larger-than-life-sized portrait is the centerpiece of the Supreme Court courtroom, not only because of its dimensions but also because of its placement: the portrait hangs directly behind the Chief Justice’s seat at the center of the bench, flanked by two columns.

Thomas Ruffin served as North Carolina’s third chief justice from 1833 to 1852, and has been perhaps the most revered judge in the state’s history. As scholars Eric Muller and Sally Greene describe a few of the accolades Ruffin has received,

At the dedication of a heroic-scale bronze statue of Judge Ruffin at the entrance to the North Carolina Supreme Court building (now the Court of Appeals) in 1915, Governor Locke Craig called him “one of the greatest judges that our race has produced.” In 1922, a dormitory was named after him on the UNC-Chapel Hill campus. Roscoe Pound secured Ruffin’s reputation as one of the ten greatest judges of the golden age of the American common-law tradition, an honor proudly proclaimed in official histories of the Supreme Court of North Carolina from the early twentieth century to the present.”<sup>1</sup>

The respect historically afforded to Ruffin is attributed to his reputation as a jurist who led the Supreme Court in crafting opinions that ushered in a wave of growth and progress, ending decades of economic stagnation. In more recent years, however, scholars have begun to reconsider Ruffin’s place in North Carolina history in light of his pro-slavery views and his active participation in the slave industry.<sup>2</sup>

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<sup>1</sup> Sally Greene & Eric L. Muller, *Introduction: State v. Mann and Thomas Ruffin in History and Memory*, 87 N.C. L. Rev. 669 (2009).

<sup>2</sup> See generally *id.*; Sally Greene, *State v. Mann Exhumed*, 87 N.C. L. Rev. 701 (2009); Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. Rev. 757 (2009).



In 1829, the Court considered whether a defendant, John Mann, could be indicted for assault against Lydia, an enslaved person. Lydia had attempted to escape a beating from Mann, and he shot her as she ran. Writing for the Court, Ruffin held that Mann could not face criminal charges because the threat of unrestrained physical violence was necessary to ensure that enslaved persons remained obedient to slaveholders. “Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.”<sup>3</sup>

Ruffin’s opinion indicates that he experienced some measure of discomfort with the outcome of the case, but that he felt the law compelled him to reach the holding nonetheless:

The struggle, too, in the Judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless however, to complain of things inherent in our political state. And it is criminal in a Court to avoid any responsibility which the laws impose. With whatever reluctance therefore it is done, the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North-Carolina.<sup>4</sup>

Ruffin’s allusion to the feelings within “[his] own breast” notwithstanding, he was an active participant in the slave trade, and a slave owner himself, with a documented record of cruelty that stood out as egregious even in its time. In 1824, Ruffin received a letter from a neighbor—himself, a fellow slaveholder—complaining of the “evil and barbarous Treatment of [Ruffin’s] Negroes,” including the “barbecu[ing], pepper[ing] and salt[ing]” of one of them.<sup>5</sup> A few years later, during his tenure on the Supreme Court, Ruffin severely beat Bridget, an enslaved woman belonging to an acquaintance of Ruffin’s, because she “gave [him] a look of insolent audacity.”<sup>6</sup> Ruffin’s deep financial ties to the slave trade and his willingness to separate slave families are equally well documented.<sup>7</sup>

In October of 2018, the Raleigh News & Observer published an op-ed by Professor Eric Muller calling for the removal of Ruffin’s portrait from the Supreme Court courtroom. The Advisory Commission on Portraits was created in response to consider policies related to portraits at the Supreme Court.

In the last year, a life-sized statue of Ruffin has been removed from the entryway of the Court of Appeals building, Orange County has removed its Ruffin portrait from its courtroom, and the University of North Carolina at Chapel Hill has removed Ruffin’s name from its dormitory.

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<sup>3</sup> *State v. Mann*, 13 N.C. 263, 266 (1829).

<sup>4</sup> *Id.*

<sup>5</sup> Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. Rev. 757, 780 (2009)

<sup>6</sup> *Id.* at 783 (alteration in original).

<sup>7</sup> See *id.* at 785–97.



# COMMISSION RECOMMENDATION

At its final meeting on September 22, 2020, the Commission voted to approve the following recommendation:

That the Portraits Commission recommend to the Supreme Court of North Carolina the following action regarding the portrait of Chief Justice Thomas Ruffin:

That the Court adopt a rule limiting the size of future portraits of former chief justices and associate justices of the Court to that of the largest of such portraits in the Court's current collection, excepting the portrait of Chief Justice Ruffin;

That the Court then commission the painting of a new portrait of Chief Justice Ruffin that conforms to the newly adopted rule relating to portrait size, said portrait to be prepared from the Ruffin portrait owned by the Dialectic and Philanthropic Societies, University of North Carolina at Chapel Hill, Chapel Hill, North Carolina; the Societies have indicated a willingness to loan their Ruffin portrait to the Court for a maximum period of five years for this purpose; the Commission recommends that the Court accept that offer;

That the new portrait, so commissioned, replace the outsized Ruffin portrait currently in the Justice Building Courtroom, and that the extant Ruffin portrait be placed in storage with the North Carolina Museum of History or the North Carolina Museum of Art, as the Court, in consultation with the appropriate officials of these state institutions, deems most appropriate or desirable;

That the placement of the new Ruffin portrait be moved one space to the left, when facing it, of the locale of the present Ruffin portrait, and the portraits of Ruffin's successor chief justices be moved one space to accommodate the new Ruffin portrait, thereby retaining the current chronological sequence of the portraits;

That a large replica of the seal of the Supreme Court be prepared and placed in the current locale of the Ruffin portrait; and

That the Court adopt a rule that henceforth the Court seal shall occupy said space, and no portrait of any former chief justice shall occupy said space to the immediate rear of the sitting chief justice's seat in the Courtroom.



# INDIVIDUAL STATEMENTS

In consideration of the diversity of thought amongst the Commissioners with regard to the final recommendation of the Commission, individual Commissioners were invited to submit to the Court a statement expressing their personal views in support or opposition to the recommendation. Commissioners Bree Newsome-Bass and Dr. Lyneise Williams submitted the statements that follow.

## Statement of Bree Newsome-Bass

Commissioner Bree Newsome-Bass requested that her e-mail to the Commission, dated July 24, 2020, be included as her personal statement to the Court.

Dear Fellow Commissioners,

I appreciate the time, energy and dedication everyone has contributed to this endeavor. Upon further reflection after our meeting yesterday, I want to share with you that I now firmly feel all portraits on the walls of the courtroom in the North Carolina Supreme Court should be relocated for the reasons detailed below:

### **The Issue Is Court Tradition and the Tradition Is Problematic Because of Its Origins**

Over the past year, the primary argument that has been made in support of Ruffin's portrait remaining in place centers on maintaining a long-standing tradition among the justices. However, that tradition itself cannot be separated from Ruffin or his legacy, since it was the commission of his life-sized portrait as a venerated figure of the Confederacy in the aftermath of the Civil War that began this tradition. The maintenance of this tradition, while I appreciate its sentimental value to those who've served on the Supreme Court and their families, has little to do with the people of the state of North Carolina, the furtherance of justice or any effort to present the Court as a neutral arbiter on matters that come before it. It's solely a tradition that has been established by the justices to hang portraits of themselves on the walls of the chamber. This is true of every state among the few that have chosen to commission and collect portraits of their Supreme Court justices. None of the portraits therefore can truly be considered neutral images because, unlike the seal of the Supreme Court with its depiction of blind justice and its inscription "suum cuique tribuere", each portrait is representative of that justice's tenure, the decisions they made while on the bench and how they or their loved ones chose to commemorate their tenure in portraiture.

### **Arguments in Favor of Keeping the Ruffin Portrait Are Contradictory**

On one hand it's argued that the commission can't make judgments about any of the justices or the rulings they made during their tenures in determining whether a portrait should be on display. On the other hand, Ruffin's tenure is repeatedly cited to argue his significance as a historical figure and to justify keeping his portrait in the chamber. This only leads us back to the problematic origins of the portrait tradition: the original purpose of hanging the portraits in 1888 was to venerate three particular justices who were significant to the Confederacy--two of whom served in the Confederate Congress--and not to establish a neutral historical record of all the justices who'd ever served.



### **The Original Context of the Ruffin Portrait is the Problem**

It's been frequently said at commission meetings that we must judge a man according to his times and not through the lens of the present. Again, that only makes the presence of the original three portraits more problematic because, unlike more recent portraits, they were installed specifically to venerate figures of the slavocracy in the aftermath of the Confederacy having lost the Civil War and its campaign to preserve the enslavement of Black Americans. The notion that Ruffin was simply "a man of his time" and that modern criticism reflects a purely 21st century sensibility is belied by the fact that a Civil War had just been fought over the issue of slavery twenty years prior to the installation of the portraits. It can't be said that no one at the time would've disagreed with the placement of these portraits. It can only be said that those who disagreed had little opportunity to challenge it, especially the recently freed Black Americans who would soon see what rights they'd gained since Emancipation stripped away from them under the policies of Jim Crow segregation in North Carolina.

### **The Presence of a Problematic Portrait Is Not Resolved By Adding More Portraits**

The vast majority of the portraits on display in the chamber were not hung in the same context as the Ruffin portrait. They were not commissioned to venerate popular figures of the Confederacy. That, however, doesn't alter the problematic context in which the initial portraits were placed in the courthouse, and no amount of new portraiture will change the historical reality of how this tradition began. Changing the size and placement of the Ruffin portrait to neutralize its prominence among the other portraits is a reasonable compromise on its face (and something that will still have to be done wherever this collection of portraits is displayed), but it's a compromise that won't resolve all of the issues regarding the portraits and only delays that resolution to a later date. There will inevitably come a time when there is not enough wall space in the courtroom to display all of the justices who've served on the Court, so things can't remain as they are indefinitely. Delaying on this issue is only handing the predicament off to a later commission to decide what portraits get removed and which remain. Ruffin's portrait will undoubtedly be at the center of controversy again at that time.

### **The Scope of the Commission Includes All of the Portraits**

The administrative order from the Court states very clearly that the purpose of this Advisory Commission is "to consider matters related to portraits of former justices of the Supreme Court of North Carolina." There is nothing in the order stating that the scope of the commission is strictly limited to the Ruffin portrait. At our most recent meeting it was suggested that any recommendation to remove the portraits entirely was beyond the scope of this commission. But since it is within the Court's authority to remove these portraits should it so choose, there's nothing to indicate that it's outside the scope of this commission to recommend the Court do just that. I understand, based on what's been shared at the meetings, that it's the desire of former justices to maintain their tradition. However, the insistence on keeping these portraits inside the courtroom, including the one of Ruffin, only removes any sense of neutrality around the portraits' presence.



### **The Courtroom Should Be A Neutral Space**

The courtroom itself is a particular and unique space that is distinct from the halls of an art or history museum. The Supreme Court should strive with every effort to maintain a position of neutrality and a commitment to the concept of blind justice. In consideration of all of this, as I stated in the meeting yesterday, the seal of the Supreme Court is arguably the only neutral image that could occupy the space behind the justices because it is a depiction of the concept of justice itself and not a portrait commissioned to commemorate any individual justice.

What should be done with the portraits when they're removed from the courtroom remains a separate matter. Based on the MOU between the Supreme Court and the North Carolina Museum of History, that may be a matter that is truly outside the scope of this commission. Removing the portraits from the courtroom and relocating them elsewhere in consultation with the North Carolina Museum of History would resolve all of these issues.

Commissioners Dr. Lyneise Williams and Dr. Darin Waters join in Commissioner Newsome-Bass's statement.

### **Statement of Dr. Lyneise Williams**

Honorable Chief Justices of the North Carolina Supreme Court,

I am not in favor of the decision supported by the majority of the commissioners regarding our final vote. The proposal to replace the large portrait painting of Judge Thomas Ruffin with the state seal and hang a smaller portrait painting in a less prominent position lost by merely one vote, signaling that many other commissioners were not in agreement with this action.

My disagreement is based on my belief that the courtroom should be a neutral space. The courtroom setting should suggest and encourage all who enter that prejudice has no place in the court and justice will be fairly served. To that end, I don't believe portraiture of any kind should be a part of the courtroom setting. I am not opposed to portraits (in any media) of the honorable people who serve as judges at all levels. I see their place in settings outside of the courtroom and in museums, where they can be historically contextualized and appropriately preserved.

Despite the results of the vote, my question to you is what will you do? It is now a part of the public record that some who enter the courtroom setting feel that the portraits and their attached meanings regarding the judges they depict render the space prejudiced. All those who watched the live-streamed meetings are now aware of this, if they weren't before. The recorded record of our meetings is available to the public, so



those who read this in the future will know this sentiment. Many commissioners believe this to be the case. Indeed, the Advisory Commission was created because two attorneys wrote an op-ed about it in the widely-circulated, News & Observer. My point is, this information is now available and known.

Knowing all that you know about this as a result of the Advisory Commission's work, and moreover, that it will continue to be possible that someone will walk into the courtroom expecting to receive a fair judgement, and instead, believe the portrait paintings that hang there communicate a prejudiced space, what will you do?



# APPENDIX

The following pages contain materials circulated among and considered by the Commission during its deliberations.

- App. 1: Administrative Order Establishing Advisory Commission on Portraits
- App. 2: Administrative Order Extending Deadline for Report and Recommendation
- App. 3: News & Observer opinion piece by Professor Eric Muller
- App. 4: Memorandum of Understanding
- App. 5: Memorandum of Chief Justice Burley Mitchell regarding portrait policies
- App. 6: Report on other states' portrait policies
- App. 7: Memorandum of Office of General Counsel regarding movement of portraits
- App. 8: Ruffin context by Commissioner Catherine Bishir
- App. 9: Sally Greene & Eric L. Muller, *Introduction: State v. Mann and Thomas Ruffin in History and Memory*, 87 N.C. L. Rev. 669 (2009).
- App. 10: Sally Greene, *State v. Mann Exhumed*, 87 N.C. L. Rev. 701 (2009).
- App. 11: Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. Rev. 757 (2009).
- App. 12: Letter from North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System
- App. 13: Letter from Orange County Board of Commissioners
- App. 14: Letter from Town of Chapel Hill Town Council and Mayor

In addition, the Commission considered information found at the following websites:

- <https://cwnc.omeka.chass.ncsu.edu/exhibits/show/thomas-ruffins-decision/ruffins-slave-activity/ruffin-slave-activity>
- <https://www.southerncultures.org/article/landmarks-power-building-southern-past-1885-1915/>



SUPREME COURT OF NORTH CAROLINA

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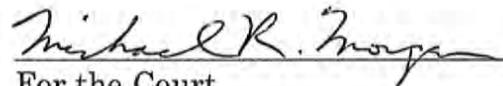
In the Matter of Establishing an )  
Advisory Commission on Portraits )  
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ADMINISTRATIVE ORDER

The Court hereby establishes an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina. The advisory commission will promulgate a report and recommendation to the Court on or before 31 December 2019. It is envisioned that the advisory commission will receive public input and review the practices of other courts around the country before finalizing its recommendation.

By Order of the Court in Conference, this the 25th day of October, 2018.

  
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this  
the 25<sup>th</sup> day of October, 2018.

AMY L. FUNDERBURK  
Clerk, Supreme Court of North Carolina



*MCH*

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M.C. Hackney  
Assistant Clerk, Supreme Court of North  
Carolina

SUPREME COURT OF NORTH CAROLINA

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In the Matter of the Advisory )  
Commission on Portraits )

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THE SUPREME COURT  
OF NORTH CAROLINA

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ADMINISTRATIVE ORDER

On 25 October 2018, this Court established an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina and directed the Commission to promulgate a report and recommendation to the Court on or before 31 December 2019. It appearing to the Court that the Commission would benefit from additional time to consider these matters, the previously established deadline is extended to 31 December 2020.

By order of the Court, this the 4<sup>th</sup> day of December, 2019.

Mark A. Davis  
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6<sup>th</sup> day of December, 2019.



AMY FUNDERBURK  
Clerk, Supreme Court of North Carolina

McIl  
Assistant Clerk, Supreme Court of  
North Carolina

**NewsRoom**

10/25/18 News & Observer (Raleigh NC) 843  
2018 WLNR 33061454

News & Observer, The (Raleigh, NC)  
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October 25, 2018

His pro-slavery rhetoric was extreme. And his portrait dominates our top NC courtroom.

Eric Muller and Sally Greene; News & Observer

One morning in late October 1831, a plantation owner took a walk around his Alamance County property. He ran a brutal operation there on the Big Alamance Creek. His overseers burned his slaves, rubbing salt and pepper into their wounds. He sold husbands away from wives and children away from parents. And he was silent partner in a slave-trading business that bought people in the border states and sold them at a profit in the deep south.

That morning the man worried over a rumor that a young enslaved woman named Bridget—whom he had decided was a bad influence—was trespassing on his property. He spotted her near his mill buildings. They had words and she gave him – he wrote – "a look of insolent audacity which Patience itself could not swallow." Grabbing a rod, he "gave her a good caning." Regretful, the man soon sought forgiveness — from Bridget's owner, for damaging his property.

As it happens, you can still see this man: in Raleigh. To find him, go to the the third floor of the Law and Justice Building on Morgan Street. Enter the paneled courtroom of the state Supreme Court and look up at the bench. You'll find him framed on the wall at the focal point of the room, between two majestic columns. You really can't miss him; he is three times the size of the other portraits. He is Thomas Ruffin, chief justice from 1833 to 1852 and still, as his portrait's position suggests, the most celebrated judge in the state's history.

Extreme rhetoric

Ruffin's reputation was solidly earned. A "thorough improvement man" in a North Carolina emerging from decades of indifference to growth — it was called the Rip Van Winkle state — he ruled in ways that hastened economic progress. Perhaps the height of his reputation came in 1936, when Roscoe Pound, dean of Harvard Law School , called him one of the 10 greatest American judges.

Missing from popular accounts of Ruffin's career, however, is one opinion with far-reaching consequences. It's missing for much the same reason that Ruffin preferred to keep his slave trading quiet. In *State v. Mann* (1829), he solidified a master's powers of discipline. His rhetoric is so extreme that historians consider the case the most shocking opinion in the entire body of slavery law.

The case arose in Chowan County. John Mann was in possession of a young enslaved woman named Lydia. Refusing one day to submit to his chastisement over something small, she fled. He shot her from behind. The state brought charges of assault and battery, and the jury found Mann guilty.

Overturing the conviction, Ruffin held that "the power of the master must be absolute, to render the submission of the slave perfect." No one remains enslaved out of devotion, he wrote: "Such obedience is the consequence only of uncontrolled authority over the body." Because the basis of slavery is raw power, Ruffin reasons, it follows that the master must hold "absolute" powers of correction.

The chilling message of *State v. Mann* was that, in the name of discipline, masters could wield virtually limitless force. Its language even made its way into slave owner instruction manuals. In our time, Martin Luther King Jr., quoted from such manuals in a sympathetic discussion of the Black Power movement. Black Power, he contended, "is a psychological reaction to the psychological indoctrination that led to the creation of the perfect slave."

Ruffin wrote hundreds of opinions involving enslaved people. As legal historian Alfred Brophy observes, these opinions "helped keep the enslaved in their subordinate status" while they "protected owners from liability for abuse and from liability for the actions of their slaves."

#### Call to account

The portrait that demands your attention has been with the Supreme Court since 1888. It was no doubt received with reverence then, what with federal troops gone and white supremacy ascendant. *State v. Mann* likely did not trouble the guests who gazed upon the portrait at the dedication of the Court's new courtroom in 1940, during the reign of Jim Crow.

But there he has remained, despite *Brown v. Board of Education* and the civil rights movement and the election of an African American president.

How can Thomas Ruffin not trouble us in 2018? We needn't worry about judging with hindsight: Ruffin behaved viciously even within his context. He went out of his way not just to inflict hardship on the enslaved people who happened to cross his path, but also to endow brutality with the force of law.

The time has come to call Thomas Ruffin to account — to revisit both his dominating presence in the courtroom and the absence of those he repressed. We owe it to the litigants whose cases are presented there, and their attorneys. We owe it to the enslaved like Lydia, who had no recourse for cruel punishment, and to those who were Ruffin's merchandise in his slave-trading business.

We owe it to Bridget.

Eric L. Muller is Dan K. Moore Distinguished Professor at the UNC School of Law . Sally Greene is an independent scholar and former member of the Chapel Hill Town Council .

#### ---- Index References ----

News Subject: (Judicial Cases & Rulings (1JU36); Legal (1LE33); Minority & Ethnic Groups (1MI43); Race Relations (1RA49); Social Issues (1SO05))

Region: (Americas (1AM92); North America (1NO39); North Carolina (1NO26); U.S. Southeast Region (1SO88); USA (1US73))

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**NewsRoom**

NORTH CAROLINA  
WAKE COUNTY

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered between the Supreme Court of North Carolina (Court) and the North Carolina Museum of History, Department of Cultural Resources, (Museum) an agency of the State of North Carolina, on the date and year below written.

### STATEMENT OF FACTS AND INTENT

1. The Court has received over the years, and it is anticipated will continue to receive, gifts of works of art including, but not limited to portrait paintings, photographs, and sculptures of former Supreme Court Justices, Marshals, Clerks, and other dignitaries of the State of North Carolina.
2. These works of art are housed and exhibited in the Supreme Court and Supreme Court building also known as the Justice Building.
3. The Court desires to transfer title to these works of art to the Department of Cultural Resources which is the agency, through its museums of history and art, responsible for the maintenance of all works of art donated to the State of North Carolina, its branches of government, and various agencies.

Based on the foregoing Statement of Facts and Intent and consideration of the promises contained herein the Supreme Court of North Carolina and the Department of Cultural Resources do agree as follows:

### AGREEMENT

1. The North Carolina Supreme Court has met and approved the transfer of title to the portraits, busts and statues (art work) listed on Addendum 1, dated August 9, 1995, to the North Carolina Museum of History, Department of Cultural Resources.
2. This transfer of title is conditioned upon the following terms:
  - a. the physical location of the artwork shall remain at the Supreme Court building and shall not be removed from the Court without the Court's written approval of its removal; and
  - b. the Museum gives prior notice of its removal which removal shall only be for the purposes set forth in paragraphs 3 and 4 below.

3. The Court encourages the use of the artwork for exhibitions and display by the Museum or through loans of the artwork by the Museum to other appropriately qualified institutions.

4. Subject to the terms of paragraph 2 above, the Court shall accept and follow the recommendations of the Museum whenever any of the artwork is to be removed, including but not limited to, relocation, whether temporary or permanent, conservation, exhibit preparation, painting, remodeling, or redecorating.

5. The Court shall pay for the restoration of the artwork listed on Addendum 2, which restoration will be coordinated through and under the guidance of the Museums of History and Art.

6. The Museum shall conduct an annual inventory of the artwork.

7. Whenever permission of the Court is required in accordance with this MEMORANDUM OF UNDERSTANDING the permission may be given by the Clerk of the Supreme Court, after consultation with and approval by the Court.

8. All future gifts of artwork to the Supreme Court will be subsequently transferred to Museum subject to the terms and conditions of this agreement.

This the 9 day of August, 1999.

Supreme Court of North Carolina

BY: Burley B. Mitchell, Jr.

Chief Justice Burley B. Mitchell, Jr.

Department of Cultural Resources

BY: Betty Ray McCain

Secretary Betty Ray McCain

Memorandum of Understanding  
Between the Supreme Court of North Carolina  
and the North Carolina Museum of History,  
Department of Cultural Resources  
Regarding Works of Art Presented to the Court  
Entered Aug. 9, 1999

### **Addendum 1**

NC Supreme Court [Portrait] Survey List

Copied from Report of the Survey of Portraits in the Supreme Court of North Carolina's Portrait Collection, Conducted  
by Outside Conservation Services of the North Carolina Museum of Art, October 23-25, 1996, and amended to include  
additional portraits and other works of art in the Court's collection

Addendum 1, cover sheet

NC Supreme Court Survey List -- Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/Date</u>	<u>Location</u>
B (F)	22	Adams	Isabelle Bowen Henderson, 1941	Hallway, 3rd Floor
B (F)	24	Allen	M.L.H. Williams, 1922	Hallway, 3rd Floor
B (F)	14	Ashe	William Garl Browne, 1887	Hallway, 3rd Floor
B (F)	26	Avery	unknown, 1933	Hallway, 3rd Floor
B (F)	4	Bagley	H.E. Burdatte	Clerk's Office
N (F)	53	Barnhill	Henry J. MacMillan, 1965-66	Courtroom
<del>B (F)</del>	<del>34</del>	<del>Waston</del> William	<del>(copy), 1893</del>	<del>Hallway, 3rd Floor</del> <b>see p. 2</b>
B (F)	15	Battle	William Garl Browne, 1859	Hallway, 3rd Floor
B (F)	70	Bennett	unknown	Library
B (F)	56	Bond	L. Freiman, c. 1947	Library
B (F)	32	Boyden	William Garl Browne ?, c. 1852	Hallway, 3rd Floor
A, L	58	Bragaw	L. Freeman, 1931	<del>Library</del> <b>Room 218 (Acc Directors office)</b>
A	31	Brown	H. Sellerett, 1931	Hallway, 3rd Floor
A	12	Burwell	A.E. Edmonds	Hallway, 3rd Floor
B (F)	10	Bynum	unknown, 1898	Hallway, 3rd Floor
F	68	Caldwell	William Garl Browne, 1852	Library
A	48	Clark	unknown, 1924	Courtroom
B (F)	25	Clarkson	Frank Stanley Herring	Hallway, 3rd Floor
B (F)	27	Connor	Mary Arnold Nash, 1940	Hallway, 3rd Floor
B (F)	28	Connor	Mary Arnold Nash, 1932	Hallway, 3rd Floor
B (F)	21	Cook	Jacques Busbee	Hallway, 3rd Floor

NC Supreme Court Survey List -- Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
B (F)	16	Daniel Joseph J.	unknown, 1892	Hallway, 3rd Floor
B (F)	67	Davis George	Jacques Busbee, 1915	Library
B (F)	36	Davis Joseph J.	unknown	Hallway, 3rd Floor
N (F)	110	Denny Emery Byrd	Irene Price, 1966	Courtroom
N (F)	114	Devin William A.	<del>unknown</del> <b>Ron Rozelle</b>	Courtroom
B (F)	35	Dick Robert P.	William Carl Browne, 1869	Hallway, 3rd Floor
B (F)	9	Dillard John H.	W.G. Randall, 1897	Hallway, 3rd Floor
B (F)	61	Dortch William T.	M.L.H. Williams, 1914	<del>Library</del> <b>Room 218 (AOC Directors' office)</b>
B (F)	19	Douglass Robert M.	unknown	Hallway, 3rd Floor
B (F)	82	Eure Mills L.	M.L.H. Williams, 1923	Library
A	54	Faircloth William T.	unknown	Courtroom
B (F)	5	Freeman Edmund B.	William Carl Browne (?)	Clerk's Office
B (F)	62	Fuller Thomas C.	M.L.H. Williams, 1913	Library
B (F)	65	Fuller Williamson W.	Nikol Schattenstein, 1935	Library
B (F)	46	Furches David M.	unknown, 1909	Courtroom
B (F)	34	Gaston William	(copy) 1893	Hallway, 3rd Floor
A	109	Gaston William	unknown	Library
N (F)	79	Graham Edward	Jacob Marling	Library
B (F)	23	Hall John	unknown	Hallway, 3rd Floor
B (F)	49	Henderson Leonard	Wiesman, 1908	Courtroom
B (F)	47	Hoke William A.	Mary Arnold Nash, 1930	Courtroom
B (F)	97	Howard George	M.L.H. Williams, 1917	Library

NC Supreme Court Survey List -- Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
B (F)	37	Iredell James	M.L.H. Williams, 1899	Lawyers' Room, 3rd Floor
B (F)	3	Kenan Thomas	Jacques Busbee, 1914	Clerk's Office
B (F)	18	Manly Matthias E.	unknown	Hallway, 3rd Floor
A	33	Manning James S.	S. Ford	Hallway, 3rd Floor
B (F)	8	<del>MacRae</del> McRae James C.	A. Edmonds, 1907	Hallway, 3rd Floor
A	41	Merrimon Augustus S.	W.G. Randall (signed),	Courtroom
B (F)	6	Montgomery Walter A.	L. H. Gebhardt, 1923	Hallway, 3rd Floor
A	38	Moore Alfred	M.L.H. Williams, 1899	Lawyers' Room, 3rd Floor
B (F)	59	Moore Bartholomes F.	William Garl Browne, 1888	Library
A	71	Morehead James T.	E.M. Whitfield, 1915	Library
B (F)	13	Murphey Archibald D.	unknown	Hallway, 3rd Floor
B (F)	52	Nash Frederick	William Garl Browne, 1888	Courtroom
N (F)	107	Parker Robert Hunt	Everett R. Kinstler, 1972	Courtroom
B (F)	44	Pearson Richmond	William Garl Browne, 1892	Courtroom
B (F)	57	Pell George	Flanders, 1940	Library
A	64	Philips Frederick	M.L.H. Williams, 1919	Library
B (F)	17	Reade Edwin	William Garl Browne, 1872	Hallway, 3rd Floor
B (F)	29	Rodman William B.	W.G. Randall, 1895	Hallway, 3rd Floor
B (F)	43	Ruffin Thomas, Sr.	J.A. Elder, 1886	Courtroom
B (F)	30	Seawell Aaron A.F.	W.C. Fields, 1953	Hallway, 3rd Floor
B (F)	11	Settle Thomas, Jr.	unknown, 1905	Hallway, 3rd Floor

NC Supreme Court Survey List -- Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
A	45	Shepherd James E.	R.M. Moore (signed), 1915	Courtroom
B (F)	81	Shipp William M.	William Garl Browne, 1886	Library
B (F)	42	Smith William N.H.	W.G. Randell, 1891	Courtroom
B (F)	98	Spruill Frank	Sidney Dickinson, 1937	Library
N (F)	51	Stacy Walter Parker	Irene Price, 1953	Courtroom
B (F)	1	Strong George Vaughan	Ruth H. Moore, 1934 (copy)	<del>4th</del> Floor Library
B (F)	50	Taylor John Louis	Randall (?)	Courtroom
B (F)	20	Toomer John D.	A. Edmonds, 1908	Hallway, 3rd Floor
B (F)	7	Walker Platt	Menzel, 1924	Hallway, 3rd Floor
B (F)	63	Warren Charles F.	unknown, 1914	Library
B (F)	66	Watson Cyrus B.	unknown	Library
B (F)	60	Wilson Joseph H.	William Garl Browne (?), 1914 (presented)	Library
N (F)	102	Winborne John W.	Everrett R. Kinstler, 1969	Courtroom
B (F)	69	Winston Patrick H.	C.A. Worrall, 1914	Library
B (F)	80	Yancy Bartlett	M.H. Rusey (Busey?), 1895	Library

NC Supreme Court Survey List -- Portraits not examined Sorted by Sitter's Name

Accession #                      Subject                      Artist/Date                      Notes

Courtroom

Recent portraits, not examined in detail (framing upgrade recommended):

118	Bobbitt	William H.	Irene Price	
119	Branch	Joseph	Rebecca Patman Chandler	
124	Sharp	Susie M.	Irene Price	

Hallway, 3rd Floor, West

20th c. portraits not surveyed in detail, with comments (framing upgrade recommended):

115	Brogden	Willis (1925-35)	Barry Lynn (S BR)	
117	Copeland	J. William (1975-84)	Paulez (S+D BL) 1990	
113	Ervin	Sam (1948-54)	Bittinger (S+D BL) 1994	varnish seems hazy
112	Higgins	Carlisle W. (1954-74)	K.R. Fox (S BR)	uneven varnish
121	Lake	I. Beverly (1965-78)	F. John F. Becker 1998	
116	Moore	Dan K. (1969-78)	Paulez (S+D BR) 1985	
120	Schenck	Michael (1934-48)	Bittinger (S+D BL) 1993	
123	Ritt	David M. (1978-82)	Kapsner (S+D BR) 1995	
122	Valentine	Timous T. (1951-52)	Ned Bittenger	

Clerk's Office

Recent portrait, not examined in detail

111	Newton	Adrian Jefferson (1941-76)	Thomas W. Orlando	
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NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
96	Hoke, John Franklin	unknown	Library	
<b>Charcoal, Pencil &amp; Conte Portraits</b>				
<b>Photographic Portraits</b>				
75	Bradley, Robert Henry	unknown	Library	
95	Bynum, John Gray, Jr.	unknown	Library	
92	Davis, George	unknown	Library	
93	Fowle, Daniel G.	unknown	Library	
72	Gardner, Dillard Scott	Hallie Siddell	Library	
89	Gilmer, John Alexander, Jr.	Alderman	Library	
74	Haywood, Marshall DeLancey	Archie Horton	Library	
77	Litchford, James	unknown	Library	
91	Lusk, Virgil S.	Blanck	Library	
94	Manning, John, Jr.	unknown	Library	
88	Merrimon, James H.	unknown	Library	

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
73 & 105	Murray, Edward	unknown	Library & Clerk's Office	duplicate copies
105	Nash, Francis ("Frank")	unknown	Clerk's Office	
104	Seawell, Edward Carver	Ellington	Clerk's Office	
103	Seawell, Joseph Lacy	Wharton	Clerk's Office	copy by Smith Studios
39	Supreme Court of North Carolina, 1905-1909	Wharton & Tyree	Clerk's Office	5 portraits in ovals: Hoke, H.G. Connor, Clark, Walker, Brown
125	Supreme Court of North Carolina, 1911-1921	unknown	Clerk's Office	photographed in Supreme Ct./State Library Bldg. (now Labor Bldg.): Walker, Brown, Clark, Hoke, Allen
40	Supreme Court of North Carolina, 1929	Underwood & Underwood, Washington, D.C.	Clerk's Office	photographed in Admin. Bldg. (now Ct. of Appeals Bldg.): G.W. Connor, Adams, Stacy, Clarkson, Brogden
126	Supreme Court of North Carolina, 1941	unknown	Clerk's Office	photographed in Justice Bldg.: Winborne, Devin, Clarkson, Stacy, Schenck, Barnhill, Seawell
127	Supreme Court of North Carolina, 1941	unknown	Clerk's Office	seated: Clarkson, Stacy, Schenck standing: Winborne, Devin, Barnhill, Seawell

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
128	Supreme Court of North Carolina, 1953	unknown	Clerk's Office	seated: Barnhill, Devin, Winborne standing: Johnson, Denny, Ervin, R.H. Parker
2	Supreme Court of North Carolina, 1960	Lewis P. Watson	Clerk's Office	Rodman, Bobbitt, Denny, Winborne, R.H. Parker, Higgins, C.L. Moore
129	Supreme Court of North Carolina, 1966-1968	Lorenz Studio	Clerk's Office	Pless, Sharp, Bobbitt, R.H. Parker, Higgins, Lake, Branch
84	Supreme Court of the United States, Chief Justices 1790-1894	unknown	Library	
83	Supreme Court of the United States, 1894	unknown	Library, Room 504	
85	Supreme Court of the United States, 1904	unknown	Library, Room 504	
78	Wiatt, John Todd Cocke	unknown	Library	photograph of painting
76	Wicker, David Alexander	unknown	Library	
90	Winston, Patrick Henry	unknown	Library	

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
<b>Portrait Busts</b>				
130	Bynum, William Preston	Lorado Taft	Library	marble
131	Ervin, Sam J., Jr.		Hallway, 3rd Floor	bronze
132	Gaston, William	Robert Ball Hughes	Library	marble, possibly F.H. Parker copy
<b>Portrait Engravings</b>				
87	Iredell, James	unknown	Library	
86	Locke, John	unknown	Library	after painting by Sir Godfrey Kneller
108	Taylor, John Louis	unknown	Library	
<b>Framed Documents &amp; Other Works of Art</b>				
55	Declaration of Independence of the United States	unknown	Courtroom	framed bronze plaque, presented by Walter Francis Burns in 1908
101	"A Legal Classic"	Robert E. Lee	Library	framed transcription of <u>Dartmouth College v. Woodward</u> , 17 U.S. 518 (1819)

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
99	License to Practice Law, 1779 (Wm. R. Davie)	n/a	Library	signatures of Samuel Ashe, Samuel Spencer & John Williams; on verso signatures of 1904 Court (Clark, Montgomery, Douglas, Walker, & H.G. Connor)
100	Magna Carta	n/a	Library	facsimile reproduction
133	"The Lost Weekend"	Martha Lang Bums	Library	watercolor print

Memorandum of Understanding  
Between the Supreme Court of North Carolina  
and the North Carolina Museum of History,  
Department of Cultural Resources  
Regarding Works of Art Presented to  
the Court  
Entered August 9, 1999

#### Addendum 2

<b>Accession # - Location</b>	<b>Subject, Artist, Description</b>
19 - Third Floor Hall	Douglass, Robert M., unknown artist, c. 1910, 30" x 25", oil on canvas
31 - Third Floor Hall	Brown, George Hubbard, H. Sellerett, 1931, 33" x 29", oil on canvas
33 - Third Floor Hall	Manning, James S., S. Ford, 20th c., 23 1/2" x 19 1/2", oil on canvas
38 - Lawyers Room	Moore, Alfred, MLH Williams, 1899 (copy of 19th c. original), 29 1/2" x 24 1/2", oil on canvas
41 - Courtroom	Merrimon, Augustus, S., W.G. Randall, c. 1892, 29" x 24 1/2", oil on canvas
54 - Courtroom	Faircloth, William T., unknown artist, c. 1900, 29 1/2" x 24 1/2", oil on canvas
58 - Room 218	Bragaw, Stephen, L. Freeman, c. 1931, 29 1/2" x 24 1/2", oil on canvas
71 - Library	Morehead, James T., E.M. Whitfield, c. 1915, 29 a/2" x 25", oil on canvas

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Raleigh, NC 27602  
Telephone: (919) 755-2100  
Fax: (919) 755-2150  
Web site: www.wcsr.com

*Portraits*

APP 5

*Newby*

Burley B. Mitchell Jr.  
Direct Dial: (919) 755-8166  
Direct Fax: (919) 755-6769  
E-mail: BMitchell@wcsr.com

June 3, 2010

Dear Friends and Former Colleagues:

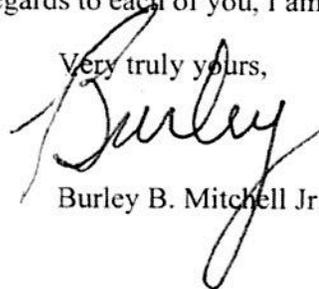
Several of you have asked me over the past year about the Rule the Court adopted while I was Chief Justice that dealt with issues concerning the size of oil portraits of the former Justices, matters relating to their maintenance and care and their public display. After searching everywhere I could think of in my files, at home and in my office, I contacted Danny Moody and Christie Cameron who located the enclosed 8 February 1999 memorandum I wrote to Christie for the Court when I was Chief Justice. It includes the text of the Rule adopted by the Court during its 4 February 1999 Conference and is self-explanatory.

I suggest that you keep this letter and the memo in your files for future reference should you or your family or others wish to donate a portrait to the Court.

My sincere thanks to Danny and Christie for once again pulling my chestnuts out of the fire and saving me from embarrassment.

With my very warmest regards to each of you, I am

Very truly yours,



Burley B. Mitchell Jr.

Bbm:adn

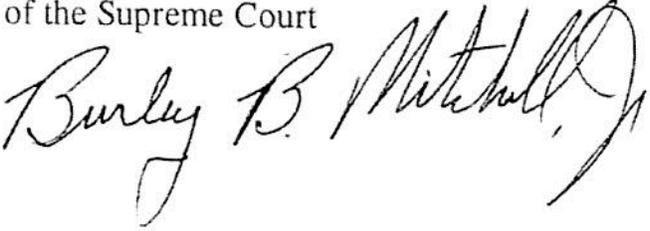
Enclosure

Supreme Court  
State of North Carolina  
Raleigh

CHAMBERS OF  
CHIEF JUSTICE BURLEY B. MITCHELL, JR.

BOX 1841  
ZIP CODE 27602

MEMORANDUM

TO: Christie Speir Cameron, Clerk of the Supreme Court  
FROM: Chief Justice Burley Mitchell   
DATE: 8 February 1999  
RE: Oil Portraits of the Former Chief Justices and Associate Justices

As you can see from the attached copies of the minutes of the 4 February 1999 Conference of the North Carolina Supreme Court, the Court has decided:

This Court will contract with and convey the entire collection of portraits of Chief Justices, Associate Justices and former Clerks in our possession, which includes all subsequent portraits, to DCR for restoration purposes and to maintain the portraits in perpetuity with the agreement from the DCR that all portraits shall be permanently displayed in locations determined by this Court.

The Court was unable to determine exactly when and what rules it had adopted with regard to oil portraits presented to or to be presented to the Court and, therefore, adopted the following Rule:

This Court hereby adopts the Rule of accepting and displaying gift portraits of Chief Justices and

8 February 1999

Associate Justices on an individual basis without regard to size or quality.

In your memorandum of 3 February 1999, you ask four questions. The Court has instructed me to answer them as follows:

You first ask, "Should I, at the Court's direction, take down the three newest portraits in the Courtroom and see if they meet the 'criteria?'" The answer is "no." As we have abandoned such "criteria," they no longer apply and there is no need to examine the three most recently received portraits.

You next ask, "Should I, at the Court's direction, send copies of the criteria to Justices Exum and Billings?" The answer is "no." Again, as we have abandoned such criteria, there is no need to contact former Chief Justices Exum and Billings. We assume that, as has been the case in the past, those having portraits painted will have their artists look at the current portraits in the courtroom and in the halls of the Supreme Court to determine the size and style portrait they wish to commission.

You next ask, "Should I, at the Court's direction, have the portraits photographed, which have not previously been photographed?" The answer is "yes."

Finally, you ask, "Would the Court be interested in having me discuss the possibility of Raymond Taylor, if he is willing, take back up the task of cataloging the portraits in the Supreme Court, with biographies, for a small booklet which the Court could reproduce for distribution - potentially a very valuable education and historical tool." The answer is "yes." The Court believes that this would be a very worthwhile project for educational and historical purposes. You should consult further with the Court, however, as to any costs to be involved in this project.

The Court wishes to thank you for your diligence and effort in reconstructing the events concerning the ownership and display of the portraits currently in our possession. As always, you have done an excellent job.

Suprem Court Conference  
minutes 2-4-99

(3) Portraits of Chief Justices and Associate Justices on Display at the Supreme Court. Chief Justice Mitchell provided the Court with an update of the history of the portraits. In addition, the conference minutes will incorporate Christie Cameron's, (Clerk of Court) memorandum dated 3 February 1999. The Court discussed whether there has been a transfer of title of the collection of portraits to the Department of Cultural Resources (hereinafter DCR) for restoration purposes. After some discussion, Justice Frye made the motion as follows:

*The Court will contract with and convey the*  
entire collection of portraits of Chief Justices, Associate Justices and former Clerks in our possession, which includes all subsequent portraits, to DCR for restoration purposes and to maintain the portraits in perpetuity with the agreement from the DCR that all portraits shall be permanently displayed in locations determined by this Court.

Motion was seconded by Justice Wainwright and was unanimously affirmed.

After a brief discussion of the Cameron memo concerning the history of the portraits, the Court made several determinations. The Court disavowed the history of the portraits due to its garbled nature and being unable to determine what rules apply. As a result, the Court adopted the following Simple Declarative Rule:

This Court hereby adopts the Rule of accepting and displaying gift portraits of Chief Justices and Associate Justices on an individual basis without regard to size or quality.

Chief Justice Mitchell and Associate Justice Lake proposed the Rule as a motion and it carried unanimously. Note that this Court has provided the requested answers to the four questions included in Christie Cameron's memo.

NONEXCLUSIVE LICENSE

I, Dean Pauls, the undersigned,  
being the owner and holder of all copyright interests in the following work(s) or art:

*Portrait of Burley B. Mitchell, Jr*

in consideration of the acquisition of the work(s) by the North Carolina Museum of Art, do hereby authorize the North Carolina Museum of Art, and other parties duly authorized by the North Carolina Museum of Art, to use the work (s) for all museum purposes including, but not limited to, displaying the work(s), lending the work(s), reproducing the work(s) by methods involving a photographic image, and displaying, distributing, selling, and transmitting such reproductions of images to others. Reproductions and transmissions may be released through media such as catalogues, books, films, television, North Carolina Museum of Art website, slides, negatives, and prints. All reproductions shall bear a copyright notice, as follows (please complete blank):

© PAULS

The effective date of this nonexclusive license shall be 4/1/02.  
This nonexclusive license, which does not transfer ownership of the copyright to the North Carolina Museum of Art, shall survive all assignments of copyright. Any transfer or assignment of the copyright shall be reported to the North Carolina Museum of Art.

4/1/02  
Date

Dean Pauls  
Signature of artist or copyright holder

DEAN PAULS  
Typed or printed name of above

NORTH CAROLINA  
WAKE COUNTY

*Original made  
Part of Supreme  
Court Conference  
minutes of  
19 August 1999*

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered between the Supreme Court of North Carolina (Court) and the North Carolina Museum of History, Department of Cultural Resources, (Museum) an agency of the State of North Carolina, on the date and year below written.

### STATEMENT OF FACTS AND INTENT

1. The Court has received over the years, and it is anticipated will continue to receive, gifts of works of art including, but not limited to portrait paintings, photographs, and sculptures of former Supreme Court Justices, Marshals, Clerks, and other dignitaries of the State of North Carolina.
2. These works of art are housed and exhibited in the Supreme Court and Supreme Court building also known as the Justice Building.
3. The Court desires to transfer title to these works of art to the Department of Cultural Resources which is the agency, through its museums of history and art, responsible for the maintenance of all works of art donated to the State of North Carolina, its branches of government, and various agencies.

Based on the foregoing Statement of Facts and Intent and consideration of the promises contained herein the Supreme Court of North Carolina and the Department of Cultural Resources do agree as follows:

### AGREEMENT

1. The North Carolina Supreme Court has met and approved the transfer of title to the portraits, busts and statues (art work) listed on Addendum 1, dated *August 9, 1999* to the North Carolina Museum of History, Department of Cultural Resources.
2. This transfer of title is conditioned upon the following terms:
  - a. the physical location of the artwork shall remain at the Supreme Court building and shall not be removed from the Court without the Court's written approval of its removal; and
  - b. the Museum gives prior notice of its removal which removal shall only be for the purposes set forth in paragraphs 3 and 4 below.

3. The Court encourages the use of the artwork for exhibitions and display by the Museum or through loans of the artwork by the Museum to other appropriately qualified institutions.

4. Subject to the terms of paragraph 2 above, the Court shall accept and follow the recommendations of the Museum whenever any of the artwork is to be removed, including but not limited to, relocation, whether temporary or permanent, conservation, exhibit preparation, painting, remodeling, or redecorating.

5. The Court shall pay for the restoration of the artwork listed on Addendum 2, which restoration will be coordinated through and under the guidance of the Museums of History and Art.

6. The Museum shall conduct an annual inventory of the artwork.

7. Whenever permission of the Court is required in accordance with this MEMORANDUM OF UNDERSTANDING the permission may be given by the Clerk of the Supreme Court, after consultation with and approval by the Court.

8. All future gifts of artwork to the Supreme Court will be subsequently transferred to Museum subject to the terms and conditions of this agreement.

This the 9 day of August, 1999.

Supreme Court of North Carolina

BY: Burley B. Mitchell, Jr.

Chief Justice Burley B. Mitchell, Jr.

Department of Cultural Resources

BY: Betty Ray McCain

Secretary Betty Ray McCain

Memorandum of Understanding  
Between the Supreme Court of North Carolina  
and the North Carolina Museum of History,  
Department of Cultural Resources  
Regarding Works of Art Presented to the Court  
Entered Aug. 7, 1999

**Addendum 1**

NC Supreme Court [Portrait] Survey List

Copied from Report of the Survey of Portraits in the Supreme Court of North Carolina's Portrait Collection, Conducted  
by Outside Conservation Services of the North Carolina Museum of Art, October 23-25, 1996, and amended to include  
additional portraits and other works of art in the Court's collection

NC Supreme Court Survey List -- Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
B (F)	22	Adams William Jackson	Isabelle Bowen Henderson, 1941	Hallway, 3rd Floor
B (F)	24	Allen William Reynolds	M.L.H. Williams, 1922	Hallway, 3rd Floor
B (F)	14	Ashe Thomas S.	William Carl Browne, 1887	Hallway, 3rd Floor
B (F)	26	Avery Alphonso Calhoun	unknown, 1933	Hallway, 3rd Floor
B (F)	4	Bagley William H.	H.E. Burdatte	Clerk's Office
N (F)	53	Barnhill Maurice Victor	Henry J. MacMillan, 1965-66	Courtroom
B (F)	34	<del>Gaston</del> William	<del>(copy), 1893</del>	<del>Hallway, 3rd Floor</del> see p.2
B (F)	15	Battle William Horn	William Carl Browne, 1859	Hallway, 3rd Floor
B (F)	70	Bennett Risden Tyler	unknown	Library
B (F)	56	Bond William Marion	L. Freiman, c. 1947	Library
B (F)	32	Boyden Nathaniel	William Carl Browne?, c. 1852	Hallway, 3rd Floor
A, L	58	Bragaw Stephen	L. Freeman, 1931	<del>Library</del> Room 218 (AOC Directors' office)
A	31	Brown George Hubbard	H. Sellerett, 1931	Hallway, 3rd Floor
A	12	Burwell Armistead	A.E. Edmonds	Hallway, 3rd Floor
B (F)	10	Bynum William P.	unknown, 1898	Hallway, 3rd Floor
F	68	Caldwell David Franklin	William Carl Browne, 1852	Library
A	48	Clark Walter	unknown, 1924	Courtroom
B (F)	25	Clarkson Heriot	Frank Stanley Herring	Hallway, 3rd Floor
B (F)	27	Connor George Whitfield	Mary Arnold Nash, 1940	Hallway, 3rd Floor
B (F)	28	Connor Henry Groves	Mary Arnold Nash, 1932	Hallway, 3rd Floor
B (F)	21	Cook Charles A.	Jacques Busbee	Hallway, 3rd Floor

## NC Supreme Court Survey List – Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/Date</u>	<u>Location</u>
B (F)	16	Daniel Joseph J.	unknown, 1892	Hallway, 3rd Floor
B (F)	67	Davis George	Jacques Busbee, 1915	Library
B (F)	36	Davis Joseph J.	unknown	Hallway, 3rd Floor
N (F)	110	Denny Emery Byrd	Irene Price, 1966	Courtroom
N (F)	114	Devin William A.	<del>unknown</del> Ron Royelle	Courtroom
B (F)	35	Dick Robert P.	William Carl Browne, 1869	Hallway, 3rd Floor
B (F)	9	Dillard John H.	W.G. Randall, 1897	Hallway, 3rd Floor
B (F)	61	Dortch William T.	M.L.H. Williams, 1914	<del>Library - Room 218 (AOC Directors office)</del>
B (F)	19	Douglass Robert M.	unknown	Hallway, 3rd Floor
B (F)	82	Eure Mills L.	M.L.H. Williams, 1923	Library
A	54	Faircloth William T.	unknown	Courtroom
B (F)	5	Freeman Edmund B.	William Carl Browne (?)	Clerk's Office
B (F)	62	Fuller Thomas C.	M.L.H. Williams, 1913	Library
B (F)	65	Fuller Williamson W.	Nikol Schattenstein, 1935	Library
B (F)	46	Furches David M.	unknown, 1909	Courtroom
B (F)	34	Gaston William	(copy) 1893	Hallway, 3rd floor
B (F)	109	Gaston William	unknown	Library
N (F)	79	Graham Edward	Jacob Marling	Library
B (F)	23	Hall John	unknown	Hallway, 3rd Floor
B (F)	49	Henderson Leonard	Wiesman, 1908	Courtroom
B (F)	47	Hoke William A.	Mary Arhold Nash, 1930	Courtroom
B (F)	97	Howard George	M.L.H. Williams, 1917	Library

NC Supreme Court Survey List -- Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/Date</u>	<u>Location</u>
B (F)	37	Iredell James	M.L.H. Williams, 1899	Lawyers' Room, 3rd Floor
B (F)	3	Kenan Thomas	Jacques Busbee, 1914	Clerk's Office
B (F)	18	Manly Matthias E.	unknown	Hallway, 3rd Floor
A	33	Manning James S.	S. Ford	Hallway, 3rd Floor
B (F)	8	<del>Mac Rae</del> McRae James C.	A. Edmonds, 1907	Hallway, 3rd Floor
A	41	Merrimon Augustus S.	W.G. Randall (signed),	Courtroom
B (F)	6	Montgomery Walter A.	L. H. Gebhardt, 1923	Hallway, 3rd Floor
A	38	Moore Alfred	M.L.H. Williams, 1899	Lawyers' Room, 3rd Floor
B (F)	59	Moore Bartholomes F.	William Garl Browne, 1888	Library
A	71	Morehead James T.	E.M. Whitfield, 1915	Library
B (F)	13	Murphey Archibald D.	unknown	Hallway, 3rd Floor
B (F)	52	Nash Frederick	William Garl Browne, 1888	Courtroom
N (F)	107	Parker Robert Hunt	Everett R. Kinstler, 1972	Courtroom
B (F)	44	Pearson Richmond	William Garl Browne, 1892	Courtroom
B (F)	57	Pell George	Flanders, 1940	Library
A	64	Philips Frederick	M.L.H. Williams, 1919	Library
B (F)	17	Reade Edwin	William Garl Browne, 1872	Hallway, 3rd Floor
B (F)	29	Rodman William B.	W.G. Randall, 1895	Hallway, 3rd Floor
B (F)	43	Ruffin Thomas, Sr.	J.A. Elder, 1886	Courtroom
B (F)	30	Seawell Aaron A.F.	W.C. Fields, 1953	Hallway, 3rd Floor
B (F)	11	Settle Thomas, Jr.	unknown, 1905	Hallway, 3rd Floor

NC Supreme Court Survey List -- Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
A	45	Shepherd James E.	R.M. Moore (signed), 1915	Courtroom
B (F)	81	Shipp William M.	William Garl Browne, 1886	Library
B (F)	42	Smith William N.H.	W.G. Randell, 1891	Courtroom
B (F)	98	Spruill Frank	Sidney Dickinson, 1937	Library
N (F)	51	Stacy Walter Parker	Irene Price, 1953	Courtroom
B (F)	1	Strong George Vaughan	Ruth H. Moore, 1934 (copy)	<del>4th</del> Floor Library
B (F)	50	Taylor John Louis	Randall (?)	Courtroom
B (F)	20	Toomer John D.	A. Edmonds, 1908	Hallway, 3rd Floor
B (F)	7	Walker Platt	Menzel, 1924	Hallway, 3rd Floor
B (F)	63	Warren Charles F.	unknown, 1914	Library
B (F)	66	Watson Cyrus B.	unknown	Library
B (F)	60	Wilson Joseph H.	William Garl Browne (?), 1914 (presented)	Library
N (F)	102	Winborne John W.	Everrett R. Kinstler, 1969	Courtroom
B (F)	69	Winston Patrick H.	C.A. Worrall, 1914	Library
B (F)	80	Yancy Bartlett	M.H. Rusey (Busey?), 1895	Library

NC Supreme Court Survey List - Portraits not examined Sorted by Sitter's Name

<u>Accession #</u>	<u>Subject</u>	<u>Artist/Date</u>	<u>Notes</u>
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Courtroom

Recent portraits, not examined in detail (framing upgrade recommended):

118	Bobhitt	William H.	Irene Price
119	Branch	Joseph	Rebecca Patman Chandler
124	Sharp	Susie M.	Irene Price

Hallway, 3rd Floor, West

20th c. portraits not surveyed in detail, with comments (framing upgrade recommended):

115	Brogden	Willis (1925-35)	Barry Lynn (S BR)
117	Copeland	J. William (1975-84)	Paulez (S+D BL) 1990
113	Ervin	Sam (1948-54)	Bittinger (S+D BL) 1994 varnish seems hazy
112	Higgins	Carlisle W. (1954-74)	K.R. Fox (S BR) uneven varnish
121	Lake	I. Beverly (1965-78)	F. John F. Becker 1998
116	Moore	Dan K. (1969-78)	Paulez (S+D BR) 1985
120	Schenck	Michael (1934-48)	Bittinger (S+D BL) 1993
123	Britt	David M. (1978-82)	Kapsner (S+D BR) 1995
122	Valentine	Itimous T. (1951-52)	Ned Bittenger

Clerk's Office

Recent portrait, not examined in detail

111	Newton	Adrian Jefferson (1941-76)	Thomas W. Orlando
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NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
96	Hoke, John Franklin	unknown	Library	
<b>Charcoal, Pencil &amp; Conte Portraits</b>				
<b>Photographic Portraits</b>				
75	Bradley, Robert Henry	unknown	Library	
95	Bynum, John Gray, Jr.	unknown	Library	
92	Davis, George	unknown	Library	
93	Fowle, Daniel G.	unknown	Library	
72	Gardner, Dillard Scott	Hallie Siddell	Library	
89	Gilmer, John Alexander, Jr.	Alderman	Library	
74	Haywood, Marshall DeLancey	Archie Horton	Library	
77	Litchford, James	unknown	Library	
91	Lusk, Virgil S.	Blanck	Library	
94	Manning, John, Jr.	unknown	Library	
88	Merrimon, James H.	unknown	Library	

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
73 & 105	Murray, Edward	unknown	Library & Clerk's Office	duplicate copies
105	Nash, Francis ("Frank)	unknown	Clerk's Office	
104	Seawell, Edward Carver	Ellington	Clerk's Office	
103	Seawell, Joseph Lacy	Wharton	Clerk's Office	copy by Smith Studios
39	Supreme Court of North Carolina, 1905-1909	Wharton & Tyree	Clerk's Office	5 portraits in ovals: Hoke, H.G. Connor, Clark, Walker, Brown
125	Supreme Court of North Carolina, 1911-1921	unknown	Clerk's Office	photographed in Supreme Ct./State Library Bldg. (now Labor Bldg.): Walker, Brown, Clark, Hoke, Allen
40	Supreme Court of North Carolina, 1929	Underwood & Underwood, Washington, D.C.	Clerk's Office	photographed in Admin. Bldg. (now Ct. of Appeals Bldg.): G.W. Connor, Adams, Stacy, Clarkson, Brogden
126	Supreme Court of North Carolina, 1941	unknown	Clerk's Office	photographed in Justice Bldg.: Winborne, Devin, Clarkson, Stacy, Schenck, Barnhill, Seawell
127	Supreme Court of North Carolina, 1941	unknown	Clerk's Office	seated: Clarkson, Stacy, Schenck standing: Winborne, Devin, Barnhill, Seawell

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
128	Supreme Court of North Carolina, 1953	unknown	Clerk's Office	seated: Barnhill, Devin, Winborne standing: Johnson, Denny, Ervin, R.H. Parker
2	Supreme Court of North Carolina, 1960	Lewis P. Watson	Clerk's Office	Rodman, Bobbitt, Denny, Winborne, R.H. Parker, Higgins, C.L. Moore
129	Supreme Court of North Carolina, 1966-1968	Lorenz Studio	Clerk's Office	Pless, Sharp, Bobbitt, R.H. Parker, Higgins, Lake, Branch
84	Supreme Court of the United States, Chief Justices 1790-1894	unknown	Library	
83	Supreme Court of the United States, 1894	unknown	Library, Room 504	
85	Supreme Court of the United States, 1904	unknown	Library, Room 504	
78	Wiatt, John Todd Cocke	unknown	Library	photograph of painting
76	Wicker, David Alexander	unknown	Library	
90	Winston, Patrick Henry	unknown	Library	

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
<b>Portrait Busts</b>				
130	Bynum, William Preston	Lorado Taft	Library	marble
131	Ervin, Sam J., Jr.		Hallway, 3rd Floor	bronze
132	Gaston, William	Robert Ball Hughes	Library	marble, possibly F.H. Parker copy
<b>Portrait Engravings</b>				
87	Iredell, James	unknown	Library	
86	Locke, John	unknown	Library	after painting by Sir Godfrey Kneller
108	Taylor, John Louis	unknown	Library	
<b>Framed Documents &amp; Other Works of Art</b>				
55	Declaration of Independence of the United States	unknown	Courtroom	framed bronze plaque, presented by Walter Francis Burns in 1908
101	"A Legal Classic"	Robert E. Lee	Library	framed transcription of <u>Dartmouth College v. Woodward</u> , 17 U.S. 518 (1819)

IC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
99	License to Practice Law, 1779 (Wm. R. Davie)	n/a	Library	signatures of Samuel Ashe, Samuel Spencer & John Williams; on verso signatures of 1904 Court (Clark, Montgomery, Douglas, Walker, & H.G. Connor)
100	Magna Carta	n/a	Library	facsimile reproduction
133	"The Lost Weekend"	Martha Lang Burns	Library	watercolor print

Memorandum of Understanding  
Between the Supreme Court of North Carolina  
and the North Carolina Museum of History,  
Department of Cultural Resources  
Regarding Works of Art Presented to  
the Court  
Entered August 9, 1999

**Addendum 2**

<b>Accession # - Location</b>	<b>Subject, Artist, Description</b>
19 - Third Floor Hall	Douglass, Robert M., unknown artist, c. 1910, 30" x 25", oil on canvas
31 - Third Floor Hall	Brown, George Hubbard, H. Sellerett, 1931, 33" x 29", oil on canvas
33 - Third Floor Hall	Manning, James S., S. Ford, 20th c., 23 1/2" x 19 1/2", oil on canvas
38 - Lawyers Room	Moore, Alfred, MLH Williams, 1899 (copy of 19th c. original), 29 1/2" x 24 1/2", oil on canvas
41 - Courtroom	Merrimon, Augustus, S., W.G. Randall, c. 1892, 29" x 24 1/2", oil on canvas
54 - Courtroom	Faircloth, William T., unknown artist, c. 1900, 29 1/2" x 24 1/2", oil on canvas
58 - Room 218	Bragaw, Stephen, L. Freeman, c. 1931, 29 1/2" x 24 1/2", oil on canvas
71 - Library	Morehead, James T., E.M. Whitfield, c. 1915, 29 a/2" x 25", oil on canvas

9/25/2019

For: Kevin Cherry, Michelle Lanier

From: LeRae Umfleet

Re: policies and procedures regarding portraits and or busts/statues/bas relief in state Supreme Courts

I reviewed websites and interviewed Supreme Court staff members responsible for managing portraits in Virginia, South Carolina, and Florida. Briefly spoke with someone in Georgia who was going to refer my questions to the Clerk of Court but have yet to connect. Left messages for the president of the Tennessee Supreme Court Historical Society.

Observations –

- Several websites had helpful information (links below)
- Several states have developed interpretive tools to provide additional information on justices, the courts system, and landmark cases in their states. Virginia and Tennessee are good examples (see information under each state for more information:
  - Virginia has interpretive panels and touchscreen interactives in their Court building
  - Tennessee developed a small museum in its Court building
  - Most provide guided tours
- No state has a written policy regarding portraits. Several have standard practices and several are at the decision/directive of the Chief Justice (see below). Virginia is the most codified.
- Preservation is a concern in all states.
- Virginia is considering setting size limitations because of space constraints for future portraits.
- Most states have their portraits funded by a non-profit support group, but all portraits are owned by the state through gift.

### **Florida State Supreme Court**

From the website:

General policy on whose portrait hangs where and involvement of the Supreme Court Historical Society  
<https://www.floridasupremecourt.org/About-the-Court/Portrait-Gallery>

“As with any institution, the Supreme Court of Florida always has been about people -- most especially those who have served as Justices. Their achievements, lifestyles, and even their foibles weave a rich fabric that has given the Court its distinctive character for more than 150 years.”

“The largest and most historically significant body of art in the Supreme Court is the official portrait gallery located along the inner and outer walls of the Courtroom. This collection of portraits contains representations of all the former Justices of the Supreme Court. A few are the only existing likeness of the Justices.”

“By longstanding custom, portraits of more recently retired Justices are displayed in the gallery areas inside the Courtroom. Older portraits are displayed along the exterior walls of the Courtroom.”

“A special custom is followed when a present or former Justice dies. The portrait of that Justice is removed from its customary place on the wall and is displayed in a place of honor near the main entrance to the Courtroom.”

Florida Supreme Court Historical Society donor page mentions that funds go to commissioning official portraits of the justices: <https://www.flcourthistory.org/Donate>

The Law Librarian was helpful in discussing the portraits and policies (Billie Blaine, (850) 922-5520)

- No written policies – basically it’s how the Chief Justice wants them hung
- There are portraits of all the justices from throughout history, hung in 3 different parts of the building:
  - Lawyer’s Lounge (where attorneys prepare before going in front of Court) – only current justices; open to the public
  - Court Room – as many portraits as will fit along the two long walls in two rows; order is roughly chronological with recent retirees from the Court closest to the front
  - Hallway outside Court – oldest portraits with short biographical sketches with just the facts of their service to the court; chronological order

## **Georgia**

From the Website:

<https://www.gasupreme.us/>

New portrait unveiled [https://www.mdjonline.com/opinion/honored-by-portrait/article\\_83844c5a-465a-11e6-b04f-97aa778495f6.html](https://www.mdjonline.com/opinion/honored-by-portrait/article_83844c5a-465a-11e6-b04f-97aa778495f6.html)

no information on who sponsored it or who has custody

Called and left a message with Clerk of Court who referred me to Public Relations who then referred me to the Clerk of Court. Awaiting a return call.

## **South Carolina**

From the Website: <https://www.sccourts.org/supreme/index.cfm>

SC Bar foundation supports efforts to acquire portraits: <https://scbf.networkforgood.com/> see “apply my donation to” section and annual report has listing of funds in another portrait fundraiser

Spoke with Supreme Court Law Librarian Janet Meyer ((803)-734-1080)

- No official written policies
- Portraits are appraised every 10 years for insurance valuation and condition assessments
- Portraits of justices hang in portrait gallery on the second-floor space that’s open to the public
- Current Chief Justice’s portrait hangs in the lobby near main entrance
- Justices choose portraits for their offices – can be mentors, justices from their home counties, etc
- The South Carolina Supreme Court Historical Society has recently been revived and it’s hoped that they will play a role in helping with raising funds for conservation of portraits and an interpretive plan.
- Librarian is tour guide for the building to explain justices’ lives, court decisions, etc.

- The library also has a small clippings and documents collection on each justice; papers of the justices are most often donated to repositories at their alma mater or the USC School of Law

## Tennessee

From the website:

<https://www.tncourts.gov/courts/supreme-court>

Tennessee Supreme Court Historical Society: <https://www.tschsociety.org/>

They have a museum: <https://www.tschsociety.org/museum.html>

Reference to Tn State Museum having portraits - Article about an unveiling:

<https://www.tncourts.gov/press/2019/06/07/portrait-judge-martha-craig-daughtrey-unveiled-nashville-supreme-court-building>

The unveiling event was sponsored by the Tennessee Supreme Court Historical Society and the Lawyers' Association for Women – Marion Griffin Chapter.

Left a message with President of the Tennessee Supreme Court Historical Society but have not received a call back (active attorney)

## Virginia

From the website:

<http://www.courts.state.va.us/courts/scv/home.html>

New Portrait hung: <https://www.gentrylocke.com/news/portrait-of-justice-cynthia-d-kinser-unveiled-at-supreme-court-of-virginia/>

“Such portraits are the result of an effort by **The Virginia Bar Association**, which established a portraits committee in 1928. Altogether, the court’s collection includes 91 portraits of justices.”

From the Virginia Bar Association: “The VBA also continues its tradition of commissioning and donating to the commonwealth portraits of Supreme Court justices upon their election. The likeness of the newest justice, Stephen R. McCullough, who also serves as judicial representative on the VBA Board of Governors, will be unveiled.”

The Virginia Bar Association established a portraits committee in 1928. The bar hoped to encourage judges’ families and local bar associations to donate portraits to the small collection in the courthouse. In 1943, following a disagreement over the quality of portraits accepted by the court, the State Art Commission recommended justices have their portraits painted from life.

In 1956 the association established a special fund to accept tax-exempt donations for portraits for presentation to the court and donation to the Commonwealth. The expense became part of the bar’s operating budget in 1958.

Portraits are presented at the winter meeting of the Virginia Bar Association and hung in the courtroom when a justice retires.

In 1998, Governor George E. Allen issued an executive memorandum assigning the Library of Virginia responsibility for the care and oversight of artwork of the Commonwealth exhibited within the Capitol Square area.

### Supreme Court of Virginia Historical Advisory Committee

<https://scvahistory.org/about-the-portrait-collection/>

The Supreme Court of Virginia Historical Advisory Committee supports the preservation of the history of the Virginia judiciary by advising and assisting the Virginia State Law Library with the preservation of oral histories of members of the bench, the bar, and court administration. The committee supports the library's goals of archiving historical records and artifacts of Virginia's judicial system in the Supreme Court of Virginia Archives, and outreach to members of the bench and bar, encouraging the preservation of historical records and artifacts documenting Virginia's legal history. In addition, the committee provides guidance to the Virginia State Law Library with the development of special educational projects, such as exhibits, that explore Virginia's legal history.

Brochure: <https://scvahistory.org/wp-content/uploads/2019/09/Portrait-brochure-Aug-2019.pdf>

Virtual exhibits: <https://scvahistory.org/about-the-biographies/exhibits/>

“To Benefit All, to Exclude None”: Judicial Trailblazers in Virginia  
Trailblazers Reflect: Clips from Video Interviews

“Bringing Down Jim Crow: the Legal Battle in Virginia, 1933-1967”  
Remembering the Fight against Jim Crow: Clips from Video Interviews

### Spoke with State Law Librarian - Gail Warren (804) 786-2075

- No solid written policies – it's the determination of the Chief Justice
- The Chief Justice directed staff to develop procedures in 2014
- New portraits are commissioned when a new Justice is elected/appointed and are funded by the Virginia Bar Association and after unveiling are donated to the state to be hung in the Court building
- Portraits hang in several places in the building, all portraits are hung somewhere in the building, none in storage per Chief Justice's directive; all have name plate with dates of service to the court
  - Current justices' portraits hang in area outside Chief Justice's office, not open to the public
  - Retired justices hang in courtroom in descending chronological order, with recently retired justices hanging closest to the front of the courtroom; 42 portraits hang there
  - Older portraits hang in foyer outside Court, beginning with 1779 court
  - Other portraits hang in hearing rooms adjacent to main Court (not open to the public)
- Portraits are part of the Commonwealth's Fine Arts collection and are managed by staff at the Library of Virginia (Meghan Townes, Visual Studies Collections Registrar)
- Tours of the spaces are provided by Library staff with a written script
- Received a grant from the Virginia Law Foundation recently to fund exhibits and interpretive signage in the building in 4 places
  - Main entry to building - Large panels with basic information on civics topics, meeting 4<sup>th</sup> grade curriculum standards
  - Hallway leading to Court – Judicial Trailblazers, including firsts – 22 people highlighted
  - Courthouse foyer – Kiosks with all portraits on touchscreens – each portrait thumbnail represents a biographical sketch of the justice; searchable and sortable on name, dates, hometown, etc

- Exhibit Space – made from repurposed conference room – content highlights significant cases and justices in state history with a focus on Civil Rights cases, acknowledging that some of Virginia’s historic rulings can be viewed as racist or unethical now – the exhibit also highlights prominent Civil Rights attorneys in reader rails under windows

## **United States Supreme Court**

[https://supremecourthistory.org/socinfo\\_acquisitions.html](https://supremecourthistory.org/socinfo_acquisitions.html)

“In concert with the collections portion of the Acquisitions program, the Society has commissioned portraits of past and recent Justices to provide images of all members of the Court. Many of these portraits are displayed in public areas of the Supreme Court Building. In addition, the Society has provided funds to enable the maintenance of portraits and other items in the collection.”



PORTRAIT REMOVAL AND RELOCATION  
Office of General Counsel  
June 10, 2020

To: Members of the Supreme Court's Advisory Commission on Portraits

From: Tina A. Krasner, General Counsel  
Elizabeth B. Croom, Legal Counsel for Technology and Innovation

**BACKGROUND**

In 1999, the Supreme Court of North Carolina entered into a Memorandum of Understanding ("the MOU," attached as Appendix 1) transferring title to its portraits and other works of art to the North Carolina Museum of History, Department of Natural and Cultural Resources ("the Museum"). The MOU recites that the Department of Natural and Cultural Resources is the State agency responsible for the maintenance of all works of art donated to the State of North Carolina. The MOU describes the items as "gifts of works of art including, but not limited to portrait paintings, photographs, and sculptures of former Supreme Court Justices, Marshals, Clerks, and other dignitaries of the State of North Carolina[,] which "are housed and exhibited in the Supreme Court or the Supreme Court building also known as the Justice Building."

The Supreme Court's Advisory Commission on Portraits was created in 2018 in response to an opinion piece in the News & Observer calling for the removal of the large portrait of Chief Justice Thomas Ruffin prominently displayed in the Supreme Court courtroom. The Commission is tasked with considering "matters related to portraits of former justices of the Supreme Court of North Carolina. . . . It is envisioned that the advisory commission will receive public input and review the practices of other courts around the country before finalizing its recommendation." See Supreme Court's Administrative Order in *In the Matter of Establishing an Advisory Commission on Portraits*, filed October 25, 2018 (attached as Appendix 2).

**ISSUES PRESENTED**

1. Is it within the Supreme Court's power to relocate or remove portraits of former justices of the Supreme Court under Chapter 100 of the North Carolina General Statutes?
2. What are the Supreme Court's rights and responsibilities with respect to relocation or removal of portraits under its 1999 Memorandum of Understanding with the Museum?

## **BRIEF ANSWERS**

1. The Supreme Court probably has the authority to relocate or remove the portraits because G.S. Chapter 100, Article 1 shall not be construed to include art galleries administered by state institutions or to prevent the placing of portraits of officials in the buildings of the institutions with which they were connected. N.C. Gen. Stat. § 100-7.
2. Pursuant to the MOU's terms, "[T]he Court shall accept and follow the recommendations of the Museum whenever any of the artwork is to be removed, including but not limited to, relocation, whether temporary or permanent, conservation, exhibit preparation, painting, remodeling, or redecorating." The intent of this term is probably to protect the physical condition of the artwork, rather than to determine whether specific artwork should be publicly displayed or where specific artwork should be placed within the Justice Building.

## **DISCUSSION**

### **I. The Supreme Court Probably Has the Authority to Relocate or Remove the Portraits Because G.S. § 100-7 Excludes Certain Portraits from G.S. Chapter 100, Article 1.**

In general, G.S. § 100-2.1(a) provides that "a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission." The term "work of art" includes "any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration." N.C. Gen. Stat. § 100-2.

However, G.S. § 100-7 specifies that G.S. Chapter 100, Article 1, which includes G.S. § 100-2.1, does not apply in certain instances as follows:

#### **§ 100-7. Construction.**

The provisions of this Article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, the North Carolina Historical Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it.

(Emphasis added.)

The Supreme Court's exhibition of portraits of former justices of the Supreme Court in the Justice Building likely qualifies for this exclusion as an art gallery administered by a state institution. Also, the Ruffin portrait and other former justices probably qualify as portraits of officials in the buildings of the institutions with which they were connected. Both of these categories are exempt from the requirements of G.S. § 100-2.1. Therefore, removing or rearranging portraits of former justices probably would not require the approval of the Historical Commission.

Although the Supreme Court's gallery of portraits is likely excluded from all of Article 1 as explained above, the provisions of G.S. 100-2.1(b) are noteworthy. G.S. 100-2.1(b) has applied to high-profile requests to remove monuments, such as Governor Roy Cooper's 2017 petition to the Historical Commission to remove three confederate monuments from the Capitol's grounds.

G.S. 100-2.1(b) places limits on the removal or relocation of "objects of remembrance" defined as "a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history."

Subsection (b) goes on to provide that an object of remembrance on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection. An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated.

Subsection (b) limits the circumstances under which an object of remembrance may be relocated to the following:

- (1) When appropriate measures are required by the State or a political subdivision of the State to preserve the object.
- (2) When necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects.

*See also* Advisory Letter: Request for a Legal Interpretation of G.S. 100-2.1 from Special Deputy Attorney General Karen Blum to the Historical Commission, dated April 16, 2018 (pertaining to Governor Cooper's petition to remove three confederate monuments from the Capitol's grounds) (attached as Appendix 3).

The General Assembly enacted the foregoing provisions of G.S. 100-2.1(b) in the 2015 Heritage Protection Act (HPA) less than two weeks after the removal of the Confederate flag from the South Carolina State House, which was widely reported in the press. The HPA severely curtailed the Historical Commission's discretion under subsection (a) to approve the removal, relocation, or alteration of "objects of remembrance." *See* Wahlers, Kasi E., *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C.L. Rev. 2176 (2016).

However, not every "monument, memorial, or work of art owned by the State" over which the Historical Commission has authority to determine removal or relocation under subsection (a) meets the definition of an "object of remembrance," which triggers the limitations on removal and relocation in subsection (b). An "object of remembrance" is "a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history." The terms "work of art," painting, and portrait are notably missing from the definition of "object of remembrance."

In addition, portraits probably do not fit this definition because they do not have the same permanent, stationary character as large, outdoor monuments. Portraits hang impermanently on interior walls. Portraits are often displayed, rearranged, relocated, or removed for different exhibitions within the same building or at other venues. The MOU between the Supreme Court and the Museum provides, "The Court encourages the use of the artwork for exhibitions and display by the Museum or

through loans of the artwork by the Museum to other appropriately qualified institutions.” For these reasons, the Supreme Court’s portraits are probably not included in the definition of “object of remembrance.”

Therefore, assuming *arguendo* that the portraits in the Justice Building were not exempt from all of Article 1 pursuant to G.S. § 100-7, they would still probably be excluded from the stringent limitations on removing or relocating “objects of remembrance,” like confederate monuments, under G.S. § 100-2.1(b).

**II. Pursuant to the MOU’s Terms, the Supreme Court Shall Accept and Follow the Recommendations of the Museum Whenever Any Portrait is to be Removed or Relocated.**

Paragraph 1 in the AGREEMENT section of the 1999 MOU between the Supreme Court and the Museum transfers title to the artwork, providing:

The North Carolina Supreme Court has met and approved the transfer of title to the portraits, busts and statues (art work) listed on Addendum 1, dated August 9, 1999, to the North Carolina Museum of History, Department of Cultural Resources.

Paragraph 6 further states, “All future gifts of artwork to the Supreme Court will be subsequently transferred to Museum subject to the terms and conditions of this agreement.”

Paragraph 2 of the MOU sets limitations on the Museum’s ability to remove artwork from the Supreme Court building as conditions for the transfer of title.

This transfer of title is conditioned upon the following:

- a. the physical location of the artwork shall remain at the Supreme Court building and shall not be removed from the Court without the Court's written approval of its removal; and
- b. the Museum gives prior notice of its removal which removal shall only be for the purposes set forth in paragraphs 3 and 4 below.

(Emphasis added.)

Paragraph 3 of the MOU addresses an allowable purpose for removal by stating, “The Court encourages the use of the artwork for exhibitions and display by the Museum or through loans of the artwork by the Museum to other appropriately qualified institutions.”

Paragraph 4 of the MOU also includes allowable purposes for removal under Paragraph 2(b), which provides:

Subject to the terms of paragraph 2 above, the Court shall accept and follow the recommendations of the Museum whenever any of the artwork is to be removed, including but not limited to, relocation, whether temporary or permanent, conservation, exhibit preparation, painting, remodeling, or redecorating.

(Emphasis added.)

The introductory clause, “Subject to the terms of paragraph 2 above,” means that relocation is only permitted within the Justice Building or when the Supreme Court approves artwork’s removal for a purpose set forth in Paragraph 3 or 4. Paragraph 4’s permitted purposes for removal include, but are not limited to “relocation, whether temporary or permanent, conservation, exhibit preparation, painting, remodeling, or redecorating.” These purposes indicate that the Museum’s recommendations shall be followed when artwork is relocated within the Justice Building or is loaned out for an exhibit.

The intent of the requirement that “the Court shall accept and follow the recommendations of the Museum whenever any of the artwork is to be removed” is likely to protect the condition of the artwork during relocations for purposes such as exhibit preparation, remodeling, or redecorating. Conversely, the intent of this provision does not appear to be to give the Museum authority to mandate that certain works shall continue to be displayed in certain locations within the Justice Building. The use of the passive voice in the phrase “whenever any artwork is to be removed” suggests that it is not the Museum’s role to tell the Supreme Court when and where to display certain works within the Justice Building. However, the Museum does have an important role in recommending best practices for protecting the physical condition of the artwork when it is loaned to another entity or relocated within the Justice Building.

The MOU’s STATEMENT OF FACTS AND INTENT also supports that the Museum’s role in making recommendations is to protect the condition of the artwork, stating:

The Court desires to transfer title to these works of art to the Department of Cultural Resources which is the agency, through its museums of history and art, responsible for the maintenance of all works of art donated to the State of North Carolina, its branches of government, and various agencies.

(Emphasis added.)

This reading is consistent with the Museum’s other responsibilities under the MOU, including that “restoration will be coordinated through and under the guidance of the Museums of History and Art” for the items on Addendum 2 (Paragraph 5) and an annual inventory of the artwork shall be conducted by the Museum (Paragraph 6).

In addition, Chapter 4, Subchapter 40 of the North Carolina Administrative Code, entitled “Museum of History,” speaks to the Museum’s role and is attached as Appendix 4. The Museum’s purpose is set forth as follows:

07 NCAC 04O .0101 STATEMENT OF PURPOSE

The purpose of the Museum of History Section is to interpret the culture and the social, economic, and political history of North Carolina from prehistory to the present, and to collect, preserve, and utilize artifacts and other materials significant to the history of the state.

(Emphasis added.)

The Museum's accession and agreement process is also described as follows:

07 NCAC 04O .0303 ACQUISITIONS

- (a) All artifacts must be provisionally accepted by the registrar or one of the registrar's assigns and forwarded to the Division for approval by the accessions committee.
- (b) A contract of gift must be signed by the registrar, Museum of History Section, or a divisional agent at a curatorial or higher level, and the donor.

The Museum's role in managing and protecting items which are loaned to other institutions is set forth in the following provision:

07 NCAC 04O .0304 LOANS

- (a) Museum materials will not be loaned or otherwise used for projects other than museum or research-related occasions. The loan of museum artifacts is restricted to nonprofit educational institutions for research and study, exhibition, or educational purposes, after it has been determined by the Curator of Collections in conjunction with the conservation staff of the Museum of History that the artifact's physical condition will not be negatively impaired by the loan and there is no present or future commitment for the utilization of the artifact.
- (b) Loans of artifacts are subject to the following conditions:
  - (1) The transportation and utilization of borrowed artifacts must comply with guidelines established by the Curator of Collections for the Museum of History.
  - (2) The borrower must provide proof of insurance policies to cover all loan items and adequate security for their protection. The borrower shall be responsible for reimbursing the Museum of History for any damage incurred during the period of the loan.
  - (3) The artifacts shall remain the property of the Department of Cultural Resources and shall be subject to withdrawal by the Division provided notice of intention to withdraw is given 15 days prior to withdrawal, unless a definite period of loan has been specified by contractual agreement.
  - (4) A written contract of loan must be completed and signed by the Curator of Collections, Museum of History Section.
- (c) Any museum or similar agency wishing to borrow items from the collection of the Division of Archives and History must contact the Curator of Collections or the Chief, Museum of History Section.

(Emphasis added.)

Finally, the process for the deaccession of artifacts is set forth in 07 NCAC 04O .0305 as follows:

Like G.S. Chapter 100, nothing in the Administrative Code gives the Museum the authority to "prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected." N.C. Gen. Stat. § 100-107.

## **Conclusion**

The MOU lacks any provision giving the Museum explicit authority to mandate that certain works shall continue to be displayed in certain locations within the Justice Building. While the Museum is the legal owner of the artwork, the MOU balances this ownership interest against the Supreme Court's interest in displaying artwork, gifted to it, within the Supreme Court's building. Like G.S. § 100-7, the terms of the MOU and the Administrative Code indicate that the Supreme Court may remove and relocate the portraits of former justices within its own building so long as it accepts and follows the recommendations of the Museum, which appear to be intended primarily to protect the portraits' physical condition.

## **APPENDICES:**

1. Memorandum of Understanding by and between the Supreme Court of North Carolina and the Museum of History, Department of Natural and Cultural Resources, dated August 9, 1999.
2. Supreme Court's Administrative Order in *In the Matter of Establishing an Advisory Commission on Portraits*, filed October 25, 2018.
3. Advisory Letter: Request for a Legal Interpretation of G.S. 100-2.1, from Special Deputy Attorney General Karen Blum to the Historical Commission, dated April 16, 2018.
4. Chapter 4, Subchapter 40 of the North Carolina Administrative Code, entitled "Museum of History."

NORTH CAROLINA  
WAKE COUNTY

**MEMORANDUM OF UNDERSTANDING**

This Memorandum of Understanding is entered between the Supreme Court of North Carolina (Court) and the North Carolina Museum of History, Department of Cultural Resources, (Museum) an agency of the State of North Carolina, on the date and year below written.

**STATEMENT OF FACTS AND INTENT**

1. The Court has received over the years, and it is anticipated will continue to receive, gifts of works of art including, but not limited to portrait paintings, photographs, and sculptures of former Supreme Court Justices, Marshals, Clerks, and other dignitaries of the State of North Carolina.
2. These works of art are housed and exhibited in the Supreme Court and Supreme Court building also known as the Justice Building.
3. The Court desires to transfer title to these works of art to the Department of Cultural Resources which is the agency, through its museums of history and art, responsible for the maintenance of all works of art donated to the State of North Carolina, its branches of government, and various agencies.

Based on the foregoing Statement of Facts and Intent and consideration of the promises contained herein the Supreme Court of North Carolina and the Department of Cultural Resources do agree as follows:

**AGREEMENT**

1. The North Carolina Supreme Court has met and approved the transfer of title to the portraits, busts and statues (art work) listed on Addendum 1, dated August 9 to the North Carolina Museum of History, Department of Cultural Resources. 0999
2. This transfer of title is conditioned upon the following terms:
  - a. the physical location of the artwork shall remain at the Supreme Court building and shall not be removed from the Court without the Court's written approval of its removal; and
  - b. the Museum gives prior notice of its removal which removal shall only be for the purposes set forth in paragraphs 3 and 4 below.

3. The Court encourages the use of the artwork for exhibitions and display by the Museum or through loans of the artwork by the Museum to other appropriately qualified institutions.

4. Subject to the terms of paragraph 2 above, the Court shall accept and follow the recommendations of the Museum whenever any of the artwork is to be removed, including but not limited to, relocation, whether temporary or permanent, conservation, exhibit preparation, painting, remodeling, or redecorating.

5. The Court shall pay for the restoration of the artwork listed on Addendum 2, which restoration will be coordinated through and under the guidance of the Museums of History and Art.

6. The Museum shall conduct an annual inventory of the artwork.

7. Whenever permission of the Court is required in accordance with this MEMORANDUM OF UNDERSTANDING the permission may be given by the Clerk of the Supreme Court, after consultation with and approval by the Court.

8. All future gifts of artwork to the Supreme Court will be subsequently transferred to Museum subject to the terms and conditions of this agreement.

This the 9 day of August, 1999.

Supreme Court of North Carolina

BY: Burley B. Mitchell, Jr.

Chief Justice Burley B. Mitchell, Jr.

Department of Cultural Resources

BY: Betty Ray McCain

Secretary Betty Ray McCain

Memorandum of Understanding  
Between the Supreme Court of North Carolina  
and the North Carolina Museum of History,  
Department of Cultural Resources  
Regarding Works of Art Presented to the Court  
Entered Aug. 9, 1999

### **Addendum 1**

#### NC Supreme Court [Portrait] Survey List

Copied from Report of the Survey of Portraits in the Supreme Court of North Carolina's Portrait Collection, Conducted by Outside Conservation Services of the North Carolina Museum of Art, October 23-25, 1996, and amended to include additional portraits and other works of art in the Court's collection

Addendum 1, cover sheet

NC Supreme Court Survey List – Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
B (F)	22	Adams William Jackson	Isabelle Bowen Henderson, 1941	Hallway, 3rd Floor
B (F)	24	Allen William Reynolds	M.L.H. Williams, 1922	Hallway, 3rd Floor
B (F)	14	Ashe Thomas S.	William Garl Browne, 1887	Hallway, 3rd Floor
B (F)	26	Avery Alphonso Calhoun	unknown, 1933	Hallway, 3rd Floor
B (F)	4	Bagley William H.	H.E. Burdatte	Clerk's Office
N (F)	53	Barnhill Maurice Victor	Henry J. MacMillan, 1965-66	Courtroom
<del>B (F)</del>	<del>34</del>	<del>G. Gaston William</del>	<del>(copy), 1893</del>	<del>Hallway, 3rd Floor</del> <i>see p.2</i>
B (F)	15	Battle William Horn	William Garl Browne, 1859	Hallway, 3rd Floor
B (F)	70	Bennett Risden Tyler	unknown	Library
B (F)	56	Bond William Marion	L. Freiman, c. 1947	Library
B (F)	32	Boyden Nathaniel	William Garl Browne ?, c. 1852	Hallway, 3rd Floor
A, L	58	Bragaw Stephen	L. Freeman, 1931	<del>Library</del> <i>Room 218 (AOC Director's office)</i>
A	31	Brown George Hubbard	H. Sellerett, 1931	Hallway, 3rd Floor
A	12	Burwell Armistead	A.E. Edmonds	Hallway, 3rd Floor
B (F)	10	Bynum William P.	unknown, 1898	Hallway, 3rd Floor
F	68	Caldwell David Franklin	William Garl Browne, 1852	Library
A	48	Clark Walter	unknown , 1924	Courtroom
B (F)	25	Clarkson Heriot	Frank Stanley Herring	Hallway, 3rd Floor
B (F)	27	Connor George Whitfield	Mary Arnold Nash, 1940	Hallway, 3rd Floor
B (F)	28	Connor Henry Groves	Mary Arnold Nash, 1932	Hallway, 3rd Floor
B (F)	21	Cook Charles A.	Jacques Busbee	Hallway, 3rd Floor

NC Supreme Court Survey List – Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
B (F)	16	Daniel Joseph J.	unknown, 1892	Hallway, 3rd Floor
B (F)	67	Davis George	Jacques Busbee, 1915	Library
B (F)	36	Davis Joseph J.	unknown	Hallway, 3rd Floor
N (F)	110	Denny Emery Byrd	Irene Price, 1966	Courtroom
N (F)	114	Devin William A.	<del>unknown</del> Ron Rozelle	Courtroom
B (F)	35	Dick Robert P.	William Garl Browne, 1869	Hallway, 3rd Floor
B (F)	9	Dillard John H.	W.G. Randall, 1897	Hallway, 3rd Floor
B (F)	61	Dortch William T.	M.L.H. Williams, 1914	<del>Library</del> Room 218 (AOC Director's office)
B (F)	19	Douglass Robert M.	unknown	Hallway, 3rd Floor
B (F)	82	Eure Mills L.	M.L.H. Williams, 1923	Library
A	54	Faircloth William T.	unknown	Courtroom
B (F)	5	Freeman Edmund B.	William Garl Browne (?)	Clerk's Office
B (F)	62	Fuller Thomas C.	M.L.H. Williams, 1913	Library
B (F)	65	Fuller Williamson W.	Nikol Schattenstein, 1935	Library
B (F)	46	Furches David M.	unknown, 1909	Courtroom
B (F)	34	Gaston William	(copy) 1893	Hallway, 3rd floor
A	109	Gaston William	unknown	Library
N (F)	79	Graham Edward	Jacob Marling	Library
B (F)	23	Hall John	unknown	Hallway, 3rd Floor
B (F)	49	Henderson Leonard	Wiesman, 1908	Courtroom
B (F)	47	Hoke William A.	Mary Arnold Nash, 1930	Courtroom
B (F)	97	Howard George	M.L.H. Williams, 1917	Library

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
B (F)	37	Iredell James	M.L.H. Williams, 1899	Lawyers' Room, 3rd Floor
B (F)	3	Kenan Thomas	Jacques Busbee, 1914	Clerk's Office
B (F)	18	Manly Matthias E.	unknown	Hallway, 3rd Floor
A	33	Manning James S.	S. Ford	Hallway, 3rd Floor
B (F)	8	<del>MacRae</del> McRae James C.	A. Edmonds, 1907	Hallway, 3rd Floor
A	41	Merrimon Augustus S.	W.G. Randall (signed),	Courtroom
B (F)	6	Montgomery Walter A.	L. H. Gebhardt, 1923	Hallway, 3rd Floor
A	38	Moore Alfred	M.L.H. Williams, 1899	Lawyers' Room, 3rd Floor
B (F)	59	Moore Barthohomes F.	William Garl Browne, 1888	Library
A	71	Morehead James T.	E.M. Whitfield, 1915	Library
B (F)	13	Murphey Archibald D.	unknown	Hallway, 3rd Floor
B (F)	52	Nash Frederick	William Garl Browne, 1888	Courtroom
N (F)	107	Parker Robert Hunt	Everett R. Kinstler, 1972	Courtroom
B (F)	44	Pearson Richmond	William Garl Browne, 1892	Courtroom
B (F)	57	Pell George	Flanders, 1940	Library
A	64	Philips Frederick	M.L.H. Williams, 1919	Library
B (F)	17	Reade Edwin	William Garl Browne, 1872	Hallway, 3rd Floor
B (F)	29	Rodman William B.	W.G. Randall, 1895	Hallway, 3rd Floor
B (F)	43	Ruffin Thomas, Sr.	J.A. Elder, 1886	Courtroom
B (F)	30	Seawell Aaron A.F.	W.C. Fields, 1953	Hallway, 3rd Floor
B (F)	11	Settle Thomas, Jr.	unknown, 1905	Hallway, 3rd Floor

NC Supreme Court Survey List – Sorted by Sitter's Name

<u>Priority</u>	<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Location</u>
A	45	Shepherd James E.	R.M. Moore (signed), 1915	Courtroom
B (F)	81	Shipp William M.	William Garl Browne, 1886	Library
B (F)	42	Smith William N.H.	W.G. Randell, 1891	Courtroom
B (F)	98	Spruill Frank	Sidney Dickinson, 1937	Library
N (F)	51	Stacy Walter Parker	Irene Price, 1953	Courtroom
B (F)	1	Strong George Vaughan	Ruth H. Moore, 1934 (copy)	<del>4th Floor</del> Library
B (F)	50	Taylor John Louis	Randall (?)	Courtroom
B (F)	20	Toomer John D.	A. Edmonds, 1908	Hallway, 3rd Floor
B (F)	7	Walker Platt	Menzel, 1924	Hallway, 3rd Floor
B (F)	63	Warren Charles F.	unknown, 1914	Library
B (F)	66	Watson Cyrus B.	unknown	Library
B (F)	60	Wilson Joseph H.	William Garl Browne (?), 1914 (presented)	Library
N (F)	102	Winborne John W.	Everrett R. Kinstler, 1969	Courtroom
B (F)	69	Winston Patrick H.	C.A. Worrall, 1914	Library
B (F)	80	Yancy Bartlett	M.H. Rusey (Busey?), 1895	Library

<u>Accession #</u>	<u>Subject</u>	<u>Artist/ Date</u>	<u>Notes</u>
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Courtroom

Recent portraits, not examined in detail (framing upgrade recommended):

118	Bobbitt	William H.	Irene Price	
119	Branch	Joseph	Rebecca Patman Chandler	
124	Sharp	Susie M.	Irene Price	

Hallway, 3rd Floor, West

20th c. portraits not surveyed in detail, with comments (framing upgrade recommended):

115	Brogden	Willis (1925-35)	Barry Lynn (S BR)	
117	Copeland	J. William (1975-84)	Paulez (S+D BL) 1990	
113	Ervin	Sam (1948-54)	Bittinger (S+D BL) 1994	varnish seems hazy
112	Higgins	Carlisle W. (1954-74)	K.R. Fox (S BR)	uneven varnish
121	Lake	I. Beverly (1965-78)	F. John F. Becker 1998	
116	Moore	Dan K. (1969-78)	Paulez (S+D BR) 1985	
120	Schenck	Michael (1934-48)	Bittinger (S+D BL) 1993	
123	Britt	David M. (1978-82)	Kapsner (S+D BR) 1995	
122	Valentine	Itimous T. (1951-52)	Ned Bittenger	

Clerk's Office

Recent portrait, not examined in detail

111	Newton	Adrian Jefferson (1941-76)	Thomas W. Orlando	
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NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
<b>Charcoal, Pencil &amp; Conte Portraits</b>				
96	Hoke, John Franklin	unknown	Library	
<b>Photographic Portraits</b>				
75	Bradley, Robert Henry	unknown	Library	
95	Bynum, John Gray, Jr.	unknown	Library	
92	Davis, George	unknown	Library	
93	Fowle, Daniel G.	unknown	Library	
72	Gardner, Dillard Scott	Hallie Siddell	Library	
89	Gilmer, John Alexander, Jr.	Alderman	Library	
74	Haywood, Marshall DeLancey	Archie Horton	Library	
77	Litchford, James	unknown	Library	
91	Lusk, Virgil S.	Blanck	Library	
94	Manning, John, Jr.	unknown	Library	
88	Merrimon, James H.	unknown	Library	

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
73 & 105	Murray, Edward	unknown	Library & Clerk's Office	duplicate copies
105	Nash, Francis ("Frank")	unknown	Clerk's Office	
104	Seawell, Edward Carver	Ellington	Clerk's Office	
103	Seawell, Joseph Lacy	Wharton	Clerk's Office	copy by Smith Studios
39	Supreme Court of North Carolina, 1905-1909	Wharton & Tyree	Clerk's Office	5 portraits in ovals: Hoke, H.G. Connor, Clark, Walker, Brown
125	Supreme Court of North Carolina, 1911-1921	unknown	Clerk's Office	photographed in Supreme Ct./State Library Bldg. (now Labor Bldg.): Walker, Brown, Clark, Hoke, Allen
40	Supreme Court of North Carolina, 1929	Underwood & Underwood, Washington, D.C.	Clerk's Office	photographed in Admin. Bldg. (now Ct. of Appeals Bldg.): G.W. Connor, Adams, Stacy, Clarkson, Brogden
126	Supreme Court of North Carolina, 1941	unknown	Clerk's Office	photographed in Justice Bldg.: Winborne, Devin, Clarkson, Stacy, Schenck, Barnhill, Seawell
127	Supreme Court of North Carolina, 1941	unknown	Clerk's Office	seated: Clarkson, Stacy, Schenck standing: Winborne, Devin, Barnhill, Seawell

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
128	Supreme Court of North Carolina, 1953	unknown	Clerk's Office	seated: Barnhill, Devin, Winborne standing: Johnson, Denny, Ervin, R.H. Parker
2	Supreme Court of North Carolina, 1960	Lewis P. Watson	Clerk's Office	Rodman, Bobbitt, Denny, Winborne, R.H. Parker, Higgins, C.L. Moore
129	Supreme Court of North Carolina, 1966-1968	Lorenz Studio	Clerk's Office	Pless, Sharp, Bobbitt, R.H. Parker, Higgins, Lake, Branch
84	Supreme Court of the United States, Chief Justices 1790-1894	unknown	Library	
83	Supreme Court of the United States, 1894	unknown	Library, Room 504	
85	Supreme Court of the United States, 1904	unknown	Library, Room 504	
78	Wiatt, John Todd Cocke	unknown	Library	photograph of painting
76	Wicker, David Alexander	unknown	Library	
90	Winston, Patrick Henry	unknown	Library	

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
<b>Portrait Busts</b>				
130	Bynum, William Preston	Lorado Taft	Library	marble
131	Ervin, Sam J., Jr.		Hallway, 3rd Floor	bronze
132	Gaston, William	Robert Ball Hughes	Library	marble, possibly F.H. Parker copy
<b>Portrait Engravings</b>				
87	Iredell, James	unknown	Library	
86	Locke, John	unknown	Library	after painting by Sir Godfrey Kneller
108	Taylor, John Louis	unknown	Library	
<b>Framed Documents &amp; Other Works of Art</b>				
55	Declaration of Independence of the United States	unknown	Courtroom	framed bronze plaque, presented by Walter Francis Burns in 1908
101	"A Legal Classic"	Robert E. Lee	Library	framed transcription of <u>Dartmouth College v. Woodward</u> , 17 U.S. 518 (1819)

NC Supreme Court Survey List continued

<u>Accession #</u>	<u>Subject</u>	<u>Artist</u>	<u>Location</u>	<u>Notes</u>
99	License to Practice Law, 1779 (Wm. R. Davie)	n/a	Library	signatures of Samuel Ashe, Samuel Spencer & John Williams; on verso signatures of 1904 Court (Clark, Montgomery, Douglas, Walker, & H.G. Connor)
100	Magna Carta	n/a	Library	facsimile reproduction
133	"The Lost Weekend"	Martha Lang Burns	Library	watercolor print

Memorandum of Understanding  
Between the Supreme Court of North Carolina  
and the North Carolina Museum of History,  
Department of Cultural Resources  
Regarding Works of Art Presented to  
the Court  
Entered August 9, 1999

**Addendum 2**

<b>Accession # - Location</b>	<b>Subject, Artist, Description</b>
19 - Third Floor Hall	Douglass, Robert M., unknown artist, c. 1910, 30" x 25", oil on canvas
31 - Third Floor Hall	Brown, George Hubbard, H. Sellerett, 1931, 33" x 29", oil on canvas
33 - Third Floor Hall	Manning, James S., S. Ford, 20th c., 23 1/2" x 19 1/2", oil on canvas
38 - Lawyers Room	Moore, Alfred, MLH Williams, 1899 (copy of 19th c. original), 29 1/2" x 24 1/2", oil on canvas
41 - Courtroom	Merrimon, Augustus, S., W.G. Randall, c. 1892, 29" x 24 1/2", oil on canvas
54 - Courtroom	Faircloth, William T., unknown artist, c. 1900, 29 1/2" x 24 1/2", oil on canvas
58 - Room 218	Bragaw, Stephen, L. Freeman, c. 1931, 29 1/2" x 24 1/2", oil on canvas
71 - Library	Morehead, James T., E.M. Whitfield, c. 1915, 29 a/2" x 25", oil on canvas

SUPREME COURT OF NORTH CAROLINA

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In the Matter of Establishing an )  
Advisory Commission on Portraits )  
)

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ADMINISTRATIVE ORDER

The Court hereby establishes an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina. The advisory commission will promulgate a report and recommendation to the Court on or before 31 December 2019. It is envisioned that the advisory commission will receive public input and review the practices of other courts around the country before finalizing its recommendation.

By Order of the Court in Conference, this the 25th day of October, 2018.

*Michael R. Morgan*  
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this 25<sup>th</sup> day of October, 2018.

AMY L. FUNDERBURK  
Clerk, Supreme Court of North Carolina



*MCH*

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M.C. Hackney  
Assistant Clerk, Supreme Court of North  
Carolina

JOSH STEIN  
ATTORNEY GENERAL



REPLY TO:  
KAREN A. BLUM  
SERVICES TO STATE AGENCIES  
PHONE: (919) 716-6816  
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E-MAIL: kblum@ncdoj.gov

16 April 2018

Mr. David Ruffin, Chair  
North Carolina Historical Commission  
4610 Mail Service Center  
Raleigh, NC 27699-4610

Re: Advisory Letter: Request for Legal Interpretation of G.S. § 100-2.1

Dear Mr. Ruffin:

On 26 January 2018, the North Carolina Historical Commission requested an interpretation of G.S. § 100-2.1, specifically addressing:

1. What actions the [NCHC] may take under the statute.
2. Whether the [NCHC] may recommend additional sites as appropriate for re-location.
3. Whether the [NCHC] may recommend that the monuments be re-interpreted.

Letter from David Ruffin, Chair, N.C. Historical Comm'n, to Alexander McC. Peters, Chief Deputy Attorney Gen., N.C. Dep't of Justice (Jan. 26, 2018) (alterations in original); App. 1. It is our understanding that the Commission's request arises from its consideration of a Petition from the Department of Administration, filed on or about September 8, 2017, requesting approval to permanently relocate three monuments from their current location on Union Square in Raleigh, the site of the State Capitol Building, to the Bentonville Battlefield State Historic Site in Four Oaks, North Carolina.

In addressing the Commission's questions, it is necessary to understand both the applicable statutory framework, and the historical background of the Commission's (and its predecessor's) approaches to similar issues. Accordingly, this letter discusses applicable statutes, and then discusses pertinent aspects of the history of the Memorials Commission and the Historical Commission.

The brief answers to the Commission's questions are as follows:

1. The Commission has authority to grant the Petitioner's request for relocation of the three monuments if it finds that relocation is required to preserve the monuments and that the Bentonville Battlefield State Historic Site, or any other site that the Commission might identify, is a site of similar prominence, honor, visibility, and availability.

2. The Commission may recommend additional sites of similar prominence, honor, visibility, and availability to the current location as appropriate for relocation of the monuments.
3. The Commission may recommend that the monuments be reinterpreted.

### **Statutory Framework**

G.S. § 100-2.1 governs the relocation of State-owned “monument[s], memorial[s], or work[s] of art,” as well as “objects of remembrance.”

In general, G.S. § 100-2.1(a) prohibits the removal, relocation, or alteration, in any way, of a State-owned monument, memorial, or work of art without the approval of the Historical Commission. N.C. GEN. STAT. § 100-2.1(a) (2017). G.S. § 100-2.1(b) places limits on the removal or relocation of an “object of remembrance” which is defined as a “monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina’s history.” N.C. GEN. STAT. § 100-2.1(b) (2017). Subsection (b) goes on to provide that an object of remembrance that is located on public property:

may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection. . . . An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. . . .

Id.

Subsection (b) further provides that an object of remembrance may only be relocated:

- (1) When appropriate measures are required by the State or a political subdivision of the State to preserve the object[; or]
- (2) When necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects.

Id.<sup>1</sup>

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<sup>1</sup> There are three exceptions where the limitations G.S. § 100-2.1 places on removal or relocation do not apply. Those exceptions are: (1) when the item at issue is an historic highway marker; (2) when the item at issue is a privately owned object of remembrance on public property where there is a legal agreement between the private party and State governing its removal or relocation; and (3) when there is “[a]n object of remembrance for which a building inspector or similar official has determined poses a threat to public safety because of an unsafe or dangerous condition.” N.C. GEN. STAT. § 100-2.1(c) (2017).

### **History of the Memorials Commission and Historical Commission**

The following historical background is instructive in addressing the Commission's questions.

In 1941, the Legislature created the Memorials Commission. Act of Mar. 15, 1941, ch. 341, sec. 1, 1941 N.C. Pub. Laws 485, 485-87. The Memorials Commission was required to approve, among other things, the acceptance of memorials and works of art before they became State property, as well as relocation, alteration, or removal of such items after they became State property:

No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by said Memorials Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the Memorials Commission.

Act of Mar. 15, 1941, ch. 341, sec. 2, 1941 Pub. Laws 485, 486 (emphasis added); App. 2. "Work of art" included monuments. *Id.* The Memorials Commission had the authority to adopt its own rules. Ch. 341, sec. 1, 1941 Pub. Laws at 486. The statutes creating the Memorials Commission became the current Chapter 100 upon the adoption of the General Statutes of North Carolina in 1943.

The Executive Organization Act of 1973 transferred all functions, powers, duties and obligations of the Memorials Commission to the Department of Cultural Resources. Executive Organization Act of 1973, ch. 476, sec. 31, 1973 N.C. Sess. Laws 583, 576-662. However, unless repealed or superseded, existing Memorials Commission rules remained in full force and effect. Ch. 476, secs. 34, 44, 1973 N.C. Sess. Laws at 585, 589.

The Memorials Commission established procedures soon after its first meeting in 1941. At the first meeting of the Memorials Commission on 25 September 1941, the Memorials Commission considered general regulations for the future, and requested the Secretary, Christopher Crittenden, to assemble information from other states. Minutes of the Memorials Commission of the State of North Carolina (Sept. 25, 1941), *in* Memorials Commission, Minutes and Correspondence, Reel No. S.137.1N (North Carolina State Archives) [hereinafter "Reel No. S.137.1N"]; App. 3.

On 22 December 1941, Secretary Crittenden submitted to the Memorials Commission his suggestions regarding policies of the commission. Suggestions Regarding the Program and Policies of the State Memorials Commission (Dec. 22, 1941), *in* Reel No. S.137.1N; App. 4. Crittenden observed that, prior to the establishment of the commission, memorials were erected on State property or State funds were used with little thought given to the artistic merit, surroundings, or importance of the person memorialized. *Id.* Crittenden hoped that "[a] far-

reaching program should be formulated to control the erection or placing of memorials on state property or those paid for, in whole or in part, with state funds.” Id.

Among other things, Crittenden suggested a procedure to be followed by anyone interested in placing a memorial on State property:

Tentative drawings should be submitted, accompanied by an accurate statement of the subject, the location, and the name and address of the designer; the name of the person making the submission should be given; and the type of materials, the cost, the source of funds, and whether any contracts or comments have already been made should also be stated. Our Commission can then consider the proposal and if necessary suggest changes. One copy of the proposal and plans can then be returned to the petitioner, while the other will [ ] be kept in the Commission’s files. Later, detailed drawings and a statement as above in duplicate should be submitted and approved by the Commission. If approval is given, one copy should be returned to the interested person, while the other is filed by the Commission.

Id. (emphasis added).

In addition, Crittenden suggested: “No memorial within the jurisdiction of the Commission should be placed without the understanding that the State reserves the right at any time, should the need arise, to move the memorial to another location or even to remove it entirely.” Id. These suggestions were not formally adopted, but the Commission did informally approve of them. Letter from Christopher Crittenden, Sec’y, State Mem’ls Comm’n, to The Members Of The State Mem’ls Comm’n (Aug. 10, 1960), in Reel No. S.137.1N; App. 5.

On several occasions over subsequent years, the Memorials Commission and Historical Commission have followed these policies and exercised broad discretion to influence the placement of monuments on state property. On 12 October 1955, the Superintendent of the State’s Board of Public Buildings and Grounds informed the Monuments Commission that a tree-planting ceremony would occur on Capitol Square to commemorate the 10th Anniversary of the United Nations. Minutes of the Memorials Commission of the State of North Carolina (Oct. 17, 1955), in Reel No. S.137.1N. The co-chair of the UN Day in North Carolina requested that a bronze plaque be placed at the foot of the tree. Id. On 17 October 1955, the Memorials Commission approved the planting of the tree, but denied the request to include a plaque under the tree:

After some discussion, in which the desirability of scrutinizing very carefully all requests for placing memorials on state property . . . it was resolved that the request for placing the memorial on Capitol Square, as proposed, be denied, but the . . . Commission could see no objections to planting the tree on a suitable spot on the Square.

Id.; App. 6.

On 18 March 1958, the Daughters of the American Revolution requested the removal of a historical marker at State College, now North Carolina State University, to a new location on the grounds of the State Capitol. Letter from Mrs. Hugh H. Alexander, State Recording Sec’y, N.S.D.A.R. of N.C., to Dr. C. C. Crittendon [sic], Dep’t of Archives and History (Mar. 18, 1958), in Reel No. S.137.1N; App. 7. According to Mrs. Hugh H. Alexander, State Recording Secretary of the National Society Daughters of the American Revolution of North Carolina, the historical marker was located “between two much traveled thoroughfares where it is in danger of being injured by fast moving traffic . . . .” Id. On 27 March 1958, Secretary Crittenden responded that the Commission:

studied your request from various angles. In the opinion of the Commission, the present location of the memorial is not inappropriate and the memorial is adequately protected from the hazards of traffic on nearby streets. Because Capitol Square is already crowded with memorials, it is felt that extreme care should be exercised in placing additional memorials or statues on that Square.

Letter from Christopher Crittenden, Sec’y, State Mem’ls Comm’n, to Mrs. Hugh H. Alexander, State Recording Sec’y, Daughters of the Am. Revolution (Mar. 27, 1958), in Reel No. S.137.1N; App. 8.

On 1 November 1963, Mrs. G. P. Dillard, State President of the United States Daughters of 1812 of North Carolina requested the Memorials Commission approve that a marker be placed in the State Capitol “in memory of our War of 1812 Governor William Hawkins.” Letter from Christopher Crittenden, Sec’y, Mem’ls Comm’n, to Mrs. G. P. Dillard, State President, U.S. Daughters of 1812 of N.C. (Dec. 18, 1963), in Reel No. S.137.1N; App. 9. The Memorials Commission surveyed the interior of the Capitol for an appropriate place for such a memorial. Id. The commission determined that the only suitable place was on the first floor of the rotunda, where memorials to the Edenton Tea Party, the Mecklenburg Declaration of Independence, and the State’s three signers of the national Declaration of Independence had been placed. Id. The Memorials Commission noted that there were no bronze plaques for any North Carolina governors, although there were busts and portraits of several of them. Id. The commission determined that William Hawkins “does not seem to be as well known today as a number of other Governors in the almost four centuries of our history . . . .” Id. Therefore, the commission postponed for future consideration the placement of a Hawkins plaque “until such plaques for the greatest and most significant of our Governors have been placed in the Capitol.” Id.

While deferring the specific request, the commission suggested an alternate memorial at a different location: “We have been looking around for a suitable memorial which the United States Daughters of 1812 could erect, and we find that such a memorial for Captain Otway Burns might appropriately be placed in the historic town of Swansboro. As you may recall, Captain Burns was a commander of the American privateers in the War of 1812.” Id.

The policies, procedures, and rules of the Memorials Commission were first codified in 1974, when the Legislature created an Administrative Procedure Act [hereinafter “APA”] in an effort to

create a uniform system of administrative procedure for State agencies and a code of regulations. Administrative Procedure Act, ch. 1331, sec. 1, 1973 N.C. Sess. Laws 692, 691-703 (establishing code of administrative regulations). The APA required that all rules promulgated by state agencies be adopted in accordance with the APA. Id. at 693.

Accordingly, the Historical Commission adopted nine rules governing the approval of memorials on State property. They included the following:

- 07 NCAC 04G .0301 Purpose
- 07 NCAC 04G .0302 Statewide Historical Significance
- 07 NCAC 04G .0303 No Memorial within 25 Years of Death
- 07 NCAC 04G .0304 Artistic Quality
- 07 NCAC 04G .0305 Memorials to be Compatible with Surroundings
- 07 NCAC 04G .0306 Commission Will Cooperate in Planning
- 07 NCAC 04G .0307 Right of Commission to Remove Memorial
- 07 NCAC 04G .0308 Presentation of Memorial Proposals to Commission
- 07 NCAC 04G .0309 Deadline for Submission of Proposals

See Meeting of the North Carolina Historical Commission (Jan. 20, 1976), in Box 1 1975-1992, DNCR Rulemaking Proceedings File, Schedule No. 48848 (unprocessed) (North Carolina State Archives) [hereinafter “DNCR Rulemaking Proceedings File”]; App. 10-11.

In 1982, the Historical Commission applied these newly adopted rules when it considered a request from the North Carolina Vietnam Veterans Monument Committee, which sought to erect a memorial on Union Square to honor North Carolinians who served in Vietnam. North Carolina Historical Commission, Minutes of Meeting (Dec. 9, 1982), in DNCR Rulemaking Proceedings File; App. 12. The Historical Commission voted to approve the monument, but required that the location of the monument be subjected to further study and be approved by the North Carolina Capital Planning Commission. Id.

These examples demonstrate the broad scope of authority exercised by the Historical and Memorials Commissions since 1941 regarding details of acceptance and location of monuments. On several occasions, the commissions have exercised discretion in evaluating the appropriateness of locations for memorials, and suggesting alternative memorials and locations. That the commission has the authority is supported by rules previously adopted by the Historical Commission under the Administrative Procedure Act. See App. 11. Rule 4G .0309, for example, notified applicants that the Historical Commission could approve, reject, suggest changes to, or request more information about submitted proposals. 7 N.C. Admin. Code 04G .0309 (1976) (repealed Feb. 1, 1985). Rule 04G .0307 reserved in the commission the “right at any time, should the need arise, to move a memorial to another location, or even to remove it entirely.” 7 N.C. Admin. Code 04G .0307 (1976) (repealed Feb. 1, 1985). In 1985, the Historical Commission repealed hundreds of unnecessary rules, including subsection 04G regarding memorials. See App.

13.<sup>2</sup> However, the statutory authority for these rules—G.S. §§ 100-2, 100-3, 143B-62(1)d and (2)e—exists today. I can discern no reason why the Historical Commission cannot do the same under G.S. § 100-2.1, so long as the commission complies with other statutory requirements set forth in that section.

### **Responses to Questions from the Historical Commission**

Based upon the foregoing, the Attorney General’s Office provides the following responses to the questions posed by the Commission:

#### **I. What actions may the Historical Commission take under G.S. § 100-2.1 on the Department of Administration’s Petition to Relocate Three Statues?**

It is clear, and the Petition acknowledges (Pet. ¶¶ 6-8), that the three statutes at issue meet the statutory of definition of “objects of remembrance.” N.C. GEN. STAT. § 100-2.1(b). The Petition does not contend that the exceptions set forth in G.S. 100-2.1(c) apply. It is also clear that the exceptions set forth in G.S. 100-2.1(c) do not apply to the statues. Therefore, the Commission has authority to grant the Department of Administration’s Petition to temporarily or permanently relocate the three statues, provided at least one of the statutory conditions of G.S. § 100-2.1(b) are present. As noted above, those requirements are “when appropriate measures are required by the State . . . to preserve the object” or “[w]hen necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects.” *Id.* Here, the Petition asserts that appropriate measures are required for preservation. (Pet. ¶ 13). In addition, the Commission must determine that the Bentonville Battlefield State Historic Site, or any other site that the Commission might identify (see below), is a site of similar prominence, honor, visibility, and availability as Union Square before it may permanently relocate the three statues. N.C. GEN. STAT. § 100-2.1(b).

#### **II. May the Historical Commission recommend additional sites as appropriate for relocation?**

Yes. Nothing in the current statutes prevents the Commission from recommending additional sites of similar prominence, honor, visibility, and availability as appropriate for relocation of an object of remembrance.

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<sup>2</sup> In 1983, the Legislature passed an act to repeal all rules adopted under the Administrative Procedure Act, effective 1 July 1985, “unless approved by the 1985 Session of the General Assembly.” Act of Jul. 29, 1983, ch. 883, sec. 1, 1983 N.C. Sess. Laws 1082, 1082-83. This forced all of the State agencies and commissions to review their rules to determine which rules should be kept. Report to NRCD Division/Program Directors, Officials and APA Coordinators, (Nov. 16-18, 1983), in Administrative Code—Legislation 1984, DNCR Rulemaking Proceedings File. *See* North Carolina Historical Commission, Minutes of Meeting (Nov. 14, 1984), in DNCR Rulemaking Proceedings File (certifying to Attorney General’s Office repeal of memorials rules); App. 13.

Mr. David Ruffin  
North Carolina Historical Commission  
April 16, 2018  
Page 8 of 8

As discussed above, historically, both the Memorials Commission (which was absorbed into the Historical Commission in 1973) and the Historical Commission itself have provided alternative suggestions for relocation of monuments.

**III. May the Historical Commission recommend that the monuments be reinterpreted?**

Yes. G.S. § 100-2.1(a) prohibits the removal, relocation, or alteration of a monument without the approval of the Historical Commission. N.C. GEN. STAT. § 100-2.1(a). Subsection (b) specifically addresses the permanent removal, or temporary or permanent relocation, of objects of remembrance. N.C. GEN. STAT. § 100-2.1(b). It does not limit the alteration of a monument.

Therefore, so long as “reinterpretation” is done by alteration and not by removal or relocation of the monument, it is within the Historical Commission’s powers and duties to authorize it.

This is not a formal opinion of the Attorney General’s Office, and has not been reviewed in accordance with the procedures for issuing formal Attorney General Opinions.

With highest regards,



Karen A. Blum  
Special Deputy Attorney General

cc: Dr. Kevin Cherry  
Alexander McC. Peters

Encl.

## APPENDIX

Letter from David Ruffin, Chair, N.C. Historical Comm'n, to Alexander McC. Peters, Chief Deputy Attorney Gen., N.C. Dep't of Justice (Jan. 26, 2018) .....	App. 1
Act of Mar. 15, 1941, ch. 341, sec. 2, 1941 N.C. Pub. Laws 485 .....	App. 2
Minutes of the Memorials Commission of the State of North Carolina (Sept. 25, 1941).....	App. 3
Minutes of the Memorials Commission of the State of North Carolina (Sept. 25, 1941).....	App. 4
Letter from Christopher Crittenden, Sec'y, State Mem'ls Comm'n, to The Members Of The State Mem'ls Comm'n (Aug. 10, 1960) .....	App. 5
Minutes of the Memorials Commission of the State of North Carolina (Oct. 17, 1955).....	App. 6
Letter from Mrs. Hugh H. Alexander, State Recording Sec'y, N.S.D.A.R. of N.C., to Dr. C. C. Crittendon [sic], Dep't of Archives and History (Mar. 18, 1958).....	App. 7
Letter from Christopher Crittenden, Sec'y, State Mem'ls Comm'n, to Mrs. Hugh H. Alexander, State Recording Sec'y, Daughters of the Am. Revolution (Mar. 27, 1958) .....	App. 8
Letter from Christopher Crittenden, Sec'y, Mem'ls Comm'n, to Mrs. G. P. Dillard, State President, U.S. Daughters of 1812 of N.C. (Dec. 18, 1963) .....	App. 9
Meeting of the North Carolina Historical Commission (Jan. 20, 1976) .....	App. 10
Title 7, North Carolina Administrative Code, Chapter 4G (repealed Feb. 1, 1985) .....	App. 11
North Carolina Historical Commission, Minutes of Meeting (Dec. 9, 1982) .....	App. 12
North Carolina Historical Commission, Minutes of Meeting (Nov. 14, 1984) .....	App. 13



THE  
NORTH CAROLINA  
HISTORICAL COMMISSION

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4610 Mail Service Center • Raleigh, NC • 27699-4610 • 919-807-7280

January 26, 2018

**VIA ELECTRONIC MAIL TO [apeters@ncdoj.gov](mailto:apeters@ncdoj.gov)**

Alexander McC. Peters  
Chief Deputy Attorney General  
North Carolina Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

**Re: N.C. Historical Commission request for legal opinion and representation**

Dear Mr. Peters:

As Chair of the North Carolina Historical Commission (NCHC), I write to solicit a legal interpretation of a recent state statute from the Department of Justice (DOJ) and request legal representation for the NCHC by DOJ counsel on the underlying matter.

The NCHC received its first request to act under N.C. Gen. Stat. § 100-2.1 at its Fall 2017 meeting, when the Department of Administration (DOA) proposed moving three Confederate monuments on the grounds of the State Capitol in Raleigh to another State Historic Site at Bentonville Battlefield in Johnston County. At the meeting, the NCHC adopted a motion postponing any decision on the request, establishing a committee to study the matter, and directing the NCHC Chair to solicit legal interpretations of N.C. Gen. Stat. § 100-2.1 from the DOJ, the University of North Carolina School of Government, and law schools within the state. The motion asks that the interpretations specifically address:

- (a) what actions the [NCHC] may take under the statute,
- (b) whether the [NCHC] may recommend additional sites as appropriate for re-location, and
- (c) whether the [NCHC] may recommend that the monuments be re-interpreted[.]

A copy of the full motion can be found on the Department of Natural and Cultural Resources (DNCR) website at <https://files.nc.gov/ncdcr/documents/NCHC%20motion%20Sept22.pdf>.

Furthermore, the NCHC requests that DOJ provide legal representation on the underlying petition from DOA, and any additional requests or inquiries involving other state agencies regarding N.C. Gen. Stat. § 100-2.1 and Confederate monuments. Your predecessor, Grayson Kelley, assigned Special Deputy Attorney General Karen Blum to attend the Fall 2017 NCHC meeting and provide advice on this matter. Upon review of Mr. Kelley's assignment, however, it appears that Ms. Blum's representation of the NCHC was limited to that single meeting. Obviously, the matter is ongoing and both the NCHC and its study committee may need legal advice at future meetings.

Thank you for your assistance with this matter, and I look forward to your reply.

Sincerely,

A handwritten signature in black ink, appearing to read "David Ruffin". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Ruffin, Chair

H. B. 265

## CHAPTER 340

AN ACT TO APPROPRIATE THE SUM OF TEN THOUSAND DOLLARS (\$10,000.00) TO BE USED BY THE DEPARTMENT OF CONSERVATION AND DEVELOPMENT IN REPAIRING, RECONSTRUCTING OR BUILDING A SPILLWAY AT THE MOUTH OF WACCAMAW RIVER IN COLUMBUS COUNTY.

WHEREAS, Waccamaw Lake in Columbus County is by legislative enactment a unit of the State Park System, under control and supervision of the Department of Conservation and Development, and is open to and used by the public for recreation; and

Preamble:  
Use of Waccamaw Lake by public for recreation.

WHEREAS, it is desirable and necessary to maintain a reasonable constant water level so that the recreational advantages of Waccamaw Lake may be fully enjoyed by the people of the State, and in order to maintain a constant water level it is necessary to repair or reconstruct the spillway at the mouth of Waccamaw River: Now, therefore,

Maintenance of constant water level necessary.

Repairs to spillway necessary.

*The General Assembly of North Carolina do enact:*

SECTION 1. That in addition to all other appropriations which are or hereafter may be made to the Department of Conservation and Development, the Governor and Council of State are authorized and directed to allocate thereto from the contingency and emergency fund the sum of ten thousand dollars (\$10,000.00), which sum or so much thereof as may be required, is to be used by the Department of Conservation and Development exclusively for the purpose of repairing, reconstructing, or building a spillway at the mouth of Waccamaw River in Columbus County.

Appropriation for repairing, reconstructing or building spillway at mouth of Waccamaw River, Columbus County.

SEC. 2. That all laws and clauses of laws in conflict with this Act are hereby repealed.

Conflicting laws repealed.

SEC. 3. That this Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 15th day of March, 1941.

S. B. 116

## CHAPTER 341

AN ACT TO PROVIDE A MEMORIALS COMMISSION IN AND FOR THE STATE OF NORTH CAROLINA.

*The General Assembly of North Carolina do enact:*

SECTION 1. That a Memorials Commission in and for the State of North Carolina is hereby created, to consist of the following officials, ex-officio: The Governor of North Carolina,

Memorials Commission, created.  
Members.

the Secretary of the North Carolina Historical Commission, the head of the Art Department of the University of North Carolina at Chapel Hill, the head of the History Department of the University of North Carolina at Chapel Hill, and the head of the Department of Architecture of the North Carolina State College of Agriculture and Engineering. The Memorials Commission shall have the power to adopt its own rules and to elect such officers from its own members as may be deemed proper. Three commissioners shall constitute a quorum. The members shall serve without compensation.

Adoption of rules.

Officers ; quorum.

No compensation.

Approval of memorials by Commission before accepted by State.

SEC. 2. That no memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by said Memorials Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the Memorials Commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the State Highway and Public Works Commission in coöperation with the Department of Conservation and Development and the State Historical Commission as provided by Chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five.

Regulation of existing memorials, etc.  
"Work of art," defined.

Section not applicable to State Highway markers.

Approval of design and location of certain bridges and other structures.

SEC. 3. That no bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the State Treasury, or which is to be placed on or allowed to extend over any property belonging to the State, shall be begun unless the design and proposed location thereof shall have been submitted to said Memorials Commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the State, shall be removed or remodeled without submission of the plans therefor to the Commission and approval of said plans by the Commission. This section shall not be construed as amending or repealing Chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five.

Approval of plans to remove or remodel such structures.

Effect of Act on Ch. 197, Public Laws, 1935.

Governor authorized to accept gifts to State of works of art, approved by Commission.

SEC. 4. That the Governor of North Carolina is hereby authorized to accept, in the name of the State of North Carolina, gifts to the State of works of art as defined in Section two of this Act. But no work of art shall be so accepted unless and

until the same shall have been first submitted to said Memorials Commission and by it judged worthy of acceptance.

SEC. 5. That upon request of the Governor and the Board of Public Buildings and Grounds, said Memorials Commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the State. The term "building" as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration.

Duties as to buildings erected or remodeled by State.

"Building," defined.

SEC. 6. That any member of said Memorials Commission who shall be employed by the State to execute a work of art or structure of any kind requiring submission to the Commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the Governor.

Disqualification of members to vote on work of art, etc.

Temporary vacancy filled.

SEC. 7. That the provisions of this Act shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing or portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, said Memorials Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it.

Construction of Act.

SEC. 8. That no monument, statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from State funds or shall be placed in or upon or allowed to extend over State property within twenty-five years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this Act shall be interpreted as prohibiting the acceptance of funds by State agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds.

Monuments, etc., for commemorating persons, within 25 years of death, forbidden on State property; etc.

Acceptance by State of funds for educational and other useful work, to commemorate persons, authorized.

SEC. 9. That all Acts or parts of Acts in conflict herewith are hereby repealed.

Conflicting laws, repealed.

SEC. 10. That this Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 15th day of March, 1941.

MINUTES OF THE MEMORIALS COMMISSION OF THE STATE OF NORTH CAROLINA

September 25, 1941

The first meeting of the Memorials Commission the the State of North Carolina, which was created by Chapter 341, Public Laws of 1941, was held in the Governor's office at three o'clock, Thursday afternoon, September 25, 1941. Members present were Governor J. Melville Broughton; Dr. A. R. Newsome, head of the history department of the University of North Carolina; Professor Ross Shumaker, head of the department of architecture of State College; and Dr. C. C. Crittenden, secretary of the Historical Commission. Professor John V. Allcott, head of the art department of the University of North Carolina, was unable to attend.

Governor Broughton called the meeting to order and stated that he expected the commission to render an important service to the state and its people.

The immediate purpose of the meeting was to consider a request of the Eighty-first Division in the World War, commonly known as the "Wildcat Division," to place on Capitol Square a memorial to their unit. Exercises for the unveiling of such a memorial had already been planned, and speakers had been secured, for Sunday, October 5.

Mr. James E. Cahall, National Adjutant of the Wildcat Veterans Association, was now called in. He stated that memorials similar to the one proposed had already been erected in Florida, Alabama, and South Carolina. He told of the plans which had been made, and submitted a drawing of the proposed memorial.

Following Mr. Cahall's withdrawal, the group discussed what general policies should be adopted and what action should be taken in the present

case. There was general agreement with Governor Broughton's proposal that if a memorial to all North Carolinians taking part in World War I were ever erected, the memorials to separate units in that war ought to be taken down. It was agreed that permission to place the proposed memorial be granted, subject to the aforesaid condition, and that Mr. Banks Arendell be informed of this action.

Governor Broughton stated that the Commission ought to consider and adopt general regulations for the future. He expressed the opinion that no memorial should be erected for any living person or any persons who have died only recently (Section 8 of the act setting up the Memorials Commission prohibits the placing of any memorial upon state property or with state funds within less than twenty-five years after the death of the person or persons memorialized); and that no memorial should be placed for any purpose not of state-wide importance.

After some discussion, Dr. Crittenden was requested to assemble information as to how this matter is handled in other states and in the District of Columbia, and to draw up tentative regulations and principles for the consideration of the Commission.

There being no further business, the Commission adjourned.

  
C. C. Crittenden, Secretary

Raleigh, N. C.  
December 22, 1941

To the Members of the Memorials Commission  
of the State of North Carolina:

At the first meeting of our Commission, on September 25, Governor Broughton asked me to investigate how other states and the Federal government handle the problems which face us, and, on the basis of information thus secured, to propose principles and regulations for the consideration of our Commission. As a result I have written to the Federal government and to Virginia, Michigan, Pennsylvania, Wisconsin, Ohio, and Massachusetts, and have received useful information, particularly from Virginia, Pennsylvania, and Massachusetts. Of all the agencies about which I have heard in this field, the Pennsylvania Art Commission seems to be functioning the most efficiently and to be rendering the greatest service.

If we are to have the same experience as the Pennsylvania Art Commission, at first we will probably encounter some misunderstanding and opposition. Later, however, after our functions and services come to be understood and appreciated by the public, we will probably receive increasing popular support.

At the beginning of our program, it will perhaps be unwise for us to attempt to draft any detailed regulations. Indeed, the Virginia Art Commission, according to the statement of its chairman, "has not adopted any rules or regulations . . . The Commission has discussed doing so, but it believes it is rather difficult to have its policies too fixed." Nevertheless, our Commission can attempt to formulate certain general policies- subject, of course, to modification in the light of later experience.

Enclosed are the minutes of our first meeting, and, for your consideration, certain tentative proposals with regard to the program and policies of our Commission.

With best wishes, I am

Yours sincerely,

C. C. Crittenden

SUGGESTIONS REGARDING THE PROGRAM AND POLICIES OF THE  
STATE MEMORIALS COMMISSION

The Memorials Commission of the State of North Carolina, created by Act of Legislature, 1941, has an important function to perform. In the past, memorials have been erected on state property or with state funds without due consideration and without the formulation of definite policies. Of the statues, bronze plaques, and other memorials on state property, some have real artistic merit, some fit in with the surroundings, and some commemorate worthwhile and important objects or persons, while others are not so appropriate. A far-reaching program should be formulated to control the erection or placing of memorials on state property or those paid for, in whole or in part, with state funds.

In general, two major points should be considered with regard to every proposed memorial:

- (1) Is the subject of sufficient historical importance? It seems clear that we should avoid memorializing either individuals or events of mere local character, and should limit memorials to persons or objects of state-wide importance. According to the act setting up our Commission, Section 8, no memorial to any person or persons shall be erected in whole or in part with state funds or upon state property within less than twenty-five years after the death of such person or persons. This will provide a "cooling off" period long enough for a subject to be viewed with some perspective, and also will tend to protect the state from families and other groups which frequently undertake to erect memorials soon after the death of some individual. Movements of the kind often result in unwise action, and yet they are embarrassing to oppose and difficult to defeat.
- (2) No memorial should be placed unless it is of the highest artistic quality, for a memorial of doubtful artistic merit is usually worse than no memorial at all. If sufficient funds are not available for employing a competent artist, then it will be best to postpone the erection of the memorial until such funds become available. The experience of the Pennsylvania Art Commission indicates that a standard type of memorial offered by a commercial concern is usually less suitable than one designed for a specific purpose. Each memorial should conform to the

surrounding architecture, landscape, and other factors. For example, since our state capitol is of classic design, it would be inappropriate to place on Capitol Square a memorial containing a Gothic arch.

There are already too many memorials on our Capitol Square, and any others should be placed there only after very careful consideration. If possible, some of the memorials already there should be removed.

Our Commission should not merely act in a negative capacity by vetoing plans for the placing of memorials, but it should also co-operate in a positive way with persons interested in such projects. If such persons will consult the Commission while plans are in their early stages, serious difficulties can often be avoided and the Commission can give useful advice.

It is suggested that the following procedure be followed by anyone interested in a memorial being placed on state property: Tentative drawings should be submitted, accompanied by an accurate statement of the subject, the location, and the name and address of the designer; the name of the person making the submission should be given; and the type of materials, the cost, the source of funds, and whether any contracts or comments have already been made should also be stated. Our Commission can then consider the proposal and if necessary suggest changes. One copy of the proposal and plans can then be returned to the petitioner, while the other will be kept in the Commission's files. Later, detailed drawings and a statement as above in duplicate should be submitted and approved by the Commission. If approval is given, one copy should be returned to the interested person, while the other is filed by the Commission.

No memorial within the jurisdiction of the Commission should be placed without the understanding that the State reserves the right at any time, should the need arise, to move the memorial to another location or even to

remove it entirely.

It is suggested that a statement be given to the press regarding the policies formulated by our Commission, and that we make every effort to acquaint the public with our purposes and activities.

Respectfully submitted,

~~C. C. Crittenden~~  
C. C. Crittenden, Secretary

December 22, 1941

August 10, 1960

To The Members Of The State Memorials Commission:

As you will recall, our Commission was established by Chapter 341, Public Laws of 1941. The members consist ex officio of the Governor, the heads of the departments of history and art at the University at Chapel Hill, and the head of the school of design at State College.\* The act provides in summary that no statue, tablet, plaque, or other memorial may be erected on State property or with State funds until approved by the State Memorials Commission.

On December 22, 1941, the following criteria were proposed by me to the Commission:

In general, two major points should be considered with regard to every proposed memorial:

- (1) Is the subject of sufficient historical importance? It seems clear that we should avoid memorializing either individuals or events of mere local character, and should limit memorials to persons or objects of state-wide importance. According to the act setting up our Commission, Section 8, no memorial to any person or persons shall be erected in whole or in part with State funds or upon State property within less than twenty-five years after the death of such person or persons. This will provide a "cooling off" period long enough for a subject to be viewed with some perspective, and also will tend to protect the State from families and other groups which frequently undertake to erect memorials soon after the death of some individual. Movements of the kind often result in unwise action, and yet they are embarrassing to oppose and difficult to defeat.
- (2) No memorial should be placed unless it is of the highest artistic quality, for a memorial of doubtful artistic merit is usually worse than no memorial at all. If sufficient funds are not available for employing a competent artist, then it will be best to postpone the erection of the memorial until such funds become available. The experience of the Pennsylvania Art Commission indicates that a standard type of memorial offered by a commercial concern is usually less suitable than one designed for a specific

\*Also the Director of the Department of Archives and History.

purpose. Each memorial should conform to the surrounding architecture, landscape, and other factors. For example, since our State Capitol is of classic design, it would be inappropriate to place on Capitol Square a memorial containing a Gothic arch.

While these proposals were, I believe, never formally approved, I understand that they did meet with the informal approval of the Commission.

During the early twenty years of its existence, the Commission has acted only six or seven times. Every request upon which it has acted involved the placing of one or another type of memorial on Capitol Square. I believe that all requests have been turned down except the one for permission to erect the three Presidents statue.

Enclosed for each of you is a copy of a letter from Mrs. Z. V. McClure, President of the American War Mothers. You will note that she requests permission to place a plaque or marker in connection with a tree that her group planted on Capitol Square last December.

I recommend that this request be denied. The record shows that in the past five years we have voted against two similar requests, as follows:

(1) On October 17, 1955, we denied a request of Mr. Don Evans, Co-Chairman UN Day in North Carolina, to place a bronze plaque at the foot of a tree that was to be erected on UN Day (October 27, 1955).

(2) On October 22, 1958, we denied the request of the Raleigh Chapter of the American War Mothers to place a bronze marker on a granite base at a tree that had earlier been planted on Capitol Square in memory of Sally Lindsay Smith (Mrs. Charles Lee).

I do not feel that these small plaques and markers meet the first criterion listed above.

It will be appreciated if you will let me have your vote at your convenience.

Yours sincerely,

Christopher Crittenden  
Secretary  
State Memorials Commission

CC:cc

Enclosure

MINUTES OF THE MEMORIALS COMMISSION OF THE STATE OF NORTH CAROLINA

Chapel Hill, North Carolina  
October 17, 1955

The Memorials Commission of the State of North Carolina met in the office of Dr. Fletcher M. Green, head of the history department of the University of North Carolina, at 5:30 o'clock, Monday afternoon, October 17, 1955. Present were Dr. Green, Mr. John Allcott, head of the art department of the University; and Dr. Christopher Crittenden, director of the State Department of Archives and History.

Dr. Crittenden acted as chairman.

Dr. Henry L. Kamphoefner, head of the department of architecture of State College, was elected chairman of the Commission, and Dr. Crittenden was elected secretary.

The Commission took under advisement a request for authorization to place a bronze plaque on Capitol Square, as follows:

State of North Carolina  
Board of Public Buildings and Grounds  
Raleigh

October 12, 1955

Dr. C. C. Crittenden, Director  
Department of Archives and History  
Education Building  
Raleigh, North Carolina

Dear Dr. Crittenden:

On Thursday, October 27, 1955 a tree planting ceremony will be held on Capitol Square. At this time a tree will be planted in connection with the observance of the 10th Anniversary of United Nations.

Mr. Don Evans, Co-Chairman UN Day in North Carolina, has requested that a bronze plaque be placed at the foot of the tree. A sketch of the proposed plaque is attached to this letter and reflects the size of the plaque is 10 inches by 12 inches.

As you know any memorials, monuments or markers erected on State property must first have the approval of the Memorials Commission. The authority of the Memorial Commission is provided in Chapter 100 of the General Statutes of North Carolina 2C.

Inasmuch as you are a member of the Commission, I am asking you to consider the request of Mr. Evans. Since there is only a few days until the 27th, I am wondering if you could discuss this request with your Commission at your very earliest convenience. I shall await your reply.

With kindest personal regards.

Sincerely,

[continued from previous page]

Geo. B. Cherry  
Superintendent

GBC:hg

cc: Mr. Don Evans  
Attorney at Law  
Planters Bank Building  
Rocky Mount, N. C.

After some discussion, in which the desirability of scrutinizing very carefully all requests for placing memorials on state property and of limiting such memorials to subjects directly and closely connected with the State of North Carolina and its people, and of statewide significance, on motion of Dr. Green, seconded by Mr. Allcott, it was resolved that the request for placing the memorial on Capitol Square, as proposed, be denied, but the the Commission could see no objections to planting the tree on a suitable spot on the Square.

The meeting adjourned at 5:55 P. M.

  
Christopher Crittenden  
Secretary

VICE REGENT  
MRS. WILLIAM D. HOLMES, JR.  
407 COURT ST.  
EDENTON, N. C.

CHAPLAIN  
MRS. C. K. PROCTOR  
226 EAST PARK DRIVE  
RALEIGH, N. C.

RECORDING SECRETARY  
MRS. HUGH H. ALEXANDER  
1309 EAST BEECH ST.  
GOLDSBORO, N. C.

CORRESPONDING SECRETARY  
MRS. W. DILLON CHAMBERS  
120 KENILWORTH ROAD  
ASHEVILLE, N. C.



National Society  
Daughters of the American Revolution  
of  
North Carolina

STATE REGENT  
MRS. ROY H. CAGLE  
28 ELK MOUNTAIN  
SCENIC HIGHWAY  
ASHEVILLE, N. C.

TREASURER  
MISS JOSEPHINE V. SMITH  
307 HAMMOND ST.  
ROCKY MOUNT, N. C.

REGISTRAR  
MRS. BENJAMIN INGRAM  
BOX 504  
WADESBORO, N. C.

HISTORIAN  
MRS. A. M. CORNWELL  
825 SOUTH ASPEN ST.  
LINCOLNTON, N. C.

LIBRARIAN  
MRS. ROBERT E. WILEY  
2601 ROSWELL AVENUE  
CHARLOTTE, N. C.

March 18, 1958

Dr. C.C. Crittendon  
Department of Archives and History  
Raleigh, N.C.

Dear Dr. Crittendon:

The North Carolina Daughters of the  
American Revolution in Conference assembled in Raleigh, N.C.  
on March 6, 1958, unanimously passed a resolution as follows:

LOCATION OF HISTORICAL MARKER

WHEREAS, The North Carolina Society, Daughters of the American  
Revolution, is deeply interested in the appropriate location  
and preservation of all historic monuments and markers, and  
WHEREAS, the historical marker commemorating the Thirteen Original  
Colonies is now located on the grounds of North Carolina State College  
between two much traveled thoroughfares where it is in danger of  
being injured by fast moving traffic, therefore be it  
RESOLVED, that the North Carolina Society, Daughters of the  
American Revolution request the State Department of Archives and  
History to consider the removal of this marker to a new location  
on the grounds of the State Capitol.

Very truly yours, *Mrs. Hugh H. Alexander*  
Mrs. Hugh H. Alexander  
State Recording Secretary, N.S.D.A.R. of  
N.C.

March 27, 1958

Mrs. Hugh H. Alexander, State Recording Secretary  
Daughters of the American Revolution  
1309 East Beech Street  
Goldsboro, North Carolina

Dear Mrs. Alexander:

Thank you for your letter requesting permission to move the marker commemorating the Thirteen Original Colonies, erected by the Daughters of the American Revolution, from the campus of North Carolina State College to Capitol Square. This matter has been referred to the State Memorials Commission, which was established by Chapter 341, Public Laws of 1941. This act provides that no memorial may be placed on State property, moved from one location to another on State property, or paid for with State funds, without the approval of the State Memorials Commission. Under the law, the Commission consists ex officio of the Governor, the Head of the Department of Architecture at State College, the Heads of the Departments of Art and History of the University at Chapel Hill, and the Director of the State Department of Archives and History. The last serves as secretary of the Commission.

The Commission has studied your request from various angles. In the opinion of the Commission, the present location of the memorial is not inappropriate and the memorial is adequately protected from the hazards of traffic on nearby streets. Because Capitol Square is already crowded with memorials, it is felt that extreme care should be exercised in placing additional memorials or statues on that Square. In view of this situation, in the opinion of the Commission, the removal of the memorial, as requested, would not be justified at the present time.

Appreciating the interest and fine work of your organization in preserving the heritage of our State and Nation, I am

Yours sincerely,

Christopher Crittenden, Secretary  
State Memorials Commission

CC/ajk

December 18, 1963

Mrs. G. P. Dillard, State President  
United States Daughters of 1812 of North Carolina  
301 West Fieldcrest Road  
Draper, North Carolina

Dear Mrs. Dillard:

As you will recall, you wrote on November 1 to request authorization from the State Memorials Commission for the United States Daughters of 1812 of North Carolina to place in the State Capitol a marker "in memory of our War of 1812 Governor William Hawkins."

I replied on November 13: "This matter will be referred to the Memorials Commission, and a little later, when they have acted, we will notify you concerning their decision."

The Memorials Commission has now acted on this matter, and pursuant to their action I am writing you as follows:

Enclosed is a copy of Chapter 341, Public Laws of 1941, AN ACT TO PROVIDE A MEMORIALS COMMISSION IN AND FOR THE STATE OF NORTH CAROLINA.

We have made a survey of the interior of the Capitol, with a view to the possible placing therein of the suggested memorial. The only suitable place appears to be on the first floor of the rotunda. There are already several memorials, including those for the Edenton Tea Party, the Mecklenburg Declaration of Independence, and North Carolina's three signers of the national Declaration of Independence.

In the Capitol is no bronze plaque for any North Carolina Governor, though there are busts of Samuel Johnston, John Motley Morehead, William A. Graham, and Matt W. Ransom. Also, portraits of Vance and Aycock hang in the Hall of the House.

As you will see from the enclosed biographical sketch, William Hawkins was Speaker of the House for two years and Governor, 1811-1814. Governor Hawkins does not seem to be as well known today as a number of other Governors in the almost four centuries of our history (including Governor John White of the Lost Colony).

If we are to memorialize our Governors with plaques in the Capitol, it is suggested that we first ought to place such memorials in honor of our greatest.

It is therefore determined by the Memorials Commission of the State of North Carolina that the request of the United States Daughters of 1812 of North Carolina to place a marker in the State Capitol in memory of Governor William Hawkins be postponed for future consideration until such plaques for the greatest and most significant of our Governors have been placed in the Capitol.

Now, rather than merely give you a negative reply, we have a positive suggestion to make. We have been looking around for a suitable memorial which the United States Daughters of 1812 could erect, and we find that such a memorial for Captain Otway Burns might appropriately be placed in the historic Town of Swansboro. As you may recall, Captain Burns was a commander of American privateers in the War of 1812.

We have taken this matter up with the Reverend Tucker R. Littleton, President of the Swansboro Historical Association, Inc., and Mr. Littleton wrote us on December 12 in part as follows:

"The news about the United Daughters of the War of 1812 is marvelous. We'd love something like that. Let me remark on Capt. Otway Burns. I agree with you that any memorial to him should be placed here for these reasons: (1). he was born on nearby Queens Creek, (2). he married first to Joanne Grant of Swansboro, who incidentally lived across the street from the Ringware House, (3). his only child, Capt. Owen Burns, was born here in Swansboro, (4). he was residing in Swansboro at the outbreak of the War of 1812, (5). he returned to Swansboro from his first privateering voyage on the Snap Dragon with \$1 million in loot aboard (See U.S. Naval Institute Proceedings, vol. 42, No. 3). All that we know about the first Snap Dragon is that she was originally a schooner of scarcely 70 feet. Burns armed her with 5 small guns and manned her with about 100 men, according to the Proceedings above. I think if the Burns family had a sketch or any likeness of the boat Walter Francis Burns would have included it in his book in 1902. Burns sold the Snap Dragon (schooner) in New York and bought the 147-ton Leverre (another schooner) which he renamed the Snap Dragon. He armed the second Snap Dragon with 4 or 5 6-pounders on the open gundeck, a long 9-pounder amidship, about 50 muskets, a few blunderbusses, pistols, cutlasses, and boarding-pikes.

"Even after Joanne died and Otway moved to Beaufort, he returned here to build the Prometheus (see my notes in your file on this).

"We would like very much to have some kind of monument to Capt. Otway Burns that could be placed in one of two public lots available to our use. I personally think a monument of some kind down by the bridge where the historical markers are placed (or to be placed) would be appropriate. Something -- however small -- that could be placed outdoors there would get the most public notice

and attention. (We would be able to exhibit something smaller in the Ringware House until greater things come to pass.) Certainly, we would give them statewide publicity."

Enclosed is a biographical sketch of Captain Otway Burns.

We hope very much that your organization will be interested in the proposed memorial, and we will be grateful if you will communicate in this connection directly with the Reverend Mr. Littleton. For our information we will thank you to send us copies of your letters to him.

With cordial good wishes, I am

Yours sincerely,

Christopher Crittenden  
Secretary, Memorials Commission

CC:jb

Meeting of the North Carolina Historical Commission  
January 20, 1976

The meeting of the North Carolina Historical Commission convened at 1:30 P.M. in Room 211 of the Archives and History-State Library Building. Commission members present were Chairman T. Harry Gattton, Dr. Frontis W. Johnston, Dr. Hugh T. Lefler, Dr. Gertrude S. Carraway, and Mr. J. C. Knowles. Attending from the Division of Archives and History were Dr. Larry E. Tise, Dr. William S. Price, Jr., Ms. Diane T. Rose, Dr. Thornton W. Mitchell, Mr. John D. Ellington, Ms. Janet K. Seapker, Mr. Donald R. Taylor, Mrs. Memory F. Mitchell, Mr. R. W. Sawyer, Mr. Samuel P. Townsend, Dr. Stephen J. Gluckman, Mr. Jerry C. Cashion, and Mr. Gerry Cohen, an attorney assigned to assist the division in complying with the Administrative Procedures Act.

Dr. Tise introduced the new Acting Assistant Director for Preservation Programs, Diane T. Rose, and announced the promotion of R. W. Sawyer to chief of the Historic Sites Section and Janet K. Seapker to acting chief of the Historic Preservation Section.

Dr. Mitchell presented to the Commission the following resolution regarding the disposition of certain accessioned records in the North Carolina State Archives:

WHEREAS, the North Carolina State Archives has accumulated as accessioned material a considerable volume of printed, published, and compiled genealogical material which is not actually documentary in nature; and

WHEREAS, the Genealogical Branch of the North Carolina State Library now maintains such items in its published collections;

NOW THEREFORE BE IT RESOLVED by the North Carolina Historical Commission pursuant to the provisions of G. S. 121-4(12) at its meeting held in the City of Raleigh on Tuesday, January 20, 1976, that the North Carolina State Archives be authorized to dispose of such material by transfer to the North Carolina State Library, maintaining a record of the material so transferred.

On motion of Mr. Knowles, seconded by Dr. Lefler, the resolution was adopted as presented.

The Commission recessed for five minutes for a meeting of the State Historical Records Advisory Board and reconvened at 1:55 P.M.

The Commission next considered House Bill 755, the Boggan-Hammond House. Dr. Tise reviewed the action of the Commission at its September, 1975, meeting regarding this appropriation. He reported that he had requested an opinion

from the Attorney General as to whether funds appropriated by the General Assembly could be expended on a historic property without the approval of the Historical Commission and whether funds appropriated by the General Assembly to a historic property approved by the Commission but for a purpose not recommended by the Commission could be expended. The Attorney General's office declined to issue a written official opinion although it did issue a draft memorandum from a staff member. Dr. Tise also reported that he had received a letter from the Anson County Historical Society seeking to have a representative appear before the Commission.

After lengthy discussion, the Commission on motion of Mr. Knowles, seconded by Dr. Johnston, voted to reaffirm its action of May, 1975. After further consideration, the Commission on motion of Mr. Knowles, seconded by Mr. Lineberger, directed Dr. Tise to meet with representatives of the Anson County Historical Society and attempt to arrive at an expenditure of the funds which could meet the criteria of the Commission and to report the results to the Commission at its next meeting.

Dr. Tise and Mr. Cashion presented a request for the waiver of the regulations governing local highway historical marker programs for the fifty-four bicentennial markers to be erected by the Winston-Salem/Forsyth County Bicentennial Commission. On motion of Mr. Lineberger, seconded by Mr. Knowles, the Commission voted to waive the requirements for these specific fifty-four bicentennial markers.

The Commission recessed for five minutes after which it reconvened to conduct a public hearing on the adoption of rules and regulations governing the procedures of the Historical Commission and the Division of Archives and History as required by the Administrative Procedures Act (G. S. 150A). It was noted that although legal notice of the public hearing was published, no written comments, interrogatories, or requests for appearance before the Commission had been received. All rules and regulations adopted were to become effective February 1, 1976.

Dr. Price and Mr. Cohen explained to the Commission the background of the proposed rules and regulations. Dr. Tise presented to the Commission Section 4A .0100 which describes the programs of the director's office and the various sections of the division. This section was to be adopted by the Secretary of the Department of Cultural Resources.

Subchapter 4A, Section .0200, Rulemaking, Adjudication, was approved by the Commission on motion of Dr. Lefler, seconded by Dr. Johnston.

Section chiefs presented the rules and regulations relating to their respective sections as follows:

Subchapter 4B, Archives and Records Section, was presented by Dr. Mitchell, and was approved on motion of Mr. Knowles, seconded by Mr. Lineberger.

Subchapter 4C, Historic Sites Regulations, was presented by Mr. Sawyer. On motion by Mr. Knowles, seconded by Dr. Johnston, the Commission approved the regulations.

Mr. Ellington presented Subchapter 4D, Museum of History. On motion of Dr. Lefler, seconded by Dr. Johnston, the Commission approved the regulations.

Mrs. Mitchell reviewed the regulations relating to the Historical Publications Section, Subchapter 4E. These were approved on motion by Dr. Lefler, seconded by Dr. Johnston.

Subchapter 4F, State Capitol and Visitor Center, was summarized by Mr. Townsend. On motion of Mr. Knowles, seconded by Mr. Lineberger, these regulations were approved by the Commission.

Dr. Tise reviewed Subchapter 4G relating to the Historic Preservation Section and explained the sections which were new. Mr. Cohen pointed out that Section .0802 should be amended by adding "under section .0200 of this subchapter," in line six. On motion of Mr. Lineberger, seconded by Dr. Lefler, Subchapter 4G was approved as amended.

Subchapter 4H, Highway Historical Marker Program, was presented by Mr. Cashion. On motion of Mr. Lineberger, seconded by Mr. Knowles, rules pertaining to highway historical markers were approved.

Mr. Taylor presented Subchapter 4I, Tryon Palace Section. On motion of Mr. Knowles, seconded by Mr. Lineberger, the regulations relating to Tryon Palace were approved.

Subchapters 4J, Exploration and Salvage Regulations, and 4K, Archaeology Section, were reviewed and presented by Dr. Gluckman. On motion by Dr. Johnston, seconded by Mr. Lineberger, Subchapters 4J and 4K were approved.

On motion of Dr. Lefler, seconded by Dr. Johnston, the Commission adopted the following resolution regarding the North Carolina Administrative Procedures Act:

WHEREAS, the North Carolina Administrative Procedures Act requires all agencies and commissions to adopt rules for their procedures, and

WHEREAS, the Registration of the State Administrative Rules Act requires all rules to be filed with the Attorney General before February 1, 1976, now, therefore

BE IT RESOLVED BY THE NORTH CAROLINA HISTORICAL COMMISSION THAT

Section 1. The attached regulations, Subchapters 4A through 4K of Chapter 4, Title 7, North Carolina Administrative Code, are adopted by the North Carolina Historical Commission, provided that the history notes are not a part of the regulations;

Section 2. The Director of the Division of Archives and History, as ex officio Secretary of the Commission, is authorized to correct any clerical errors;

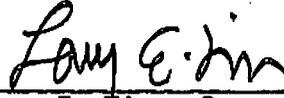
Section 3. The Director of the Division of Archives and History, as ex officio Secretary of the Commission, is authorized and directed to file the attached regulations with the Attorney General and to sign any certification forms;

Section 4. The attached regulations shall be in full force and effect from and after February 1, 1976.

This the 20th day of January, 1976.

There being no other business, the meeting was adjourned at 4:45 P. M.

Respectfully submitted,



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Larry E. Tise, Secretary  
(ex officio)

SECTION .0300 - APPROVAL OF MEMORIALS FOR ACCEPTANCE

.0301 PURPOSE

This section specifies the rules to be used by the Historical Commission in considering and acting upon proposed memorials, works of art, bridges, and other structures, including markers and monuments, which may be proposed for erection on any state-owned property or right-of-way.

History Note: Statutory Authority G.S. 100-2 to -8;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.

.0302 STATEWIDE HISTORICAL SIGNIFICANCE

The subject must be historically accurate and of statewide historical significance. The commission will avoid memorializing either individuals or events of only local importance.

History Note: Statutory Authority G.S. 100-2, 3;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.

.0303 NO MEMORIAL WITHIN 25 YEARS OF DEATH

No memorial will be approved for a person or persons within less than 25 years after the death of such person or persons.

History Note: Statutory Authority G.S. 100-8;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.

.0304 ARTISTIC QUALITY

No memorial will be approved unless it is of undoubtedly high artistic quality. If sufficient funds are not available for employing a competent artist, then the commission will recommend postponement of the erection of the monument until such funds become available. The commission will take the position that memorials designed for the specific purpose at hand are more suitable than standard types offered by commercial firms.

History Note: Statutory Authority G.S. 100-2, 3;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.

.0305 MEMORIALS TO BE COMPATIBLE WITH SURROUNDINGS

Each memorial must be judged by the commission to be compatible with the approved state interpretive plans, if such exist, for the structure or property, or both, where it is to be located. This should apply especially to memorials proposed for location at state-owned properties which are open for public visitation or touring for educational purposes, such as the state historic sites.

History Note: Statutory Authority G.S. 100-2, 3;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.

.0306 COMMISSION WILL COOPERATE IN PLANNING

The commission, upon request, will work with and advise individuals or groups while their plans for proposed memorials are in the early stages so that

- (1) Proposals may be shaped in a manner that the commission can later approve, or
- (2) Proposals which cannot be approved in principle can be discovered before extensive efforts are expended upon them.

History Note: Statutory Authority G.S. 100-2, 3;  
143B-62(1)d; (2)e;  
Eff. February 1, 1976.

.0307 RIGHT OF COMMISSION TO REMOVE MEMORIAL

The commission reserves the right at any time, should the need arise, to move a memorial to another location, or even to remove it entirely.

History Note: Statutory Authority G.S. 100-2, 3;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.

.0308 PRESENTATION OF MEMORIAL PROPOSALS TO COMMISSION

To bring a proposal for a memorial before the North Carolina Historical Commission for action, a proposal shall be submitted in duplicate to: director, division of archives and history, 109 East Jones Street, Raleigh, North Carolina 27611. The proposal should consist of:

- (1) Tentative drawings showing the design and location of the proposed memorial,
- (2) An accurate statement of the subject,
- (3) The name and address of the designer,
- (4) The type of materials, cost, and source of funds,
- (5) The proposed artist, manufacturer, and contractor, as applicable,
- (6) The name and address of the person or group making the submission.

History Note: Statutory Authority G.S. 100-2, 3;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.

.0309 DEADLINE FOR SUBMISSION OF PROPOSALS

Proposals must be submitted at least 30 days prior to a meeting of the commission in order to be considered at that meeting. The commission may approve or reject a proposal or suggest changes or request more information. The commission's action on any proposal will be conveyed to the submitter in writing.

History Note: Statutory Authority G.S. 100-2, 3;  
143B-62(1)d, (2)e;  
Eff. February 1, 1976.



RECEIVED

December 1, 1977

State of North Carolina  
Department of Justice

BY Wendy Lapisse  
ADMINISTRATIVE PROCEDURES SECTION  
ATTORNEY GENERAL'S OFFICE

RUFUS L. EDMISTEN  
ATTORNEY GENERAL

REGULATION CERTIFICATION

I do hereby certify that the attached regulation(s) Subchapters 4B-4G, 4I and 4K of Title 7 are correct  
(cite)

copies as (adopted, ~~amended~~) by The North Carolina Historical Commission pursuant to the authority  
(agency)

vested in it by Sec. 143B-62 and 100-2 of the General Statutes of North Carolina.  
(section(s))

— This regulation is to be effective thirty days after filing with the Attorney General's Office.

This regulation is to be effective 0 days after filing with the Attorney General's Office, on

\_\_\_\_\_ (date). An effective date of other than thirty days after filing is necessary because of the following circumstances: Readoption of existing regulations required by N.C. Court of Appeals decision

Larry Edin  
(Officer)  
SECRETARY (ex officio)  
(Title)

The attached regulation(s) are received for filing on this day December 1, 1977 and are in the form specified by this office.

Rufus L. Edmisten  
Attorney General  
[Signature]  
(by Deputy Attorney General)

**SECTION .0300 - APPROVAL OF MEMORIALS FOR ACCEPTANCE**

<b>07 NCAC 04G .0301</b>	<b>PURPOSE</b>
<b>07 NCAC 04G .0302</b>	<b>STATEWIDE HISTORICAL SIGNIFICANCE</b>
<b>07 NCAC 04G .0303</b>	<b>NO MEMORIAL WITHIN 25 YEARS OF DEATH</b>
<b>07 NCAC 04G .0304</b>	<b>ARTISTIC QUALITY</b>
<b>07 NCAC 04G .0305</b>	<b>MEMORIALS TO BE COMPATIBLE WITH SURROUNDINGS</b>
<b>07 NCAC 04G .0306</b>	<b>COMMISSION WILL COOPERATE IN PLANNING</b>
<b>07 NCAC 04G .0307</b>	<b>RIGHT OF COMMISSION TO REMOVE MEMORIAL</b>
<b>07 NCAC 04G .0308</b>	<b>PRESENTATION OF MEMORIAL PROPOSALS TO COMMISSION</b>
<b>07 NCAC 04G .0309</b>	<b>DEADLINE FOR SUBMISSION OF PROPOSALS</b>

*History Note: Authority G.S. 100-2; 100-3; 143B-62(1)d,(2)e;  
Eff. February 1, 1976;  
Readopted Eff. December 1, 1977;  
Repealed Eff. February 1, 1985.*

North Carolina Historical Commission  
Minutes of Meeting -- December 9, 1982

A meeting of the North Carolina Historical Commission was convened at 9:45 a.m. in Room 211 of the Archives and History-State Library Building. Commission members present were Mrs. Frank A. Daniels, Jr., chairman; T. Harry Gatton, vice-chairman; Harley E. Jolley, H. G. Jones, Clyde M. Norton, and Samuel W. Johnson. Gertrude S. Carraway, Dick Brown, Sarah M. Lemmon, and Raymond Gavins were represented by proxy. Mr. Everett was unable to attend due to a last minute conflict.

Also attending were Secretary of Cultural Resources Sara W. Hodgkins, William S. Price, Jr., Suellen Hoy, Samuel P. Townsend, Richard W. Sawyer, David Olson, John J. Little, John D. Ellington, Jeffrey J. Crow, John W. Saputo, Abbe Godwin, members of the press, and others.

Chairman Daniels opened the meeting and extended greetings to Secretary Hodgkins and members of the commission, noting especially the presence of Mr. Norton returning to the commission after an illness of several months. Mrs. Daniels announced the appointment by the Governor of Cliff W. Everett, an attorney from Greenville, to succeed John Raper, whose term expired. Greetings were also extended to those present by Secretary Hodgkins.

The first item of business was consideration of a request from the North Carolina Vietnam Veterans Monument Committee. Sam Townsend, as liaison between the committee and the commission, made a brief statement and introduced John Saputo, president of the monument committee, who made the presentation. Saputo explained that the purpose of the monument is not to make a political statement but rather to honor and pay tribute to the more than 200,000 North Carolinians who served in Vietnam. Funds for the memorial, estimated to cost approximately \$150,000, will be solicited from the general populace of the state. Although many corporations made substantial contributions to the war effort in terms of materials and supplies, the committee decided that donations would not be accepted from that source. The committee would like to locate the memorial on the northeast corner of Capitol Square, if approved. In selecting a designer, the committee sought proposals from all members of the Tri-State Sculptors Guild. Of the two finalists who were invited to submit models in clay, the design by Abbe Godwin of Greensboro was the unanimous choice of the committee. In commenting on her design, Ms. Godwin said she chose to emphasize one of the positive aspects of the war-- the camaraderie between the men. Her sculpture, entitled "After the Fire Fight," depicts a wounded soldier being supported by another while a third looks to the sky for an approaching evacuation helicopter. The monument will be cast in bronze on a rise of approximately twenty inches above ground level. In-ground markers or plaques will list numbers wounded, killed, or missing in action from North Carolina.

Dr. Price asked if the uniforms would be identified by branch of service. Ms. Godwin explained that she had eliminated insignia from the uniforms in order to replicate as authentically as possible the uniforms worn by the military during the war and to make identification across service lines as broad as possible. Dr. Price commended that approach.

Dr. Jones expressed concern that certain elements of the monument could be easily damaged or broken by vandals. Ms. Godwin said the monument would be reinforced and that she did not believe it could be easily damaged.

Mr. Gatton moved that the commission approve the monument in principle based on Ms. Godwin's model, with the following conditions:

1. Art work, plaques, inscriptions, and any other design work not already presented to the commission must be approved by the commission before casting or construction;
2. Landscape design and the foundry to cast the monument will be subject to the commission's approval;
3. The location of the monument will be subject to further study by a site committee of the commission;
4. The location of the monument must be approved by the North Carolina Capital Planning Commission.

Motion was seconded by Dr. Jolley and carried unanimously.

Mr. Gatton was appointed to chair the site committee and will work with the State Property Office and the Capital Planning Commission to select an appropriate site for the monument. Mr. Townsend will continue as liaison between the various committees and commissions involved.

At the conclusion of the foregoing the commission took a short recess. Upon reconvening, the minutes of the September 9 meeting were approved as received. The final report and recommendations of the Committee on Operations and Procedures was approved on motion by Mr. Gatton, seconded by Dr. Jones. Following are

the recommendations of this committee as adopted:

1. That there be established early in the biennial session of the North Carolina General Assembly a firm date on which public hearings regarding historic properties will be held, such date to be confirmed with the legislative leadership;
2. That the leadership of the commission needs to be in more direct and active contact with the leadership of the General Assembly;
3. That the full commission should meet twice annually unless the necessity arises for a meeting for a public hearing on special appropriations;
4. That commission meetings should be timely and deal with substantive matters of policy and budget planning as well as dealing with the matters mandated by statute;
5. That the commission needs to define its own goals and mission just as the Division of Archives and History should define its own goals, both short and long-range;
6. That the commission chairman and the director of Archives and History need to control an agenda that will bring forward substantive matters relating to the entire program of the division, concentrating on problems and their resolution on the one hand and planning and strategies for implementing such plans on the other, and it should be the responsibility of the chairman and the director to devise such an agenda;
7. That meeting agendas should concentrate on goals, objectives, and future planning rather than concentration on a review of what has taken place since the previous meeting as that can be accomplished by written reports as necessary;
8. That the Executive Committee should handle the matters requiring urgent attention in the interim between regularly scheduled meetings;

9. That the director, at meetings of the commission, should speak for the leadership of the division with section chiefs present to fill in gaps as needed.

Secretary Hodgkins thanked Mr. Gatton and his committee for its report and said that she looked forward to working with the commission under its new format.

The following meeting dates were established for 1983 and 1984:

<u>1983</u>	<u>1984</u>
May 12 (and 11 if necessary)	May 10
October 13	October 11

The commission's role vis à vis the legislature was discussed. Chairman Daniels suggested that several members of the commission might wish to make appointments with Secretary Hodgkins to discuss pertinent legislation and to offer assistance.

Dr. Jolley was appointed to chair the grants committee, replacing Mr. Raper.

Dr. Price addressed the commission on future directions of the Division of Archives and History. He prefaced his remarks by thanking the Gatton Committee for its report and said he felt that the problems experienced in the past had been the result in part of circumstances beyond our control and partly because the commission had not been consulted in an advisory capacity.

Although the anticipated six percent reduction in our operating budget will necessitate the curtailment of travel and a delay in purchasing equipment and supplies, such a reduction will not cause the same problems for us as in the last fiscal year. We are not presently faced with having to reduce the staff or eliminate positions and the Secretary has been able to secure approximately \$40,000 with which to purchase essential equipment for the Archives. In response to a question from Mrs. Daniels regarding equipment priorities, Dr. Price said that we are working to develop a priority list for the Archives at this time. We should begin to develop such a list for the entire division. Currently, Archives and Historic Sites have the greatest needs for equipment. The Museum of History will require additional equipment at such time as it might expand into the old art museum building on Morgan Street.

Dr. Price reported that expansion budget requests for FY 1983/84 and FY 1984/85 contained the following items for the division:

	<u>1983/84</u>	<u>1984/85</u>
Archives Equipment	\$ 39,500	\$ 47,700
Historic Sites:		
Continuation of positions in special bills:		
Town Creek, Andrew Jackson	43,260	43,585
Museum of History:		
Security (2 guards)		
Replacement of roof at Museum of Albemarle	30,273	26,307
Restoration of Eastern Office: (4 positions)	69,816	68,150

In addition, Dr. Price reported that the legislative committee appointed to review regional offices had commended the division on the work of the Western Office. The committee, however, has recommended that the Eastern Office not be staffed at this time.

Several areas of concern were cited by Dr. Price: The staff tends to be "insulated" and to identify with others within their own areas of expertise as opposed to fellow staff members in the division. Several programs implemented in past years in an attempt to unify the staff have had little success. Currently a series of "staff breaks" has been initiated featuring speakers of national reputation, beginning with David McCullough. We hope this will have positive results. A second area which needs improvement is that of cooperation between the sections of the division and between the division and other state agencies. A third area cited was that of public service. The division has an obligation to serve the public in the best manner possible; in the coming months we will work toward increasing and improving our efforts in this area.

A continuing problem is that of lack of space, particularly in the museum and the archives. We are making progress toward resolving this problem taking into account the recommendations of the Facilities Study Committee.

Dr. Jones expressed the opinion that the lack of a sense of obligation and loyalty to North Carolina contributed to the lack of unity among the staff. He felt this is caused in part by the State Personnel Office ruling that we can no longer require professional members of the staff to have completed a course in North Carolina history. Dr. Price agreed that this is a concern, although a lecture series on North Carolina history taught by Dr. Jerry Cashion has been offered to interested staff on a volunteer basis for several years.

Mr. Gatton commented that the increased use of computers should alleviate some of the need for records storage space.

Dr. Jones asked for a status report on the Andrew Jackson Memorial. Dr. Price reported that since the special appropriation two years ago which authorized the "Andrew Jackson Birthplace State Historic Site" we have persuaded the Andrew Jackson Memorial Committee to allow us to base interpretation of the site on the history of the Waxhaws region rather than focusing on a specific place of birth. Mr. Sawyer reported that a proposal had been made to the committee that the visitor center be constructed on the grounds of the Waxhaws drama with exhibits emphasizing Jackson's youth and the life of the early settlers of the region, particularly the Waxhaws Indians. The controversy surrounding Jackson's birthplace will be discussed in the interpretation program.

Dr. Price remarked that the Jackson Memorial and the Elizabeth II in Manteo are new concepts in the historic sites program and that the division would need the assistance of the Historical Commission in developing criteria for dealing with these types of sites as more demands for non-traditional sites are made by local constituencies.

Major two and five-year goals were reviewed. Plans for the next biennium include completion of the museum service center concept with the addition of Old Fort and a center in the southeastern part of the state; integration of word processors and other high technology equipment into the historical publications program; completion of the Elizabeth II and Spencer Shops sites; resolution of the records storage problem and replacement of major equipment in the archives; build-up of local constituency and community support for archaeology and historic preservation and establishment of a computer center in the Bailey-Gallant House for retrieval of survey information; and improved interpretations programs at the State Capitol and Tryon Palace.

Five-year goals include a study of personnel and operations in the Museum of History and expansion of facilities; a curator for the Executive Mansion; word processors for each editor in publications; development of site plans for each state historic site and publication of a history of furniture and textile manufacturing in the state; acquisition of data processing equipment in the records center; publication of a guide to National Register properties; assistant administrator and collections manager positions at Tryon Palace; and updating of the furnishings inventory at the Palace and bringing this information into the CUMAS system.

Dr. Jones asked if any plans were under way to restore and use the Seaboard Building. Dr. Price said we had expressed our concern to the State Property Office and that during recent months several proposals for its use had been received from the business community.

Mr. Johnson commended the staff of the division but noted that retrenchment had occurred in operations but not in the number of employees. He felt that the needs of the program should be examined and adjustments in personnel made to accommodate those needs. He felt that the division should assume more of a leadership role in the statewide historical program rather than undertaking to accomplish the majority of work in that area.

Public Hearing: Administrative Code 7 NCAC 4G.0400

For the record, the chair noted that notice of the hearing had been given by publication of a legal notice in the Charlotte, Raleigh, Asheville, and Wilmington newspapers, with no response being received from the public. It was further noted that the purpose of the hearing was to repeal existing procedures for grants to preservation projects and nonstate museums (rules 4G.0401 - .0426) and to adopt revised procedures (rules .0427 - .0436).

The revised procedures were reviewed by the commission. Dr. Jones suggested that rule .0232 be amended by the addition of "/or" in line ten; Mr. Johnson suggested that rule .0433 be amended by adding "which approval shall be granted only in exceptional circumstances" at the end of the last line (line 5).

Mr. Norton moved that Section 4G.0401 - .0426 be repealed and .0427 - .0436 be adopted as amended. Motion was seconded by Dr. Jones; carried unanimously.

Other Business

Mr. Johnson was asked to give an update on the action of the Professional Review Committee regarding the Moore Square Historic District in downtown Raleigh. He reported that nomination of the district was deferred at the July meeting of the committee due to strong opposition from the business community. At its October meeting the committee voted to hold a public hearing on November 23. The hearing was held as scheduled with very light attendance and no opposition being voiced by those present.

John Little announced plans for a meeting to discuss the effect of the National Register program on private property owners, community planning, and public projects to be held in early 1983. Notices will be sent to commission members as soon as the date is finalized.

John Ellington reported on negotiations to acquire the old art museum for exhibit and office space for the Museum of History. The feasibility study is under way and should be completed by April 1983. Secretary Hodgkins asked that the Wake County legislative delegation be kept informed as negotiations progress.

Dr. Jones asked the Secretary if she felt that relocating the Museum of History would give the impression that a new State Library building is no longer a priority. Mrs. Hodgkins replied that although a new building is still a high priority, it is impossible to obtain an appropriation for that purpose at this time. She felt we should take advantage of every opportunity to alleviate our space problems even though this is only an interim solution. Dr. Price said that while some of the immediate pressure for library space will be lifted by this move, the library as well as the archives requires reinforced space for shelving and storage and this will not be available in the space to be vacated by the Museum of History.

The following resolution to Mr. Raper was adopted on motion by Mr. Gatton, seconded by Dr. Jolley:

WHEREAS, John E. Raper, Jr., served as a member of the North Carolina Historical Commission from his appointment on November 17, 1977, until November 30, 1982; and

WHEREAS, Mr. Raper was a faithful attendee of meetings of the Commission during his five years as a member; and

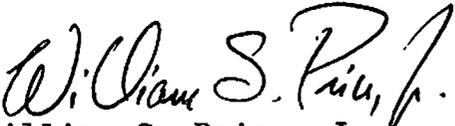
WHEREAS, Mr. Raper's strong leadership of the Grants Committee of the Commission led to a more thoughtful management of grants-in-aid to historic properties;

Now, therefore, be it resolved by the North Carolina Historical Commission:

THAT John E. Raper, Jr., be commended for his years of service to the cause of history in North Carolina; and

THAT a copy of this Resolution be forwarded to Mr. Raper with deep gratitude.

At the conclusion of the foregoing business, the commission adjourned at 1:30 p.m.

  
William S. Price, Jr.  
Secretary (ex officio)

Legislative Research Commission  
Use Only

Filed in Accordance With  
Article 6C of Chapter 120  
N.C. General Statutes

(date)

DM



State of North Carolina  
Department of Justice  
P. O. Box 629 - Raleigh, NC 27602

Rufus L. Edmisten  
Attorney General

Justice Department  
Use Only

RECEIVED

12/31/84  
(date)

MLB

Administrative Procedures Section  
Attorney General's Office

### CERTIFICATION OF RULEMAKING

Certifying Agency: North Carolina Historical Commission		
Certified Rule (citation): 7 NCAC 4 A-K		
Action:	<input type="checkbox"/> ADOPTION	<input type="checkbox"/> AMENDMENT
		<input checked="" type="checkbox"/> REPEAL
Formal Action Date: Nov. 14, 1984	Statutory Authority: G.S. 143B-1(c); G.S. 121-12	Public Notice Date: Oct. 26, 1984
Public Hearing Date: Nov. 14, 1984	Public Hearing Not Required for This Action Under G. S.:	
Rule Summary (also indicate change in rule if amended): Administrative rules and procedures of the Division of Archives and History, Department of Cultural Resources		
Circumstances Requiring Rule Adoption, Amendment or Repeal: Need to condense and reduce code and to eliminate unnecessary and ambiguous language		
Effective Date (no earlier than the 1st day of second calendar month following filing): February 1, 1985		

Shelley Gray  
 APA Coordinator or Agency Contact Signature  
 109 E. Jones St. Raleigh  
 Address  
 733-7305  
 Phone

William S. Price, Jr.  
 Officer Signature  
 William S. Price, Jr., Secretary  
 Typed Name  
 North Carolina Historical Commission  
 Title

This 'Certification of Rulemaking', with attachments, was received for filing, in the form specified by this office on: 12/31/84  
 (date)

Rufus L. Edmisten  
 Attorney General

by: Charles L. Mumford App 13  
 (Deputy/Assistant/Associate Attorney General)

**CHAPTER 4 - DIVISION OF ARCHIVES AND HISTORY**

**APPENDIX 4**

**SUBCHAPTER 40 - MUSEUM OF HISTORY**

**SECTION .0100 - ADMINISTRATION**

**07 NCAC 040 .0101 STATEMENT OF PURPOSE**

The purpose of the Museum of History Section is to interpret the culture and the social, economic, and political history of North Carolina from prehistory to the present, and to collect, preserve, and utilize artifacts and other materials significant to the history of the state.

*History Note:* Authority G.S. 121-2(6); 121-4(6); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. February 1, 1987.

**07 NCAC 040 .0102 VISITING HOURS**

**07 NCAC 040 .0103 VISITATION**

**07 NCAC 040 .0104 USE OF THE ARCHIVES AND HISTORY/STATE LIBRARY FACILITIES**

**07 NCAC 040 .0105 CONSULTATION AND TECHNICAL ASSISTANCE**

**07 NCAC 040 .0106 EXHIBIT SERVICES**

**07 NCAC 040 .0107 MUSEUM DOCENTS**

*History Note:* Authority G.S. 121-4(6),(9); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. June 1, 1989; February 1, 1987;  
Expired Eff. August 1, 2015 pursuant to G.S. 150B-21.3A.

**SECTION .0200 - PROGRAMS**

**07 NCAC 040 .0201 INTERPRETIVE PROGRAMS**

**07 NCAC 040 .0202 MOBILE MUSEUM OF HISTORY**

**07 NCAC 040 .0203 EXTENSION PROGRAMS**

**07 NCAC 040 .0204 TAR HEEL JUNIOR HISTORIAN ASSOCIATION**

*History Note:* Authority G.S. 121-4(4),(6),(11),(13); 121-7; 143B-62(1)g.(3); 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. June 1, 1989;  
Expired Eff. August 1, 2015 pursuant to G.S. 150B-21.3A.

**SECTION .0300 - COLLECTIONS**

**07 NCAC 040 .0301 ARTIFACTS**

An accessions committee must approve all artifacts acquired for any purpose by the Division of Archives and History. The accessions committee shall consist of:

- (1) Director, Division of Archives and History, Chairman;
- (2) Chief, Museum of History Section;
- (3) Chief, Historic Sites Section;
- (4) Curator of Collections Branch, Museum of History Section; and
- (5) Other specialists appointed by the committee chairman as needed.

*History Note:* Authority G.S. 121-4(1),(6); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 26, 2015.

**07 NCAC 040 .0302 APPRAISAL**

The museum will not appraise artifacts.

*History Note:* Authority G.S. 121-4(1),(6); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 26, 2015.

#### **07 NCAC 040 .0303 ACQUISITIONS**

- (a) All artifacts must be provisionally accepted by the registrar or one of the registrar's assigns and forwarded to the Division for approval by the accessions committee.
- (b) A contract of gift must be signed by the registrar, Museum of History Section, or a divisional agent at a curatorial or higher level, and the donor.
- (c) A contract of loan containing the conditions of the loan must be completed and signed by the registrar, Museum of History Section, or a divisional agent at a curatorial or higher level, and the owner prior to the lending of any artifact to the Division.
- (d) Items left temporarily with the museum for identification must be recorded on a receipt form and one copy given to the owner. If the owner fails to pick up or otherwise receive custody of items left for identification within one year of written notification and after at least three documented efforts by the museum to return them, the items revert to the museum for disposal.

*History Note:* Authority G.S. 121-4(6),(9); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 26, 2015.

#### **07 NCAC 040 .0304 LOANS**

- (a) Museum materials will not be loaned or otherwise used for projects other than museum or research-related occasions. The loan of museum artifacts is restricted to nonprofit educational institutions for research and study, exhibition, or educational purposes, after it has been determined by the Curator of Collections in conjunction with the conservation staff of the Museum of History that the artifact's physical condition will not be negatively impaired by the loan and there is no present or future commitment for the utilization of the artifact.
- (b) Loans of artifacts are subject to the following conditions:
  - (1) The transportation and utilization of borrowed artifacts must comply with guidelines established by the Curator of Collections for the Museum of History.
  - (2) The borrower must provide proof of insurance policies to cover all loan items and adequate security for their protection. The borrower shall be responsible for reimbursing the Museum of History for any damage incurred during the period of the loan.
  - (3) The artifacts shall remain the property of the Department of Cultural Resources and shall be subject to withdrawal by the Division provided notice of intention to withdraw is given 15 days prior to withdrawal, unless a definite period of loan has been specified by contractual agreement.
  - (4) A written contract of loan must be completed and signed by the Curator of Collections, Museum of History Section.
- (c) Any museum or similar agency wishing to borrow items from the collection of the Division of Archives and History must contact the Curator of Collections or the Chief, Museum of History Section.

*History Note:* Authority G.S. 121-4(6); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. June 1, 1989; February 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 26, 2015.

#### **07 NCAC 040 .0305 DEACCESSIONS**

The deaccession of artifacts must be approved by the deaccession committee of the Division of Archives and History and by the North Carolina Historical Commission. The deaccession committee shall consist of:

- (1) Director, Division of Archives and History, Chairman;
- (2) Chief, Museum of History Section;
- (3) Chief, Historic Sites Section.

*History Note:* Authority G.S. 121-4(6); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. February 1, 1987;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 26, 2015.

**07 NCAC 040 .0306 RESEARCH AND STORAGE AREAS**

*History Note:* Authority G.S. 121-4(1),(6); 121-7; 143B-62(2)a;  
Eff. February 1, 1985;  
Amended Eff. June 1, 1989; February 1, 1987;  
Expired Eff. August 1, 2015 pursuant to G.S. 150B-21.3A.

Dear Commission Members,

Although I cannot join your meeting tomorrow, I have been thinking about the context in which the portrait of Thomas Ruffin was created and thought the following chronology might be useful to connect some dots, dates, and people. Please let me know if errors have crept in. I also think it's useful to know "who's who."

With best wishes,

Catherine W. Bishir

1865-1876: period of Presidential and then Congressional Reconstruction, with Federal troops occupying the state. Black men could vote and hold office under new constitution of 1868, and there is great political rivalry between Republicans (including most blacks as well as many whites) and Conservatives (Democrats).

1876: official end of Reconstruction, as Federal troops are withdrawn from the South and former Confederates (Democrats) regain political power—"Redemption"—and former Confederate governor Zebulon Vance was elected governor. Democrats (including many Confederate veterans and their family members) set about consolidating their power amid continuing challenges from black and white Republicans.

1883: **Samuel A'Court Ashe**, Confederate veteran of elite descent, newspaper editor, political leader, and historian, returns from a trip to Boston and publishes articles in his *News and Observer* urging North Carolinians to celebrate their own history and heroes as do the northerners.

1885: **Alfred Moore Waddell**, another Confederate veteran of elite descent, addresses the Raleigh Ladies Memorial Association, points out the absence of monuments and portraits of North Carolina heroes (in contrast to other states) and calling upon citizens to produce such memorials.

1888: **Portrait of Thomas Ruffin** presented to the Supreme Court at formal event. Governor Alfred Moore Scales, another Confederate veteran, stated that for years leading citizens had urged that "a life-size portrait of Thomas Ruffin, the great Chief Justice, be painted and placed in the chamber of the Supreme Court." A new Supreme Court building (on Edenton Street) had just been completed. Many requests had come from eminent members of the bar, "especially in a letter of **Judge [Thomas] Ashe**" (a kinsman of Samuel A'Court Ashe and a recently deceased associate justice of the court who had studied law under Ruffin), to Ruffin's daughter, **Mrs. Paul C. Cameron** (Anne). Paul Cameron, who was generally identified as the richest man in the state, set about to accomplish this and commissioned the portrait from Richmond painter John A. Elder. Evidently somewhat modeled on the full-length Thomas Sully portrait of George Washington prominently located in the House of Representatives in the North Carolina State Capitol, which would have been well known to everyone involved. With Justice Thomas Ashe recently deceased, Thomas S. Kenan spoke on his family's behalf in presenting the portrait to the governor and Supreme Court. Kenan also noted that the portrait showed growing interest "among our

people in an effort to perpetuate the memory of our distinguished citizens.” At this time in North Carolina, a full-height portrait was a rarity indeed, with that of George Washington the best known.

1890s-1900: Period of racial and political conflict, victories of “Fusionists” (joint effort of Republicans including black men and Populists), which spurred Democrats to create the 1898 and 1900 White Supremacy Crusade. The 1898 campaign was followed by the notorious Wilmington Coup in which **Alfred Moore Waddell** was a leading figure and **Paul and Anne Ruffin Cameron’s son Bennehan Cameron** a strong supporter. These campaigns returned the Democrats to power and resulted in a constitutional amendment essentially disfranchising black men and the hardening of Jim Crow laws and policies. The era saw the proliferation of Confederate monuments—including the one on Union Square promoted by Waddell and others, as well as memorials to various Democratic figures, including Samuel A’Court Ashe at Union Square.

Over the years, the life-size portrait of Ruffin was moved to two successive Supreme Court buildings, where the rooms were designed to accommodate the large size of the painting Ruffin’s daughter had sponsored.



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3-1-2009

# Introduction: State v. Mann and Thomas Ruffin in History and Memory

Sally Greene

Eric L. Muller

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# INTRODUCTION: *STATE v. MANN* AND THOMAS RUFFIN IN HISTORY AND MEMORY

SALLY GREENE & ERIC L. MULLER

In one of his earliest opinions on the Supreme Court of North Carolina, Judge Thomas Ruffin<sup>1</sup> penned what is undoubtedly the coldest and starkest defense of the brutality of slavery ever to appear in an American judicial opinion. In the assault and battery prosecution *State v. Mann*,<sup>2</sup> Ruffin created for slave owners an absolute immunity from criminal liability for the physical punishment of their slaves, no matter how cruelly inflicted. “The power of the master must be absolute,” ruled Ruffin, “to render the submission of the slave perfect.”<sup>3</sup>

This notorious decision provided fodder for Harriet Beecher Stowe, who saw Ruffin as an honorable and decent man trapped in a culture of vicious racial subordination.<sup>4</sup> The slender body of criticism that began with Stowe and other abolitionists<sup>5</sup> has been embraced and expanded, more than a century later, by academic legal historians, for whom Ruffin has become emblematic of all that was wrong with the

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1. Editor’s Note: In 1829, when Thomas Ruffin was elected by the General Assembly to the Supreme Court of North Carolina, the court was made up of three “Judges” and one “Chief Justice.” See Martin H. Brinkley, *Supreme Court of North Carolina: A Brief History*, <http://www.aoc.state.nc.us/www/copyright/sc/facts.html> (last visited Feb. 27, 2009). When the court heard the *State v. Mann* case, Ruffin was styled a Judge. In 1833, Ruffin’s peers elected him Chief Justice, a title he held until 1852. Six years later, he returned to serve one final year, again as Judge. For more information on the chronology of Ruffin’s time on the court, see generally Judge James A. Wynn, Jr., *State v. Mann: Judicial Choice or Judicial Duty?*, 87 N.C. L. REV. 991 (2009). During and since his lifetime, scholars and historians have referred to Ruffin using both the Judge and Chief Justice titles. For consistency and simplicity, and because Ruffin held the title of Judge at the time *State v. Mann* was decided, the articles in this Issue refer to Ruffin as “Judge,” unless specifically referring to Ruffin in his capacity as Chief Justice.

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

3. *Id.* at 266.

4. See HARRIET BEECHER STOWE, *A KEY TO UNCLE TOM’S CABIN* 78 (1853) (“No one can read this decision, . . . so dreadful in its results, without feeling at once deep respect for the man and horror for the system.”).

5. See generally Laura H. Korobkin, *Appropriating Law in Harriet Beecher Stowe’s Dred*, 62 NINETEENTH-CENTURY LITERATURE 380 (2007) (contextualizing Stowe’s critiques of Ruffin and *State v. Mann* within a larger body of abolitionist criticism).

antebellum South. In 1996, for instance, Sanford Levinson raised the following provocative questions about Judge Ruffin:

Can one have, as apparently Harriet Beecher Stowe did, “deep respect for the man” Ruffin even as one despises the system that he served? Would we, for example, wish to honor him by placing his portrait in American law schools as a presumed inspiration to further generations of law students as to what it means to be a “distinguished” lawyer or judge, or does authorship of *State v. Mann* disqualify him from any such honor?<sup>6</sup>

Within the popular narratives of Ruffin’s place in North Carolina history, however, such questions have gone unasked. While Ruffin the judge has received the highest of praise for his overall contribution to the development of the law, his opinion in *State v. Mann* has been simply ignored. At the dedication of a heroic-scale bronze statue of Judge Ruffin at the entrance to the North Carolina Supreme Court building (now the Court of Appeals) in 1915, Governor Locke Craig called him “one of the greatest judges that our race has produced.”<sup>7</sup> In 1922, a dormitory was named after him on the UNC-Chapel Hill campus.<sup>8</sup> Roscoe Pound secured Ruffin’s reputation as one of the ten greatest judges of the golden age of the American common-law tradition,<sup>9</sup> an honor proudly proclaimed in official histories of the Supreme Court of North Carolina from the early twentieth century<sup>10</sup> to the present.<sup>11</sup> Even today, the official history of the Supreme Court of North Carolina praises Ruffin’s accomplishments without so much as mentioning the infamous *Mann* opinion.<sup>12</sup>

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

7. Locke Craig, *Acceptance*, in ADDRESSES AT THE UNVEILING AND PRESENTATION TO THE STATE OF THE STATUE OF THOMAS RUFFIN BY THE NORTH CAROLINA BAR ASSOCIATION: DELIVERED IN THE HALL OF THE HOUSE OF REPRESENTATIVES 26, 26 (1915).

8. The University of North Carolina at Chapel Hill Engineering Information Services, *Ruffin Residence Hall*, <http://www.planroom.unc.edu/bldg/detail.asp?id=117> (follow “Aliases & Notes” hyperlink) (last visited Feb. 6, 2009).

9. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4, 30 n.2 (1938).

10. Hon. Robert W. Winston, *A Century of Law in North Carolina*, 176 N.C. 763, 786 (1919) (reprinting remarks from the Proceedings of the North Carolina Bar Association in celebration of the 100th anniversary of the establishment of the Supreme Court of North Carolina).

11. Brinkley, *supra* note 1.

12. *Id.*

On November 16, 2007, in the presence of a portrait of the judge commissioned in the 1840s for what is now jointly called the Dialectic and Philanthropic Societies at UNC-Chapel Hill, a symposium of legal scholars and historians was convened to reconsider the legacy of Thomas Ruffin in light of *State v. Mann*. This Issue of the *North Carolina Law Review* consists of papers developed from that symposium on “The Perils of Public Homage: *State v. Mann* and Thomas Ruffin in History and Memory.” The questions raised in the following pages could not be more timely. In the wake of the election of our first African American president, the essays in this Issue add new perspective to countless other conversations on race as we work our way toward putting contradictory pieces of history and memory together. For as the historian Ira Berlin has aptly written, “only by testing memory against history can a sense of a collective past be sustained.”<sup>13</sup>

As conveners of the symposium, we extend our thanks to all the participants, to all who attended and made the event a success, and especially to our sponsors, the UNC School of Law, the UNC Center for the Study of the American South, and the UNC Institute for the Arts and Humanities.

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13. Ira Berlin, *American Slavery in History and Memory*, in *SLAVERY, RESISTANCE, FREEDOM* 1, 20 (Gabor Boritt & Scott Hancock eds., 2007).





3-1-2009

## State v. Mann Exhumed

Sally Greene

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## STATE v. MANN EXHUMED\*

SALLY GREENE\*\*

*State v. Mann overturned a Chowan County jury's conviction of John Mann for assault upon a slave he had hired from a woman named Elizabeth Jones. Historians interested in exploring the discrepancy between the trial court's verdict and Ruffin's reversal have faced a significant hurdle: the inability to find evidence of the facts surrounding the case. Contrary to what scholars have concluded, however, the record is not silent on John Mann or Elizabeth Jones or her wounded slave Lydia. Evidence available in public records enables us to reconstruct sufficient facts to support tentative conclusions.*

*Elizabeth Jones was a minor child who had inherited Lydia upon the death of her parents. She was being raised in rural Chowan County in the household of her brother-in-law, Josiah Small. Small, a local farmer of good standing, acted in Elizabeth's interest as her guardian by keeping Lydia hired out. In 1828 Lydia was hired by John Mann, a widowed sea captain living in Edenton. A criminal record of his own, plus the fact that he had gone into bankruptcy with overwhelming debts, suggests that Mann occupied one of the lower rungs of Edenton's well-articulated class structure. To a Chowan County judge and jury, his indictment for assault upon a hired slave would have looked similar to other cases in which a free man was accused of assaulting another man's slave, cases that clearly gave rise to criminal prosecution. Little about John Mann would have suggested that he ought to enjoy the powers of a master.*

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\*\* Independent scholar. J.D. 1984, The George Washington University; Ph.D. 1996, University of North Carolina at Chapel Hill. A special thanks to my friend Eric Muller for recognizing the significance, both nationally and to the UNC-Chapel Hill community, of exploring Judge Ruffin's legacy in the light of *State v. Mann*, as well as for the opportunity to work with him to host this symposium. On the trail in search of Lydia, Elizabeth Jones, and John Mann, I've gathered debts to many other helpful people, including George Stevenson and others on the staff of the North Carolina Office of Archives and History; also Brooks Graebner, Al Brophy, Catherine Bishir, Trish Roberts-Miller, Anne Rowe, Elizabeth Vann Moore, Sally Koestler, Janice Eileen Wallace, Tom Davis, Fitz Brundage, David Cecelski, and Paul Jones. Cara Gardner of the North Carolina Law Review has gone far beyond the line of duty. Thanks to one and all.

*Close study of the evidence suggests that Ruffin's reversal would have been seen in Edenton as wrong on the facts. And further study of the law of masters, hirers, and slaves suggests that the reversal was at least questionable on the law. Read in this new light, State v. Mann can be seen to stand on its own as a succinct but powerful treatise in implicit defense of slavery in terms that Ruffin's fellow planters would have readily understood. In justifying the reversal of Mann's conviction, Ruffin successfully enlists the key Burkean themes of conservative southern thought of the day, fatalistic themes emphasizing the surpassing importance of the status quo over any hope of reform. The opinion can be read as part of a broader pattern reflected in the writings of an increasingly defensive slaveholding elite; thematically it foreshadows Thomas Dew's crucially important defense of slavery in his Review of the Debate in the Virginia Legislature of 1831 and 1832. And yet Ruffin's rhetoric outdid itself. In attempting to silence any criticism of the workings of the system from which its author so clearly benefited, ironically State v. Mann may have hastened slavery's undoing.*

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#### INTRODUCTION

The rhetoric of inevitability that Thomas Ruffin so powerfully deploys in *State v. Mann*<sup>1</sup> is almost enough to obscure a stubborn fact: a jury in Chowan County reached the opposite conclusion. In the fall of 1829, twelve white men listened as the defendant John Mann, who owned no slaves but had hired one named Lydia, recounted how, one day back at the shank end of winter,<sup>2</sup> he had had quite enough of her insolence. He had tried to correct her physically, but she bolted.

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1. 13 N.C. (2 Dev.) 263 (1829).

2. The indictment of John Mann alleges that the assault occurred on March 1, 1829. Chowan County Slave Records, Criminal Actions Concerning Slaves (1767-1829 broken series), North Carolina Office of Archives and History, Raleigh [hereinafter Chowan County Slave Records].

What then was he to do but to “call[] for his gun”<sup>3</sup> as she ran away, possibly toward her home,<sup>4</sup> possibly out to the marshes where fugitive slaves were known to be biding their time?<sup>5</sup> And so he stopped her in her tracks. But the twelve white men did not credit his defense. They saw the case as more like *State v. James Wilson*,<sup>6</sup> filed in 1826, or *State v. Charles Creecy*,<sup>7</sup> filed in 1828, in which free men were indicted for assaulting slaves not their own. Such a scenario could clearly give rise to a criminal charge.<sup>8</sup> And in this case, the assault had been committed with a deadly weapon: the slave was lucky to be alive. Thus, upon an instruction from the trial judge that granted Mann only a “special property” in Lydia, not the full rights of her owner, and with the further qualification that his use of force had been cruel and unreasonable, the jury convicted him of assault and battery.<sup>9</sup>

For all its cloak of authority, the opinion pronounced by Thomas Ruffin overturning the jury’s verdict was far from inevitable. The trial court’s distinction between an owner of a slave and a mere hirer made perfect sense. A decision sanctioning the punishment of one who had abused his temporary and conditional possession of the chattel property of another would have paralleled the civil remedy for

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3. *State v. John Mann*, Superior Court (Fall Term 1829), Chowan County Slave Records, *supra* note 2.

4. Hired slaves who were victims of abuse had a natural tendency to seek refuge with their owners. JONATHAN D. MARTIN, *DIVIDED MASTERY: SLAVE HIRING IN THE AMERICAN SOUTH* 140–42 (2004). Lydia could have returned to her owner, complaining of mistreatment, while leaving Mann obligated to pay for the entire unfulfilled term of the hire. As Chowan County slave Allen Parker reported, such a thing happened to a man who had hired his mother in the 1840s. ALLEN PARKER, *RECOLLECTIONS OF SLAVERY TIMES* 33–35 (Worcester, Chas. W. Burbank & Co. 1895). I am grateful to the students of David Cecelski’s Fall 2000 graduate class, *The Slave Narrative in American History*, East Carolina University, for their annotated edition of Allen Parker’s narrative. See *The Allen Parker Slave Narrative*, <http://core.ecu.edu/hist/cecelskid/> (last visited Feb. 15, 2009). This incident is reported in Chapter 3.

5. From the early nineteenth century on, “[t]he backcountry pocosins harbored scores of fugitive slaves.” THOMAS PARRAMORE, *CRADLE OF THE COLONY: THE HISTORY OF CHOWAN COUNTY AND EDENTON, NORTH CAROLINA* 50 (1967). Dismal Swamp fugitives figure in the regional lore and in fiction, notably in Harriet Beecher Stowe’s novel *DRED: A TALE OF THE GREAT DISMAL SWAMP* 238–42 (Robert S. Levine ed., Univ. of N.C. Press 2006) (1856), in which *State v. Mann* plays a central role.

6. Grand Jury Indictment, Chowan County Criminal Action Papers (Dec. 1826), North Carolina Office of Archives and History, Raleigh (indicting James Wilson, a “free man of color,” for assault upon Luck, a female slave belonging to Sarah Knox).

7. Grand Jury Indictment, Chowan County Criminal Action Papers (Jan. 1828), North Carolina Office of Archives and History, Raleigh (indicting Charles Creecy for assault upon Charles, slave of Jonathan Haughton).

8. See *State v. Hale*, 9 N.C. (2 Hawks) 582, 582 (1823).

9. *State v. John Mann*, Superior Court (Fall Term 1829), Chowan County Slave Records, *supra* note 2.

the same kind of harm. Indeed, Ruffin goes out of his way to note that the traditional law of bailment, in which such a case would arise, is not disturbed by his ruling.<sup>10</sup> An opinion that gave hirers certain rights of physical control but drew the line at excessive or cruel punishment would have harmonized with the type of common-law reasoning the courts regularly performed.<sup>11</sup>

The few scholars who have puzzled over the discrepancy between the trial court's conviction and the appellate court's reversal have reported a frustrating stumbling block: a near-total lack of documentary evidence of what actually happened in Chowan County, who the principal actors were, and what forces were at play.<sup>12</sup> To the contrary, the record is not silent on John Mann, the enslaved woman Lydia, or her owner Elizabeth Jones. Information available in papers filed in the Chowan County Court enables us to recreate enough of the setting to draw certain conclusions. The conclusions must be tentative, for all that we have to go on are spare documents produced under compulsion of law. The people involved in this drama, even the white people, are not the sort whose letters and diaries are found in the archives of state institutions. The slim evidence that Lydia ever existed underscores what an extraordinary testament we have in the writings of another Chowan County slave, Harriet Jacobs, author of *Incidents in the Life of a Slave Girl*.<sup>13</sup> Yet out of fragile yellowed pages a sketch of the past emerges, providing enough of a picture to confirm a suspicion that legal historians have held for years: it did not have to be this way.

Close study of the evidence suggests that Ruffin's reversal of Mann's conviction would have been seen in Edenton as unsettling, unnecessary, and wrong. As hard as Judge Ruffin worked to present the case as the definitive word about the physical power of masters over slaves, the stubborn fact remains that the defendant was a slave hirer. Although hiring was commonplace throughout the antebellum period, it was an uneasy business. Few slaveowners would have

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10. *State v. Mann*, 13 N.C. (2 Dev.) 263, 264 (1829). On civil claims against hirers generally, see MARTIN, *supra* note 4, at 119–28; and THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 133–58 (1996).

11. See *Commonwealth v. Booth*, 4 Va. (2 Va. Cas.) 394, 395 (1824).

12. Mark Tushnet goes so far as to imply that documents relating to *State v. Mann* were “destroyed during the Civil War.” MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* 67 (2003).

13. HARRIET ANN JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF* (Jean Fagan Yellin ed., Harvard Univ. Press 2002) (1861). See generally JEAN FAGAN YELLIN, *HARRIET JACOBS: A LIFE* (2004) (placing *Incidents in the Life of a Slave Girl* within the context of Jacobs' eventful life before, during, and after the Civil War).

agreed that the hirers of their slaves would become, “for the time being, the owner,” as Ruffin’s opinion put it, with all the powers that that entailed.<sup>14</sup> Indeed, as the Tennessee Supreme Court would later say, “[a] more startling proposition to the slave-owner can scarcely be conceived.”<sup>15</sup>

The people in Chowan County who would have most strongly objected to Ruffin’s reversal were not closet abolitionists concerned about the “humanity” of one female slave. Rather, they were Ruffin’s own peers—fellow landed slaveowners. Understanding that hirers lacked the self-interest in a slave’s welfare that came as a function of ownership, these men depended on the law to sanction the punishment of those who abused the privilege. The conviction of John Mann for a battery upon a hired slave was the right result from the standpoint of the very class to which Ruffin belonged. Yet the view from Edenton is rarely considered. Over the course of almost two centuries, *State v. Mann* has come to be best known for its broad holding, for the categorical proposition that the “powers of the master” must be “absolute.”<sup>16</sup> The opinion’s easy elision of slaveowner and slave hirer has been ignored,<sup>17</sup> glossed over,<sup>18</sup> and even accepted as settled law,<sup>19</sup> with the critical emphasis understandably falling on the ways in which Ruffin’s breathtakingly “dehumaniz[ing]”<sup>20</sup> rhetoric confronts us with the realization of slavery’s ultimate dependence on raw physical power. Influenced by Harriet Beecher Stowe’s vocal dismay over what she saw as the unavoidable dilemma that the unbending law had forced upon the reluctant judge<sup>21</sup>—following Stowe in taking his protestations at face

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14. See generally MARTIN, *supra* note 4 (surveying the history of slave hiring).

15. *James v. Carper*, 36 Tenn. (4 Sneed) 397, 398 (1857). For a discussion of this case, see MARTIN, *supra* note 4, at 121–23.

16. *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

17. EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVEHOLDERS MADE* 35–36 (1972).

18. MORRIS, *supra* note 10, at 190.

19. Omar Swartz, *Codifying the Law of Slavery in North Carolina: Positive Law and the Slave Persona*, 29 T. MARSHALL L. REV. 285, 298 & n.67 (2004).

20. *Id.* at 299.

21. HARRIET BEECHER STOWE, *A KEY TO UNCLE TOM’S CABIN* 77–79 (London, Sampson, Low, Son 1853). For analyses of Stowe’s interpretation of *State v. Mann*, see Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe’s Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1132–37 (1998); Alfred L. Brophy, *John Quincy Adams: 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, 66–69 (2000); and Laura H. Korobkin, *Appropriating Law in Harriet Beecher Stowe’s Dred*, 62 NINETEENTH-CENTURY LITERATURE 380, 380–83

value—some critics continue to conclude that Ruffin was a reluctant agent of the law of slavery, rather than one of its most brilliant, most interested shapers. An insistence upon the importance of the local facts of *State v. Mann* challenges such readings.

Once it becomes plausible that Ruffin's reversal of the trial court's conviction represented a choice, not an inevitability, larger questions arise: Were legal precedent and principle really so clear as to require such a result? If not, what elements of Ruffin's background might have combined with circumstances in slaveholding North Carolina in 1829 to compel such a far-reaching opinion? In the following passages, I argue that neither facts nor precedent appear to have dictated the reversal. Rather, I suggest, *State v. Mann* gave Ruffin, a lawyer and planter with a vested interest in the slave labor system, an opportunity to make a significant contribution to an emerging conversation in defense of slavery—or more precisely, a conversation emerging in response to escalating attacks upon slavery arising on multiple fronts.

To stress the polemical aspect of *State v. Mann* is not to ignore its practical effect upon the behavior of masters, slaves, and hirers.<sup>22</sup> Nor should such an interpretation discount the ways in which the opinion can usefully be analyzed within the broad structures of antebellum law, or within the still broader structures of nineteenth-century American law as it evolved into a distinct system of its own.<sup>23</sup> But the importance of *State v. Mann* radiated beyond the opinion's status as a pronouncement of law. The political climate of 1829 offered ample reason for Ruffin to reverse Mann's conviction. Affirming the jury's verdict would have involved an acknowledgment, at least at some level, of the rights of a wounded slave. Every time the judicial system "recognized the legal personality of the slave," as James Oakes has observed, it "risked undermining slavery."<sup>24</sup> In *State v. Mann*, Ruffin takes the opposite stance: he insulates the authority of slaveowners—

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(2007). The connection is also discussed in GREGG D. CRANE, RACE, CITIZENSHIP, AND LAW IN AMERICAN LITERATURE 56–86 (2000); and TUSHNET, *supra* note 12, at 97–137.

22. See *infra* note 145 and accompanying text.

23. By the first conference on the American law of slavery, in 1974, it was clear that *State v. Mann* had become a central point of study by legal historians. See Stanley N. Katz, Opening Address, *Bondage, Freedom, & the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography*, 17 CARDOZO L. REV. 1689, 1690 (1996). Ruffin's opinion has been the subject of one casebook, by Mark Tushnet, see *supra* note 12, dozens of journal articles, and many discussions in books on the legal history of the antebellum period.

24. JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 155 (1990).

indeed of any “person having the possession and command of the slave”<sup>25</sup>—against threatening winds of change. Particularly as read against newly discovered facts surrounding the Chowan County trial, Ruffin’s opinion can be seen to stand on its own as a succinct but powerful treatise in implicit defense of slavery in terms that his fellow planters would have readily understood. In justifying the reversal of Mann’s conviction, Ruffin successfully enlists the key themes of southern conservative thought, fatalistic themes emphasizing the surpassing importance of “the actual condition of things”<sup>26</sup> over any hope of reform. The opinion can be read as part of a broader pattern reflected in the writings of an increasingly defensive slaveholding elite: and in attempting to silence any criticism of the workings of the system from which its author so clearly benefited, ironically *State v. Mann* may have hastened slavery’s undoing.

#### I. CHOWAN COUNTY, NORTH CAROLINA: THE TRIAL AND CONVICTION OF CAPT. JOHN MANN

In death, there is life. Lydia comes to life—for us—in the papers settling the estate of Thomas Jones, the Chowan County farmer who owned her. He died in November 1822 without a will, leaving a wife, eight living children (five of them minors), and considerable property. In addition to land holdings of some 640 acres, he left twenty-one slaves, among them a sixteen-year-old girl named Lydia.<sup>27</sup> Lydia stayed on at the Jones’ homestead as a house servant for Thomas’ widow, Temperance Jones.<sup>28</sup> With Temperance’s death two years

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25. *State v. Mann*, 13 N.C. (2 Dev.) 263, 265 (1829).

26. *Id.* at 266.

27. See *Estate of Thomas Jones* (1822), Chowan County Estate Records, North Carolina Office of Archives and History, Raleigh [hereinafter *Estate of Thomas Jones*]; *Petition to Divide Negroes, Estate of Thomas Jones, supra*; *Order on Petition to Divide Negroes, Estate of Thomas Jones, supra*; *Order on Petition to Divide Land, Estate of Thomas Jones, supra*. Lydia’s name and age appear on the Inventory and Account Sales of the Goods and Chattels of Thomas Jones, *Estate of Thomas Jones, supra*.

28. *Inventory and Account Sales of the Goods and Chattels of Thomas Jones, Estate of Thomas Jones, supra* note 27. I am hesitant to call Temperance Jones Elizabeth Jones’ mother. The two youngest children, Temperance and Sarah, initially became wards of another man, John Blount, though a year later a different guardianship gave them to one of the adult Jones children, Henderson D. Jones. *Id.* Possibly Elizabeth was born to a previous wife. Thomas Jones apparently had three other adult children in addition to Henderson: William, John M., and Matilda, of whom William was deceased. The division of land, in 1824, gave one share to “William Jones heirs.” *Id.* A bill of sale of a slave belonging to William Jones’ estate indicates that he died in 1818. Letter from Thomas Jones to Josiah McKiel (Mar. 1819), Book G-2, at 439, Chowan County Register of Deeds.

later, however, everything changed.<sup>29</sup> The minor Jones children, including Elizabeth, who may have been as old as fifteen by then,<sup>30</sup> went to live (if they had not already) with guardians. With her brothers James and August, Elizabeth became the ward of Josiah Small,<sup>31</sup> who had married their sister Matilda in 1818.<sup>32</sup> For Lydia, the consequences were much worse. What remained of the home she knew was broken up. The slaves were divided among the heirs; some were sold off.<sup>33</sup> For the remainder of 1824, after Temperance Jones'

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29. Estate of Temperance Jones, 1824, Chowan County Estate Records, North Carolina Office of Archives and History, Raleigh [hereinafter Estate of Temperance Jones]. Technically, Lydia had been hired by Temperance Jones after her husband's death. Inventory and Account Sales of the Goods and Chattels of Thomas Jones, Estate of Thomas Jones, *supra* note 27. We have no specific information on whether the children stayed on with Mrs. Jones after Mr. Jones' death. *But see infra* note 31.

30. On Elizabeth's age: she apparently turned twenty-one, the statutory age for the termination of a guardianship, in 1829. *See* An Act for the Better Care of Orphans, and Security and Management of Their Estates, ch. 69, § 2, 1 H. POTTER, LAWS OF THE STATE OF NORTH CAROLINA 210–11 (Raleigh, N.C., J. Gales & Son 1821). The last annual guardianship statement that Small filed for her was in 1830 (for 1829). *See infra* note 56. In 1841, an Elizabeth J. Jones married Jethro M. Riddick. North Carolina Marriage Bonds (1841), Chowan County, North Carolina Office of Archives and History, Raleigh. Elizabeth is referred to as Elizabeth J. Jones in her father's estate papers, *see* Estate of Thomas Jones, *supra* note 27, as well as in the deed of sale of the land she inherited from her father to Josiah Small in 1838. Deed from Elizabeth Jones to Josiah Small (1838), Book L-2, at 282, Chowan County Register of Deeds. A Jethro H. Riddick and wife Elizabeth are later found in nearby Gates County. According to Sally Koestler's genealogical research, this Riddick came to that marriage with two children by a previous wife; four children were subsequently born after 1841 to him and Elizabeth. *See* Sally's Family Place, <http://www.sallysfamilyplace.com/MapleLawn/> (last visited Feb. 15, 2009). In the Gates County Census taken in September 1850, this Elizabeth's age is given as thirty-eight, which would have made her seventeen or eighteen in March 1829, not twenty-one. 1850 Census, Chowan County, N.C. (S-K Publications CD-ROM, 2002). Elizabeth Jones' guardianship could have been terminated before age twenty-one, *see* An Act for the Better Care of Orphans, and Security and Management of Their Estates, ch. 69, § 2, 1 H. POTTER, LAWS OF THE STATE OF NORTH CAROLINA 210–11 (Raleigh, N.C., J. Gales & Son 1821), but if it had been, no evidence of it survives. This couple could be a different Jethro and Elizabeth Riddick.

31. Chowan County Court document naming Josiah Small guardian of James, Elizabeth, and August Jones (June 15, 1824), Estate of Thomas Jones, *supra* note 27. The date of this document suggests that the children lived with Temperance Jones until her death.

32. North Carolina Marriage Bonds (1818), Chowan County, North Carolina Office of Archives and History, Raleigh. Josiah Small is cited as husband of Matilda Jones in Estate of Thomas Jones, *supra* note 27.

33. The value of the slaves was to be settled equally on ten heirs. The slaves' total market worth was \$4,525. Each heir, therefore, was to end up with the equivalent of \$452.50. Two slaves, Lydia and "Boy Jerry," went to Elizabeth. Together, they were worth \$575. Order on Petition to Divide Negroes, Chowan County Court of Pleas and Quarter Sessions (Dec. Term 1824), Estate of Thomas Jones, *supra* note 27. In order to settle her debt to the other heirs, Elizabeth sold Jerry. Petition to Chowan County Court of Pleas and Quarter Sessions, seeking permission for Elizabeth Jones to sell Jerry (Dec.

death, Lydia was hired out to Elizabeth's older brother Henderson D. Jones.<sup>34</sup> That experience would have offered a taste of her new life as a hired slave, the investment property of Elizabeth Jones, a girl at least three years her junior.

Elizabeth's guardian, Josiah Small, was a farmer, a justice of the peace actively involved in the civic life of Chowan County.<sup>35</sup> In the Revolutionary period, Edenton gained significance as a port city; with other ports having been closed off by the British, it "became a vital life-line for Washington's army."<sup>36</sup> Edenton's strategic importance cemented its position as the political center of the colony. Her sons and daughters gave their all to the cause of liberty.<sup>37</sup> Some of their names—like those of Samuel Johnston, a revolutionary leader, the last colonial governor of North Carolina and one of the state's first senators,<sup>38</sup> and James Iredell, who became an associate justice on the first United States Supreme Court<sup>39</sup>—live on. Though less well remembered, the Smalls and the Joneses also contributed to the prosperity of the young state, shouldering their responsibilities in an uncertain and exciting time.

Josiah Small was a descendant of John Small (ca. 1639–1700),<sup>40</sup> a Virginia Quaker whose family was among the waves of Quakers who sought refuge in the new colony of North Carolina to escape religious persecution. Virginia's governor William Berkeley, appointed in 1642, was a faithful servant of Charles I—"a King's man to his

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Term 1826), Estate of Thomas Jones, *supra* note 27; Memorandum from Henderson Jones, Administrator of Estate of Temperance Jones, to Josiah Small, seeking payment of balance due from James K., Elizabeth J., and August Jones, to settle the division of Thomas Jones' slaves (Dec. 12, 1826), Estate of Thomas Jones, *supra* note 27.

34. Account of sales of property belonging to Temperance Jones, Estate of Temperance Jones, *supra* note 29.

35. Small is identified as justice of the peace in the 1828 criminal proceeding against the entire county magistrate court discussed *infra* note 103 and accompanying text. For 1826, he is identified as tax assessor. Chowan County Taxables (1825–1828 broken series), North Carolina Office of Archives and History, Raleigh.

36. PARRAMORE, *supra* note 5, at 33.

37. *Id.* at 32–38; see also YELLIN, *supra* note 13, at 3–5 (discussing the role residents of Edenton played in the Revolutionary War).

38. THE GOVERNORS OF NORTH CAROLINA 88–89 (Michael Hill ed., 2007).

39. WILLIS P. WHICHARD, JUSTICE JAMES IREDELL 90 (2000).

40. For a thorough Small family genealogy, see James D. Small, Descendants of Quaker John Small, <http://homepages.rootsweb.ancestry.com/~smalljd/lines/quakerjohn-va.html/> (last visited Feb. 15, 2009) [hereinafter Descendants of Quaker John Small]. I am grateful to Janice Eileen Wallace, another descendant, for her email correspondence of Dec. 3–20, 2003, explaining further details of the Small family connections (on file with the North Carolina Law Review).

autocratic fingertips.”<sup>41</sup> He suppressed all dissent from the Church of England, even after Cromwell seized control of the British government. Put out of office in 1652, he became governor again in 1660 under Charles II. This time he redoubled his determination to rid the colony of this strange and heretical sect. In its 1659–1660 session, the Virginia legislative assembly passed “An Act for Suppressing Quakers,” a draconian law requiring, among other things, the imprisonment of all Quakers until they left the colony.<sup>42</sup>

On the Albemarle Peninsula, John Small’s family found a more welcoming environment.<sup>43</sup> His son John Small (ca. 1663–1736) settled in a location now known as Folly Swamp, on the western edge of the Great Dismal Swamp, in what is now Gates County (within a region that for most of his lifetime was claimed by both Virginia and North Carolina).<sup>44</sup> This John Small’s son Joseph settled a little farther south, in current-day Chowan County, in an area called Cow Hall Swamp.<sup>45</sup> There he accumulated land and slaves, creating a legacy that his sons and grandsons would build upon. His son Benjamin Sr. left an estate of more than 500 acres and some eighteen slaves. On Benjamin’s death in 1820, his son Josiah Small, who had two years earlier married Matilda Jones, inherited one tract of land and two slaves; this was in addition to a tract of 135 acres the father had

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41. JAY WORRALL, JR., *THE FRIENDLY VIRGINIANS: AMERICA’S FIRST QUAKERS* 20 (1994).

42. *Id.* at 19–40. Further laws aimed directly against Quakers were passed in 1661 through 1666. *Id.*

43. Under the Carolina Charter granted by Charles II in 1663 (written largely by John Locke), “No person . . . shall be in any ways molested, punished, disquieted, or called into question for any differences in opinion or practice in matters of religious concernment, but every person shall have and enjoy his conscience in matters of religion throughout the province.” SETH B. HINSHAW, *THE CAROLINA QUAKER EXPERIENCE 1665–1985*, at 1–2 (1984).

44. RAYMOND PARKER FOUTS, *FOLLOWING THE LAND: A GENEALOGICAL HISTORY OF SOME OF THE PARKERS OF NANSEMOND COUNTY, VIRGINIA, AND CHOWAN/HERTFORD/GATES COUNTIES, NORTH CAROLINA, 1604–2004*, at 48 (2005); Descendants of Quaker John Small, *supra* note 40. On the boundary dispute that lasted from 1665 to 1728, see William K. Boyd, *Introduction to WILLIAM BYRD’S HISTORIES OF THE DIVIDING LINE BETWEEN VIRGINIA AND NORTH CAROLINA* xxi, xxix–xxvi (William K. Boyd ed., 1929). Most of Gates County was originally within Nansemond County, Virginia. *Id.* According to Jay Worrall, by 1664, as a result of Berkeley’s legislation, “only two little Quaker groups remained in Virginia,” one of them in southeastern Nansemond County. WORRALL, *supra* note 41, at 32.

45. Cow Hall Swamp, referred to in numerous deeds of land owned in Chowan County by Small family members, does not appear on contemporary maps, but we have some indication that it was on the Chowan/Perquimans County border. See Descendants of Quaker John Small, *supra* note 40.

deeded to the son in 1817.<sup>46</sup> By 1830, Josiah Small had charge over seventeen slaves.<sup>47</sup>

We have no record of how the older generations of Quaker Smalls negotiated their position as slaveowners. According to Seth Hinshaw's history of Quakers in North Carolina, "[t]he religious conviction that slavery was morally wrong developed quite slowly."<sup>48</sup> By the time it took hold, Hinshaw points out, Quakers in eastern North Carolina had been owning slaves for many years, handing them down (as we see here) from generation to generation.<sup>49</sup> We do know that in December 1795, when Benjamin Small would have been about fifty years old,<sup>50</sup> the Quaker community in Chowan County was targeted for its emancipationist advocacy. A grand jury resolved to combat its "insatiated enthusiasm" and its pernicious influence.<sup>51</sup> Perhaps the slaveholding Benjamin Small failed to see the moral dilemma.<sup>52</sup> Perhaps he had fallen away from the faith.<sup>53</sup> Benjamin's

46. Deed from Benjamin Small Jr. to Josiah Small (1817), Book G-2, at 281, Chowan County Register of Deeds; Will of Benjamin Small (1821), Chowan County Wills, 1694–1938, North Carolina Office of Archives and History, Raleigh. Josiah Small owned at least thirty-two additional acres. Letter from James and Stephen Skinner to Josiah Small (Mar. 17, 1823), Book H-2, at 259, Chowan County Register of Deeds.

47. 1830 Census, Chowan County, N.C. (S-K Publications CD-ROM, 2002) [hereinafter 1830 Chowan County Census].

48. HINSHAW, *supra* note 43, at 128.

49. *Id.* at 128–30.

50. See Descendants of Quaker John Small, *supra* note 40.

51. Presentment of grand jury charging that Quakers are inciting negroes to seek freedom, Beaufort, Bertie, Carteret, Chowan, et al. Counties, Miscellaneous Records, 1699–1865, North Carolina Office of Archives and History, Raleigh. This document links the Quaker agitation to "the miserable havoc & malfeasance which have lately taken place in the West Indies," almost certainly a reference to the 1791 revolution in Haiti, which caused much alarm. See YELLIN, *supra* note 13, at 5–6.

52. Even if they had resisted the practice of slavery, the proper response was unclear. Emancipation could lead to a dire result: the slave could be recaptured and sold to a market of ready buyers. HINSHAW, *supra* note 43, at 131. This no-win situation prompted the Society of Friends in North Carolina to establish a trust into which slave owners could place their slaves, a haven in which "in effect [the] slaves were actually free." *Id.* at 132. The Quakers set up this system upon advice given in 1809 by attorney William Gaston, Ruffin's friend and later colleague on the supreme court. JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA 1790–1960*, at 25 (1995). In 1827, the supreme court declared the trust illegal, upholding a superior court decision by Thomas Ruffin. Trustees of the Quaker Soc'y of Contentnea v. Dickenson, 12 N.C. (1 Dev.) 189, 201–03 (1827). Gaston argued the case for the Quakers. For further discussion, see ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 75–79* (1975).

53. The man who mistreated Allen Parker's mother was a farmer named Small. See PARKER, *supra* note 4, at 33. He was "a very hard, mean man," according to Parker. *Id.* On the other hand, perhaps some Smalls did manumit their slaves. In 1859, a free negro named Benjamin Small was in nearby Pasquotank County. FRANKLIN, *supra* note 52, at 97.

son Josiah may not have considered himself a practicing Quaker at all. If he had, he may well have been disqualified from serving as guardian of Thomas Jones' children.<sup>54</sup>

Yet Josiah Small did commit himself to the guardianship. He performed his duties diligently. The law required him to "tak[e] care of and improv[e] all the estate" belonging to his charges; and so he did by consistently keeping their chattel property in the hiring market.<sup>55</sup> Beginning in 1825, and for every year thereafter through the fateful engagement with John Mann, Josiah Small hired Lydia out for the benefit of his wife's little sister.<sup>56</sup> The hiring of slave labor was a common and, by the 1820s, ritualized affair. Writes Harriet Jacobs, who was never offered for hire but saw the practice up close,

Hiring-day at the south takes place on the 1st of January. On the 2d, the slaves are expected to go to their new masters. On a farm, they work until the corn and cotton are laid. They then have two holidays. Some masters give them a good dinner under the trees. This over, they work until Christmas eve. If no heavy charges are meantime brought against them, they are given four or five holidays, whichever the master or overseer may think proper. Then comes New Year's eve; and they gather together their little alls, or more properly speaking, their little nothings, and wait anxiously for the dawning of day. At the appointed hour the grounds are thronged with men, women, and children, waiting, like criminals, to hear their doom pronounced.<sup>57</sup>

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54. North Carolina law prohibited Quakers from assuming guardianships of minor children from families that were not Quaker. An Act for the Better Care of Orphans, and Security and Management of Their Estates, ch. 69, §§ 2-3, 1 H. POTTER, LAWS OF THE STATE OF NORTH CAROLINA 210-11 (Raleigh, N.C., J. Gales & Son 1821). This law was not disturbed in the legislative revisions through 1825. See generally JOHN L. TAYLOR ET AL., REVISAL OF THE LAWS OF THE STATE OF NORTH-CAROLINA: PASSED 1821-1825 (Raleigh, N.C., J. Gales & Son 1827) (documenting revisions of the law of North Carolina from 1821 to 1825). I have found no evidence that the Thomas Jones family was Quaker.

55. The language is from the court paper naming Small guardian of James, Elizabeth, and August Jones, filed in Chowan County Court on June 15, 1824. Estate of Thomas Jones, *supra* note 27. "The hiring out of slaves for the benefit of orphans was an approved practice and one which could scarcely be avoided; accordingly, the county courts authorized the guardians of orphans to hire out the slaves belonging to their charges to the best advantage." ROSSER HOWARD TAYLOR, SLAVEHOLDING IN NORTH CAROLINA: AN ECONOMIC VIEW 76-77 (1926).

56. See Annual guardianship accounts for Elizabeth Jones filed by guardian Josiah Small (1825-1829), Estate of Thomas Jones, *supra* note 27.

57. JACOBS, *supra* note 13, at 15.

More details are found in the narrative of Allen Parker, a slave born in Chowan County in 1838 who, as a child, accompanied his mother as a hired slave.<sup>58</sup>

It was customary in those days for those having slaves to let, to take them to some prominent place, such as a point where two roads crossed, on the first day of the New Year, and at a given hour of the day the slaves would be put up at auction, and let to the highest bidders for one year; there was generally quite a gathering on these occasions, both of slaves and of white people. It was always understood that a person hiring a slave must furnish board and clothes in addition to paying a certain sum of money per year, and also agreeing not to misuse the slave in any way that would injure his or her value.<sup>59</sup>

The terms of Lydia's hiring resembled those laid down for Parker's mother.<sup>60</sup> Although we know from the criminal proceedings that Lydia was hired out in 1828 to John Mann, the names of those who hired her in 1825 through 1827 are presumably lost. The accounting that Josiah Small kept on Elizabeth Jones' estate ledgers of the amount received each year for "negro hire" is apparently all that survives. These records show that Lydia was able to command a market rate even for the year 1827, when she apparently gave birth to, and buried, a child.<sup>61</sup>

When 1828 came around, Lydia was hired out as a domestic to a poor white man who lived in town. John Mann was a mariner,

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58. Like Lydia, Parker and his mother were bequeathed to a young mistress as a result of an estate settlement and were subsequently hired out. See PARKER, *supra* note 4, at 8-9, 33-41.

59. *Id.* at 9-10.

60. The following terms were set forth for the hire of Thomas Jones' slaves: "the hirer furnishing a winter and summer suits, shoes and stockings, hat and blanket pay their taxes and not to go any way by water only at the risk of the hirer." Inventory and Account Sales of the Goods and Chattels of Thomas Jones, Estate of Thomas Jones, *supra* note 27. Compare the terms for hiring Allen Parker and others out of the estate of Peter Parker, 1839: "The Negroes are to have two Suits of clothes each one Summer and one Winter Suit. Hat. Blanket. Shoes and stockings. Their taxes to be paid and they are not to go by water or fish at any fishery. Returnable here 1st day of January next." Inventory of Estate Sale, Estate of Peter Parker (1830), Chowan County Estates Records, North Carolina Office of Archives and History, Raleigh.

61. See Estate of Thomas Jones, *supra* note 27. Josiah Small's guardianship account for Elizabeth Jones for the year 1827, filed March 1828, lists expenses for a midwife and a coffin, as well as income of \$38.25, a rate comparable to other years and to those commanded by the slaves of her siblings for "negro hire," as evidenced by their annual ledgers in the estate papers. *Id.*

recently widowed,<sup>62</sup> probably in his fifties.<sup>63</sup> In the highly stratified town of Edenton, this old sailor's position hovered near the bottom of the ladder.<sup>64</sup> His name is absent from the rosters of the county's justices of the peace, census takers, and tax assessors. He lived up on the north end of town, next to the town commons where livestock was kept, far from the sound side with its large, gracious houses, some of which contribute to Edenton's historic residential core today.<sup>65</sup> He left no estate papers. It is unlikely that he left any estate. The paper trail that farmers and merchants left in debits and credits to each other is in Mann's case little more than a trail of debt and woe. From what can be pieced together at this distance, we can safely conclude that in Edenton, in the fall of 1829, a jury would have found little reason to look Capt. Mann in the face and decide to accord him the "absolute" powers of a master.

Mann's name appears in two Chowan County land records from 1806, both of which involve an apparent benefactor, a fellow mariner named William Everton. On July 8, 1806, Everton bought at a sheriff's sale four improved half-lots on the north end of what was platted as the "Old Plan" of Edenton, on the east side of Broad Street.<sup>66</sup> Five days later, he gave two of the half-lots to John Mann.<sup>67</sup>

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62. "Mrs. Exeney Mann wife of Capt. John Mann" died on May 18, 1825. 2 LOIS SMATHERS NEAL, *ABSTRACTS OF VITAL RECORDS FROM RALEIGH, NORTH CAROLINA, NEWSPAPERS* 468 (1980); see also deed records cited *infra* note 75 (indicating Mann's family connections).

63. The 1830 Chowan County Census indicates that Mann was between fifty and sixty years of age. See 1830 Chowan County Census, *supra* note 47. Other evidence of his age comes from the tax rolls. From 1817 through the antebellum period in North Carolina, white males were taxed only until age forty-five; white women were not taxed. NORTH CAROLINA RESEARCH: GENEALOGY & LOCAL HISTORY 232 (Helen F.M. Leary ed., 2d ed. 1996). By 1820, John Mann was paying no poll tax. Chowan County Taxables (1820), North Carolina Office of Archives and History, Raleigh.

64. "It was a class-conscious community. The pages of the [*Edenton*] *Gazette* echo the continuous irritation of the well-to-do over the shenanigans of the lower-class elements. Many shared a reader's annoyance over 'the midnight revels of sailors, or men who emulate their manners.'" PARRAMORE, *supra* note 5, at 44; see also YELLIN, *supra* note 13, at 31 (discussing the hierarchical nature of Edenton society during the 1800s).

65. Mann occupied half-lots 146 and 147 of the Old Plan of Edenton, at the corner of Broad Street and the Town Commons (now Freemason Street). See deeds cited *infra* note 75; see also Chowan County Taxables (1816), North Carolina Office of Archives and History, Raleigh (describing Mann's property as half-lots 146 and 147).

66. Letter from Charles Roberts to William Everton (July 8, 1806), Book D-1, at 72, Chowan County Register of Deeds. Everton bought half-lots numbered 146 through 149 of the Old Plan of Edenton from Charles Roberts. Roberts was the county sheriff. See MARC D. BRODSKY, *THE COURTHOUSE AT EDENTON: A HISTORY OF THE CHOWAN COUNTY COURTHOUSE OF 1767*, at 118 (1989).

67. Letter from William Everton to John Mann (July 15, 1806), Book D-1, at 74, Chowan County Register of Deeds. In this deed, Everton is referred to as a "mariner,"

We have evidence of the men's association as sailors from a protracted lawsuit involving an ill-fated voyage that set out from Edenton in 1806. The trip ended in a shipwreck near the Ocracoke Inlet. Both Everton and Mann were called as witnesses on behalf of the ship's owner. From Everton's testimony of January 1812, we learn that he had commanded or piloted ships out of Edenton to the West Indies and elsewhere for about ten years.<sup>68</sup>

John Mann presumably had similar experience, but we lack the benefit of his testimony. When his subpoena was issued, in October 1811, no doubt he had more urgent matters on his mind.<sup>69</sup> His finances were in shambles. On January 8, 1812, he was hauled into debtor's prison.<sup>70</sup> Under the terms of what was called the insolvent

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and Mann is called John Mann, Jr. The deed can be read as if the half-lots Mann acquired are numbers 148 and 149. Subsequent deeds, however, as well as tax records, indicate that Mann occupied half-lots 146 and 147. See records cited *supra* note 65; deeds cited *infra* note 75. Later the same month, Mann was bondsman for the wedding of William Everton and Fanny Miller. See Marriage Bond for William Everton and Fanny Miller (July 31, 1806), Chowan County Marriage Bonds, North Carolina Office of Archives and History, Raleigh.

68. In *Benjamin Hassell v. James Hathaway*, brought in the Chowan County Court of Pleas and Quarter Sessions and appealed to the county superior court, the issue was liability for a shipwreck that occurred as Hathaway's Schooner Jane attempted to navigate out of the Pamlico Sound, across the Ocracoke Bar, and out to sea. *Benjamin Hassell v. James Hathaway* (June 12, 1811), Minutes of the Chowan County Court of Pleas and Quarter Sessions, North Carolina Office of Archives and History, Raleigh. Everton was evidently not on this trip but rather was called to testify about the customs of the trade. Typical of the period, the ship was carrying, for Hassell, some 130,000 pounds of shingles from Edenton to the West Indies on a route that kept to the sound side of the outer banks until reaching the Ocracoke Inlet. See Chowan County Shipping Records (1806), North Carolina Office of Archives and History, Raleigh; Civil Actions Concerning Shipping (1731), Chowan County Civil Action Papers, North Carolina Office of Archives and History, Raleigh. Since 1795, when a hurricane resulted in the closing of the Roanoke Inlet, the distant Ocracoke Inlet provided the only access to the ocean. THOMAS R. BUTCHKO, EDENTON: AN ARCHITECTURAL PORTRAIT 18-19 (1992). As reflected in issues of the *Edenton Gazette* of the period, trade destinations included Jamaica, Barbados, Antigua, and Havana. See, e.g., *Commercial State of the West-Indies*, EDENTON GAZETTE, Oct. 22, 1807, at 1 (describing concern about North Carolina ports losing their commercial advantage in trade with the West Indies); *Insurrection in Jamaica*, EDENTON GAZETTE, Oct. 27, 1811, at 3 (describing merchants' accounts of the Jamaican insurrection).

69. Subpoena for John Mann (Oct. 4, 1811), Chowan County Civil Action Papers, North Carolina Office of Archives and History, Raleigh. The archival file contains Mann's subpoena but no corresponding deposition.

70. One Nathan Brinkley was able to have Mann confined to prison for nonpayment of a \$50 note he had signed in June 1807. See Letter from John Mann in Debtor's Prison (Jan. 15, 1812), Chowan County Insolvent Debtors, North Carolina Office of Archives and History, Raleigh [hereinafter Insolvent Debtors]; Note from John Mann to Nathan Brinkley for \$50 (June 15, 1807), Insolvent Debtors, North Carolina Office of Archives and History, Raleigh. Although the statutory relief did not include a discounting of the

debtors' law, Mann surrendered himself to jail for twenty days.<sup>71</sup> On January 29, he appeared before two justices of the peace at Mrs. Horniblow's Tavern to plead the statute in defense of his creditors.<sup>72</sup> Although insolvency *per se* did not put Mann in a class apart from the county's mainstream population—Josiah Small's brother Joseph was in debtor's prison in 1811<sup>73</sup>—his debts were crippling. Already, by 1807, he had lost title to his house, when it was sold out from under him to satisfy a legal judgment obtained by plantation owner Josiah Collins.<sup>74</sup> Even his household furnishings had been deeded out of his

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debts owed, it did buy the debtor time; he was forgiven until he had money again. See An Act to Alter and Amend the Act for the Benefit of Insolvent Debtors, ch. 380, 1 H. POTTER, LAWS OF THE STATE OF NORTH CAROLINA 705 (Raleigh, N.C., J. Gales & Son 1821); see also GUION GRIFFIS JOHNSON, ANTI-BELLUM NORTH CAROLINA: A SOCIAL HISTORY 654–56 (1937) (describing the law of imprisonment for debt during the eighteenth and nineteenth centuries, including the provision that any property the insolvent party owned or subsequently obtained would be seized to repay the debt).

71. See Arrest Warrant for John Mann (Jan. 8, 1812), Chowan County Insolvent Debtors, North Carolina Office of Archives and History, Raleigh. The world literally shifted beneath his feet: on January 23, Edenton experienced a rare earthquake. PARRAMORE, *supra* note 5, at 48.

72. See Letter from John Mann to Justices of the Peace (Jan. 29, 1812), Chowan County Insolvent Debtors, North Carolina Office of Archives and History, Raleigh. Situated near the courthouse, the widow Elizabeth Horniblow's tavern was for many years the regular site of public meetings. "Court week" at the tavern, held six times a year, was a boisterous affair. The cook, Molly Horniblow, was Harriet Jacobs' grandmother. YELLIN, *supra* note 13, at 1–12. One of the magistrates before whom Mann appeared was James Hathaway. See *supra* note 68.

73. Statement re Josiah Small from Justices of the Peace (Jan. 31, 1811), Chowan County Insolvent Debtors Records, North Carolina Office of Archives and History, Raleigh. Small was imprisoned for a single debt, to John Coffield. *Id.*

74. With Mann apparently unable to satisfy the judgment, the court attempted a forced sale of his property. The court states that it "[l]evied on a house & grounds where John Mann lives which is said to be mortgaged & also a horse which is said to belong to Thomas Liles but there was no sale for want of time." Chowan County Execution Docket, Court of Pleas and Quarter Sessions (Sept. Term 1807), North Carolina Office of Archives and History, Raleigh. In the same season, Mann apparently lost another lawsuit, this one brought by "Sawyer and Norcom." Another attempted levy on the house failed. Trial, Appearance and Reference Docket, Court of Pleas and Quarter Sessions (Dec. Term 1807), North Carolina Office of Archives and History, Raleigh. Collins then had issued a writ of *venditioni exponas*, which requires the sheriff to make satisfaction or be personally liable. The amount demanded in the writ was some £36. On December 14, 1807, Myles O'Malley, acting sheriff of Chowan County, sold Mann's property at public auction for £20 to Mathias E. Sawyer. See Letter from Myles O'Malley to Mathias E. Sawyer (Dec. 14, 1807), Book G-2, at 333, Chowan County Register of Deeds. Sawyer was an Edenton physician with an elite background, a relative of Samuel Johnston and James Iredell, and father of Edenton attorney Samuel Tredwell Sawyer. See YELLIN, *supra* note 13, at 26; see also JOHN G. ZEHMER JR., HAYES: THE PLANTATION, ITS PEOPLE, AND THEIR PAPERS chart 6 (2007) (displaying the Johnston family genealogy). The writ of *venditioni exponas* would have made O'Malley liable to Collins for the £16 balance; that may explain O'Malley's presence among Mann's creditors in the 1812 proceeding.

legal possession by persons who, apparently, were acting in his interest.<sup>75</sup> Since the statute afforded only procedural relief, not a reduction in the amounts owed, he would have had difficulty recovering in the best of circumstances. But Edenton in 1812 was not experiencing the best of circumstances. The British blockades brought on by the War of 1812 sharply depressed the local economy.<sup>76</sup> With a ban imposed on foreign trade, maritime activity reached such a low that the *Edenton Gazette* ceased to report the shipping news.<sup>77</sup>

How Capt. Mann fared after the war is not clear. The shipping business made something of a comeback,<sup>78</sup> but it appears doubtful that his fortunes rebounded. He never regained title to his house, though he continued to live there on the northern edge of town

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75. Three months after the forced sale of Mann's property, William Everton bought the property from Dr. Sawyer for the considerable sum of £100. Deed from Mathias E. Sawyer to William Everton (Mar. 15, 1808), Book D-1, at 161, Chowan County Register of Deeds. This deed refers to half-lots 148 and 149, an anomaly that may reflect the initial confusion between Everton's purchase of half-lots 146-49 and his gift of two of them to Mann. See deeds and records cited *supra* notes 65-67. Perhaps the profit Sawyer made was intended to cover for Mann's debts in the lawsuit brought by Sawyer and Norcom. Everton sold it immediately for £50 to James Jones, with John Fife and John Mann as witnesses. Deed from William Everton to James Jones (Feb. 20, 1808), Book D-1, at 150, Chowan County Register of Deeds (referring to half-lots 146 and 147). The relationship of James Jones to either the Mann or the Thomas Jones family is not evident, but some association with Mann is indicated by the fact that, in April 1809, Mann subleased to James Jones a garden plot that he had leased from the town. Deed from John Mann to James Jones (Apr. 10, 1809), Book E-2, at 63, Chowan County Register of Deeds. In April 1810, Jones sold the Mann property for \$54 in Spanish silver to William Liles, with John Fife and John Mann as witnesses. Deed from James Jones to William Lyles (Apr. 3, 1810), Book F-1, at 251, Chowan County Register of Deeds. In May 1811, William Liles conveyed the property as a gift to John and Thomas Mann, minor sons of John Mann, to be theirs upon their majority, with provision that, if they were to die before reaching majority, then the property would go to Mann's daughter Mary Ann. Deed from William Lyles to John Mann and Thomas Mann (May 4, 1811), Book F-2, at 64, Chowan County Register of Deeds. On February 3, 1812, James Jones executed a gift deed to Nancy and Mary Mann, daughters of Exany Mann, conveying many particular items of household furnishings to the daughters to be used by Exany Mann for her lifetime. Deed from James Jones to Nancy and Mary Mann (Feb. 3, 1812), Book F-2, at 270, Chowan County Register of Deeds. Throughout this period, John Mann continued to be responsible for taxes on this property, half-lots 146 and 147 of the Old Plan of Edenton. See Chowan County Taxables (1816), North Carolina Office of Archives and History, Raleigh (specifying that Mann owns half-lots 146 & 147); Chowan County Taxables (1828, 1832), North Carolina Office of Archives and History, Raleigh.

76. PARRAMORE, *supra* note 5, at 49-50.

77. *Id.* For more on the impact of the War of 1812 on coastal North Carolina, see SARAH MCCULLOH LEMMON, FRUSTRATED PATRIOTS: NORTH CAROLINA AND THE WAR OF 1812, at 120-42 (1973).

78. PARRAMORE, *supra* note 5, at 53.

through 1829 and until his probable death a few years later.<sup>79</sup> But if we can tentatively conclude that Mann failed to escape the ranks of those whom the blacks, according to Guion Johnson, called “poor white trash” and the upper classes called “red necks” or worse,<sup>80</sup> it would not be correct to assume that he lived completely apart from his “betters.” On the contrary, as Bill Cecil-Fronsman concludes from his research on the “common whites” in antebellum North Carolina, relationships across the classes were fluid.<sup>81</sup> For all its pretensions, Edenton was a rough town, an old seaport that had seen better days.<sup>82</sup> Religion was “less than a preoccupation.”<sup>83</sup> The tavern,

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79. A John Mann voted in the sheriff's race in Chowan County in August 1832, and he appears on the Edenton tax rolls for 1832. See List of Voters in Sheriff Election (Aug. 9, 1832), Chowan County Election Records, North Carolina Office of Archives and History, Raleigh; Chowan County Taxables (1832), North Carolina Office of Archives and History, Raleigh. These are the last possible records of him that I have found. In December 1832, Mann's two half-lots, lots 146 and 147 in the Old Plan of Edenton, were sold for unpaid taxes. Deed from William D. Rascoe to Jonathan H. Haughton (Dec. 17, 1832), Book L-2, at 38, Chowan County Register of Deeds. The buyer, Jonathan H. Haughton, sold the property in 1837 to Mary A. Mann for \$1. Deed from Jonathan H. Haughton to Mary A. Mann (Feb. 1, 1837), Book L-2, at 39, Chowan County Register of Deeds. In 1841, William E. Mann of Pasquotank County, as agent for Mary A. Mann, sold the property, noting in the deed that it was “the lots upon which said Mans [sic] father lived.” Deed from Mary A. Mann to James R. Lemitt (Jan. 1, 1841), Book N-2, at 76, Chowan County Register of Deeds. As late as 1853 (as far as I have traced the deed), the property was being described as the two lots where John Mann formerly lived. See Deed from Richard Keough to Thomas W. Hudgins (Aug. 20, 1853), Book P-2, at 520, Chowan County Register of Deeds. Two out of four sales of the property since Mary A. Mann's ownership, up to 1853, were the result of distressed circumstances. See Deed from Mary A. Mann to James R. Lemitt (Jan. 1, 1841), Book N-2, at 76, Chowan County Register of Deeds; Deed from William D. Rascoe to Enoch Jones (Aug. 30, 1843), Book N-2, at 77, Chowan County Register of Deeds (tax foreclosure sale); Deed from Enoch Jones to Richard Keough (Mar. 24, 1848), Book O-2, at 199, Chowan County Register of Deeds; Deed from Richard Keough to Thomas W. Hudgins (Aug. 20, 1853), Book P-2, at 520, Chowan County Register of Deeds (satisfying a bank debt).

80. JOHNSON, *supra* note 70, at 68.

81. One reason was that the lines were constantly being rearranged: “Misfortune could quickly transform a family of independent producers into dependent poor whites.” BILL CECIL-FRONSMAN, *COMMON WHITES: CLASS AND CULTURE IN ANTEBELLUM NORTH CAROLINA* 16–17 (1992).

82. Revolutionary-era Edenton had direct access to the Atlantic via the Roanoke Inlet, but its closing in 1795 led to a decline in maritime trade. See BUTCHKO, *supra* note 68, at 18–19. In the fall 1828 term of Chowan County Superior Court, solicitor John L. Bailey brought indictments against four “disorderly houses” run by women. See Arrest Warrant for Emily Skittlethorpe (Oct. 9, 1828), Chowan County Criminal Action Papers, North Carolina Office of Archives and History, Raleigh; Arrest Warrant for Rachel Kennedy (Oct. 9, 1828), Chowan County Criminal Action Papers, North Carolina Office of Archives and History, Raleigh; Disorderly House Judgment Against Fanny Reuben (Oct. 8, 1828), Chowan County Criminal Action Papers, North Carolina Office of Archives and History, Raleigh; Indictment of Sally Green (Jan. 3, 1828), Chowan County Criminal Action Papers, North Carolina Office of Archives and History, Raleigh.

open to all comers, promoted a distinct egalitarianism.<sup>84</sup> In March 1825, in conjunction with an assault, Mann or possibly his son was arrested for false imprisonment, along with Elizabeth Jones' older brother and a man named Small.<sup>85</sup> Back in 1812, Thomas Jones had been one of the creditors against whom Mann had pleaded the statutory debtors' relief.<sup>86</sup> Thus when Josiah Small hired out Lydia to the old sailor John Mann in January 1828 he was probably dealing with a known quantity; but the fact that he went through with it tells us that he thought it was a safe enough risk.<sup>87</sup>

Not so, as it turned out. Lydia spent the calendar year 1828 with Mann and apparently stayed on as his servant into 1829.<sup>88</sup> The assault

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83. PARRAMORE, *supra* note 5, at 48; *see also id.* at 43–49 (describing Edenton's post-Revolutionary period of decline). The criminal court records from 1820 through 1830 are replete with "affrays" and assaults. *See, e.g.*, Indictment of James Wilson (Dec. 1, 1826), Chowan County Criminal Action Papers, North Carolina Office of Archives and History, Raleigh. As Yellin confirms, the names of defendants cut across all classes. YELLIN, *supra* note 13, at 32.

84. A visitor to the state in the post-Revolutionary period "noted that in the taverns of North Carolina there was only a large sitting room 'where the governor of the state, and the judge of the district . . . must associate with their fellow-citizens of every degree.'" CECIL-FRONSMAN, *supra* note 81, at 51.

85. The grand jury indictment, found in the Chowan County Criminal Action Papers (1826), North Carolina Office of Archives and History, Raleigh, is against Henderson D. Jones, John B. Small, and "John Mann Junior." The victim was one John H. Jones, whose relationship to the Thomas Jones family I have not discovered. The three were found guilty. Chowan County Superior Court Minutes (Fall Term 1826), North Carolina Office of Archives and History, Raleigh. John and Exaney Mann had children named John, Thomas, Nancy, and Marry Ann. *See* deeds cited *supra* note 75. A John W. Mann married Frances Thompson in December 1824 and died in September 1827. On the marriage, *see* North Carolina Marriage Bonds (1824), Chowan County, North Carolina Office of Archives and History, Raleigh, and NEAL, *supra* note 62, at record #3887; on the death, *see* NEAL, *supra* note 62, at record #3888. John W. Mann is called "Jr." in one report of his wedding. *Id.* at record #3887. Mann the father, however, is called "John Mann Jr." in the property deed conveyed from William Everton in 1806. *See* Letter from William Everton to John Mann, *supra* note 67. Further support for the theory that this indictment was against the father is found (perhaps) in the superior court minutes: a "John W. Mann" is taken off of the jury for this case, whereas the defendant Mann is called "John Mann." Chowan County Superior Court Minutes (Fall Term 1826), *supra*.

86. John Mann's file, Insolvent Debtors, *supra* note 70.

87. If Tushnet is correct that owners charged a premium to hirers with known risks, TUSHNET, *supra* note 12, at 45, then Small's belief that Mann was not a particularly risky hirer is confirmed by the amount of Lydia's hiring for 1828: \$33.75. *See infra* note 88. This amount was in line with the rates she commanded in prior years as well as the rates charged by Elizabeth's siblings, as evidenced by their guardianship accounts found in the Estate of Thomas Jones, *supra* note 27.

88. Notably, an odd gap in the narrative occurs at this point. Neither the trial record nor the record on appeal states that the contract of hire was renewed for 1829. From the trial court report: "It was proved upon the trial, that the negro belonged to Elizabeth Jones, but had been hired to the Defendant for the year 1828 and was in his possession at the time the battery took place." *State v. John Mann*, Superior Court (Fall Term 1829),

took place on Sunday, March 1.<sup>89</sup> Frustrated with Lydia's resistance to his "chastisement" over what the court concluded was "a small offence," Mann called out, probably to his daughter Mary Ann, to fetch his gun as Lydia fled.<sup>90</sup> Taken as a whole, the incident was a classic illustration of a hiring gone wrong. According to Jonathan Martin's research, poor whites like Mann were as likely as any to want a taste of "mastery"; hence they opted to hire slaves even when free labor was available.<sup>91</sup> Slave hirers tended to believe they had "complete authority" over the slaves, despite the different position commonly taken by the slaves' owners.<sup>92</sup> Slaves, on the other hand,

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Chowan County Slave Records, *supra* note 2; *see also* Trial Court Record in Supreme Court Cases, *State v. Mann* (Dec. Term 1829), case #1870, North Carolina Office of Archives and History, Raleigh [hereinafter *Supreme Court Cases*] (stating only that Lydia was hired to Mann in 1829 and in his possession at the time of the shooting). The estate records are inconclusive. From Josiah Small's annual accounts of Elizabeth Jones' estate: for negro hire 1825, \$29.50; 1826, \$33.75; 1827, \$38.25; 1828, \$33.75; and 1829, the year of the assault, for reasons unclear, a significantly greater amount, \$52.50. The year 1828 is the last year for which an account exists in the Estate of Thomas Jones, *supra* note 27. It is also the last account for Elizabeth Jones' estate that Small filed in county court. *See* Minute Docket, County Court of Pleas and Quarter Sessions, Term Reports (Mar. 1827–1830), Chowan County.

On the possibility of informal renewals, Harriet Jacobs tells us, "If [the slave] lives until the next year, perhaps the same man will hire him again, without even giving him an opportunity of going to the hiring-ground." JACOBS, *supra* note 13, at 15–16. Perhaps Small simply had not gotten around to formalizing the agreement he intended to make with Mann; but the record leaves open the possibility that Lydia was not, technically, Mann's hired slave after the end of 1828.

This gap in the evidence appears to have influenced Ruffin's final opinion. The first draft recites that the battery took place during 1828, the year of the hire. 4 THE PAPERS OF THOMAS RUFFIN 249, 249 (J.G. de Roulhac Hamilton ed., 1920). The third and final draft is not so precise, seeming to recognize that the term was unclear: "[T]he slave had been hired by the defendant, and was in his possession; and the battery was committed during the period of hiring." *State v. Mann*, 13 N.C. (2 Dev.) 263, 264 (1829). Also in the final version is a sentence not found in the first: "Our laws uniformly treat the master or other person having the possession and command of the slave as entitled to the same extent of authority." *Id.* at 265 (emphasis added). The fortuitous circumstance of a factual uncertainty may have prompted Ruffin to broaden the holding beyond legal hirers to anyone in some position of "possession and command" of a slave. *Id.*

89. This is the date given on Mann's indictment. *See* Chowan County Slave Records, *supra* note 2.

90. The trial record states that Mann "called for his gun." *State v. John Mann*, Superior Court (Fall Term 1829), Chowan County Slave Records, *supra* note 2. Mary Ann Mann was subpoenaed as a witness, along with Josiah Small and a Robert Sawyer, whose subpoena was returned unserved. *Id.* Thus the circumstances suggest that it was his daughter Mary Ann (or conceivably Sawyer) to whom he turned for his gun. The 1830 Chowan County Census, *supra* note 47, reports that Mann had living with him one female between twenty and thirty years old.

91. MARTIN, *supra* note 4, at 107–08.

92. *Id.* at 106. Though unwilling to assert that slave hirers were as a rule harsher than owners, Martin does note that "owners[] could never be sure that hirers, given their lack

remained well aware of the difference in authority between their true and hired masters, so much so that they played the one against the other.<sup>93</sup> When we consider Lydia's assault from her point of view, what emerges is a brave strategy of self-help. Mann's physical beating was something Lydia decided not to tolerate. Trusting that Josiah Small would not stand for her abuse either, she started to run. Mann ordered her to stop. She did not. Even before he found the trigger, she had probably determined that she would make her way back to Cow Hall Swamp—taking her chances on having broken her part of the agreement, hoping to appeal to Small for her own safety while at the same time exposing the malice of John Mann to the whole community.

She was luckier than Frederick Douglass, whose owner promptly returned him to the abusive hirer from whom he had fled.<sup>94</sup> She avoided the sort of ordeal suffered by the unnamed slave in the Tennessee case of *Carey v. State*,<sup>95</sup> who, upon fleeing from an abusive hirer, was next seen two months later and 200 miles away in the company of a man claiming to be his owner (the man was arrested for “stealing” his own slave).<sup>96</sup> But in choosing to flee from her hirer's cruelty—in putting herself in further jeopardy, with no assurance of safe harbor—Lydia actually wrested a measure of control over her fate. In running away, slaves like Lydia were protesting their abuse while laying bare the contradictions inherent in the practice of slave hiring.<sup>97</sup> We do not know how badly she was wounded (Elizabeth Jones' guardianship ledger for 1829 shows no medical expense),<sup>98</sup> but one way or another she presumably did make her way back to the Small homestead. Shortly afterward, in the spring term of Chowan County Superior Court, Josiah Small persuaded solicitor John

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of long-term interest in the slaves, were acting with sufficient ‘prudence’ when they inflicted whippings and other beatings.” *Id.* at 112. Examples of harsh or cruelly negligent hirers can certainly be found in the case law. *See, e.g.,* Hogan v. Carr & Anderson, 6 Ala. 471, 471–72 (1844) (holding that an owner was entitled to reclaim a slave from an insolvent hirer who refused to get medical attention for the slave when the slave was suffering from debilitating injuries).

93. MARTIN, *supra* note 4, at 128–31.

94. *Id.* at 143–44 (discussing FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 114–24 (John Stauffer ed., Modern Library 2003) (1857)). As Martin notes, Douglass made a calculated decision to appeal to his master by emphasizing his value as property, not as a human being deserving of sympathy; yet his effort was to no avail.

95. 26 Tenn. (7 Hum.) 499 (1847).

96. *Id.* at 500.

97. *See* MARTIN, *supra* note 4, at 139.

98. Estate of Thomas Jones, *supra* note 27.

Lancaster Bailey to take the case to a grand jury upon a charge of assault and battery, and a true bill was returned.<sup>99</sup>

If Mann was as impoverished as the evidence suggests, then the decision to pursue a criminal indictment would have made sense: a civil claim would have been fruitless. For reasons unknown (perhaps simply because of a crowded docket),<sup>100</sup> the trial was put over until the fall term. By then, in a town “not so large that the inhabitants were ignorant of each other’s affairs,” as Jacobs put it,<sup>101</sup> many would have heard about Mann’s subsequent scrape with the law. Toward the end of April 1829, just two months after the incident with Lydia, a peace warrant was executed upon Mann at the behest of a man who feared for his life. The warrant alleged that, “with a certain loaded gun, [Mann] did shoot at and shoot and maim George Totten with the intent him the said George to kill and murder, and . . . there is great danger that said John Mann will kill the said George Totten sure enough.”<sup>102</sup> To all who cared to notice, John Mann’s rough edges were obvious.

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99. Josiah Small swore out the bill of indictment. Chowan County Slave Records, *supra* note 2. Laura Edwards supposes that the case against Mann was presented to a magistrate, who in turn decided to elevate the case to a jury trial. Laura F. Edwards, *Enslaved Women and the Law: The Paradoxes of Subordination in the Post-Revolutionary Carolinas*, 26 *SLAVERY & ABOLITION* 305, 311 (2005). This conclusion is incorrect. As Johnson notes, Small would have had three choices, “namely, indictment, an action for damages at the suit of the party grieved, and finally, a pecuniary penalty recoverable in a summary manner, before a single magistrate.” JOHNSON, *supra* note 70, at 618 (quoting an antebellum source on North Carolina law).

100. Through the 1820s and beyond, superior court judges across the state were overworked. JOHNSON, *supra* note 70, at 637–38.

101. JACOBS, *supra* note 13, at 29.

102. Chowan County Criminal Action Papers (1829), North Carolina Office of Archives and History, Raleigh. The warrant refers to Mann both as “John Mann” and “John Mann Junior,” but it seems almost certain that it is the same Capt. Mann. John W. Mann, who may have been the same as Mann’s son John, *see supra* note 85, died in September 1827. NEAL, *supra* note 62, at record #3888. Further, the father had been called “Junior” in the deed to his property from his benefactor William Everton. *See Letter from Charles Roberts to William Everton, supra* note 66.

Under common law, the peace warrant empowered justices of the peace “to restrain evil doers, rioters and disturbers of the public peace, and to take them and cause them to be imprisoned and punished and take of the security for their good behavior.” SWAIM’S JUSTICE—REVISED: THE NORTH CAROLINA MAGISTRATE 27 (1856); *see also* State v. Wilson, 46 N.C. (1 Jones) 550, 552 (1854) (discussing the common-law proceedings under which a justice of the peace may issue a peace warrant). Mann provided security until a scheduled appearance at the next session of the county court. Chowan County Criminal Action Papers, *supra*. Malachi Haughton and Samuel T. Sawyer joined as sureties. *Id.* Further, earlier in April 1829, Mann had been called as a state’s witness in a case against Richard Middleton for “unlawfully retailing of spirituous liquor by the small measure.” *Id.*

In causing Lydia's case to be tried, Josiah Small was clearly seeking public vindication on behalf of his young ward Elizabeth Jones. Present in the courtroom, too, would have been the interest of Elizabeth's father. Thomas Jones would still have been remembered as a respected member of the community, a man possessed of significant land holdings, like Small a justice of the peace actively involved in the affairs of the county.<sup>103</sup> The jury, in fact, consisted largely of men from the same broad middle ranks of the community as the Small and Jones families—names like Blount, Brownrigg, Skinner, Hoskins—families that had been around for generations, their men rotating through positions of leadership in the county.<sup>104</sup> Set apart from the wealthier and more self-sufficient planter class to which the Johnstons and Iredells belonged, these, writes Guion Johnson,

were the men who sought the county offices and delighted in the title of 'squire which the position of justice of the peace carried with it. By far the largest number in this class was engaged in agriculture. The small planter usually possessed some two or three hundred acres of land and as many as ten or fifteen slaves. He sometimes worked beside his slaves in the field, and seldom risked the management of the farm to an overseer. The homes of the middle class were not infrequently as substantially built as those of the aristocracy. Along the public highway, in the streets, and in the shops their superiors greeted them cordially. They predominated at political gatherings and were often elected to membership in the Legislature.<sup>105</sup>

Being a justice of the peace (as Josiah Small was and Thomas Jones had been) was a particular marker of local power; these men constituted the county magistrate court. The community looked to them for leadership.<sup>106</sup> Indeed, both Cecil-Fronsmann and Johnson conclude that the magistrate judges had a way of monopolizing

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103. Jones was apparently a justice of the peace at the time of his death in 1822. See *Justices of the Peace* (1823), Chowan County, Governor's Papers, at 46, North Carolina Office of Archives and History, Raleigh. He is listed as a Chowan County tax assessor for 1819. *Chowan County Taxables* (1819), North Carolina Office of Archives and History, Raleigh.

104. Jury members are named along with the brief record of the trial and verdict in *State v. John Mann*. Chowan Minute Docket, Superior Court (Fall Term 1829), North Carolina Office of Archives and History, Raleigh.

105. JOHNSON, *supra* note 70, at 63.

106. CECIL-FRONSMAN, *supra* note 81, at 32.

control of the county.<sup>107</sup> Further, these families tended to consolidate their interests by marrying their children to each other. For as Thomas Ruffin wrote to his daughter Catherine in 1832, marriage

is a lottery at best; but where the disposition, personal *character* of the parties and reputation of the connexions are unknown—where education and manners are unlike and may be uncongenial—it is a lottery, in which a ticket does wonders when it comes out a mere blank; generally, it draws ruin and wretchedness.<sup>108</sup>

Genealogies of the members of Mann’s jury would quickly reveal kinships of blood and marriage; and other connections abounded. Josiah McKiel, who represented Chowan County in the House of Commons in 1826 and 1828, was Small’s cousin.<sup>109</sup> (In the same term of court, perhaps on the same day, McKiel was acquitted of two charges of assault and battery against slaves who belonged to other men, one of them being a fellow jury member.<sup>110</sup>) Juror Baker Hoskins, descended from Winifred Hoskins, Secretary of the Edenton Tea Party of 1774, “was a prominent citizen of the county and very popular with the people of Chowan”,<sup>111</sup> he served in the House of Commons from 1806 to 1808 and, in the 1820s, was a justice of the peace.<sup>112</sup> Hoskins was one of the commissioners who presided over

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107. *Id.* at 32–33; JOHNSON, *supra* note 70, at 617–20.

108. Letter from Thomas Ruffin to Catherine Ruffin (Feb. 15, 1832), in 2 THE PAPERS OF THOMAS RUFFIN 55, 56 (J.G. de Roulhac Hamilton ed., 1918).

109. JOHN H. WHEELER, 2 HISTORICAL SKETCHES OF NORTH CAROLINA, FROM 1584 TO 1851, at 97 (Genealogical Pub. Co. for Clearfield Co. 1993) (1851); Descendants of Quaker John Small, *supra* note 40; E-mail from Janice Eileen Wallace, Family Genealogist, to Sally Greene (Dec. 9, 2003, 21:16:09 EST) (on file with the North Carolina Law Review). McKiel later moved to Arkansas, where he became a lower-court judge. 8 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 325–26 (New York, G.P. Putnam 1865). Under the North Carolina Constitution of 1776, members of the House of Commons had to own at least one hundred acres. See CECIL-FRONSMAN, *supra* note 81, at 34.

110. State v. Josiah McKiel, Indictment Proven (Spring Term 1829), for Assault upon Isaac, Property of Clement H. Blount and Thomas Ware, Chowan County Slave Records, *supra* note 2; State v. Josiah McKiel, Indictment Proven (Spring Term 1829), for Assault and Battery upon Dover, Property of John Blount, Chowan County Slave Records, *supra* note 2. Both trials were set for September. See Chowan County Slave Records, *supra* note 2. McKiel was found not guilty in both trials. Chowan County Superior Court Minutes (Fall Term 1829), North Carolina Office of Archives and History, Raleigh.

111. *The Edenton Tea Party*, in 3 NORTH CAROLINA HISTORICAL AND GENEALOGICAL REGISTER 116, 124 (J.R.B. Hathaway ed., Genealogical Publishing Co., Inc. 1998) (1903).

112. WHEELER, *supra* note 109, at 96; Justices of the Peace 46 (1823), Chowan County, Governor’s Papers, North Carolina Office of Archives and History, Raleigh; see also Indictment of Magistrate Court, Chowan County Criminal Action Papers 1827–1829,

the apportionment of the assets of Thomas Jones' estate.<sup>113</sup> His sister Martha was married into the Blount family, a venerable old family tracing itself back to James Blount's settlement in 1669.<sup>114</sup> Juror Clement H. Blount, one of James Blount's descendants, lived at Mulberry Hill, the family plantation on the Albermarle Sound.<sup>115</sup> His maternal grandfather was the Rev. Clement Hall, a distinguished Anglican missionary and rector of St. Paul's Episcopal Church in Edenton.<sup>116</sup> His mother participated in the Edenton Tea Party.<sup>117</sup> Juror Joseph H. Skinner owned Montpelier, an estate of 700 to 800 acres on the Albemarle Sound, which included a valuable fishery.<sup>118</sup> Juror Thomas I. Brownrigg belonged to a wealthy Irish Protestant family that established the first commercial fishing operation in provincial North Carolina; Wingfield, their estate on the Chowan River, by 1810 consisted of some 1,400 acres.<sup>119</sup> His half-sister Priscilla was married to John L. Bailey, the solicitor bringing the case against Mann.<sup>120</sup> Of the other members of the jury, perhaps Joseph

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(Spring Term 1828), North Carolina Office of Archives and History, Raleigh [hereinafter Indictment of Magistrate Court] (including Baker Hoskins in a list of Chowan County justices of the peace).

113. Estate of Thomas Jones, *supra* note 27.

114. On the Chowan Blounts, see JOHN H. WHEELER, REMINISCENCES AND MEMOIRS OF NORTH CAROLINA AND EMINENT NORTH CAROLINIANS Ivii–lviii (Columbus, Columbus Print Works 1884). On Martha Hoskins Rombough Blount, see JACOBS, *supra* note 13, at 296 n.2 (indicating that in 1829, Mrs. Blount may have been secretly acting as Harriet Jacobs' "protectress," helping to plot her escape).

115. CATHERINE W. BISHIR, NORTH CAROLINA ARCHITECTURE 116–17 (portable ed. 2005); WHEELER, *supra* note 109, at lvii.

116. See CHARLES C. TIFFANY, A HISTORY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA 242–44 (New York, Christian Literature Co. 1895).

117. Diana Gale Matthiesen, Genealogy of Ann Hall, Mother of Clement Hall Blount, <http://dgmweb.net/genealogy/FGS/B/BlountJames-AnnHall.shtml> (last visited Feb. 15, 2009).

118. See Estate of Joseph H. Skinner, Chowan County Estates Records (1835), North Carolina Office of Archives and History, Raleigh; Letter from George Stevenson, Private Manuscripts Archivist, North Carolina State Archives, to Sally Greene (Oct. 16, 2007) (on file with the North Carolina Law Review).

119. PARRAMORE, *supra* note 5, at 22–24; Elizabeth Brownrigg Waddell, Genealogical Essay (1886), in Brownrigg Family Papers (on file with the Southern Historical Collection, Wilson Library, The University of North Carolina at Chapel Hill); Survey of Wingfield Estate, in Brownrigg Family Papers, *supra* (indicating that in 1810, the estate held by Thomas' father, also named Thomas, consisted of 1,450 acres); see also Abstracts of Wills, in 1 NORTH CAROLINA HISTORICAL AND GENEALOGICAL REGISTER 26, 530 (J.R.B. Hathaway ed., Genealogical Publishing Co., Inc. 1998) (1900) (confirming Thomas I. as son of Thomas, who was in turn son of Richard Brownrigg).

120. See John L. Bailey, in 4 BIOGRAPHICAL HISTORY OF NORTH CAROLINA FROM COLONIAL TIMES TO THE PRESENT 53, 53–54 (Samuel A. Ashe et al. ed., 1905–1917). Priscilla was the last child born of Thomas and Ruth Baker Brownrigg, who died when

Faribault would have been sympathetic to the defendant; he signed Mann's bail bond.<sup>121</sup> If so, then stronger voices prevailed. Jury members even may have had a hand in crafting Judge Daniel's instruction, which carefully asserted that Mann, as a hirer, had only a limited, "special property" in the slave and thus his powers of correction were constrained.<sup>122</sup> In committing an assault that was "cruel[,] unreasonable[,] and disproportionate to the offence committed by the slave," the jury found, Mann had exceeded the bounds of his authority.<sup>123</sup>

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Priscilla was two. Waddell, *supra* note 119. Priscilla's older brother was Richard T. Brownrigg. *See id.* He was a justice of the peace. Justices of the Peace 46 (1823), Chowan County, Governor's Papers, North Carolina Office of Archives and History, Raleigh; *see also* Indictment of Magistrate Court, *supra* note 112 (including R. T. Brownrigg in a list of Chowan County justices of the peace).

121. Recognizance bond for John Mann, Chowan County Slave Records, Criminal Actions Concerning Slaves (Apr. 10, 1829), North Carolina Office of Archives and History, Raleigh. Signing with Faribault, vouching for Mann a second time, was Samuel Tredwell Sawyer. *Id.*; *see also supra* note 102 (indicating that Sawyer had previously acted as a surety for Mann). Sawyer was a young attorney who was secretly having an affair with Harriet Jacobs; in 1829 she bore the first of two children by him. *See* YELLIN, *supra* note 13, at 26–40. Also on the jury were Hardy Hurdle, David Harrell, Sr., Thomas I. Charlton, Thomas M. Carter, Isaac Pettijohn, and Lemuel Skinner. Chowan County Minute Docket, Superior Court (Fall Term 1829), North Carolina Office of Archives and History, Raleigh.

Most likely, all of the jurors were slave owners in the fall of 1829. The 1830 Chowan County Census records list eleven of them as heads of household, all with slaves. 1830 Chowan County Census, *supra* note 47. The twelfth, Isaac Pettijohn, is absent from the 1830 census but is listed in the 1820 census as owning three slaves. 1820 Census, Chowan County, N.C. (S-K Publications CD-ROM, 2002). Most owned quite a few: Joseph H. Skinner, sixty-nine; Hoskins, forty-four; McKiel, thirty-two; Blount, twenty-seven; Faribault, twenty-six; Carter, twenty-six; Brownrigg, twenty-six; Charlton, sixteen; and Lemuel Skinner, fourteen. 1830 Chowan County Census, *supra* note 47. Harrell owned one; Hurdle owned four. *Id.*

122. *State v. John Mann*, Superior Court (Fall Term 1829), Chowan County Slave Records, *supra* note 2.

123. *Id.* According to Johnson's research, superior court trials of the period were marked by a "loose method of pleading," the result of which was that "law and fact became inextricably blended so that the jury necessarily decided, as in the county courts, both upon the law and upon the facts and thus usurped the functions of the court." JOHNSON, *supra* note 70, at 641. In the trial record, the passage articulating the jury instruction is rough, with the word "unreasonable" and the phrase "who had only a special property in the slave" added by carat insertions, indicating perhaps some negotiation. *State v. John Mann*, Superior Court (Fall Term 1829), Chowan County Slave Records, *supra* note 2.

The language that finally resulted makes it clear that the jury was doubly narrowing its holding: one, it applied only to persons with no more than "a special property in the slave," and two, it applied only to excessive, "cruel," and "unreasonable" incidences of assault. *Id.* Following this jury's logic, slave hirers may still have been permitted to commit ordinary assault. For more on the "localism" of the law of this period, see generally Laura F. Edwards's contribution to this symposium, *The Forgotten*

From this enlightened distance, it is tempting to imagine that the men on the jury were acting out of sympathy for a wounded young black woman, coming down on the side of “humanity” as against the legal “interest” of Capt. Mann;<sup>124</sup> and perhaps, at some level, they were. But given the available evidence, such a conclusion would be pure conjecture. We know nothing, unfortunately, of how the community felt about Lydia.<sup>125</sup> We do, however, have some idea how they might have felt about the defendant. John Mann’s jury was not a “jury of his peers.” Rather, many of these men had everything in common with Josiah Small and the late Thomas Jones. The men on the jury included Small’s political colleagues, relatives, and undoubtedly friends. Performing their duty in a criminal trial, as guardians of the public order, this jury had to weigh one proprietary interest against another. Unsurprisingly, they came down in favor of the party with the greater interest in the slave, who also happened to be one of their own.<sup>126</sup>

## II. THE QUESTION THAT “CANNOT . . . BE BROUGHT INTO DISCUSSION”: RUFFIN’S REVERSAL IN ITS IDEOLOGICAL CONTEXT

The opinion Thomas Ruffin wrote for the Supreme Court of North Carolina in reversing Mann’s conviction is reviled and repudiated, but also respected, as Robert Cover notes<sup>127</sup>—respected for its “honesty.”<sup>128</sup> Following the interpretation first suggested by Stowe,<sup>129</sup> some readers to this day have taken the position he strikes—that of a dutiful judge resisting, solemnly and with great difficulty, the pull of the human heart—at face value.<sup>130</sup> But the particulars of the

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*Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law*, 87 N.C. L. REV. 855 (2009).

124. For an argument that Lydia had a “humanizing” influence on the jury, see Edwards, *supra* note 99, at 307.

125. We do have Jacobs’ claim: “Slavery is terrible for men; but it is far more terrible for women.” JACOBS, *supra* note 13, at 77.

126. Mann was fined \$5—a sum he probably was never obligated to pay. He won the right to appeal without having to give security. *State v. John Mann*, Superior Court (Fall Term 1829), Chowan County Slave Records, *supra* note 2.

127. COVER, *supra* note 52, at 77.

128. See, e.g., Brophy, *supra* note 21, at 1122 (noting Ruffin’s “honest” understanding “that slaves would not abide by the Southerners’ moral philosophy, which taught that slaves should be content with their low place in Southern society”).

129. See *id.* at 1132–37.

130. See, e.g., GENOVESE, *supra* note 17, at 35–36; TUSHNET, *supra* note 12, at 63; MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 54–65 (1981) (discussing the law/sentiment dichotomy); Swartz, *supra* note 19, at 299–300; Jules Yanuck, *Thomas Ruffin and North Carolina Slave Law*, 21 J. S. HIST. 456, 462–63 (1955). On Tushnet, see Eric Muller’s contribution to this

trial in Edenton suggest that he may have been up to something else entirely—that his rhetoric may have served to disguise a conscious avoidance of the realistic possibility that the jury had gotten it right.

Even given the brief trial record before him, Ruffin knew Chowan County well enough to have grasped the essential dynamics of the case. His roommate at Princeton had been a young man from Edenton named James Iredell, son of the Supreme Court justice, later governor of the state and a United States senator.<sup>131</sup> As a circuit-riding superior court judge,<sup>132</sup> Ruffin had spent time in Chowan County as recently as the spring of 1828. During that term, he signed a grand jury indictment related to a nuisance charge that had been brought in 1826 against the entire magistrate court. The magistrates had been indicted for failing to levy sufficient taxes to keep the jail, courthouse, and stocks in repair. Joseph B. Skinner, a prominent member of the community (and another close friend of Ruffin's),<sup>133</sup> had been jailed on behalf of the magistrate court for its nuisance offense. The indictment that issued under Ruffin's signature charged the sheriff with negligently allowing Skinner to escape from the county jail.<sup>134</sup>

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symposium, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 760 (2009); and Andrew Fede, *Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet's The American Law of Slavery*, 2 L. & HIST. REV. 301, 301 (1984).

131. WHICHARD, *supra* note 39, at 253–54; Governor William A. Graham, *Life and Character of the Hon. Thomas Ruffin, Late Chief Justice of North Carolina* (Oct. 21, 1870), reprinted in 1 THE PAPERS OF THOMAS RUFFIN 17, 21 (J.G. de Roulhac Hamilton ed., 1918) (stating that Ruffin and Iredell were roommates for several years and remained friends until Iredell's death).

132. Ruffin rode the circuits as a superior court judge from 1816 to 1818 and again from 1825 to 1828. *Chronology of Thomas Ruffin*, in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 131, at 5.

133. Joseph B. Skinner, a lawyer and farmer, had served with Ruffin in the House of Commons in 1815. See WHEELER, *supra* note 109, at 95 (indicating that Skinner was Edenton's representative to the House of Commons in 1815); *Chronology of Thomas Ruffin*, in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 131, at 5 (indicating that Ruffin was Hillsboro's representative to the House of Commons in 1815). He is remembered for having transformed the local fishing industry with a technique involving the use of large nets. PARRAMORE, *supra* note 5, at 54. During the spring 1828 term, Ruffin was boarding with him. See Letter from Thomas Ruffin to Catherine Ruffin (Apr. 14, 1828), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 131, at 442, 444. Joseph B. Skinner was first cousin of jury member Joseph H. Skinner. See Abstract of Chowan County Wills, in 2 NORTH CAROLINA HISTORICAL AND GENEALOGICAL REGISTER 5, 27 (J.R.B. Hathaway ed., Genealogical Publishing Co., Inc. 1998) (1901).

134. Indictment of Magistrate Court, *supra* note 112 (stating that Joseph B. Skinner had been jailed on behalf of the county justices of the peace, who had been found guilty of failing to levy sufficient taxes “to erect and keep in good repair the public jail, court house and stocks”).

And Ruffin had a further connection to Chowan County, one felt indirectly but powerfully. Toward the end of 1828, he left the bench to head up the State Bank of North Carolina, a position into which he had been recruited in the hopes that he could restore the ailing institution to secure financial footing.<sup>135</sup> He “effectually reinstated the bank in public confidence, and relieved it of its embarrassments,” wrote North Carolina Chief Justice Walter Clark many years later.<sup>136</sup> If the Chowan County records are any indication, Ruffin achieved this turnaround through aggressive litigation: the county’s civil action papers for 1829 are replete with successful prosecutions of debts owed to the State Bank.<sup>137</sup> He had been warned that the resolution of the bank’s sizeable unpaid accounts in Edenton would require particular skill and discretion.<sup>138</sup> In the end, the bank’s successes in court did cost Ruffin some goodwill in the Edenton community.<sup>139</sup> Whatever else might be said, this project certainly would have deepened his knowledge of local affairs.

Thus, when Judge Ruffin picked up the file in the appeal of Mann’s conviction,<sup>140</sup> he would have recognized the names of many members of the jury. They were his peers as well as Josiah Small’s—men of rank and standing with whom he would normally have identified. Ruffin stood in a position to see that the jury’s conviction of an ordinary slave hirer for shooting a slave not his own rested on solid ground. As much as anyone, it would have been those men on the jury to whom he was speaking when he “freely confess[ed]” a “sense of the harshness” of his opinion.<sup>141</sup> But given the nature of

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135. See Walter Clark, Chief Justice of the Supreme Court of North Carolina, Thomas Ruffin (Feb. 1, 1915), in ADDRESSES AT THE UNVEILING AND PRESENTATION TO THE STATE OF THE STATUE OF THOMAS RUFFIN BY THE NORTH CAROLINA BAR ASSOCIATION 7, 11 (1915).

136. *Id.*

137. Chowan County Civil Action Papers (1829), North Carolina Office of Archives and History, Raleigh.

138. See Letter from Joseph B.G. Roulhac, President, State Bank of N.C., to Thomas Ruffin (Dec. 23, 1828), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 131, at 462–63.

139. In December 1829, just before he was appointed to the supreme court, Thomas Ruffin was sharply criticized for his insensitive collection techniques. A. Farmer, Letter, EDENTON GAZETTE, Nov. 14, 1829, at 3.

140. Supreme Court Cases, *supra* note 88. Though docketed in 1829, the appeal was not heard until February 15, 1830. Supreme Court Minute Docket (Feb. 15, 1830), North Carolina Office of Archives and History, Raleigh. At that point, Ruffin had been serving on the Supreme Court for little more than a month; the General Assembly’s vote to place him on the court was ratified by Governor John Owen’s letter of appointment on January 9, 1830. Commission from Governor John Owen as Judge of the Supreme Court (Jan. 9, 1830), in 2 THE PAPERS OF THOMAS RUFFIN, *supra* note 108, at 3.

141. State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829).

appellate practice (then and now), nothing required that he look beyond the “cold record” before him.<sup>142</sup> He would have been free to disregard what he knew of Edenton, for other than the names of the jury members, very little context would have been included in the report of the proceeding below.<sup>143</sup> Ruffin’s opinion betrays a studied indifference to the facts and conditions that might have motivated the jury’s verdict.

In rejecting the significance of a fact that the jury considered crucial—in refusing to recognize a legal distinction between an owner and a hirer—Ruffin set himself against “the established habits and uniform practices of the country” (to use his own phrase).<sup>144</sup> Owners entered the hiring market with trepidation: entrusting one’s own slave to someone who lacked a vested interest in the slave’s wellbeing was not a welcome prospect.<sup>145</sup> Slave hiring continued as a practice throughout the antebellum period because it was profitable.<sup>146</sup> But as

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142. For a helpful discussion of the impact of the static, often abbreviated appellate record upon a judge’s decision-making process, see Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 455–56 (2004) (“[W]ritten text triggers a different thought process than oral language, one that is considerably more amenable to logical and abstract operations.”); see also Edwards, *supra* note 99, at 306–07 (noting the way “Ruffin uprooted John Mann from context”).

143. The file preserved in the archives, see Supreme Court Cases, *supra* note 88, consists of a procedural history of the case, the names of the jurors, and a report of the trial court’s opinion, followed by a copy of Ruffin’s opinion in Ruffin’s hand. (This version differs from the published version in one respect: it calls for a new trial.) A rule set forth by the Supreme Court of North Carolina in 1827 prescribed the following:

It is ordered that in all appeal cases, whether on the law or equity side of the Court, the counsel for the appellant shall deliver to the counsel appearing on the other side, if any, a statement in writing of all the points intended to be made and relied on, at least eight clear days before the day of the argument of the cause; and any point or matter of objection to the judgment or decree below, not contained therein, shall be considered as waived, unless the Court shall, for sufficient reasons offered or appearing, allow or desire that such matter or point may be made and discussed.

Regulae Generales, 12 N.C. (2 Dev.) 269, 270 (1827). Given that Mann had no counsel on appeal, it is doubtful that even this much of an argument was submitted to the court.

144. *Mann*, 13 N.C. (2 Dev.) at 265.

145. Accordingly, they encumbered the contracts of hire with all sorts of conditions. See MARTIN, *supra* note 4, at 106. Contracts in Chowan County, for example, included a standard provision that the slave not be allowed to travel by water. Estate of Thomas Jones, *supra* note 27. Slaves could escape by water—as Harriet Jacobs did. JACOBS, *supra* note 13, at 156–58. Or they could die by water. See *Wilder v. Creedy*, 33 N.C. (1 Ired.) 421, 423 (1850) (per curiam). Judge Ruffin wrote the opinion in *Wilder* denying a slave owner’s recovery for the death of his slave by strictly interpreting a contract restriction against employment on the waters. *Id.*

146. See generally MARTIN, *supra* note 4 (documenting the importance of slave hiring to the capitalist antebellum economy).

Ruffin's cousin Frank Ruffin put it in 1852 in the pages of *The Southern Planter*, the practice was "felt everywhere to be a serious evil."<sup>147</sup> The inherent conflict between owners and hirers often erupted into actual conflict, putting individual slaves at risk and posing a systematic risk to white solidarity. Ultimately all parties suffered: "the hirer, the hiree, the negro himself, and society at large."<sup>148</sup>

Reflecting this tension, moreover, the case law was not nearly as settled as Ruffin's opinion suggests. Slaves were burdened with a perplexing "double character," as Ariela Gross' research has emphasized—as property and as person, even as property in which more than one legal interest could be held.<sup>149</sup> Courts across the South wrestled with the opposing claims of owners and hirers, weighing the interests differently in different circumstances. For example, in 1798 the Supreme Court of North Carolina treated a slave hirer as an owner for purposes of allowing his defense of justifiable homicide in response to a slave who attempted to kill him.<sup>150</sup> Yet in a civil case invoking different policy issues, the same court in 1827 clearly stated that "[a] contract of hiring is not a sale of the thing for the period of hiring; the property remains as it did before—it is a contract for the use of the thing hired."<sup>151</sup>

Not only did different legal issues command different approaches: courts did not always resolve the same issues in the same ways. That a hirer should bear the risk of the slave's running away or falling ill through maltreatment was generally agreed; these were outcomes within the hirer's arguable control.<sup>152</sup> But the states were

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147. MARTIN, *supra* note 4, at 3 (quoting *Hiring Negroes*, 12 THE SOUTHERN PLANTER 376, 377 (1852)). On Thomas and Frank Ruffin's kinship, see Genealogical Essay, Letter from Frank G. Ruffin to Paul C. Cameron (June 1, 1870), in 4 THE PAPERS OF THOMAS RUFFIN, *supra* note 88, at 244.

148. MARTIN, *supra* note 4, at 3 (citing *Hiring Negroes*, 12 SOUTHERN PLANTER 376, 376 (1852)).

149. The phrase "double character," as applied to a slave's dual status as person and as property, was coined by antebellum Georgia Supreme Court reporter Thomas Cobb. See ARIELA GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 3 (2000).

150. *State v. Weaver*, 3 N.C. (Tray.) 54, 55 (1798).

151. A hirer "is called the *qualified owner*, not to express his ownership, or that he has any part of the property, but for want of a proper term to express his interest in it." *Whitaker v. Whitaker*, 12 N.C. (1 Dev.) 310, 311 (1827) (emphasis added); see also *Pettijohn v. Beasley*, 15 N.C. (4 Dev.) 512, 513 (1834) (following *Whitaker* in holding that ownership of slaves is undisturbed by another's temporary hiring of them).

152. See, e.g., *Lunsford & Davie v. Baynham*, 29 Tenn. (1 Hum.) 267, 269–70 (1849). This case reflects a common theme of paternalism:

split on where the risk should lie if a slave were to die unexpectedly during the term of employment.<sup>153</sup> When a hirer breached the explicit terms of the contract of hire, the liability could vary, both if the hirer or his agent put the slave to an unauthorized use<sup>154</sup> and if the hirer had turned the slave over to a third party who had not complied with the agreement.<sup>155</sup> These potential limitations on the hirer's ownership interest and authority are found in civil cases, to be sure, the type of cases that Ruffin in one stroke dismisses as irrelevant to the criminal proceeding of *State v. Mann*.<sup>156</sup> But the supposed necessity to consider a hirer's power of correction differently in a criminal case is not at all clear. Ruffin cites no authority for such a distinction, nor does he cite an opinion acquitting a slave hirer of a criminal charge of abusive correction. Indeed, by 1857, in a case of civil trespass against an abusive hirer, the Tennessee Supreme Court had come to

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The law . . . rigidly exacts from the hirer an observance of the duties of humanity, and that measure of care and attention to the comfort and welfare of the slave, that a master, of a just and humane sense of duty, would feel it incumbent upon him to exercise in the treatment of his own servant.

*Id.* at 270; *see also* *Jones v. Glass*, 35 N.C. (1 Ired.) 305, 309 (1852) (holding hirer liable for his overseer's cruel and unreasonable punishment of a hired slave). For discussion of this type of case, *see* GROSS, *supra* note 149, at 102–03.

153. It was settled in some states that the hirer should not have to pay for the entire term if the slave were to die through no fault of the hirer's. The leading case for this concept of apportionment was *George v. Elliott*, 12 Va. (1 Hen. & M.) 5, 6 (1808); *see also* *Dudgeon v. Teass*, 9 Mo. 867, 868 (1846) (allowing owner an abated recovery for the accidental death of a slave); *Bacot v. Parnell*, 18 S.C.L. (2 Bail.) 424, 424 (1831) (following explicitly the holding in *George v. Elliott* although it was not binding precedent). But in other states the hirer was fully liable, on the reasoning that “[t]he tenant or hirer is considered as a purchaser for a limited time.” *Outlaw & McClellan v. Cook*, Minor 257, 258 (Ala. 1824); *see also* *Harmon v. Fleming*, 25 Miss. 135, 143 (1852) (reasoning that because the hirer did not stipulate to an abated price in the contract in case of a slave's death, he is liable for the full cost); GROSS, *supra* note 149, at 102–04 (grounding the basis for full recovery in paternalist ideology).

154. *Compare* *Bell v. Bowen*, 46 N.C. (1 Jones) 316, 318 (1854) (holding hirer liable when slave died after hirer took slave out of the county, contrary to agreement, even though hirer not negligent), *with* *Slocumb v. Washington*, 51 N.C. (1 Jones) 357, 359 (1859) (holding hirer not liable for slaves' frostbite when slaves were worked in area forbidden by contract since frostbite was not result of negligence).

155. *Compare* *Wilder v. Creedy*, 33 N.C. (1 Ired.) 431, 432 (1850) (noting that since “property vested . . . in the hirer,” party to whom hirer entrusted the slave was not liable for negligence in slave's death under control of sub-hirer; contrary result “would expose third persons to great damage, and, indeed, prevent much of the traffic of life”), *with* *Bell v. Cummings*, 35 Tenn. (1 Sneed) 275, 277 (1855) (stating that hirer “cannot denude himself of the obligation imposed, or transfer them to another, without the owner's consent”), *and* *Traynor v. Johnson*, 40 Tenn. (1 Head) 44, 46 (1859) (holding hirer liable for negligence of sub-hirer on “contract implied by law, which forbids the hirer to transfer the possession or services of the slave to a third person, without the owner's consent”).

156. 13 N.C. (2 Dev.) 263, 264–65 (1829).

repudiate the holding of *State v. Mann*, asserting that to invest the hirer with the owner's full complement of rights is "untenable upon any just principles."<sup>157</sup> A distinction between civil and criminal law does not enter into this court's reasoning. Rather, the court is simply appalled at the idea that the rights of correction that belong to an owner should be fully transferred to a hirer: such a notion "is sanctioned by neither reason, policy, nor sound authority."<sup>158</sup> Taken on its own terms as a case about the limits of a slave hirer's powers of correction over a slave not his own, Ruffin's opinion is an outlier.

Moreover, even taking with Ruffin the considerable leap of granting the slave hirer the full powers of an owner, his assertion that the common law could offer no help in this criminal context was exaggerated. In 1824, in *Commonwealth v. Booth*,<sup>159</sup> the Virginia court admitted the possibility that a hirer could cross the line from permissible to criminally cruel punishment, even though the slave was considered to be "his own slave for the time being."<sup>160</sup> Three years later, in *Commonwealth v. Turner*,<sup>161</sup> a case directly confronting the situation of a slaveowner who had cruelly beaten his own slave, the same court reversed course and held, in terms much like those that Ruffin would employ in *Mann*, that "great changes are not to be made by the Courts," that such an offense could be addressed only by statute or in "the tribunal of public opinion."<sup>162</sup> A dissenting judge, however, advanced the argument that a measure of common-law protection of a slave against "cruel" and "inhuman" abuse by a master could exist compatibly with "the full enjoyment of the right of

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157. *James v. Carper*, 36 Tenn. 397, 401 (1857). This decision is openly critical of two criminal opinions, both of which cite *State v. Mann* approvingly: *Nelson v. State*, 29 Tenn. (1 Hum.) 518 (1850), and *Jacob v. State*, 22 Tenn. (1 Hum.) 493 (1842).

158. *James*, 36 Tenn. at 401. The hirer had committed assault and battery upon a slave on suspicion that the slave had committed a criminal offense while in the hirer's employ. "[T]hough it were conceded, for the sake of the argument, that the owner of the slave, in virtue of his absolute right of property, might take the law into his own hands, . . . it is very clear that this may not be done by the hirer, or by a stranger." *Id.* at 403. Compare *Gillian v. Senter*, 9 Ala. 395, 396 (1846), which allowed an overseer, "standing *in loco magisteri*," to inflict moderate corporal punishment on a slave for committing a criminal offense, with *Trotter v. McCall*, 26 Miss. 410, 413 (1853), and *Nelson v. Bondourant*, 26 Ala. 341, 352 (1855), both of which granted hirers the full corrective powers of owners, following the law of master and apprentice. But *Bondourant* states that the hirer, like the owner, "has no right to be barbarous or cruel." *Bondourant*, 26 Ala. at 352.

159. 4 Va. (1 Rand.) 394 (1824).

160. *Id.* at 395; see also MORRIS, *supra* note 10, at 188 (noting how *Booth* focused on the common law notions of master-apprentice relationships to justify an action against a slave hirer for cruel or inhumane punishment of a slave).

161. 26 Va. 678 (5 Rand.) (1827).

162. *Id.* at 686.

property.”<sup>163</sup> As Eric Muller notes elsewhere in this Issue, the author of the dissent, William Brockenbrough, was Judge Ruffin’s cousin.<sup>164</sup>

Finally, within North Carolina law, it would have been possible to come at the case from another direction, extending the argument of *State v. Hale*,<sup>165</sup> a case holding a white man guilty of common-law assault for beating a slave that he neither owned nor controlled. Although Ruffin is at pains in *Mann* to dismiss the state’s argument that *Hale* offered valuable guidance in a case in which the defendant was not the owner of the wounded slave,<sup>166</sup> Chief Justice Taylor’s sketch of the type of man who might be involved in a case like *Hale* comes close to describing the actual defendant John Mann. According to Taylor, offenses like Hale’s were

usually committed by men of dissolute habits, hanging loose upon society, who, being repelled from association with well-disposed citizens, take refuge in the company of coloured persons and slaves, whom they deprave by their example, embolden by their familiarity, and then beat, under the expectation that a slave dare not resent a blow from a white man.<sup>167</sup>

Ruffin could have built upon the reasoning of *Hale* to extend the protection of the common law to a slave shot in the back by a “dissolute” slave hirer far beneath the class of “well-disposed” Chowan County slave owners.<sup>168</sup> Further following *Hale*, he could have upheld the jury’s conviction of Mann for an excessive assault, while clarifying that the defendant would not have been liable for an ordinary assault.<sup>169</sup> The resulting opinion would have aligned the

163. *Id.* at 689 (Brockenbrough, J., dissenting).

164. Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 774 (2009) (concurring that the case law gave Ruffin ample room to affirm the jury’s verdict). For further discussion of *Booth* and *Turner*, see ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 107–09 (1992); and MORRIS, *supra* note 10, at 188–89. For a comparison of *Turner* and *Mann*, see Andrew Fedé, *Gender in the Law of Slavery in the Antebellum United States*, 18 CARDOZO L. REV. 411, 420–23 (1996).

165. 9 N.C. (1 Hawks) 582, 584 (1823).

166. *State v. Mann* 13 N.C. (2 Dev.) 263, 264 (1829).

167. *Hale*, 9 N.C. (1 Hawks) at 583.

168. Such protection would have had the policy justification of discouraging private acts of retaliation by slave owners. “A wanton injury committed on a slave is a great provocation to the owner, awakens his resentment, and has a direct tendency to breach the peace, by inciting him to seek immediate vengeance.” *Id.* at 583.

169. As discussed in the superior court case of *State v. Mann*, *State v. John Mann*, Superior Court (Fall Term 1829), Chowan County Slave Records, *supra* note 2, Mann’s jury had distinguished between ordinary and “cruel, unreasonable” assault. Its logic mirrors that of the Virginia court in *Commonwealth v. Booth*, 4 Va. (2 Va. Cas.) 394, 395

humanity of the slave Lydia with the property interest of her owner Elizabeth Jones, while reinforcing the role of the criminal law in maintaining the security of the slavery system for the peace and well-being of the state.

In sum, neither the facts nor controlling legal authority compelled Thomas Ruffin to reverse the conviction of John Mann for assault and battery against a hired slave. A decision affirming the Chowan County verdict, particularly one written with the unswerving conviction that marked Ruffin's style, could have done much to shore up the authority of slave owners against the corroding influence of abusive hirers. Such an opinion would have buttressed the civil law respecting the owners' property rights in their chattel slaves, lending the solemn weight of the criminal law to the sanctity of such rights. Although, as Thomas Morris observes, by 1850 there had been "no appellate case that upheld the indictment and conviction of masters [owners or hirers] for cruelty to their slaves if the indictment rested solely on a common-law foundation,"<sup>170</sup> such use of the common law was clearly available to Ruffin in 1830. Yet he chose not to follow that course.<sup>171</sup>

Against this backdrop, a theory proposed by Sally Hadden becomes increasingly credible. Hadden suggests that Ruffin was motivated by fears of slave revolt and political unrest common to his

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(1824). Unlike Ruffin, Chief Justice Taylor in *Hale* was quite willing to assume that the courts could resolve these cases one at a time (judging each, however, "with a view to the actual condition of society, and the difference between a white man and a slave"). *Hale*, 9 N.C. (1 Hawks) at 586. He concludes "that many circumstances which would not constitute a legal provocation for a battery committed by one white man on another, would justify it, if committed on a slave, provided the battery were not excessive." *Id.* For further discussion of the availability of *Hale* as precedent for a different outcome in *State v. Mann*, see Judge James A. Wynn, Jr., *State v. Mann: Judicial Choice or Judicial Duty?*, 87 N.C. L. REV. 991, 1003–05 (2009); and Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 772 (2009).

170. MORRIS, *supra* note 10, at 193. On a related point, Fede notes that the North Carolina legislature did not take up Ruffin's invitation to regulate the master's power of correction, thus implicitly endorsing the standard set forth in *State v. Mann*. FEDE, *supra* note 164, at 111.

171. Indeed, the strength of *State v. Mann* may well explain the absence of such cases in subsequent years. Citing an 1831 trial in Raleigh, North Carolina, as an example, Stowe maintained that *State v. Mann* served to license unspeakable abuse by slave masters. STOWE, *supra* note 21, at 105–06. Similarly, John S. Jacobs, brother of Harriet Jacobs, recalled an incident of a Chowan County slave hirer having cruelly punished a slave with impunity, attributing his behavior to the law laid down in *State v. Mann*. John C. Jacobs, *A True Tale of Slavery*, in JACOBS, *supra* note 13, at 225, 226 & 226 n.50.

class.<sup>172</sup> Her theory relies largely on a tenuous conclusion that Ruffin's fears were motivated by a specific event: the publication of David Walker's *Appeal to the Colored Citizens of the World*, published in 1829 but not generally known about in North Carolina until at least March of 1830.<sup>173</sup> Although she may or may not be correct that Ruffin had early notice of this incendiary pamphlet by way of *The Richmond Enquirer*, edited by his cousin Thomas Ritchie,<sup>174</sup> such proof would be far from the only evidence that places Ruffin squarely within the elite class of conservative planters who held grave anxieties about the future of slavery, for whom any development that seemed likely to encourage slave rebellion was cause for alarm. One response to such fear might have been to grant power over slaves to as many white men as possible—even a slave hirer like John Mann.

Ruffin had strong family ties to the planter establishment of Tidewater Virginia going back to colonial times. His distinguished older cousin Spencer Roane, a son of the Essex County elite, had served on Virginia's Supreme Court of Appeals from 1789 to 1822.<sup>175</sup>

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172. Sally Hadden, *Judging Slavery: Thomas Ruffin and State v. Mann*, in LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH 1, 13–15 (Christopher Waldrep & Donald G. Nieman eds., 2001).

173. *Id.* at 13–15, 26 n.73. Walker's *Appeal* was noted by the *Raleigh Star* on March 4, 1830; then, in August of that year, after copies began to appear in Wilmington along with associated “rumors of insurrection,” the governor ordered the confiscation of all copies. FRANKLIN, *supra* note 52, at 66–67 & 66 n.34.

174. Hadden, *supra* note 172, at 14.

175. TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890, at 10 (1999). Ruffin's mother, Alice Roane Ruffin, was the first cousin of Spencer Roane (who was the son-in-law of Patrick Henry). *See id.* at 10–39, 1130–59; Graham, *supra* note 131, at 19. Roane, a vocal Jeffersonian antifederalist, had established *The Richmond Enquirer* in 1804 and installed his (and Alice Roane's) cousin Thomas Ritchie as editor. With his brother-in-law Dr. John Brockenbrough, a founding director of the Bank of Virginia, Roane and Ritchie were at the core of the “Richmond Junto,” a close-knit group of men said to have “virtually governed Virginia through its power to control her courts, legislatures, and financial policies.” RONALD L. HEINEMANN ET AL., OLD DOMINION, NEW COMMONWEALTH: A HISTORY OF VIRGINIA, 1607–2007, at 161–63 (2007); CHARLES HENRY AMBLER, THOMAS RITCHIE: A STUDY IN VIRGINIA POLITICS 11 (1913); *see also* Rex Beach, *Spencer Roane & the Richmond Junto*, 22 WM. & MARY Q. 1, 3 (1942) (describing the origins and influence of the Junto). *But see generally* F. Thornton Miller, *The Richmond Junto: The Secret All-Powerful Club—or Myth*, 99 V. MAG. OF HIST. & BIOGRAPHY 63 (1991) (questioning the actual existence of a “junto”). Brockenbrough was brother of William Brockenbrough, the judge. *See* Genealogical Essay in Letter from Frank G. Ruffin to Paul C. Cameron, *supra* note 147, at 244. Although Ruffin was unable to study law with Roane, he did undergo his initial legal training with a Petersburg attorney. Letter from Spencer Roane to Thomas Ruffin (July 28, 1806), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 131, at 101; Graham, *supra* note 131, at 21.

Regarding slavery, a shift in attitude took place between his generation and Ruffin's. Whereas Roane was inspired by Revolutionary concepts of liberty to view emancipation claims expansively,<sup>176</sup> and whereas Ruffin's father had expressed to his college-age son a hope for a time "when an Alwise, and Mercifull Creator" would "prepare the Hearts of all men to consider each other as Brothers,"<sup>177</sup> by the late 1820s the political climate had changed. "Many of the older generation had paid at least rhetorical homage to the idea that slavery ought to yield eventually to liberty," writes Eva Wolf, "but to Virginia's new generation of conservative leaders such thoughts were irresponsible."<sup>178</sup> Accounts of this shift are complex and competing, but the weight of the evidence points toward a distinct hardening of the defenses of the slave labor system throughout the South.<sup>179</sup> Before the first issue of William Lloyd Garrison's *Liberator* sounded its alarms nationwide, before Nat Turner's terrorizing rampage, slaveholders had begun to close ranks, refining their understanding of the "liberty" guaranteed by the Constitution into "the liberty to own slave property."<sup>180</sup>

The "strife-filled atmosphere" under which, according to Hadden, Ruffin labored as he came to decide *State v. Mann*<sup>181</sup> had in

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176. See HUEBNER, *supra* note 175, at 14–15, 24–25.

177. Letter from Sterling Ruffin to Thomas Ruffin (June 1804), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 131, at 54–55.

178. EVA SHEPPARD WOLF, RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION 190–91 (2006). On North Carolina, see JOHNSON, *supra* note 70, at 560–61 (noting that while "the policy of the State was consistently opposed to emancipation," western North Carolinians "were opposed to slavery not because of their sympathy for the slave but because of what the system did to the nonslaveholder").

179. See ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, THE MIND OF THE MASTER CLASS: HISTORY AND FAITH IN THE SOUTHERN SLAVEHOLDERS' WORLDVIEW 110–13 (2005); MICHAEL O'BRIEN, 2 CONJECTURES OF ORDER 938–41 (2004); LARRY E. TISE, PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701–1840, at 41–74 (1987); JEFFREY ROBERT YOUNG, DOMESTICATING SLAVERY: THE MASTER CLASS IN GEORGIA AND SOUTH CAROLINA, 1670–1837, at 161–62 (1999) (noting the emergence of a "proslavery orthodoxy" during the years 1816 through 1829).

180. WOLF, *supra* note 178, at 176. Garrison's *Liberator* began publication in January 1831; Nat Turner's Rebellion took place in August 1831. See *id.* at 196–97. For a thorough refutation of the traditional theory that abolitionism did not exist as an organized movement prior to the appearance of the *Liberator*, see generally RICHARD S. NEWMAN, THE TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC (2002). For a discussion of the formation of the antislavery movement, see generally David W. Blight, *Perceptions of Southern Intransigence and the Rise of Radical Antislavery Thought, 1816–1830*, 3 J. EARLY REPUBLIC 139 (1983) and sources cited therein.

181. Hadden, *supra* note 172, at 12.

fact been building for many years. Even in colonial times, planters had “had good reason to worry about their security as slaveowners,” as they agonized over interference from the mother country.<sup>182</sup> After the Revolution, the climate of fear darkened considerably with the news of the 1791 slave rebellion in St. Domingue. The unprecedented events that unfolded there—the only successful slave revolt in history—culminated in the abolition of colonial slavery in 1794 and the declaration of a free republic in 1804. The whole affair “horrified white southerners”: so concerned were they about the precedent it could set at home that they avoided even mentioning it in public.<sup>183</sup> Two unsuccessful but nevertheless frightening domestic attempts at rebellion—Gabriel’s Rebellion in the Richmond area, in 1800,<sup>184</sup> and Denmark Vesey’s plot discovered in 1822 in Charleston<sup>185</sup>—contributed further to the insecurities of the planter class up and down the eastern seaboard.

North Carolina whites were “thoroughly alarmed” by events in St. Domingue. They were similarly troubled by the Vesey plot and other threatened insurrections closer to home.<sup>186</sup> Potential insurrections had been discovered in Onslow County in 1821 and in Tarboro in 1825; and from other counties up into late 1829 and early 1830 came anxious reports of the mobilization of runaway slaves.<sup>187</sup> Surrounding Edenton, from the Albemarle Sound and the Chowan River to the Great Dismal Swamp, lived several thousand fugitive

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182. YOUNG, *supra* note 179, at 63.

183. *See id.* at 102. On the reaction to the revolution in St. Domingue generally, including its connection in southern minds to the French Revolution, see *id.* at 101–05. Thomas Ritchie’s promise in the pages of *The Richmond Enquirer* to publish “full accounts” of the events in the new Republic of Haiti, in January 1804, went unfulfilled: “A brief experience revealed . . . that such a promise was not in harmony with the feelings and sentiments of Virginia, which had already decided upon a policy of studied silence upon the subject of negroes and negro slavery.” AMBLER, *supra* note 175, at 25. As literary historian John Wharton Lowe notes, “The Haitian presence in southern culture has been hushed up. The island’s spectral legacy was regarded as an infection that if acknowledged and released might spread.” John Wharton Lowe, Professor of English and Comparative Literature, and Dir., Program in L.A. and Caribbean Studies, L.A. State Univ., *Unleashing the Loas: The Literary Legacy of the Haitian Revolution in the U.S. South and the Caribbean*, Hutchins Lecture at the Center for the Study of the American South, UNC-Chapel Hill (Nov. 6, 2007); *see also* David Lowenthal, *On Arraigning Ancestors: A Critique of Historical Contrition*, 87 N.C. L. REV. 901, 917 (2009) (discussing the impact of the revolution in St. Domingue on American slaveholders); *supra* note 51 (regarding the reaction in Chowan County).

184. *See* WOLF, *supra* note 178, at 108–09, 118–19.

185. *See* YOUNG, *supra* note 179, 167–70.

186. R.H. Taylor, *Slave Conspiracies in North Carolina*, 5 N.C. HIST. REV. 20, 25 (1928).

187. JOHNSON, *supra* note 70, at 514–15; Hadden, *supra* note 172, at 12–13.

slaves: the Albemarle was “a slave territory that defies all laws.”<sup>188</sup> As David Blight has observed,

at the core of the system of slavery lay the slaveholders’ compelling fear of the black people they enslaved. Especially where the slave population was dense, the instances of a field hand’s defiance, the cries of despair at a slave auction, the strange and incomprehensible behavior patterns of growing hordes of blacks, and the specter of servile insurrection (whether rumored or real) all combined to create a paranoia which dominated the psyche of the master class.<sup>189</sup>

Across North Carolina, the numbers of free blacks had risen dramatically since 1800, and in 1829 rumors were circulating that they might gain expanded political rights.<sup>190</sup> Hadden plausibly connects these rumors, and their explosive effect, to the state of affairs in Virginia, where a regional dispute over the terms of legislative representation and suffrage had developed into a full-blown debate and a call for a new constitution.<sup>191</sup> Under Virginia’s system of freehold suffrage, only white males with significant land holdings could vote, a requirement that disfranchised high percentages of white men outside the eastern region. (By 1829, the only other state that restricted voting rights to property holders was North Carolina, which was similarly split between eastern landed slaveowners and western yeoman farmers. A similar demand for reform was heard beginning around 1820, but the easterners managed to forestall constitutional changes until 1834–1835.) As the population of non-slaveholding white farmers in the western part of the state had grown, they began to demand rights equal with those of the eastern slaveholders.<sup>192</sup>

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188. DAVID CECELSKI, *THE WATERMAN’S SONG: SLAVERY AND FREEDOM IN MARITIME NORTH CAROLINA* 129 (2001) (quoting an Albemarle sea captain); TAYLOR, *supra* note 55, at 23–24; John Hope Franklin & Loren Schweninger, *The Quest for Freedom: Runaway Slaves and the Plantation South*, in *SLAVERY, RESISTANCE, FREEDOM* 21, 26 & n.6 (Gabor Boritt & Scott Hancock eds., 2007); *see also supra* note 5 (discussing how fugitive slaves often hid in the marshes).

189. Blight, *supra* note 180, at 145.

190. Hadden, *supra* note 172, at 13; *see also* FRANKLIN, *supra* note 52, at 58 (noting that legal rights of free Negroes tended to be curtailed in proportion to the intensity of the white population’s fears of insurrection).

191. Hadden, *supra* note 172, at 12–13.

192. For a discussion of the Virginia Constitutional Convention, *see* SUSAN DUNN, *DOMINION OF MEMORIES: JEFFERSON, MADISON, AND THE DECLINE OF VIRGINIA* 149–70 (2007); O’BRIEN, *supra* note 179, at 799–816; and WILLIAM W. FREEHLING, *1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 169–70 (1990). In the end, the reformers gained little; the convention “was a triumph for the conservative majority.”

The very act of questioning the relative power of these two distinct groups brought slavery itself into the conversation; but the issue quickly moved beyond the proportional fairness of white representation to the philosophical issue of natural rights that had informed the Revolutionary-era debates:

The crux of the reformers' argument was, as James Monroe (siding here with the westerners) summarized it, that "putting the citizens in an equal condition" by apportioning legislative representation according to the white population "is just" because it "is founded on the natural rights of man" and because "the revolution was conducted on that principle [of equal rights]."<sup>193</sup>

The conservative response was at least twofold. One reflected the logical fear that reform "would 'put the power controlling the wealth of the State, into hands different from whose which hold the wealth.'" <sup>194</sup> A second response went to the heart of the matter, beyond slavery to race. Political equality based solely on "the natural rights of man" was an unthinkable concept, as the example of the French Revolution, and St. Domingue in its wake, had taught: As a member of the House of Delegates put it in early 1829, "follow it in its full extent, and to what monstrous conclusion are we brought? Are not slaves men?"<sup>195</sup>

For the eastern Virginia slaveholding establishment, the very stability of the commonwealth was at stake. Roused to their defenses, these men drew upon a long tradition of conservative thought, wrapped it securely around the interests and values of the world as they knew it, and launched a forceful series of rebuttals to the reformists' challenges. Borrowing from a broad range of political philosophers including Richard Filmer, Thomas Hobbes, and Edmund Burke, as Michael O'Brien relates in *Conjectures of Order*, they attacked the reformists' proposals for being abstract and ungrounded.<sup>196</sup> Lofty "self-evident" ideals that in 1776 had inspired heroism were now called "the 'childish fripperies of natural

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DUNN, *supra*, at 172. On North Carolina, see DUNN, *supra*, at 154, and JOHNSON, *supra* note 70, at 33-35.

193. WOLF, *supra* note 178, at 187.

194. *Id.* (quoting Benjamin Watkins Leigh).

195. DICKSON D. BRUCE, JR., THE RHETORIC OF CONSERVATISM: THE VIRGINIA CONVENTION OF 1829-30 AND THE CONSERVATIVE TRADITION IN THE SOUTH 89 (1982) (quoting *Richmond Daily Whig*, Jan. 15, 1829); see also WOLF, *supra* note 178, at 190-91 (discussing the tension between slavery and the ideals of the French Revolution).

196. O'BRIEN, *supra* note 179, at 804.

rights.’ ”<sup>197</sup> Accordingly, convention delegate Benjamin Watkins Leigh “called upon reformers to ‘give us something which we may at least call reasons for [reform]: not arithmetical and mathematical reasons; no mere abstractions; but referring to the actual state of things as they are.’ ”<sup>198</sup>

Burke’s 1790 *Reflections on the Revolution in France*<sup>199</sup> proved especially useful to the Virginia conservatives’ arguments. Its direct attack on the excesses of 1789 had obvious relevance, but the real power of Burke’s argument lay in its larger framework. As Frank Turner writes in a recent introduction to the work:

The lasting command of Burke’s polemic is his recognition that the appeal to visionary political goals in the name of the rights of man or another political or religious ideology must necessarily result not in justice but in destruction and death, because rational utopians under the banner of light and reason would define and redefine political terms and social categories to advance their own tyrannical aims.<sup>200</sup>

Repeatedly Burke must reconceptualize “liberty” in the face of “new definitions that rob it of its very being,” Turner observes.<sup>201</sup> “To that end he again and again advocates a politics of prudence, restraint, and moderation while warning against the politics of perfectionism.”<sup>202</sup> Burke’s aim is to repudiate the claims of idealists, “who would sacrifice the good inherent in existing, if imperfect and even inconsistent, political and social arrangements.”<sup>203</sup> As an earlier reader of his work put it, “there is no decrier of theories and theorists comparable.”<sup>204</sup>

For the Virginia conservatives, Burke confirmed that the French Revolution dramatized “the importance of political and social stability,” that “any apparently stable system” was inherently “fragile.”<sup>205</sup> Following Burke and others including the Augustan-era

197. *Id.* (quoting the vocal Tidewater conservative Abel P. Upshur).

198. *Id.* at 805.

199. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Frank Turner ed., Yale Univ. Press 2003) (1790).

200. *Id.* at xxxvi.

201. *Id.* at xiv.

202. *Id.*

203. *Id.*

204. JOHN MACCUNN, *THE POLITICAL PHILOSOPHY OF BURKE* 1 (Russel & Russel, Inc. 1965) (1913).

205. BRUCE, *supra* note 195, at xv–xvi. On Burke, see DUNN, *supra* note 192, at 158.

writers Jonathan Swift and Alexander Pope,<sup>206</sup> Virginia conservatism privileged a “social” ethos that entailed a “rejec[tion of] a competitive, individualistic morality in favor of one in which every citizen would seek to subordinate his own desire to the accomplishment of the public good.”<sup>207</sup> It also counseled an acquiescence to “human finitude,” a kind of resignation that worked to justify a defense of the status quo.<sup>208</sup> All of these arguments, observes Dickson Bruce in *The Rhetoric of Conservatism*, were put to use by the conservatives in voicing their “openly antidemocratic sentiments and their disapproval of the principles upon which much of reform was based.”<sup>209</sup>

At issue in Virginia in 1829–1830 was the structure of government, not the legitimacy of slavery.<sup>210</sup> Yet “the problem of social order” lay at the heart of both topics.<sup>211</sup> The same pragmatic conservatism that underwrote a successful diffusion of the reformers’ demands was adaptable to the explicitly proslavery arguments that soon after, with the appearance of Thomas Dew’s *Review of the Debate in the Virginia Legislature of 1831 and 1832*,<sup>212</sup> would increasingly be heard. Such rhetoric, as Bruce points out, “could be used whenever conservatives needed to defend stability, inequality, and order against proposed changes in social or political life.”<sup>213</sup> A

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206. On Swift and Pope, see BRUCE, *supra* note 195, at 153. Pope was a particular favorite of Ruffin’s. Letter from Thomas Ruffin to Catherine Ruffin (Mar. 14, 1826), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 131, at 243.

207. BRUCE, *supra* note 195, at xvi.

208. *Id.*

209. *Id.* For more on southern slave owners’ historical “propensity toward tradition,” even while they “embraced the radical cause” of the Revolution, see YOUNG, *supra* note 179, at 57–89, and DUNN, *supra* note 192, at 11–12. See also FOX-GENOVESE & GENOVESE, *supra* note 179, at 649–79 (suggesting that the planter class rejected certain notions of revolutionary “individualism” dating back to the Reformation).

210. BRUCE, *supra* note 195, at 175; see also WOLF, *supra* note 178, at 186 (noting that reformers “held back from attacking slavery directly since they wanted slaveholders to agree to their demands”).

211. O’BRIEN, *supra* note 179, at 812.

212. THOMAS R. DEW, *REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832* (Negro Universities Press 1970) (1832). Dew was reacting to a subsequent debate in the Virginia legislature on the merits of slavery itself. Inspired by the Nat Turner insurrection, these debates resulted in “a clear statement of ideas in favor of slavery,” after which emancipation “cease[d] to be a significant possibility for Virginia.” BRUCE, *supra* note 195, at 177; see also FREEHLING, *supra* note 192, at 181–90 (discussing the debates in the Virginia legislature surrounding Rep. Thomas Jefferson Randolph’s proposed plan to free Virginia slaves born on or after July 4, 1840); WOLF, *supra* note 178, at 196–234 (detailing Virginia emancipation debates).

213. BRUCE, *supra* note 195, at 175. During the convention, “little regarded were the two great subjects of slavery and democracy. The former was only obliquely germane to

close reading of *State v. Mann* suggests that Ruffin embraced the same body of conservative thought, applying its themes more directly than the Virginia planters had toward a justification of slavery: he adopts a Burkean rhetoric to support a decision that puts the authority of the slaveholder on a stronger legal footing than it had ever been.

The simplest way to resolve the case in Mann's favor would have been procedural. After determining, as Ruffin did, that neither the jury instruction nor the indictment framed the issue in a way that acknowledged that Lydia was, for purposes of the criminal charges, the "defendant's own slave," he could have ordered entry of judgment for the defendant.<sup>214</sup> Instead, the opinion moves directly from the troubling question of the flawed indictment to the highly "general question" of "whether the owner is answerable *criminaliter* for a battery upon his own slave, or other exercise of authority or force not forbidden by statute"—a question that is confidently answered in the negative.<sup>215</sup> The reasoning that follows is a thorough appropriation of the fundamental premises of conservative ideology, including its manifestation of fear and anxiety, offered up in unwavering, even hermetic tones of authority. On the strength of this rhetoric, Ruffin seals the "power of the master"<sup>216</sup> from judicial interference; and in so doing, he shields the practice of slavery itself from the possibility of question.

The first justification presented for the master's "absolute" power is an appeal not to precedent or principle but, rather, to the judgment of "the whole community":

The established habits and uniform practice of the country in this respect is the best evidence of the portion of power deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently we could not set

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how the delegates saw their task, or so, at least, the delegates claimed." O'BRIEN, *supra* note 179, at 811.

214. Such was the result in *Commonwealth v. Booth*, 4 Va. (1 Rand.) 394 (1824), an appeal of a judgment of assault against a slave hirer, upon the finding of a flawed indictment. Alternatively, Ruffin could have ordered a new trial on a proper indictment, something he considered, as demonstrated by the extant "second draft" opinion, 4 THE PAPERS OF THOMAS RUFFIN 251, 253 (J.G. de Roulhac Hamilton ed., 1920), and even in the draft found in the Supreme Court archive. See Trial Court Record in Supreme Court Cases, *State v. Mann*, *supra* note 88.

215. *State v. Mann*, 13 N.C. (2 Dev.) 263, 265 (1829).

216. *Id.* at 266.

our notions in array against the judgment of everybody else, and say that this or that authority may be safely lopped off.<sup>217</sup>

Continuing along this line, Ruffin contrasts the “principle of moral right” that he concedes must be felt by “every person in his retirement” with “the actual condition of things” which dictates that “it must be so.”<sup>218</sup> That well-settled community norms must take precedence over slippery notions of abstract justice is reiterated with Burkean flair toward the end of the opinion: Ruffin disdains “any rash expositions of abstract truths by a judiciary tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil by means still more wicked and appalling than that evil.”<sup>219</sup>

This important distinction between the actual and the abstract was clearly expressed in the Virginia constitutional debate. Following Burke, conservatives argued that “truth” was a function of experience. “[T]o base any government on principles rather than experience was to court disaster, because one was engaging only in speculation.”<sup>220</sup> Correspondingly, Ruffin declines to engage in the kind of case-by-case reasoning—permissible under common law—that would have allowed the guilt of the defendant to be decided by a jury:

Merely in the abstract it may well be asked, which power of the master accords with which right? The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice . . . . The danger would be great, indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper and every dereliction of menial duty.<sup>221</sup>

Ruffin is not saying that a case in which the master had abused his authority might never arise—only that the question “cannot . . . be brought into discussion in the courts of justice.”<sup>222</sup> Similarly in

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217. *Id.* at 265.

218. *Id.* at 266.

219. *Id.* at 268. Some names that Burke gave to theorists include “refining speculatists,” “smugglers of adulterated metaphysics,” and “metaphysical knights of the sorrowful countenance,” according to MACCUNN, *supra* note 204, at 1.

220. BRUCE, *supra* note 195, at 119. The crisis of St. Domingue lingered as an example of the colossal error of such thinking. *Id.* at 91.

221. *Mann*, 13 N.C. (2 Dev.) at 267.

222. *Id.*

Virginia in 1828: “Principle, almost everyone including the conservatives recognized, was with the West,” but as one eastern gentleman wrote to another, “the actual condition of things’ demanded something else.”<sup>223</sup>

Beneath the emphasis on the primacy of experience as a means of opposing the reformers’ appeal to idealistic “fundamental principles” lay a deeper, more basic theme: the innate weakness and corruptibility of human beings. To the Virginia conservatives, reform movements were at best misguided. They “argued that, given human nature, one could safely predict only the worst possible outcome for any process of social and political change.”<sup>224</sup> This belief resonated especially with Episcopalians:

Emphasizing human frailty, and ignoring the power of divine providence to overcome that frailty, [Episcopalianism] offered no grounds for optimism about social possibilities. Instead, it was a religion that encouraged believers to recognize the imperfections of life in the world, and to strive continually to make adjustments to those imperfections, rather than to seek perfection in oneself or in one’s society. Such a religious perspective on life could only have reinforced that sense of human weakness and social fragility upon which so much of Virginia political conservatism rested.<sup>225</sup>

Ruffin himself, who would in time become a leading member of the Episcopal Church in North Carolina, shared these sober views on the role of religion in private and public life.<sup>226</sup> Accordingly, a sense of

223. BRUCE, *supra* note 195, at 23 & n.60 (quoting a letter from Robert Powell to Waller Halladay).

224. *Id.* at 81.

225. *Id.* at 162. As Bruce further notes, the Episcopal emphasis on a ritual that “allow[ed] little if any room for the autonomous expression of emotion” reinforced the conservative reliance on social norms. *Id.* at 163. “Episcopalian religion gave strong, if implicit support to an outlook on society, or politics, which stressed the dangers of independence while finding virtue in the constant maintenance of proper relationships with others.” *Id.* at 164.

226. Ruffin was an original vestry member of the reconstituted, post-Revolutionary St. Matthew’s Episcopal Church in Hillsborough beginning in 1824; he was confirmed there four years later. JOSEPH BLOUNT CHESHIRE, AN HISTORICAL ADDRESS DELIVERED IN ST. MATTHEW’S CHURCH HILLSBOROUGH, N.C., ON SUNDAY, AUGUST 24, 1924: BEING THE ONE HUNDREDTH ANNIVERSARY OF THE PARISH 26–27 (1925); RICHARD RANKIN, AMBIVALENT CHURCHMEN & EVANGELICAL CHURCHWOMEN: THE RELIGION OF THE EPISCOPAL ELITE IN NORTH CAROLINA, 1800–1860, at 82–83 (1993). “He was one of [the] most active members [of the church] in the State, and more than once represented the Diocese in the Triennial Convention of the Union.” Graham, *supra* note 131, at 34. On the “high-church” nature of Ruffin’s belief, which stressed duty and discipline and “intellectual assent to orthodox Christology,” see RANKIN, *supra*, at 83–84. See also FOX-

resignation pervades the opinion. Though the “principle of moral right” might pull in the other direction, “in the actual condition of things it must be so. There is no remedy.” For the slave, “there is no appeal from his master; . . . his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God.”<sup>227</sup>

Thus, the conservatives’ position was not that their system was ideal, but rather that it worked: “it was pretentious to search for perfection based on human devising.”<sup>228</sup> In a recent study, Trish Roberts-Miller suggests that the hallmark pessimism of the rhetoric of the planter class contained an “indirect acknowledgment” of the fundamental contradiction of domestic life that every planter knew, yet few would publicly concede: the simultaneous existence of the genteel “big house” and the common incidences of sheer brutality by which that house, and the slave labor system upon which it was built, were held together.<sup>229</sup> The organic conception of the slaveholding household, in which slaves were part of one large “family” linked by bonds of affection, was itself a defensive ideology that arose in the early nineteenth century, part of a significant shift in the way in which slaveholders thought of themselves as productive citizens of the new nation.<sup>230</sup> Containing slavery within an edifice of domesticity was

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GENOVESE & GENOVESE, *supra* note 179, at 427–29 (calling high-church Episcopalianism the preferred religion of “affluent planters of Virginia and the Carolinas”).

227. *Mann*, 13 N.C. (2 Dev.) at 266–67.

228. BRUCE, *supra* note 195, at 86.

229. See TRISH ROBERTS-MILLER, *FANATICAL SCHEMES: PROSLAVERY RHETORIC AND THE TRAGEDY OF CONSENSUS* (forthcoming 2009) (unpublished manuscript at 28) (on file with the North Carolina Law Review).

230. YOUNG, *supra* note 179, at 111.

During the colonial period, the vast difference between imperial administrators and the southern plantations had encouraged southerners to resist the [British-led] campaign to ameliorate slavery. But by the late eighteenth century, the principle of reciprocity between the governed and their governors had become embedded in the public conscience. The slaveowners’ prominent role in shaping a new federal political identity placed them at the apex of American society, a position that led them to view organic metaphors with growing enthusiasm . . . . American slaveowners in the early national period realized that the recognition of the social ties binding every element of society together would serve to reinforce their mastery. Occupying the top rung on the social hierarchy, the planters could finally feel comfortable extending their humanitarian rhetoric to encompass their subordinates.

*Id.* (footnote omitted); see also FOX-GENOVESE & GENOVESE, *supra* note 179, at 670–79 (arguing anti-abolitionists “accepted self-interest as the guiding principle in human affairs”).

critical to the slaveholders' efforts "to secure their mastery over an African American slave population that thirsted for freedom."<sup>231</sup>

One of the most startling aspects of *State v. Mann*—the part that most viscerally strikes readers as "honest"<sup>232</sup>—is the way in which Ruffin pierces through the romantic fiction of the happy slaveholding family. The slave's obedience, he writes, "is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect."<sup>233</sup> Although Ruffin eloquently makes the conventional appeal to the moral responsibility of the master to treat even erring slaves with humanity and restraint,<sup>234</sup> he does not rest his argument on hollow notions of paternalism. Forthrightly recognizing that the slave does not "labor upon a principle of natural duty, or for the sake of his own personal happiness,"<sup>235</sup> he acknowledges that the system of slavery is inherently unstable. And with this point he again draws upon one of the key themes of conservative thinking, one also reflected in the Virginia debates of 1829–1830, the fragility of any social or political system.<sup>236</sup> Slavery itself had to be protected from any "threats . . . to the established order."<sup>237</sup>

The trial court's conviction of John Mann for callously taking aim against a hired slave would seem an unlikely threat to the integrity of the entire slave system. Within a planter ideology that privileged freeholders on the theory that an investment in land promoted the building of other ties to the community, Mann owned no estate. Within an ideology that looked upon unfettered expressions of "passion" with suspicion, he had acted with reckless

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231. YOUNG, *supra* note 179, at 122.

232. See Alfred L. Brophy, *Thomas Ruffin: Of Moral Philosophy and Monuments*, 87 N.C. L. REV. 799, 802 (2009).

233. *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

234. *Id.* at 267.

The protection already afforded by several statutes, that all-powerful motive, the private interest of the owner, the benevolences towards each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude and ameliorating the condition of the slaves.

*Id.* According to YOUNG, *supra* note 179, at 124, "ever increasing numbers of slaveowners were, by 1815, subscribing to the notion that mastery entailed responsibility and morality."

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

236. See *supra* note 205 and accompanying text.

237. BRUCE, *supra* note 195, at 91.

abandon.<sup>238</sup> Even on the few facts that we can confidently assign to Ruffin's knowledge, Mann was a dubious torchbearer for the "absolute" rights of the master. But his conviction, while it vindicated the rights of Lydia's owner Elizabeth Jones and her family, also sent a message of sympathy—perhaps even reward—regarding a slave who had been shot as she tried to escape a white man's control. If Ruffin were indeed troubled by fears of political unrest and potential slave revolt, *State v. Mann* provided him with a ready platform: with the "disparity in numbers between whites and blacks"<sup>239</sup> possibly working to the advantage of restless slaves, the case afforded an opportunity to consolidate the authority of white men, without regard to social rank.<sup>240</sup> American slaveowners had only to look to the plantation economies of the Caribbean to see that when slaves and free blacks vastly outnumbered free whites, mass runaways and rebellion were a constant reality.<sup>241</sup> One way to understand the reversal of Mann's conviction is as a dramatic, preemptive expansion of the numbers of white men with an unqualified right of discipline over slaves.

Ruffin's elision of the difference between a slaveowner and a slave hirer was a crucial strategic and rhetorical move that enabled him to avoid nuance, to expound upon the issue of the master's authority in broad, firm strokes. Granted, the nature of American judicial discourse is to "adopt a tone of overweening confidence," as Sanford Levinson has observed. "Few judges . . . have made their reputation by confessing (at least in print) how close they were to deciding the case in the opposite direction."<sup>242</sup> Over the course of his career, Ruffin continued to write in a style that, as one student of his work has said, leaves the reader "feeling that he is inevitably swept

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238. *Id.* at 75–79, 120–21. Indeed, it was believed that owning property could induce a man to keep control of his passions. *Id.* at 83.

239. *Mann*, 13 N.C. (2 Dev.) at 268.

240. "[T]he master or other person having the possession and command of the slave [is] entitled to the same authority." *Id.* at 265; see also *supra* note 88 (suggesting the possibility that Lydia was not technically Mann's hired slave when the assault occurred). A recognition of white solidarity in this context, however, would not necessarily have indicated a belief that all whites had equal rights of representation and suffrage. See WOLF, *supra* note 178, at 225.

241. CECIL-FRONSMAN, *supra* note 81, at 18–20. By the mid-1820s, in response to the growing numbers of free blacks in the state, North Carolina was already moving toward strengthened legislative controls over their activity. See FRANKLIN, *supra* note 52, at 62–64.

242. Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 188–89 (Peter Brooks & Paul Gewirtz eds., 1996).

toward an unavoidable decision.”<sup>243</sup> But even this quality of *State v. Mann* finds expression in ways corresponding to the particular rhetoric that Ruffin’s contemporaries were coming to adopt in response to perceived threats, direct and indirect, to the institution of slavery.

Historians going back at least to Kenneth Stampp have remarked upon the “aura of pathos” that permeated the slaveholding South.<sup>244</sup> What Roberts-Miller and others have identified alternatively as a “rhetoric of doom” or a “rhetoric of defense”<sup>245</sup> in southern discourse strikes a posture that “depends upon seeing people’s options as severely limited, if not entirely controlled, by imperious external circumstances.”<sup>246</sup> This sense of tragic inevitability (together with a certain frustration that northern readers may not sufficiently grasp his point) is present in the preamble to Ruffin’s opinion:

A Judge cannot but lament when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist and are thoroughly understood. The struggle, too, in the Judge’s own breast between the feelings of the man and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless, however, to complain of things inherent in our political state.<sup>247</sup>

Then in the passage citing violence as the ultimate foundation for slavery we find, again, a tone of somber resignation: “I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can,” Ruffin writes, but “[t]his discipline belongs to the state of slavery.”<sup>248</sup> With this fatalistic turn he denies his own considerable power to intercede, in effect “attributing victimhood” to

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243. Dillard S. Gardner, Thomas Ruffin as a Judge 4 (ca. 1961–1964) (unpublished manuscript) (on file with the North Carolina Supreme Court Library). Further, “[t]here is a ‘take it or leave it’ quality in his opinions which reflects a man of strong convictions and rare doubts.” *Id.* Gardner was the Supreme Court marshal-librarian from 1937 to 1964. E-mail from J. Barrett Fish, Reference Librarian, North Carolina Supreme Court Library, to Sally Greene (Oct. 15, 2008, 12:22:16 CST) (on file with the North Carolina Law Review).

244. KENNETH P. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 3 (1956); ROBERTS-MILLER, *supra* note 229 (manuscript at 28).

245. ROBERTS-MILLER, *supra* note 229, at 2.

246. *Id.* at 17.

247. *State v. Mann*, 13 N.C. (2 Dev.) 263, 264 (1829).

248. *Id.* at 266.

himself and to all “those who most benefit from (and promote) the systemic injustice” of slavery.<sup>249</sup>

The consequence of such rhetoric is to preclude real debate—not simply to declare that one party is right (as a legal opinion must), but to present the argument as closed from the beginning. Ruffin’s opinion rejects the notion that any claim of assault brought on behalf of a slave against any “person having command of the slave” could prevail against the combined interest of “the property of the master, his security and the public safety.”<sup>250</sup> It assertively avoids an analysis of conflicting principles. It is not seriously engaged in a balancing of competing interests (although the opportunity to weigh the interest of the hirer against that of the owner was certainly available). Within the conventions of a judicial opinion, it is a discourse upon the proper rules of behavior “while slavery exists amongst us in its present state”<sup>251</sup> (and upon the judiciary’s supposed inability to intervene), written with a wary eye toward those who would challenge its very existence. In this respect, again the rhetoric of *State v. Mann* aligns with contemporaneous writings of defensive slaveholders who “sought to render principles irrelevant to discussions of policy”<sup>252</sup>—who in so doing “increasingly curtailed free discussion of alternative viewpoints on how southern society should be ordered.”<sup>253</sup>

#### CONCLUSION

“The instability of human knowledge is one of our few certainties,” the journalist Janet Malcolm has written. “Almost everything we know we know incompletely at best. And nothing remains the same when retold.”<sup>254</sup> What the archives have to tell us about the Chowan County trial of a poor white slave hirer named John Mann fills in certain gaps, while leaving other questions unanswered. We can conclude, at least provisionally, that the guilty verdict announced by a jury of slaveholders was a principled result, a public vindication of the interest of the slave Lydia’s owner, the

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249. ROBERTS-MILLER, *supra* note 229, at 18.

250. *Mann*, 13 N.C. (2 Dev.) at 265–66.

251. *Id.* at 268.

252. BRUCE, *supra* note 195, at 178.

253. YOUNG, *supra* note 179, at 218; *see also* ROBERTS-MILER, *supra* note 229, at 18 (calling the conservative stance “a view of history that, in various ways, occludes the practical and particular historical causes of and pragmatic solutions to political problems thereby severely limiting the role that rhetoric—that is, public argument—can play in identifying the various options to a polis”).

254. Janet Malcolm, *Strangers in Paradise: How Gertrude Stein and Alice B. Toklas Got to Heaven*, NEW YORKER, Nov. 13, 2006, at 55.

orphan girl Elizabeth Jones, as well as Elizabeth's guardian Josiah Small. We can speculate, on the basis of an evolving, unsettled body of law governing the rights and relations of masters, hirers, and slaves, that the common law was capacious enough to have sustained a jury's conviction on appeal. The remaining task, then, becomes not to understand Ruffin's opinion as a logical and inevitable statement of law, but rather to try to comprehend what did motivate him to overturn the jury's verdict (and to do so in such sweeping terms). We are free, that is, to analyze *State v. Mann* as a work of rhetoric that arises within a particular context.

Ruffin's Virginia background, his position as a prominent North Carolina lawyer and planter, and evidence from the text itself suggest a context of an emerging resistance to pressures upon the planter elite to become a more inclusive polity, pressures accompanied by continuing threats of slave revolt. Among other possible ways we might read *State v. Mann*, then, we can situate it along a continuum of increasingly proslavery polemics, between the positions taken by the conservative Virginians in 1829–1830, who sought at least to contain slavery as part of their successful campaign against efforts to dilute their political power, and the full-throttle defense of slavery mounted by Thomas Dew in the aftermath of the Virginia slavery debates of 1831–1832.<sup>255</sup> But Ruffin's rhetoric did not just arise within a certain historical moment; he took an active part in defining the moment, making decisions about what mattered and what did not. He chose to elevate the slave hirer John Mann to the status of a master. With that act, he created the urgent situation for which his judicial response became the commanding solution.<sup>256</sup>

In some ways, *State v. Mann* was a perfect storm, the surprising end point of a series of fateful contingencies. If Mann had been possessed of assets, the most likely response to the assault would have been an uncontroversial civil claim for damages. If the case had been tried when it was first docketed, in the spring of 1829, Ruffin would

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255. See DEW, *supra* note 212. On the Virginia slavery debate, see DUNN, *supra* note 192, at 49–55.

The Virginia debate of 1831–1832 marked one of the last chances the nation had to reverse course before the tragedy of the Civil War. If Virginians had shown true leadership, if they had courageously and farsightedly voted on a plan to abolish slavery, perhaps American history would have flowed in a different channel.

*Id.* at 55. For a helpful discussion of Dew's treatise, see DUNN, *supra* note 192, at 57–60. See also *supra* note 212 (putting Dew's work in context).

256. See Richard E. Vatz, *The Myth of the Rhetorical Situation*, in CONTEMPORARY RHETORICAL THEORY: A READER 226 (John Louis Lucaites et al. eds., 1999).

not yet have been on the supreme court to hear the appeal. If the incident had happened a year earlier, in fact, Ruffin would have presided over the trial. Perhaps a different jury instruction would have led to an acquittal. Or perhaps in this setting, he would have behaved differently: perhaps his interactions with a jury composed of fellow slaveowners would have resulted in Mann's conviction, perhaps with an appeal, or perhaps not. But it is "useless," as Ruffin would say, to embark upon such a train of speculation. *State v. Mann* as we know it quietly inserted itself into the body of North Carolina law, upon which subsequent North Carolina cases worked, if not to undo it, at least to mitigate its effect.<sup>257</sup>

The real storm coalesced once *State v. Mann* began to circulate more widely: it came from the direction of those living outside of the regions "where institutions similar to [Ruffin's] own exist[ed] and [were] thoroughly understood."<sup>258</sup> Though Ruffin surely expected that his words would reach a northern audience, he could not control the way in which those words would be taken. In a development far exceeding his intent, the opinion underwent a kind of "ideological drift," to borrow a concept from Jack Balkin.<sup>259</sup> For the abolitionists, Ruffin's shockingly frank depiction of slavery's dependency on the "absolute" physical power of one body over another became a rallying cry against the entire institution. "In fact," writes Laura Korobkin, "it is far more likely that *State v. Mann* would never have become notable in the legal community had it not been taken up and widely circulated by the abolitionist press."<sup>260</sup> Well before Stowe made the opinion the centerpiece of her 1856 novel *Dred*, it was broadly condemned. As Korobkin notes, it was cited in Garrison's *Liberator* (repeatedly, beginning in 1839)<sup>261</sup> and in Charles Elliott's 1850 *Sinfulness in American Slavery: Proved from Its Evil Sources*.<sup>262</sup> It was quoted the same year in a letter to the House of Representatives "to prove that 'the law sanctions every atrocity

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257. See OAKES, *supra* note 24, at 161–66.

258. *State v. Mann*, 13 N.C. (2 Dev.) 263, 264 (1829).

259. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870–72 (1993).

260. Korobkin, *supra* note 21, at 386.

261. *Antislavery Lecture IV: Contentment! Happiness! Kind Treatment!* LIBERATOR (Boston), May 31, 1839, at 85.

262. CHARLES ELLIOTT, *SINFULNESS OF AMERICAN SLAVERY: PROVED FROM ITS EVIL SOURCES; ITS INJUSTICES; ITS WRONGS; ITS CONTRARIETY TO MANY SCRIPTURAL COMMANDS, PROHIBITIONS, AND PRINCIPALS, AND TO THE CHRISTIAN SPIRIT; AND FROM ITS EVIL EFFECTS; TOGETHER WITH OBSERVATIONS OF EMANCIPATION, AND THE DUTIES OF AMERICAN CITIZENS IN REGARD TO SLAVERY* 222 (B. F. Tefft ed., 1850).

perpetrated upon the slave.’ ”<sup>263</sup> The opinion became so well known among abolitionists that it could be invoked without being called by name.<sup>264</sup> As Alfred Brophy puts it elsewhere in this Issue, the “clarity of thought” in Ruffin’s opinion facilitated the abolitionists’ “critique [of] the proslavery legal system.”<sup>265</sup>

As an unintended exhibit for the brief against slavery, *State v. Mann* might also be read as part of an earlier conversation, within a body of southern work so stubbornly opposed to any critical discussion of slavery that it resulted in a backlash even prior to the Garrisonian period. In the 1820s, according to David Blight, antislavery activists were already sensing the futility of appeals to moral right; increasingly they saw southerners as “impervious to persuasion.” What they read in southern sources became a “radicalizing stimulus” for their advocacy. The abolitionists’ shift of tactics from gradualism to “immediatism,” in part fueled by a strong Christian evangelical movement, thus also reflected “a rational response to the steadily rising temper of southern intransigence and a dilemma of diminishing alternatives.”<sup>266</sup> Considered in this light, Ruffin’s insistence, for example, that he was powerless to act without the legislature’s authority was a way of absolving himself, akin to other southern writers’ invocation of an even higher authority.<sup>267</sup> “Appeals to ‘Divine Providence’ were a release from responsibility for many defenders of slavery,” writes Blight. “Psychologically released from culpability, and resigned to a vague faith in divine guidance, many slaveowners avoided seeking solutions.” Abolitionists viewed these appeals as “proslavery ploys,” for

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263. Korobkin, *supra* note 21, at 388 (quoting William Jay, *Review of Clay Compromise: Letter to Hon. William Nelson, M.C., from William Jay*, THE NATIONAL ERA, Feb. 28, 1850, at 53).

264. *Id.* at 387–89; see also Brophy, *supra* note 232, at 799, 807 (“Indeed, abolitionists used *State v. Mann* as a centerpiece of their attack on slavery and the law.”).

265. Brophy, *supra* note 232, at 853.

266. Blight, *supra* note 180, at 142, 144, 162. Building upon David Brion Davis’ definition, Blight calls immediatism “a ‘surrogate religion,’ representing expression of moral sincerity, eagerness for sacrifice, adoption of anti-institutional individualism, and heightened militancy.” *Id.* at 141; see also NEWMAN, *supra* note 180, at 86–106 (noting that the influence of the African American moral confrontation of slavery helped facilitate the movement among white reformers to adopt a more impassioned, emotional response). See generally, David Brion Davis, *The Emergence of Immediatism in British and American Antislavery Thought*, in ANTE-BELLUM REFORM 139 (David Brion Davis ed., 1967) (discussing the shift in social attitudes from a detached, rational abolitionist strategy to a sense of moral responsibility resulting in a transition from gradualism to “immediatism”).

267. *State v. Mann*, 13 N.C. (2 Dev.) 263, 268 (1829). Recall also that Ruffin adds a suggestion that no less authority than “the law of God” could sanction a slave’s appeal from his master. *Id.* at 267.

“[w]aiting humbly for ‘Providence’ to undermine slavery was hardly what most [of them] had in mind.”<sup>268</sup> Whereas southerners like Ruffin looked to the north (where “[i]t is impossible” that a case such as *State v. Mann* “can be appreciated”) and saw “a false and fanatical philanthropy,”<sup>269</sup> abolitionists were already responding by developing “an ideology of faith in man’s perfectibility, coupled with an apocalyptic view of the world.”<sup>270</sup> This fruitless interchange “demonstrated how morally irreconcilable America’s conflict over slavery had already become.”<sup>271</sup>

Ruffin’s thought during the crucial period of the 1820s and into the 1830s merits further study. Along the lines of the ideological impasse discussed above, such scholarship might take into account Perry Miller’s claim that a fundamental “disillusion[ment] about human nature” was characteristic of lawyers in both the North and the South—a tendency that “eventually . . . color[ed] the curiously fatalistic complexion of the Civil War,”<sup>272</sup> a claim explored from a different angle by Robert Cover.<sup>273</sup> Such study might elaborate on the significance of religion to Ruffin’s ideas about slavery, considering him and Dew as fellow Episcopalians.<sup>274</sup> Within a period that, for all its “stiffening of proslavery intransigence,”<sup>275</sup> nevertheless (as witnessed by the Virginia slavery debates) “retained a residual sense that slavery was not immutable,”<sup>276</sup> more can be learned about how Ruffin reflected southern thought and how he shaped it.

The Chowan County story of *State v. Mann*, meanwhile, remains incomplete. With more sleuthing in the archives, it might yet be possible to connect Elizabeth Jones firmly to living descendants.<sup>277</sup>

268. Blight, *supra* note 180, at 147.

269. *Mann*, 13 N.C. (2 Dev.) at 264, 268.

270. Blight, *supra* note 180, at 147.

271. *Id.* at 151.

272. PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 214, 228 (1965).

273. COVER, *supra* note 52, at 119–30. Ruffin’s insistence that he is powerless before the command of law is an example of what Cover calls “judicial ‘can’t,’” a rhetorical move that he identifies primarily (but not exclusively) among judges in free states resolving fugitive slave cases against the freedom of the slave—a strategy that “seemed to move [the conversation] in a direction less and less susceptible to ameliorist solutions.” *Id.* at 121. Cover mentions *State v. Mann* in passing. *Id.* at 121 n.7.

274. O’BRIEN, *supra* note 179, at 943.

275. Blight, *supra* note 180, at 142.

276. O’BRIEN, *supra* note 179, at 942.

277. The Jethro and Elizabeth Riddick found in Gates County in 1850 may not be the same Jethro Riddick and Elizabeth Jones who married in Chowan County in 1841. See *supra* note 30. One of the children of Jethro H. and Elizabeth Riddick, Carolina, married Alford Rountree; they are buried, with other relatives, near Hobbsville, Gates County,

As to Lydia, her trail has receded far beneath the surface of the archival evidence. Although much of the story is lost, one conclusion is clear: in daring to resist John Mann's abuse, Lydia made a bid for freedom that became far more effective than she would surely ever know.

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North Carolina. See Rountree Cemetery Hobsville Road, <http://www.throughwire.net/gates/family/rountreehobbsville.htm> (last visited Feb. 15, 2009). Information about living descendants in this line (some of them still in Gates County) comes from Elmer T. Johnston Jr. of Chesapeake, Virginia. E-mails from Elmer T. Johnson, Jr. to Sally Greene (Aug. 2, 2006, 08:42 EST and Aug. 3, 2006, 08:19 EST) (on file with the North Carolina Law Review). Johnston was unable to provide any specific information about Elizabeth Riddick's life.





3-1-2009

# Judging Thomas Ruffin and the Hindsight Defense

Eric L. Muller

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## JUDGING THOMAS RUFFIN AND THE HINDSIGHT DEFENSE\*

ERIC L. MULLER\*\*

*Judge Thomas Ruffin of the antebellum Supreme Court of North Carolina enjoys the reputation as one of the great judges of the nineteenth century; some rank him among the greats of all American history. This reputation has been little tarnished by his authorship of State v. Mann, an opinion that has become one of the central texts of the American law of slavery due to its savage endorsement of the right of the temporary hirer of a slave to shoot her in the back without risking criminal sanction.*

*Scholars have hesitated to condemn Judge Ruffin for his Mann opinion. To some extent, this is because Ruffin professed great personal anguish in that opinion at the harshness of its outcome. In addition, the archival record seemed to contain few clues (beyond the Mann opinion itself) about Ruffin's attitudes toward slavery and his own slaves. Finally, and relatedly, scholars have wished to honor what the Article calls the "hindsight defense" of historical actors—the claim that present observers cannot fairly assess the behavior of figures from the past because they will inevitably ignore the culture and morals of that earlier time.*

*This Article presents newly discovered archival evidence that places Judge Ruffin and his Mann opinion in a much more troublesome light. The evidence reveals Ruffin to have been a batterer of slaves, a speculating slave trader at a time when that trade had become disreputable, and a serial breaker of slave families. These new disclosures not only force a reconsideration*

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\*\* Dan K. Moore Distinguished Professor in Jurisprudence and Ethics, University of North Carolina School of Law. I owe thanks to my friend Sally Greene for helping me see how Thomas Ruffin's life and legacy relate to the themes of historical memory and responsibility that so interest me—and for giving me great comments on an early draft of this paper. I also owe thanks to the staff of the Manuscripts Department of the Louis Round Wilson Library at the University of North Carolina at Chapel Hill, particularly Matthew Turi, Aidan Smith, Nathaniel King, and Timothy Williams. John Orth, Adrienne Davis, Al Brophy, and Leslie Branden-Muller read drafts of the paper and offered helpful feedback.

I dedicate this Article to the memory of Bridget, Dick, Noah, and November.

*of Judge Ruffin and his Mann opinion, but also suggest that the "hindsight defense" of historical actors is often excessively simplistic and reductionist.*

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#### INTRODUCTION

When Thomas Ruffin died at the age of eighty-three on January 15, 1870, the obituarists outdid themselves. “[A]s a jurist and Chief Justice of North Carolina,” said the Raleigh *Sentinel*, Ruffin’s “fame ha[d] gone abroad in the land, across the great waters;” with his death, “the whole state and humanity itself” had “lost something . . . of the dignity and prestige of the Judiciary.”<sup>1</sup> “In all the history of North Carolina there has not lived or died a better man,”<sup>2</sup> opined the *North Carolina Standard*. “He is not only a loss to his family and friends but to the whole country,” said Ruffin’s hometown newspaper, the *Hillsborough Recorder*, which also expressed the hope that the “example of his life” and “the truth of his opinions” would “prove a voice, speaking from the tomb for the good of his country and the happiness of mankind.”<sup>3</sup>

Nevermind that the “example of [Ruffin’s] life” included not just owning human beings but trafficking in them, battering somebody else’s slave for giving him a look that he did not like, and repeatedly

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1. Obituary, *Thomas Ruffin*, THE SENTINEL (Raleigh, N.C.), Jan. 19, 1870, at 4, reprinted in 4 THE PAPERS OF THOMAS RUFFIN 229, 230 (J.G. de Roulhac Hamilton ed., 1920).

2. Obituary, *Thomas Ruffin*, THE NORTH CAROLINA STANDARD, Jan. 18, 1870, at 2.

3. *The Death of Judge Ruffin*, THE HILLSBOROUGH RECORDER, Jan. 26, 1870, at 3.

separating husbands from wives and parents from children.<sup>4</sup> Nevermind that the opinions whose truth the obituaries praised included Ruffin's opinion in *State v. Mann*,<sup>5</sup> which went out of its way to bolster a slave owner's "uncontrolled authority over the body" of his slave,<sup>6</sup> and *Cannon v. Jenkins*,<sup>7</sup> which volunteered, in dictum, that an estate executor ought to break up a slave family if separate sales would bring a higher price.<sup>8</sup> These facets of Ruffin's life did not matter to his contemporaries—or at least those who wrote his eulogies.

Neither, apparently, did they matter to those who commissioned a statue of Ruffin in 1915 and placed it at the entrance to the Court of Appeals of North Carolina,<sup>9</sup> or to those at the University of North Carolina at Chapel Hill who named a new dormitory to honor him in 1922.<sup>10</sup> Nor did they seem to matter to Harvard Law School Dean Roscoe Pound, who, as late as 1936, identified Thomas Ruffin as one of the "great judges of the formative era of our law."<sup>11</sup>

Only in recent years has Ruffin's authorship of *State v. Mann* come to diminish his reputation. But scholars have trodden tentatively. Its title notwithstanding, Sally Hadden's important essay *Judging Slavery: Thomas Ruffin and State v. Mann*<sup>12</sup> offers little in the way of judgment. Hadden did valuable work in Ruffin's archived writings, work that revealed Ruffin as a sterner, more cold-hearted person and slave owner than scholars had thought.<sup>13</sup> Hadden nonetheless accepted Ruffin's claim that he truly "lamented" the brutality of slavery and concluded that Ruffin "understood slavery's

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4. See *infra* Part V.

5. 13 N.C. (2 Dev.) 263 (1829).

6. *Id.* at 266.

7. 16 N.C. (1 Dev. Eq.) 422 (1830).

8. *Id.* at 426.

9. See Sally Greene, *Judge Thomas Ruffin and the Shadows of Southern History*, in *COMMEMORATION AND THE AMERICAN CITY: ESSAYS ON MONUMENTS, MEMORIALIZATION, AND MEANING* (David Gobel & Daves Rossell eds., forthcoming 2009).

10. University of North Carolina at Chapel Hill, *Carolina Story—Names Across the Landscape: Thomas Ruffin*, <http://museum.unc.edu/exhibits/names/thomas-ruffin-1787-1870-and-ruffin-residence-hall> (last visited Feb. 27, 2009).

11. See ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 84 (1938). Pound delivered his opinion of Ruffin in a lecture in 1936; that lecture was published in 1938. *Id.* at vi–vii.

12. Sally Hadden, *Judging Slavery: Thomas Ruffin and State v. Mann*, in *LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH* 1–28 (Christopher Waldrep & Donald C. Nieman eds., 2001).

13. See *id.* at 6–11.

basic immorality.”<sup>14</sup> Similarly, in his seminal work *Slave Law in the American South*, Mark Tushnet accepted Ruffin’s professions of anguish at the outcome of *State v. Mann* as demonstrations of “candor” and Southern “honor.”<sup>15</sup> Only Sanford Levinson has explicitly called the question of out-and-out *judging* Thomas Ruffin for his authorship of *State v. Mann*.<sup>16</sup> And he did not answer the question he called.<sup>17</sup>

There is a reason for this reluctance to judge Thomas Ruffin that goes beyond the sense among historians that it is not their professional role to assign blame to figures from the past.<sup>18</sup> That reason is what might be termed the “hindsight defense” of historical figures. Writing fourteen years ago, Sanford Levinson put the point clearly: “It is, of course, a cheap thrill to denounce Ruffin . . . from the safety of a 1995 perspective.”<sup>19</sup> The hindsight defense posits that we cannot fairly or accurately judge historical figures because we inevitably do so by reference to the morality and customs of our own day rather than the morality and customs of theirs. It is a common, almost instinctive, objection that gets voiced whenever someone calls attention to the darker sides of our American heroes. It was, for example, Wyoming Senator Malcolm Wallop’s reaction when Congress considered an apology and reparations payments for Franklin Roosevelt’s wartime incarceration of Japanese Americans: “[T]o superimpose the peacetime mentality of today on the past and to judge our predecessors on that account is . . . ‘[t]he hindsight wisdom of a Monday morning quarterback.’”<sup>20</sup>

In this Article, I will argue against the hindsight objection, both as a general proposition and specifically in the case of Thomas Ruffin. First, as a general matter, the hindsight objection rests on a simplistic idea of what any particular moment actually represents in the course of a society’s history. The hindsight objection conceives of historical moments as monoliths—times in which “people” believed or thought a particular thing or acted in a particular way. Yet on most matters of

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14. *Id.* at 18.

15. MARK TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* 93–96 (2003).

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

17. See *id.* at 1969, 1980.

18. See TREVOR BURNARD, *MASTERY, TYRANNY & DESIRE: THOMAS THISTLEWOOD AND HIS SLAVES IN THE ANGLO-JAMAICAN WORLD* 31 (2004) (“As historians, it is not our responsibility to attribute retrospective blame.”).

19. Levinson, *supra* note 16, at 1975.

20. 134 *CONG. REC.* 7608, 7615 (1988) (statement of Sen. Wallop).

later consequence, this is often verifiably false; careful examination of history often reveals considerable diversity of opinion and practice and the possibility of meaningful, and morally consequential, choice.

Second, whatever the abstract merits of the hindsight objection, Thomas Ruffin is in a uniquely poor position to avail himself of it. In drafting his opinion in *State v. Mann*, Ruffin turned his gaze directly to readers who were outside what he understood as his own framework. *State v. Mann* was exquisitely aware of the certainty of judgment by outsiders; Ruffin expected that judgment and crafted an opinion that would respond to and defend against it. And even more to the point, Ruffin enlisted the passage of time as a rhetorical and substantive weapon in *State v. Mann*: the opinion depended on Ruffin's confident prediction that a future generation would see the rightness of his judgment. Having invoked the passage of time as his sword in *State v. Mann*, Ruffin should not be heard to raise it as a shield.

And third, even if we entertain a hindsight objection tendered on Ruffin's behalf, that objection is invalid on its merits. The archives contain a good deal more evidence about Thomas Ruffin's views and practices concerning slaves and slavery than scholars have heretofore uncovered. This new material reveals that Ruffin's personal "lamentations" about the harsh outcome of *State v. Mann* likelier reflected posturing than honest confession. The full archival record shows that Thomas Ruffin was not among the better men of his time and place on matters relating to slavery and that he may have been among the worst.

#### I. *STATE V. MANN* AND THE CURIOUSLY STURDY REPUTATION OF THOMAS RUFFIN

Thomas Ruffin is seen differently today from how he was seen at the time his obituaries appeared in North Carolina newspapers. To his contemporaries, or at least those of his race and class, Ruffin was a figure of towering accomplishment, and his memory retained that aura for at least seven decades.<sup>21</sup> Today, he is a figure of discomfort. Scholars struggle to reconcile his many accomplishments with his authorship of *State v. Mann*, perhaps the coldest and starkest defense of the physical violence inherent in slavery that ever appeared in an

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21. The glowing evaluation of Ruffin by Dean Roscoe Pound, cited in *supra* note 11, came in 1936, nearly seventy years after Ruffin's death. See TUSHNET, *supra* note 15, at 74.

American judicial opinion.<sup>22</sup> To say the least, *State v. Mann* has complicated the narrative of an American legal hero.

Notably, though, *State v. Mann* has not come close to destroying that narrative. Ruffin remains a celebrated figure. His imposing statue still greets every visitor to the Court of Appeals of North Carolina. Each year, ninety-five students at the University of North Carolina at Chapel Hill live in a dormitory that bears his name. The local chapter of the international legal fraternity Phi Alpha Delta at the university is the Ruffin Chapter. While Ruffin's portrait does not hang on the walls of the university's law school, it does adorn the chamber of the campus's Dialectic Society.

Ironically, part of the durability of Ruffin's reputation comes from the very thing that most tarnishes it: the opinion in *State v. Mann*. Others have analyzed the *Mann* opinion with great sophistication,<sup>23</sup> so only the briefest of summaries is needed here.<sup>24</sup> John Mann leased the slave Lydia from her owner for the year 1828.<sup>25</sup> When she committed what the reported opinion calls "some small offense," Mann began to "chastise" her.<sup>26</sup> Lydia ran off during the punishment.<sup>27</sup> Mann shot her in the back as she ran, wounding but not killing her.<sup>28</sup> It was already settled North Carolina law that a stranger to a slave—that is, a person not the slave's owner—could be indicted for the crime of battery in a situation of this sort.<sup>29</sup> On the other hand, as Sally Hadden reports, "[l]ocal officials rarely intervened when an owner struck or shot a slave."<sup>30</sup> John Mann was neither a stranger to Lydia nor was he her true owner; he was a leaseholder. *State v. Mann* therefore appeared to present the legal

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22. The scholarly conference that spawned the articles published in this symposium, "The Perils of Public Memory: *State v. Mann* and Thomas Ruffin in History and Memory," held at the University of North Carolina at Chapel Hill on November 16, 2007, testifies to the difficulty of squaring Ruffin's celebrated memory with his authorship of *Mann*.

23. The most noteworthy analysis is undoubtedly Mark Tushnet's. See TUSHNET, *supra* note 15, at 20–37.

24. The facts I relate come from The Supreme Court of North Carolina's opinion. However, Sally Greene's contribution to this symposium, *State v. Mann Exhumed*, 87 N.C. L. REV. 701, 707–27 (2009), presents new archival evidence that significantly expands our understanding of the case.

25. *State v. Mann*, 13 N.C. (2 Dev.) 263, 263 (1829).

26. *Id.*

27. *Id.*

28. *Id.*

29. See *State v. Hale*, 9 N.C. (2 Hawks) 582, 584 (1823) (finding there is "as much reason" for making a stranger's battery of a slave indictable "as if a white man had been the victim").

30. Hadden, *supra* note 12, at 9.

question of whether, under the common law, the leaseholder of a slave could be indicted for the crime of battery.

Judge Ruffin did not cast the question so narrowly, however; he did not choose to draw what might seem an inviting distinction between a person who owned a slave and a person who merely leased a slave. He reported instead that the law “uniformly” treated “the hirer and possessor of a slave” as, “for the time being, the owner” for the purposes of both “rights and duties.”<sup>31</sup> As Judge Ruffin shaped it, the case therefore presented the question of whether a slave owner—temporary *or* permanent—could be indicted for the common-law crime of battery for using excessive physical force against his slave.<sup>32</sup>

Judge Ruffin held that he could not. Slaves could be compelled to a lifetime of work only if they lacked independent will, and the only way to strip them of that will was to confer on the slave’s owner an “uncontrolled authority over [her] body.”<sup>33</sup> As Ruffin memorably put it, “[t]he power of the master must be absolute to render the submission of the slave perfect.”<sup>34</sup> And that power insulated the owner from criminal responsibility even for “instances of cruelty and deliberate barbarity.”<sup>35</sup> The legislature might, if it wished, “interpose express enactments to the contrary;” that is, it might pass a statute clearly extending the scope of the crime of battery to cover a slave owner.<sup>36</sup> But a court—that is to say, Judge Thomas Ruffin—could not do so through a judicial opinion.

This was a cold outcome, to be sure: a man shoots a woman in the back, and a judge refuses to hold him accountable. But Judge Ruffin protected himself from judgment by studding the opinion with confessions of his personal distaste for the outcome and of the distress that the case had brought him. The confessional tone began with Judge Ruffin’s very first line: “A Judge cannot but lament when such cases as the present are brought into judgment.”<sup>37</sup> And it continued all the way through to the opinion’s final paragraph, in which Judge Ruffin reported that he “would gladly have avoided th[e] ungrateful question” that the case presented.<sup>38</sup> In between this opening and this closing, Judge Ruffin repeatedly bared what he

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31. *Mann*, 13 N.C. (2 Dev.) at 265.

32. *See id.* at 264–65.

33. *Id.* at 266.

34. *Id.*

35. *Id.* at 267.

36. *See id.* at 268.

37. *Id.* at 264.

38. *Id.* at 268.

reported to be his anguish. He wrote that the case opened a “severe” “struggle” in his “own breast” between his “feelings [as a] man” and his “duti[es as a] Magistrate.”<sup>39</sup> And he “most freely confess[ed his] sense of the harshness of th[e] proposition” that he used the case to establish.<sup>40</sup> “I feel it as deeply as any man can,” Judge Ruffin wrote.<sup>41</sup> But all of this personal distress was beside the point. With “reluctance,” Ruffin claimed, he was “compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina.”<sup>42</sup>

Judge Ruffin’s tone of self-disclosure appears to have succeeded in blunting personal criticism in his own day. Harriet Beecher Stowe, no friend of slavery or its defenders, was quite taken with Ruffin’s profession of anguish. In *The Key to Uncle Tom’s Cabin*, Stowe wrote of *State v. Mann* and its author that one could not “read th[e] decision, so fine and 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.”<sup>43</sup> “[J]udging [Ruffin] from the short specimen” of the opinion in *State v. Mann*, Stowe concluded that he had “one of that high order of minds which looks straight through all verbiage and sophistry to the heart of every subject which it encounters.”<sup>44</sup> Stowe accepted Ruffin’s claim that the law left him with no choice but the outcome that so pained him: he was a man of “honor,” of “humanity,” and of “the kindest and gentlest feeling” who was “obliged to interpret these severe laws with inflexible severity.”<sup>45</sup>

Francis Nash, a prominent North Carolina lawyer of the generation that followed Ruffin’s, proved himself equally unfazed by *State v. Mann* in his biography of Ruffin that appeared in the *Charlotte Observer* in 1905.<sup>46</sup> “As a judge,” wrote Nash, Ruffin’s “excellence was supreme”—on par with that of Chief Justice John

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39. *Id.* at 264.

40. *Id.* at 266.

41. *Id.*

42. *Id.* at 264.

43. HARRIET BEECHER STOWE, *THE KEY TO UNCLE TOM’S CABIN* 147 (1853) [hereinafter *STOWE, THE KEY TO UNCLE TOM’S CABIN*]; see also 1 HARRIET BEECHER STOWE, *SUNNY MEMORIES OF FOREIGN LANDS* 261 (1854) (“It always seemed to me that there was a certain severe strength and grandeur about [the opinion in *State v. Mann*] which approached to the heroic.”).

44. STOWE, *THE KEY TO UNCLE TOM’S CABIN*, *supra* note 43, at 147–48.

45. *Id.* at 133.

46. Francis Nash, *Chief Justice Thomas Ruffin*, in 1 *THE PAPERS OF THOMAS RUFFIN* 35, 39 (J.G. de Roulhac Hamilton ed., 1918).

Marshall.<sup>47</sup> His opinions were notable for “their breadth of view, fullness of discussion, the battle-axe force of their reasoning, the strength of their language, and the almost inevitable character of their conclusions.”<sup>48</sup> In support of this characterization, Nash cited Ruffin’s opinion in *State v. Boyce*,<sup>49</sup> in which the court held that a slave owner could not be charged with the crime of maintaining a disorderly house for allowing his slaves to dance and sing on Christmas Eve.<sup>50</sup> In his essay, Nash included—but was apparently not troubled by—Ruffin’s comment that these “noisy outpourings of glad hearts” were God’s blessing on slaves, creatures with “corporeal vigor” but “vacant mind[s].”<sup>51</sup> Nash did not, however, cite *State v. Mann* as evidence of Ruffin’s “battle-axe” logic and “inevitable” conclusions. In fact, he did not mention *Mann* at all.

Neither did Harvard Law School Dean Roscoe Pound mention *Mann* in 1936, when he listed Thomas Ruffin as one of the great common-law judges in United States history.<sup>52</sup> In Pound’s eyes, *Mann* presumably did not detract from Ruffin’s excellence in regularly satisfying what Pound identified as the three criteria of great judging: “reasoned application of the law the judges receive from a tradition; responsiveness to the need to adapt the law to new circumstances; and attention to the role of judicial decisions as precedent.”<sup>53</sup>

Historian Julius Yanuck did include *State v. Mann* in his important 1955 article “Thomas Ruffin and North Carolina Slave Law,” but *Mann* did not detract from the author’s assessment of Ruffin’s Chief Judgeship as a time of amelioration in the slave law of the state.<sup>54</sup> Ruffin’s position in *Mann* was harsh, Yanuck conceded,<sup>55</sup> but several things tempered it: Ruffin’s “deep aversion”<sup>56</sup> to its

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47. *Id.*

48. *Id.*

49. 32 N.C. (10 Ired.) 536 (1849).

50. *Id.* at 541.

51. *Id.*

52. See POUND, *supra* note 11, at 4.

53. TUSHNET, *supra* note 15, at 74–75. Martin H. Brinkley’s “brief history” of the Supreme Court of North Carolina that appears on the court system’s website echoes this assessment, saying nothing at all about *State v. Mann* or Ruffin’s contributions to the law of slavery. See Martin H. Brinkley, *Supreme Court of North Carolina: A Brief History*, <http://www.aoc.state.nc.us/www/copyright/sc/facts.html> (last visited Feb. 27, 2009).

54. Julius Yanuck, *Thomas Ruffin and North Carolina Slave Law*, 21 J. S. HIST. 456, 475 (1955).

55. *Id.* at 462.

56. *Id.*

“unpleasant”<sup>57</sup> outcome, the “sincere personal distaste”<sup>58</sup> that Ruffin felt for the result that logic commanded, and especially the fact that Ruffin was “himself the most moral of men”<sup>59</sup> who was “humane toward his slaves.”<sup>60</sup> *Mann* permitted needless violence against slaves under the guise of “correction,” but Yanuck, who found in Ruffin’s papers “no ill-treatment of slaves,”<sup>61</sup> was confident—erroneously, as will soon become clear—that “it was . . . unthinkable that Ruffin and the many planters of his status in society would ordinarily avail themselves of the full latitude permitted them in correcting their slaves.”<sup>62</sup>

And as noted earlier, even the leading recent work on Ruffin, while offering a more clear-eyed view of *Mann*’s place in Ruffin’s career, has taken Ruffin’s professions of anguish more or less at face value. Sally Hadden reported herself “skeptical” that Thomas Ruffin’s professed “paternalism” toward slaves was “sincere” or “more than skin-deep”<sup>63</sup> but nonetheless accepted that Ruffin “lament[ed] the brutality of slavery” and “understood slavery’s basic immorality.”<sup>64</sup> Mark Tushnet, too, accepted that Ruffin “believed that absolute dominion [of master over slave] was indeed morally repugnant”<sup>65</sup> and that Ruffin’s “statements of regret” in *State v. Mann* came from the judge’s firm commitment to “developing a sound rule of law” notwithstanding the presence in the case of contrary “circumstances” that he would have found “appealing.”<sup>66</sup>

The subject matter of *State v. Mann* was obviously volatile. The care with which Thomas Ruffin honed the language of the opinion through three complete drafts reflects his awareness of the opinion’s sensitivity.<sup>67</sup> By lacing the opinion with confessions of personal anguish and moral discomfort, Ruffin built a firewall against our judgment. That firewall has weakened over 180 years, but it has not crumbled.

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57. *Id.* at 463.

58. *Id.*

59. *Id.* at 466.

60. *Id.* at 474.

61. *Id.* at 475.

62. *Id.* at 473–74.

63. Hadden, *supra* note 12, at 8.

64. *Id.* at 18.

65. TUSHNET, *supra* note 15, at 63.

66. *Id.* at 84.

67. The three drafts appear in 4 THE PAPERS OF THOMAS RUFFIN, *supra* note 1, at 249–57.

II. *STATE V. MANN* AND THE HINDSIGHT DEFENSE

Confessed anguish is not the only thing that has kept *State v. Mann* from swamping Thomas Ruffin's reputation. So too has the passage of time. Slavery ended a few decades after Ruffin wrote his opinion; the culture that sustained the institution withered after slavery's demise. In the United States today, slavery is outlawed, its culture foreign and unfamiliar.

We are therefore doubly reluctant to judge Judge Ruffin for his authorship of *State v. Mann*: not only did he confess to us his personal discomfort over the harshness of the decision, but he lived in an earlier world so different from our own that we fear we cannot judge him fairly. We have the benefit of hindsight, something that Thomas Ruffin of necessity lacked. Thus, as we consider the case of Thomas Ruffin, he stands before us with a well-pled "hindsight defense."

An especially eloquent articulation of the hindsight defense of historical figures is that of the nineteenth-century British politician and historian Thomas Babington Macaulay. In 1835, Macaulay published a review of an edited publication of Sir James Mackintosh's *History of the Revolution in England*.<sup>68</sup> Macaulay's review praised Mackintosh but faulted the volume's unnamed editor for "the contempt with which [he thought] fit to speak of all things that were done before the coming in of the very last fashions in politics."<sup>69</sup> This error, Macaulay wrote, was "as pernicious as almost any error concerning the transactions of a past age can possibly be."<sup>70</sup> To "form a correct estimate" of the "merits" of a prior generation, Macaulay argued that "we ought to place ourselves in their situation, to put out of our minds, for a time, all that knowledge which they, however eager in the pursuit of truth, could not have, and which we, however negligent we may have been, could not help having."<sup>71</sup> "Undoubtedly," Macaulay conceded, "it is among the first duties of a historian to point out the faults of the eminent men of former generations."<sup>72</sup> But as a matter of fairness, historians owe it to those eminent men to strip away hindsight and see the world as their

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68. THOMAS BABINGTON MACAULAY, *Sir James Mackintosh*, in II CRITICAL AND HISTORICAL ESSAYS BY LORD MACAULAY 283 (1901).

69. *Id.* at 300.

70. *Id.*

71. *Id.* at 302.

72. *Id.* at 305-06.

subjects saw it. “As we would have our descendants judge us,” Macaulay memorably argued, “so ought we to judge our fathers.”<sup>73</sup>

Thomas Ruffin cited his supposedly anguished feelings to stave off judgment for the harshness of the outcome in *State v. Mann*. Yet we can also read Ruffin’s *Mann* opinion as subtly invoking the hindsight defense in its first few sentences:

A Judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist and are thoroughly understood. The struggle, *too*, in the Judge’s own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible.<sup>74</sup>

It is often assumed that what Thomas Ruffin chiefly “lamented” was the pathos of the case—the “distasteful” nature of the assault on Lydia and the chasm that the case opened up “between ‘the Judge’ and ‘the man.’”<sup>75</sup> But that is not precisely what Ruffin said. What Ruffin actually said he “lamented” was the inevitability of judgment—the certainty that his opinion (and, by extension, its author) would be *misunderstood* and *condemned* by people unfamiliar with its context. Ruffin lamented *his own* position, not Lydia’s. The emotional struggle between feeling and duty was also severe, but Ruffin’s insertion of the word “too” makes plain that this struggle was a distinct difficulty from the one that he chiefly “lamented.”

Mark Tushnet is undoubtedly right that Ruffin was primarily glancing northward when he predicted that his reasons would not be “appreciated” in places where “institutions similar to [his] own” did not exist.<sup>76</sup> But the sentence also might be a glance toward the *future*—toward a reader of a later day such as ours, in which “institutions similar to [his day’s] own” no longer “exist” and are no

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73. *Id.* at 302. For an articulation of the hindsight defense, see Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 711 (2004) (“During the period in which state and federal laws sanctioned slavery and discrimination, a majority of Americans presumably believed these practices were not immoral, at least not intolerably so. To hold now, in hindsight, that society committed immoral acts would impose on society an obligation based on conduct that has only become widely accepted as immoral after its occurrence. It is arguably unfair to blame society based on moral standards not yet established at the time of the purported wrongdoing.”).

74. *State v. Mann*, 13 N.C. (2 Dev.) 263, 264 (1829) (emphasis added).

75. TUSHNET, *supra* note 15, at 26.

76. *See id.* at 26–27.

longer “thoroughly understood.” In a closely related passage of *State v. Mann*, Ruffin “most freely confess[ed] [his] sense of the harshness of the proposition” the opinion established; intriguingly, he said that as a moral proposition, it was one that “every person *in his retirement* must repudiate.”<sup>77</sup> In the language of his time, the verb “retire” had a double sense: it meant “to withdraw into seclusion,” but it also had the temporal connotation we think of today—a withdrawal from an office or business toward life’s end to enjoy greater leisure.<sup>78</sup> Thus, in the word “retirement,” we can perhaps sense a touch of anxiety in Ruffin about how his judgment would look not just to observers from a different place, but to observers from a later time.

The hindsight defense has worked well for Thomas Ruffin. Even Sanford Levinson, a scholar so horrified by *Mann* as to ask whether Ruffin’s portrait deserves to hang in honor on the walls of an American law school, gave the hindsight defense its due. “[T]o denounce Ruffin . . . from the safety of a 1995 perspective,” Levinson argued in that year, was but a “cheap thrill.”<sup>79</sup> In the balance of this Article, I will argue that there is nothing “cheap” in denouncing Ruffin from the safety of the present. Not only are the merits of the hindsight defense overstated as a general matter, but Thomas Ruffin arrives in today’s world poorly positioned to assert it.

### III. THE DANGEROUS GENERALITY OF THE HINDSIGHT DEFENSE

“The past is a foreign country: they do things differently there.”<sup>80</sup> This is the first sentence of L.P. Hartley’s 1953 novel *The Go-Between*, but we might also take it as a statement of the central idea of the hindsight defense. The hindsight defense depends on the notion that a historical figure lived not just in a different moment from our own but in a wholly different moral *context*—a moment of culture, belief, and practice so different from the present as to make judgment perilous if not impossible. Insofar as the hindsight defense reminds us that the past differs from the present, it has some value.

On the other hand, insofar as the hindsight defense subtly suggests that the past was a monolith, it is usually false and misleading. To put the point in L.P. Hartley’s language, we must remember that the foreign country of the past is in fact *a whole country*: a big place where different people thought about and did

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77. *Mann*, 13 N.C. (2 Dev.) at 266 (emphasis added).

78. See XIII OXFORD ENGLISH DICTIONARY 782 (1989).

79. Levinson, *supra* note 16, at 1975.

80. L.P. HARTLEY, *THE GO-BETWEEN* 9 (1953).

many things in different and conflicting ways. In debates about the contested beliefs and practices of some segment of the population of a particular historical era, the hindsight defense, therefore, offers us very little and needlessly deters us from judgment. Careful consideration of the merits and demerits of a historical figure should press beyond the hindsight defense to focus on the choices that the historical figure made from within the broad range of views, beliefs, and behaviors of his day.

A personal anecdote might help illustrate the way the hindsight defense tends to depict the past. When I was in high school, I read something about the devastation wrought at Hiroshima and Nagasaki by our two atomic bombs. In a conversation that evening with my grandmother, who parented my mother alone during the war while my grandfather served in the U.S. Navy, I expressed a teenager's outrage that my country could have inflicted so much suffering on so many innocent civilians. My grandmother flashed with impatience. "You don't understand," she said, "and you don't know what it was like. Times were different then. People were scared and had made a lot of sacrifices. People thought the bombs were necessary. There was no other way to win the war."<sup>81</sup>

I would imagine that many people have had similar exchanges with parents or grandparents upon learning of some arguable blemish on the memory of an earlier generation. The broad assertion that "times were different" is an understandable response to defend the memory and reputation of that earlier generation. It appears everywhere—not just in private family discourse. It is, for example, the view that Alan Simpson voiced on the floor of the United States Senate two decades ago during the debate over an apology for the Japanese American internment. "[A]t that time," said Simpson, "in most every structure of our citizenry, or [sic] Government and our bureaucracy, [internment] seemed the very right thing to do."<sup>82</sup>

The trouble with this understandable sort of response is that it is often demonstrably oversimplified. Consider Alan Simpson's recollection that internment seemed "right" in "most every structure of our citizenry, [our] Government, and our bureaucracy."<sup>83</sup> This is false. The government's policy of excluding Japanese Americans

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81. I mention this anecdote not to join issue on the debate over whether the United States was justified in dropping either or both of those two atomic bombs, but to illustrate a common claim about the monolithic and unanimous nature of past judgments and events.

82. 134 CONG. REC. 7608, 7615 (1988) (statement of Sen. Simpson).

83. *Id.*

from the West Coast and detaining them *en masse* did *not* seem the right thing to do to the Attorney General of the United States, the Director of the FBI, a third of the Justices of the Supreme Court of the United States, many respected public intellectuals, and many newspaper editorialists of the time.<sup>84</sup> The truth is that among those paying attention to the issues, support for exclusion and internment was not the monolith that Senator Simpson recalled.<sup>85</sup> These policies were choices that government officials made from among an array of options debated at the highest and most central levels of government and public opinion.

The point emerges even more clearly if we think about our own society and how the true range and nuance of our views might be characterized by the generations that will follow us. Suppose that many decades from now an American politician, speaking of the U.S. detention facility at Guantanamo Bay, urges the Americans of his day to remember that the Americans of our day were frightened by the attacks of September 11, 2001, and therefore thought Guantanamo necessary to combat terrorism. The politician might point to the overwhelming support that the President received for the military effort against al Qaeda and the Taliban in the Authorization to Use Military Force of September 18, 2001,<sup>86</sup> and infer in his own mind that Guantanamo was one of a package of measures against terrorism that “the American people” wanted and supported. But do you find this an accurate characterization of the true range of American thought and feeling on Guantanamo, in particular, or on the appropriate balance between civil liberties and national security more generally? This thought experiment about how future generations will be tempted to reduce ours to a monolith helps us see more clearly how the hindsight defense tempts us to a monolithic and falsely simplistic understanding of the past.

Thomas Ruffin’s opinion in *State v. Mann* is just as powerful an illustration of the uselessness of the hindsight defense in a careful judgment of a historical figure. While a defender of Ruffin might claim that his reasoning in *State v. Mann* was a simple product of its time and culture rather than a contestable choice, nearly everything

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84. See Eric L. Muller, *Fixing a Hole: How the Criminal Law Can Bolster Reparations Theory*, 47 B.C. L. REV. 659, 695–701 (2006).

85. It is worth noting that Senator Simpson was a boy of ten when the exclusion and internment of Japanese Americans commenced and can, for that reason, be excused for misperceiving the unanimity of support for the program.

86. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

about the case points the other way. First, we must remember that the case reached the Supreme Court of North Carolina on appeal from a judgment of conviction rendered by a trial court after a jury trial in Chowan County, North Carolina. This means that a district attorney in Chowan County thought that John Mann's shooting of Lydia was an indictable offense.<sup>87</sup> It also means that a Chowan County jury of white men, many of them slave owners,<sup>88</sup> saw fit to convict Mann of assault and battery for his violence against Lydia. If the views of the district attorney and a unanimous Chowan County jury are any indication of the *zeitgeist*, they would tend to show that Thomas Ruffin's opinion missed it rather than reflected it. Ruffin himself contended otherwise in *Mann*; he maintained that his ruling was consistent with "the established habits and uniform practice of the country," which indicated that absolute power of a slave owner over a slave, even to the point of willful battery, was "requisite to the preservation of the master's dominion."<sup>89</sup> The history of the *Mann* litigation itself suggests otherwise.

Ruffin went to great lengths in the *Mann* opinion to present its outcome as foreordained. Because no statute explicitly criminalized a slave owner's battery of his slave, Ruffin concluded that a court was "forbidden" from recognizing that violent act as a common-law crime through "a train of general reasoning on the subject."<sup>90</sup> Ruffin described himself as "*compelled*" to hold that,

while slavery exists amongst us in its present state, or until it shall seem fit to the legislature to interpose express enactments to the contrary, it will be the *imperative duty* of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute.<sup>91</sup>

Here too, however, Ruffin had more options than he admitted. Just six years before *Mann*, the Supreme Court of North Carolina held in *State v. Hale* that a man who was not the owner of a slave *could* be indicted for battering that slave, *even though no North Carolina statute specifically criminalized battery of a slave by a non-owner*.<sup>92</sup> Chief Judge Taylor's approach was nearly the opposite of Ruffin's in *Mann*: "As there is no positive law decisive of the

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87. See Hadden, *supra* note 12, at 8–9.

88. See Greene, *supra* note 24, at 722–27; TUSHNET, *supra* note 15, at 70.

89. *State v. Mann*, 13 N.C. (2 Dev.) 263, 265 (1829).

90. *Id.* at 267.

91. *Id.* at 268 (emphasis added).

92. *State v. Hale*, 9 N.C. (2 Hawks) 325, 325 (1823).

question” before the court, Taylor reasoned, “a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result, which is best adapted to general expedience.”<sup>93</sup> This is precisely what Ruffin said a court was “forbidden” from doing six years later in deciding whether the lessee of a slave could be indicted for battery. *State v. Hale* certainly left Ruffin the flexibility to reach a different result in *State v. Mann*, had he wished to do so. The *Hale* decision undercuts any claim that *Mann* was just a product of its time and culture.<sup>94</sup>

So does the dissenting opinion in the Virginia case of *Commonwealth v. Turner*,<sup>95</sup> a prosecution of a slave owner for maliciously assaulting and battering his own slave.<sup>96</sup> The General Court of Virginia held that a slave owner could not be indicted at common law for maliciously and excessively beating his own slave. However, Judge William Brockenbrough filed a dissenting opinion in which he contended that the owner of a slave *could* be indicted for that common-law crime.<sup>97</sup> Brockenbrough explicitly rejected the claim—made by Ruffin in *State v. Mann* just two years later—that only the legislature, and not common-law judges, could extend the criminal prohibition of battery to slave owners. Common-law judges in England could treat an attempt to commit any felony as a misdemeanor, Brockenbrough noted, and judges in Massachusetts could use the common law to allow an indictment for poisoning a cow.<sup>98</sup> Surely, then, “an [i]ndictment might be sustained in Virginia

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93. *Id.* at 325–26.

94. The 1824 opinion of the Supreme Court of Virginia in *Commonwealth v. Booth*, 4 Va. (2 Va. Cas.) 394 (1824), also undercuts the idea that *State v. Mann* merely reflected the culture of its time. The facts of *Booth* paralleled those of *Mann*: a jury in Petersburg, Virginia, convicted a man of assault for excessively beating a slave whom he had leased for a month. *See id.* at 194. The Supreme Court of Virginia overturned the conviction because the language of the indictment was legally insufficient in failing to allege the excessiveness of the lessee’s punishment of the slave. *See id.* at 395. But the court was careful to reserve judgment on the “grave and serious as well as delicate” question of whether a lessee’s temporary ownership of a slave conferred the authority to inflict an excessive beating. *See id.* at 396. I thank Sally Greene for bringing the *Booth* case to my attention.

95. 26 Va. (5 Rand.) 678 (1827) (Brockenbrough, J., dissenting).

96. For a useful discussion of the *Turner* case, see ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* 107–09 (1992); and THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 188–89 (1996).

97. *Turner*, 26 Va. (5 Rand.) at 686–90 (Brockenbrough, J., dissenting).

98. *Id.* at 686–89.

for maliciously and inhumanly beating a slave almost to death.”<sup>99</sup> This is not to say that Brockenbrough’s position was the law in Virginia on the question; it was just a dissenting opinion. But Brockenbrough’s dissent does show that Thomas Ruffin’s contrary position in *State v. Mann* was not foreordained by the culture of the day: a well-respected Virginia judge who was Ruffin’s first-cousin-once-removed<sup>100</sup> and with whom Ruffin was known privately to consult on legal questions relating to the law of slavery<sup>101</sup> took the opposing position.

And there is, finally, the matter of Ruffin’s language in *State v. Mann* itself. If the outcome of *Mann* were merely a reflection of the *zeitgeist*, Ruffin would have had no occasion to write anything more than a simple opinion reciting the facts and applying the law. As we know, though, that is not the sort of opinion that Ruffin wrote. He filled his opinion with his “lamentations” and “feelings,” with the “struggle” in his “breast,” with his “reluctance” to reach a result he found “harsh[]” but to which he was “compelled,” and with his “happiness” that ameliorating social conditions were diminishing the risk of a recurrence of the distasteful facts of the case. These are not the words of a judge who believes his outcome foreordained and his reasoning uncontroversial. *State v. Mann* itself therefore demonstrates that Thomas Ruffin wrote with a nervous eye toward the judgment of his contemporaries—contemporaries like his cousin, Judge William Brockenbrough, who lived in the same historical moment and the same culture as Ruffin, but who saw the world differently and reached different conclusions about the institution of slavery and the comparative roles of the courts and the legislature in tempering it.

All of these factors help us see more clearly that the hindsight defense misleadingly presents the past as a stream of monolithic moments rather than moments of alternatives, debate, and choice. Once we appreciate the contingency and diversity of the world in which historical figures lived, we can begin to think more carefully about how to evaluate the beliefs that those figures actually held and the choices they actually made.

Happily, Thomas Macaulay’s eloquent nineteenth-century essay on hindsight offers a framework for this more careful and realistic

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99. *Id.* at 689.

100. See 2 THE PAPERS OF THOMAS RUFFIN 27 n.1 (J.G. de Roulhac Hamilton ed., 1918).

101. See Letter from William Brockenbrough to Thomas Ruffin (Feb. 7, 1831), in 2 THE PAPERS OF THOMAS RUFFIN, *supra* note 100, at 27–30.

inquiry. Macaulay recognized that the dangerous effect of a careless hindsight defense is to “put the best and the worst men of past times on the same level.”<sup>102</sup> The proper questions to ask about those of a prior generation, Macaulay argued, are “not where they were, but which way they were going,” whether “their faces [were] set in the right or in the wrong direction,” and whether they were “in the front or in the rear of their generation.”<sup>103</sup> To be sure, there is an uncomfortable whiggishness to Macaulay’s questions—a supposition that the passage of time invariably leads to ever-greater wisdom, morality, and achievement. One need not believe with Macaulay that all historical motion is upward in order to appreciate the wisdom of his observation that every generation has ample opportunity for choice on the important questions of its day. Every generation has greater and lesser figures, heroes and villains—and the hindsight defense foolishly puts them all on the same level.

#### IV. THOMAS RUFFIN AND THE STRATEGY OF HINDSIGHT

There is an additional important problem with declining to judge Thomas Ruffin for his opinion in *State v. Mann* out of concern for the unfairness of hindsight. Whatever the merits of the hindsight defense, Thomas Ruffin is in a uniquely poor position to assert it. In *State v. Mann*, Ruffin used the passage of time as both a rhetorical device and a substantive remedy. Time, he maintained, would ameliorate the institution of slavery in ways that he, as a judge, could not. There is reason to think that Ruffin was not particularly serious about this prediction. But even if he was serious about it, we should not now have to entertain a claim that the passage of time bars us from judging him and his opinion.

In 1803, as a young man of sixteen, Thomas Ruffin left the South to attend Princeton in New Jersey.<sup>104</sup> There he encountered a different set of attitudes about the institution of slavery than those of his boyhood in Virginia and North Carolina. In fact, the year after Ruffin arrived at Princeton College, the New Jersey legislature passed “An Act for the Gradual Abolition of Slavery,” a law providing that female slaves born after July 4, 1804, would be free at age twenty-one and male slaves born after that date would be free at age twenty-

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102. MACAULAY, *supra* note 68, at 303.

103. *Id.* at 305.

104. William A. Graham, *Life and Character of the Honorable Thomas Ruffin*, in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 21 (J.G. de Roulhac Hamilton ed., 1920).

five.<sup>105</sup> The young Ruffin was moved to write a letter to his father expressing his concerns about the institution. Ruffin's letter to his father does not survive, but his father's reply does, and in it, Sterling Ruffin said to his son, "[Y]ou feel for [slaves], lament, greatly lament their uncommon hard fate, without being able to devise any means by which it may be ameliorated!"<sup>106</sup> The elder Ruffin could envision only one path to a more humane treatment of slaves: the passage of time. He wrote:

[T]he fewer there are of this discription [sic] intermix'd with the Whites, the more they are under our immediate eye, and the more they partake of the manners and habits of the whites, and thereby require less rigidness of treatment to get from them, those services which are absolutely necessary for their support and very existence.<sup>107</sup>

Unfortunately, Sterling Ruffin explained to his son, "there are too many with us to render a tolerably free intercourse of sentiment possible."<sup>108</sup> But as the ratio of black slaves to whites decreased, "less rigidness" would be possible.

This is a lesson that stayed with the young Thomas Ruffin. In fact, when the time came in *State v. Mann* for the adult Thomas Ruffin to opine on the criminal law's role in limiting brutality toward slaves, he reproduced his childhood lesson almost verbatim.<sup>109</sup> Ruffin held, as we know, that a slave's obedience could be enforced only through a permanent or temporary owner's "uncontrolled authority" over the slave's body, even to the point of malicious battery.<sup>110</sup> This was a "harsh" proposition, Ruffin confessed, but "in the actual condition of things, it must be so[; t]here is no remedy."<sup>111</sup>

What Ruffin meant, though, was that the *courts* could provide no remedy. As his father had taught him twenty-five years earlier, *the passage of time* would provide the remedy. "We are happy to see," Ruffin stated in the opinion, "that there is daily less and less occasion

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105. See An Act for the Gradual Abolition of Slavery, 1804 N.J. Laws 251 (1804), available at <http://njlegallib.rutgers.edu/slavery/acts/A78.html>.

106. Letter from Sterling Ruffin to Thomas Ruffin (June 1804), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 54.

107. *Id.* at 54–55.

108. *Id.* at 55.

109. The first to perceive the possibility of a connection between Sterling Ruffin's advice and Thomas Ruffin's *Mann* opinion was Mark Tushnet. See TUSHNET, *supra* note 15, at 92 ("The structure of argument Ruffin's father developed bears an uncanny resemblance to the structure of Ruffin's opinion in *State v. Mann*.").

110. *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

111. *Id.*

for the interposition of the Courts” to police a slave owner’s treatment of his slaves.<sup>112</sup> Existing statutes, the owner’s profit motive, and the community’s censure of brutal slave owners were already “produc[ing] a mildness of treatment and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude and ameliorating the condition of the slaves.”<sup>113</sup> And things would only get better, Ruffin predicted: “The same causes are operating and will continue to operate with increased action, until the disparity in numbers between the whites and blacks, shall have rendered the latter in no degree dangerous to the former, when the police now existing may be further relaxed.”<sup>114</sup> Here was his father’s lesson about the benefits of a declining ratio of black slaves to whites, transformed into dictum in a judicial opinion. This result that his father had predicted was “greatly to be desired,” Thomas Ruffin said, but could best be achieved through the “progress” of “events” rather than by “rash expositions of abstract truths by a Judiciary tainted with a false and fanatical philanthropy.”<sup>115</sup>

In *State v. Mann*, Thomas Ruffin banked on the passage of time as the only legitimate remedy for the brutality that inhered in the institution of slavery as it then existed. “Be patient,” Ruffin implied. “A day will come when whites so outnumber black slaves that all reason for violent correction will have disappeared. Then you will look back and appreciate the rightness of this opinion, and understand why we judges could not intervene to protect the slave Lydia and others in her position.”

It is possible that Ruffin genuinely believed this childhood lesson and that he invoked it in *State v. Mann* in the best of faith. There is, however, some reason to doubt that. More than twenty-five years after *Mann*, in 1855, Thomas Ruffin was invited to give a speech to the State Agricultural Society of North Carolina on the virtues and advantages of North Carolina agriculture.<sup>116</sup> He included a lengthy section on the excellence, productivity, and humaneness of slavery in North Carolina. It is a remarkable oration, describing North Carolina’s slaves as a “humble, obedient, quiet and . . . contented and cheerful race of laborers”<sup>117</sup> and making the case that slave owners

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112. *Id.* at 267.

113. *Id.* at 267–68.

114. *Id.* at 268.

115. *Id.*

116. See Address of Thomas Ruffin (Oct. 18, 1855) in 4 THE PAPERS OF THOMAS RUFFIN, *supra* note 1, at 323–37.

117. *Id.* at 334.

bestowed a blessing on their slaves by continuing their bondage rather than “turn[ing] them loose to their own discretion and self-destruction.”<sup>118</sup> But he made a special effort to demonstrate that North Carolina’s slave owners generally were not “ruthless and relentless tyrants” who practiced “extraordinary severity” but rather benign and gentle owners who cared for their slaves.<sup>119</sup> The owner’s self-interest led him to be “observant of the health and morals of his slaves; to care for them, and provide for them; to restrain them from baneful excesses, and employ them in moderate, though steady labor.”<sup>120</sup> Incredibly, Ruffin cited as proof of North Carolina slavery’s essential humaneness the fact of the “increase in the numbers of our slave population beyond the ratio of natural increase in the population of any other nation.”<sup>121</sup> In *State v. Mann*, Ruffin argued that the decline of the slave population over time was what would guarantee their humane treatment. Twenty-five years later, he argued that the hearty *increase* in the slave population proved that slaves were well treated.

Thus, there is reason to suspect that Ruffin may have invoked his father’s lesson in *State v. Mann* as makeweight rather than as a serious prediction about the future. Perhaps he invoked it because it was a way to buy slavery some time and keep it out of the courts. Perhaps he invoked it to blunt or silence the criticism of *Mann* that he feared. But whatever Ruffin’s reasons were for invoking the passage of time as the chief remedy for the excesses of slavery in *State v. Mann*, that is the choice that he made. He predicted that the rightness and wisdom of *Mann* would be clear in hindsight. That is, Ruffin *invited* hindsight, and profited from the invitation. Surely, were he alive today, he would be in no position to complain about our accepting his invitation.

#### V. THOMAS RUFFIN: SLAVE BATTERER, SLAVE TRADER, SLAVE FAMILY BREAKER

I have argued thus far that the hindsight defense offers us little help in taking the true measure of a historical figure and that, whatever the merits of such a defense, Thomas Ruffin does not deserve to invoke it. In place of the simplistic trope that we cannot judge historical figures because “times were different then,” I have

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118. *Id.* at 330.

119. *Id.* at 332.

120. *Id.*

121. *Id.*

suggested Thomas Macaulay's more nuanced inquiry into "not where they were, but which way they were going," whether "they [were] in the front or in the rear of their generation."<sup>122</sup> This inquiry, in Thomas Ruffin's case, produces clear results. Thomas Ruffin was much closer to the rear than the front of his generation on questions relating to slavery.

This is a conclusion that the existing scholarship on Thomas Ruffin has not reached largely for want of evidence. According to Julius Yanuck, "Ruffin's papers reveal no ill-treatment of slaves."<sup>123</sup> Mark Tushnet reports more broadly that Ruffin's surviving correspondence "reflect[s] a great deal of attention to politics, rather less to personal matters, occasional references to domestic matters such as purchasing seed and meat, and even fewer references to slavery—itself perhaps an indication of the place slavery had in Ruffin's psychological universe."<sup>124</sup> These scholars presumably relied on the four-volume collection of Thomas Ruffin's papers published between 1918 and 1920 by Ruffin's great-grandson, the historian J.G. de Roulhac Hamilton. In the preface to his collection, Hamilton asserted that his "guide in making the selection of the letters to be printed" was "solely [his] desire to choose all such letters as may throw light upon the history of the State and Nation, or upon the personality and character either of Judge Ruffin or the writers."<sup>125</sup> It might be more accurate to say that Hamilton's desire was to choose those letters that threw a *positive* light on his great-grandfather—and to exclude, for example, a letter such as Ruffin's to his wife on January 29, 1833, in which he exclaimed that slaves were "creatures [who] have no feeling or thought, one or the other," and that "the conduct of negroes generally . . . would lead one to the belief, that all good feeling is banished from their bosoms."<sup>126</sup> In fact; Hamilton omitted from the collection a great number of letters and other materials that deal with slavery, including some that cast Thomas Ruffin as a batterer and trader of slaves and a breaker of slave families.<sup>127</sup>

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122. MACAULAY, *supra* note 68, at 305.

123. Yanuck, *supra* note 54, at 475.

124. TUSHNET, *supra* note 15, at 91.

125. J.G. de Roulhac Hamilton, *Preface* to 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 3.

126. Letter from Thomas Ruffin to Anne Ruffin (Jan. 29, 1833), in Thomas Ruffin Papers (on file with the Southern Historical Collection, Wilson Library, The University of North Carolina at Chapel Hill) [hereinafter Thomas Ruffin Papers].

127. Many of these omitted materials form the basis of Parts VI(A), VI(B), and VI(C) of this Article. The materials themselves are located in the Thomas Ruffin Papers

A. *The Battery of Bridget*

Thomas Ruffin owned ten slaves when he married in 1811 and thirty-two by 1830.<sup>128</sup> His law practice in the 1810s and 1820s and his judicial duties between around 1830 and 1860 kept him on the road for long periods; as a result, he left most of his plantation affairs, including the management and discipline of his slaves, to overseers.<sup>129</sup> At least since the publication of Jean Bradley Anderson's *The Kirklands of Ayr Mount*,<sup>130</sup> the literature has reflected the fact that Ruffin knew that his overseers treated his slaves brutally.<sup>131</sup> For example, in 1824, Ruffin's friend and former teacher Archibald D. Murphey alerted Ruffin to his overseers' "evil and barbarous Treatment of [his] Negroes," including the "barbecu[ing], pepper[ing] and salt[ing]" of one of them.<sup>132</sup> And this was not the only time Ruffin received such warnings.<sup>133</sup> Ruffin's archived papers, which contain many more letters *to* Ruffin than *from* him, do not reveal how Ruffin responded to this information about his overseers.

But Ruffin's papers do reveal an episode that shows Ruffin's *own* brutality—a brutality that was probably tortious and may have been criminal. The story began in January of 1830, just a month before Ruffin heard the appeal in *State v. Mann*.<sup>134</sup> Ruffin owned two North Carolina plantations—one in Rockingham County and one called the Hermitage in Alamance County.<sup>135</sup> The Hermitage had originally belonged to Archibald D. Murphey, but by the early 1820s Murphey owed so much money to Ruffin and others that he was forced to sell the property to Ruffin in order to reduce the debt.<sup>136</sup> He struggled to reclaim it through the rest of the 1820s,<sup>137</sup> and his wife continued to

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archived in the Southern Historical Collection at the University of North Carolina at Chapel Hill.

128. Hadden, *supra* note 12, at 5.

129. *See id.* at 5–6.

130. JEAN BRADLEY ANDERSON, *THE KIRKLANDS OF AYR MOUNT* (1991).

131. *See id.* at 52–53.

132. Letter from A.D. Murphey to Thomas Ruffin (June 3, 1824), in Thomas Ruffin Papers, *supra* note 126.

133. *See* Hadden, *supra* note 12, at 6.

134. *See id.* at 8.

135. *See* Manuscripts Department, Library of the University of North Carolina at Chapel Hill, Biographical Note, Inventory of the Thomas Ruffin Papers, 1753–1898, <http://www.lib.unc.edu/mss/inv/r/Ruffin,Thomas.html#d0e402> (last visited Feb. 25, 2009).

136. John A. McGeachey, *A Dreamer's Speculations: The Financial Plight of Archibald D. Murphey*, May 2002, <http://www4.ncsu.edu/~jam3/admurphey.htm>.

137. *See id.*

live there as the Ruffins' guest.<sup>138</sup> However, a final financial reversal late in 1829 forced Murphey to turn the Hermitage over to Ruffin for good,<sup>139</sup> and early in November of that year, he was imprisoned in Greensboro for debt for several weeks.<sup>140</sup> After his release, Murphey returned briefly to the Hermitage on the Haw River<sup>141</sup> but then moved for the rest of the winter to Greensboro.<sup>142</sup> His wife remained behind at the Hermitage.<sup>143</sup>

Before leaving for Greensboro, the ailing Murphey pleaded with Ruffin to allow him to take along a slave of Ruffin's named Bridget:

If you knew or had any idea of my afflicted condition, you would not deny my request as to Bridget . . . . I cannot expect Cornelia<sup>144</sup> to remain with me long, and when she is gone I shall be left dependent upon those who know not how to nurse me, or take care of me in my sufferings. I appeal to your generosity on this subject, and to your sympathy for a human Being, who has suffered and is probably long doomed to suffer the extreme of human wretchedness.

If our Friendship does not entitle me to this small Boon at your Hands, let my affliction prefer its claim. I declare to you that I had rather be dead than to be deprived of all chance of good nursing in my sufferings. One thing is certain, I should quickly die. Let me therefore entreat you not to deprive me of Bridget, if I can make out to pay you for her.<sup>145</sup>

As it happened, Ruffin had his own plans for Bridget, and they did not include Archibald Murphey. For reasons that the historical record does not reveal, Murphey's wife, who continued to live at the Hermitage, detested Bridget,<sup>146</sup> and Ruffin himself saw her as a bad

138. See Letter from Thomas Ruffin to Archibald D. Murphey (Oct. 29, 1831), in Thomas Ruffin Papers, *supra* note 126 (referring to Mrs. Murphey's residence with the Ruffin family).

139. See McGeachey, *supra* note 136.

140. See *id.*; see also Letter from Archibald D. Murphey to Thomas Ruffin (Nov. 17, 1829), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 523 n.1.

141. See Letter from Archibald D. Murphey to Thomas Ruffin (Jan. 13, 1830), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 537–38.

142. See Letter from V.M. Murphey to Thomas Ruffin (Feb. 10, 1830), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 538.

143. See Letter from Thomas Ruffin to Archibald D. Murphey, *supra* note 138.

144. Cornelia was a slave who principally served Murphey's mother or mother-in-law. See Letter from V.M. Murphey to Thomas Ruffin, *supra* note 142.

145. Letter from Archibald D. Murphey to Thomas Ruffin, *supra* note 141.

146. One possibility that suggests itself is, of course, an emotional or sexual relationship between Murphey and Bridget. The archival record is, not surprisingly, silent

influence on the rest of his slaves. As Ruffin later explained in a letter to Murphey, Bridget “was the aversion [and] terror to the highest degree of all the relations of the mother of [Murphey’s] children” and was of a “detestable character” who Ruffin feared “would impair the value of her descendants, whom I owned; not to speak of the other slaves which I got from you over part of which she had great influence.”<sup>147</sup> So eager was Ruffin to get rid of Bridget that he had tried to make arrangements “to sell her at a great distance” and had instructed his agent that if he could not sell her, he should give Bridget away to any man who would promise that she would “not be sold or live short of a thousand miles from” the Hermitage.<sup>148</sup>

Moved by Murphey’s plea for Bridget, Ruffin abandoned these plans to ship her off to parts unknown and instead decided to give her to his ailing friend outright and by deed, without payment.<sup>149</sup> Murphey later reported that he understood that Ruffin did not want Bridget returning to the grounds of the Hermitage,<sup>150</sup> but Ruffin’s feelings in fact ran even deeper than that. Ruffin had written to Murphey:

I did never expect, [that Bridget] would be permitted to annoy me in any way much less that the feelings of the venerable Matron, who honor me and mine by her residence with us [and] of the ladies of my family would be outraged by having her brought here, nor that the value of my negroes would be impaired by a permitted intercourse between them and a person of this woman’s character, temper, disposition towards me [and] mine, habits of life, dress, indulgences, [etc.].<sup>151</sup>

Thomas Ruffin really did not like the slave Bridget.

Ruffin was therefore furious when, toward the end of October of 1831, he learned that Bridget had been spotted on the grounds of the Hermitage.<sup>152</sup> “With the view of punishing her contumacy and defending my rights of property,” Ruffin explained to Murphey, he “endeavored to find her[,] but she was gone.”<sup>153</sup> He instructed his

on that possibility, except for the evidence cited here of Mrs. Murphey’s distaste for Bridget and her husband’s intense desire for her companionship in his illness.

147. Letter from Thomas Ruffin to Archibald D. Murphey, *supra* note 138.

148. *Id.*

149. *See id.*; *see also* Letter from Archibald D. Murphey to Thomas Ruffin (Jan. 24, 1830), *in* Thomas Ruffin Papers, *supra* note 126.

150. *See* Letter from Archibald D. Murphey to Thomas Ruffin (Dec. 21, 1831), *in* Thomas Ruffin Papers, *supra* note 126.

151. Letter from Thomas Ruffin to Archibald D. Murphey, *supra* note 138.

152. *See id.*

153. *Id.*

overseer to whip her if he could find her, but when the overseer found her, she maintained that she had come to the Hermitage with Murphey as his servant, so the overseer did not whip her.<sup>154</sup> When Murphey left the Hermitage the next day, Ruffin told Murphey, Bridget “remained prowling about my plantation or near it,” which had a very unsettling effect on the rest of Ruffin’s slaves.<sup>155</sup>

On the morning of Saturday, October 28, 1831, Ruffin took a walk toward the mill buildings at the Hermitage and happened upon Bridget “posted at the bridge.”<sup>156</sup> According to Ruffin, Bridget “gave [him] a look of insolent audacity which Patience itself could not swallow.”<sup>157</sup> Ruffin had had enough. “Upon the instant,” Ruffin reported to Murphey, he “gave her a good caning.”<sup>158</sup> That is, Judge Ruffin of the Supreme Court of North Carolina assaulted Murphey’s slave Bridget, beating her with some sort of rod.

The legal ramifications of this assault were potentially serious, and Ruffin, having recently authored *State v. Mann*, undoubtedly knew it. Bridget did not belong to Ruffin; he had given a deed for her to Murphey more than a year before the assault. Neither was Ruffin Bridget’s hirer, as John Mann was Lydia’s in *State v. Mann*. As a white non-owner and non-hirer, Ruffin therefore arguably had only the rights of what the law called a “stranger” in relation to Bridget,<sup>159</sup> and a stranger’s rights were few. Under North Carolina law of the day, at a minimum, a stranger’s assault on the slave of another exposed the stranger to liability in damages to the slave’s owner.<sup>160</sup> Murphey therefore likely had a cause of action against Ruffin for the tort of trespass.

Even criminal liability was not out of the question. As discussed earlier,<sup>161</sup> in the 1823 case of *State v. Hale*, the Supreme Court of North Carolina held that a white man who beat the slave of another could be indicted at common law for battery.<sup>162</sup> A slave’s provocation

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154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *See State v. Hale*, 9 N.C. (2 Hawks) 582, 584 (1823).

160. *See generally* *Williams v. Averitt*, 10 N.C. (3 Hawks) 308 (1824) (concerning an action in trespass for beating of the slave of another); *Hale*, 9 N.C. (2 Hawks) at 589 (“An assault and battery is not indictable in any case to redress the private injury, for that is to be effected by a civil action . . .”); *Richardson v. Saltar*, 4 N.C. (Car. L. Rep.) 505 (1817) (holding that members of a patrol party who were not themselves official patrollers were liable in trespass for beating the slave of another).

161. *See supra* notes 92–94 and accompanying text.

162. *See Hale*, 9 N.C. (2 Hawks) at 583.

of the violence could provide the accused batterer with a defense, and the *Hale* court recognized that “many circumstances which would not constitute a legal provocation for a battery committed by one white man on another would justify it if committed on a slave, provided the battery were not excessive.”<sup>163</sup> This was an allusion to the court’s 1820 observation in *State v. Tacket* that while mere words could not amount to legal provocation in a confrontation between two white men, they might suffice as provocation when uttered by a slave.<sup>164</sup> Bridget, however, did not say a word. She merely gave Ruffin a look that he did not like. No reported case in North Carolina (or elsewhere) treated a look askance from a slave as legal provocation to battery.<sup>165</sup>

In *Southern Slavery and the Law 1619–1860*, Thomas D. Morris reports that North Carolina followed Virginia law in permitting the owner of a plantation to whip a slave “if [the slave] was on the land without written permission from his owner or had not been sent on some lawful business.”<sup>166</sup> If this was so, and if Bridget was actually on Ruffin’s property when he came upon her,<sup>167</sup> then perhaps Ruffin had the legal right to cane her. Yet Morris’s reading of the relevant North Carolina statute may be mistaken. It authorized a landowner to administer a “severe whipping” to a slave who came onto his land with a dog, gun, or weapon unaccompanied by a white person, or who “travel[led] from his master’s land by himself” along any but “the most usual and accustomed road.”<sup>168</sup> It is certainly not clear that this

163. *Id.* at 586.

164. *See State v. Tacket*, 8 N.C. (1 Hawks) 103, 107, 109 (1820).

165. In a much later case, *State v. Bill*, 35 N.C. (13 Ired.) 254 (1852), the Supreme Court of North Carolina noted that it was “impossible to define” the “acts in a slave toward a white person” that would “amount to insolence,” though it listed “a look, the pointing of a finger, a refusal or neglect to step out of the way when a white person is seen to approach” as examples of insolence. *Id.* at 257. These forms of insolence were, the court suggested, adequate reasons to bring a slave before a magistrate for possible punishment. *Id.* The *Bill* case did not, however, establish that these were valid reasons for a non-owner to engage in self-help and inflict a caning himself. *See id.*

166. MORRIS, *supra* note 96, at 197, 482 n.66.

167. Ruffin wrote to Murphey that Bridget was “posted at the bridge” when he came upon her. Letter from Thomas Ruffin to Archibald D. Murphey, *supra* note 138. It is impossible to be certain whether this was on or off Ruffin’s property, although the property did straddle both the Haw River and the Great Alamance Creek. Perhaps the “bridge” to which Ruffin refers in this letter was a bridge across one of those; if so, Bridget would have been on Ruffin’s property at the time he beat her. On the other hand, Ruffin stated in the letter that Bridget had been spotted “prowling about [his plantation] or near it,” which leaves open the possibility that she was not on his property at the time of the beating. *Id.* (emphasis added).

168. JOHN HAYWOOD, *A MANUAL OF THE LAWS OF NORTH-CAROLINA* 518 (1819).

statute authorized Thomas Ruffin to beat Bridget with a cane for being at the Hermitage and looking at him wrong.

And even if the statute permitted such violence, Thomas Ruffin himself did not seem to know it. The very day of the incident, Ruffin sat down to write a long letter to Murphey.<sup>169</sup> Ruffin obviously knew that word of the caning would get back to him, and he nervously sought Murphey's assurance that he would pursue no legal remedy. One of his purposes in writing, Ruffin explained, was to "to avow to you as the owner of this woman, the force I have used to her. If you think she merited only what she got, I shall be gratified at the concord of our views."<sup>170</sup> On the other hand, said Ruffin, "[s]hould my conduct meet your disapproval, the more obvious is the propriety of the exposition I have made of it."<sup>171</sup> Ruffin closed the letter by expressing "the hope . . . that [Murphey would] find no cause of complaint against" him, but he did not defend himself by citing any common-law or statutory right to beat Bridget.<sup>172</sup> Murphey let Ruffin twist a bit before replying; only two months later, on December 21, 1831, did Murphey write to Ruffin that his "flogging [sic] Bridget ha[d] given [him] no offense."<sup>173</sup>

This single episode, heretofore unknown in the literature, does not transform Thomas Ruffin into one of the monsters of his time, though his assault must have scarred Bridget and may have left her permanently impaired. The episode does, however, supply important context about the capacity for brutality in the judge who presented himself to the public as so deeply distressed by the harshness of *State v. Mann*. Sally Hadden wrote of Thomas Ruffin that "[a]s the son of a minister who taught his son to care for his slaves personally but whose job forced him to leave them in the hands of brutal overseers, Ruffin's conscience must have been pricked, just a little, by the *Mann* opinion."<sup>174</sup> Ruffin's beating of Bridget at the Hermitage not long after the *Mann* decision calls such an assessment of the quality of Ruffin's conscience into question.

### B. *Speculating on Human Beings*

Sally Hadden was the first scholar to bring to prominent light Thomas Ruffin's involvement in the slave-trading business in the

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169. Letter from Thomas Ruffin to Archibald D. Murphey, *supra* note 138.

170. *Id.*

171. *Id.*

172. *Id.*

173. Letter from Archibald D. Murphey to Thomas Ruffin, *supra* note 150.

174. Hadden, *supra* note 12, at 11.

1820s.<sup>175</sup> She sensibly maintained that it was difficult to reconcile Ruffin's willingness to engage in the trade in slaves with the idea that Ruffin was sincere in his professed paternalism toward them.<sup>176</sup> She also surmised that Ruffin abandoned the slave-trading business at the death of his business partner because he had come to see that his "neighbors or colleagues found his activities in the trade distasteful."<sup>177</sup> But because she viewed Ruffin's slave-trading partnership as very financially rewarding, she suggested that his reasons for engaging in the slave trade may have been "only financial at heart" rather than reflecting anything deeper about his moral vision.<sup>178</sup>

Again, the full record of Ruffin's involvement in the slave trade complicates this picture.<sup>179</sup> Ruffin was exposed to blunt disapproval of his participation in the slave trade shortly after beginning it, but he continued it anyway, even while serving as a superior court judge. And it is difficult to see Ruffin's slave trading principally as a remedy for financial distress; the partnership's financial records make clear that Ruffin was a speculator in the slave trade, not someone who depended on its profits.

Thomas Ruffin was the primary equity partner in the two-man slave-trading partnership he set up with Benjamin Chambers.<sup>180</sup> Ruffin's papers do not reveal how Ruffin and Chambers first met, although they do show that the two men had an attorney-client relationship that predated the 1822 launch of their slave-trading business by some two years.<sup>181</sup> Their venture was actually two

175. See *id.* at 7–8. Hadden was not the first to note Ruffin's involvement in the slave-trading business; Jean Bradley Anderson briefly described it in her 1991 book *The Kirklands of Ayr Mount*. ANDERSON, *supra* note 130, at 52.

176. Hadden, *supra* note 12, at 8.

177. *Id.* at 7.

178. *Id.* at 8.

179. This full record includes Ruffin's correspondence from his partner Benjamin Chambers from 1821 to 1826 and from others relating to the wrapping up of Chambers's estate after his death in 1827, two partnership agreements between Ruffin and Chambers, Ruffin's day books detailing his expenditures and income between 1821 and 1831, the partnerships' accounting ledger, and annual inventories of slaves purchased and sold for two of the five years that the business operated. *But cf.* Hadden, *supra* note 12, at 7 ("[R]ecords of the [Ruffin-Chambers] partnership are scanty.").

180. Ruffin invested \$4,000 in the partnership at its start; Chambers invested \$2,000 and devoted his slave Dick to the enterprise. See Articles of Agreement between Benjamin Chambers and Thomas Ruffin (Oct. 26, 1821), in Thomas Ruffin Papers, *supra* note 126.

181. See Letter from Benjamin Chambers to Thomas Ruffin (Aug. 18, 1820), in Thomas Ruffin Papers, *supra* note 126. In a much earlier letter, a client of Ruffin's sought advice on whether to pursue a collection action against a "Benjamin Chambers," but it is

successive partnerships—one that the two men created in October of 1821 for a three-year term, and a second that they created in June of 1825 for a two-year term that was cut short by Chambers's death in March of 1827.<sup>182</sup> The partnership's business model was simple: they would buy slaves in the Upper South, transport them to the Deep South, and sell them there at a profit.<sup>183</sup> Ruffin provided two-thirds of the first partnership's capital of \$6000; Chambers provided the other \$2000 and did all of the buying, transporting, and selling of slaves.<sup>184</sup> The capitalization of the second partnership was also \$6000, but Ruffin provided all of it; Chambers contributed only his sweat equity and the labors of his slave Dick to that venture.<sup>185</sup>

Michael Tadman has argued persuasively that the nineteenth-century Southern slave trader was not the pariah in white Southern society that Northern abolitionists and some Southern slavery defenders made him out to be.<sup>186</sup> Yet there can be little question that trafficking in slaves was not seen as an affirmatively *honorable* trade<sup>187</sup> and that those men like Thomas Ruffin who managed to rise to positions of high station in Southern society did so *despite* their slave-trading rather than *because of* it.<sup>188</sup> Surely there were very few judges in the 1820s who trafficked in slaves on the side. Yet this is

impossible to know whether this was the same Benjamin Chambers with whom Ruffin ultimately went into the slave-trading business. See Letter from John Johnston to Thomas Ruffin (Feb. 5, 1814), in Thomas Ruffin Papers, *supra* note 126.

182. See Articles of Agreement between Benjamin Chambers and Thomas Ruffin, *supra* note 180; Articles of Agreement between Benjamin Chambers and Thomas Ruffin (June 15, 1825), in Thomas Ruffin Papers, *supra* note 126. Chambers died on March 21, 1827, in Abbeville, South Carolina, after a long illness; Ruffin learned of his partner's death in a letter from the administrator of Chambers's estate about a week later. See Letter from A.B. Arnold to Thomas Ruffin (Mar. 27, 1827), in Thomas Ruffin Papers, *supra* note 126.

183. This was a very common trading pattern in the 1820s. See MICHAEL TADMAN, *SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH* 41 (1989).

184. See Articles of Agreement between Benjamin Chambers and Thomas Ruffin (Oct. 26, 1821), *supra* note 180.

185. See Articles of Agreement between Benjamin Chambers and Thomas Ruffin (June 15, 1825), *supra* note 182.

186. See TADMAN, *supra* note 183, at 179–210.

187. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 239 (1956) (noting that the “traffic in slaves . . . was offensive not only to abolitionists but also to many of slavery's staunchest [sic] defenders.”); TUSHNET, *supra* note 15, at 88 (“In the 1820s slave trading was not an entirely respectable occupation among honorable men of the South.”).

188. See TADMAN, *supra* note 183, at 192–200. *But cf.* STAMPP, *supra* note 187, at 268 (“[I]t was not at all uncommon for merchants or bankers in the towns of the Upper South to act as silent partners of the speculators[, and] many respectable commission merchants, factors, general agents, and lawyers engaged in a little slave trading as a side line.”).

what Thomas Ruffin did. He agreed to serve as a judge of the Superior Court of North Carolina in the summer of 1825, just days after he formally renewed his slave-trading partnership with Benjamin Chambers with a new infusion of cash.<sup>189</sup>

The first partnership agreement that Ruffin drafted in 1821 hints at his awareness of the dishonor attached to slave-trading: he included a provision that “the whole business of buying and selling is to be conducted by . . . Chambers . . . *and is to be carried on in the name of said Chambers alone.*”<sup>190</sup> We cannot know exactly why Ruffin did not want his name attached to his business’s slave-trading activities, but worries about the their dishonor seem a likely explanation. And even if the potential dishonor of the slave trade was not apparent to Thomas Ruffin before he launched his business, it became clear in a letter he received shortly thereafter. The letter came from a man named Quinton Anderson of Caswell, North Carolina, whom Ruffin had invited to join in the slave business, presumably as an additional investor. Anderson declined Ruffin’s invitation, and given Ruffin’s prominence, might have been expected to do so diplomatically. Anderson was instead blunt: “I have after giving the subject mature consideration, come to the conclusion that the situation of my business forbids that I should embark in business of that nature, not the least consideration with me, is *the trafic [sic] itself, against which the feelings of my mind in some measure revolt.*”<sup>191</sup> This letter leaves no doubt that Thomas Ruffin knew he was embarking on a business venture that some of his peers morally condemned.

Yet the literature has suggested that Ruffin was willing to take this step because he was financially strapped and the slave trade permitted him to “address[] his financial problems.”<sup>192</sup> Here too, the full archival record complicates the accepted story. Thomas Ruffin’s overall financial situation was unquestionably precarious by around

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189. See Articles of Agreement between Benjamin Chambers and Thomas Ruffin (June 15, 1825), *supra* note 182. On Ruffin’s agreement to serve as a superior court judge, see 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 326 n.1, 327. Mark Tushnet has noted that Ruffin “was not formally a trader in slaves when he became a supreme court judge.” TUSHNET, *supra* note 15, at 88. This is true, but it misses the important fact that Ruffin *was* formally a slave trader when he became a superior court judge.

190. Articles of Agreement between Benjamin Chambers and Thomas Ruffin (Oct. 26, 1821), *supra* note 180 (emphasis added). The second partnership agreement, signed in June of 1825, had the same provision. Articles of Agreement between Benjamin Chambers and Thomas Ruffin (June 15, 1825), *supra* note 182.

191. Letter from Quinton Anderson to Thomas Ruffin (Jan. 15, 1822), *in* Thomas Ruffin Papers, *supra* note 126.

192. TUSHNET, *supra* note 15, at 88.

1820 because he stood as a surety on sizeable debts of his friend and former teacher Archibald D. Murphey that Murphey was having an increasingly difficult time paying.<sup>193</sup> Yet Ruffin's papers reveal no true sense of panic until December of 1821, when Murphey was arrested and jailed for nonpayment of a note. At that moment, and for a time thereafter, Ruffin's papers reflect anxiety on Ruffin's part that Murphey's financial problems might swamp him as well.<sup>194</sup>

But by the time this crisis arrived, Ruffin was already in the slave-trading business. He had launched it on October 20, 1821—some six weeks before Murphey's arrest and its economic ripple effects.<sup>195</sup> Ruffin had \$4,000 of cash on hand to capitalize the business, as well as \$300 extra that he was able to advance to Chambers so that he could buy Ruffin an additional "negro boy."<sup>196</sup> Furthermore, in June of 1825, when Ruffin launched his second slave-trading partnership with Chambers with a cash investment of \$6,000, Ruffin was not in dire financial straits. In fact, almost simultaneously with setting up the new slave-trading business, Ruffin left his comparatively lucrative private practice of law in order to take a lower-paying state trial court judgeship.<sup>197</sup> The claim that Ruffin started and then stayed in the slave business principally because it was a business whose profits helped him deal with his "precarious" financial situation<sup>198</sup> thus appears overstated.

This is not to deny that Ruffin's slave-trading business was at least initially quite profitable. At the settling of the affairs of the first Ruffin-Chambers partnership in June of 1825 after three years of business, Ruffin got back his initial investment of \$4,000 along with a

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193. See McGeachey, *supra* note 136; see also Letter from John Fitzhugh May to Thomas Ruffin (Nov. 9, 1821), in Thomas Ruffin Papers, *supra* note 126 (expressing concern over Ruffin's "situation" as surety on Archibald D. Murphey's debts, but expressing confidence that "with the advantages that [Ruffin] possess[ed]," he would "have no occasion to despair").

194. See Letter from Thomas Ruffin to Solomon Debow (Jan. 10, 1822), in Thomas Ruffin Papers, *supra* note 126 ("You have probably heard from some of your friends in this part of the Country of the total ruin of our worthy friend Archibald D. Murphey Esq. & of the very large sums of money which I have paid and shall have to pay as his surety—they are of such magnitude as to induce in me serious apprehensions of meeting with the same fate which has befallen him.").

195. See Thomas Ruffin, Daybook Entry (Oct. 20, 1821), in Thomas Ruffin Papers, *supra* note 126.

196. *Id.*

197. See Letter from A.D. Murphey to Thomas Ruffin (July 13, 1825), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 46, at 327 ("Your Profits may be less: but you will be able to scuffle through the difficulties.").

198. Hadden, *supra* note 12, at 7.

profit of nearly \$5,500.<sup>199</sup> He more than doubled his money in three years. That good fortune, however, did not last. In the second partnership, Ruffin reinvested his original \$4,000 investment from the first partnership along with nearly a third of the first partnership's profits. Here Ruffin lost quite badly. He did not even see the full return of his initial investment on the 1825 partnership, let alone a profit; he put \$6,000 into the partnership and got back only \$4,094.<sup>200</sup> Ruffin wrote to his wife of his despondency over this loss in June of 1827:

I find that the man who owed me money<sup>201</sup> has left but little to pay with & that I am likely to lose, probably, two or three thousand dollars—a circumstance not very pleasant at any time, but particularly unwelcome in the present limited state of my income. What I shall get will also be probably some time in coming. I do not know but that this loss is the chief cause of the *fatigue* I experience; but I am really almost broken down.<sup>202</sup>

Thus, to the extent that Ruffin was looking to his slave-trading business as a salve for financial distress, he was sorely disappointed; his overall cash investment of \$10,000 over a five-year period netted him a total gain of only about \$3,500,<sup>203</sup> or less than six percent on an annualized basis.

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199. See Thomas Ruffin Ledger Book, Entry 127, in Thomas Ruffin Papers, *supra* note 126.

200. See *id.*

201. That Ruffin did not refer to Chambers by name or as his slave-trading partner raises the tantalizing possibility that he concealed his involvement in the slave-trading business even from his own wife.

202. Letter from Thomas Ruffin to Anne Ruffin (June 25, 1827), in Thomas Ruffin Papers, *supra* note 126.

203. This calculation clears up some inaccuracies in the scholarship. Sally Hadden reported that “Ruffin’s notes show that *the partnership* turned more than a \$6,000 profit during a three-year period.” Hadden, *supra* note 12, at 7 (emphasis added). Apparently relying on Hadden’s numbers, Mark Tushnet wrote that “Ruffin invested four thousand dollars in the initial purchase of slaves, and eventually he made a profit of about six thousand dollars in the slave-trading venture.” TUSHNET, *supra* note 15, at 88. Hadden’s number appears to be too small and Tushnet’s too large. Ruffin’s ledger reflects that the 1821 partnership produced profit *to him* in the amount of around \$5,500, see Thomas Ruffin Ledger Book, Entry 127, *supra* note 199, but *the partnership’s* profits would have been *double* that, because the partnership agreement provided that the partnership’s profits were to be “equally divided” between Chambers and Ruffin. See Articles of Agreement between Benjamin Chambers and Thomas Ruffin (Oct. 26, 1821), *supra* note 180. If Ruffin received about \$5,500 in profits, then *the 1821 partnership’s* profits must have been in the vicinity of \$11,000. Tushnet’s characterization of Ruffin’s success in the slave-trading business appears to have confused Hadden’s erroneous statement of the 1821 *partnership’s* profits with the amount that *Thomas Ruffin* “eventually . . . made . . . in

The crucial point, however, is this: Thomas Ruffin's ledger book and day books reveal that he did *not* look to his slave-trading business as any sort of salve for financial distress. Notwithstanding the profit it achieved, Ruffin never took so much as a penny in cash from his first slave-trading partnership between October of 1821 and June of 1825.<sup>204</sup> He simply allowed the money to sit in the hands of Benjamin Chambers—in the form of cash and slaves—as Chambers wandered the East Coast for over three years. In June of 1825, when Ruffin finally received a profit from the first partnership, he rolled more than a third of it along with his original investment back into the second partnership. This was not a man who, in Mark Tushnet's words, "addressed his financial problems by trading in slaves."<sup>205</sup> He did not get into the business of trafficking in human beings, or stay in it once he had started, in order to make ends meet, or to offset losses from other faltering investments and enterprises on whose income he and his family depended. Thomas Ruffin got into the slave-trading business as a speculator, plain and simple.

### C. *Breaking Up Slave Families*

Thomas Ruffin's career as lawyer, plantation owner, and judge coincided with what scholars have called the "paternalist" or "domesticating" era of American slavery. This was a time when slave owner narratives came to reflect a "domesticating mission to sponsor among slaves the virtues of the 'Victorian family'"<sup>206</sup> and pro-slavery propaganda maintained that "masters were emotionally attached to their slaves [and] encouraged the institution of the family among them."<sup>207</sup> In this world of supposed emotional attachment and "family values," the break-up of slave families—husbands from wives, children from parents—was something to avoid. Slave owners, moved by their own gentle and protective emotions toward their slaves, would be expected to try to keep slave families together.

This paternalism shows up in Thomas Ruffin's judicial writing around the time of *State v. Mann*. In *Cannon v. Jenkins*,<sup>208</sup> a case that

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the slave-trading venture." TUSHNET, *supra* note 15, at 88. This article shows that Ruffin actually made only about \$3,500 on a total investment of \$10,000.

204. Both his ledger and his day books make this clear; at no point between the founding of the partnership in October of 1821 and its settlement in June of 1825 is there any indication of any partnership payment to Ruffin.

205. TUSHNET, *supra* note 15, at 88. Though the quoted words are Tushnet's, he makes clear that the underlying claim is Sally Hadden's. *See id.*

206. TADMAN, *supra* note 183, at 9.

207. *Id.* at 111.

208. 16 N.C. (1 Dev. Eq.) 245 (1830).

the Supreme Court of North Carolina decided just a few months after *Mann*, the question was whether an estate administrator fraudulently sold four slave brothers as a single lot to a bidder with whom he had allegedly colluded. Ruffin upheld the sale but noted in extended dictum that “[m]ost commonly the articles sell best singly; and therefore, they ought, in general, to be so offered.”<sup>209</sup> Separate sales were normally what “must be done if the executor discovers that the interest of the estate requires it; for he is not to indulge his charities at the expense of others.”<sup>210</sup> But Ruffin could not fully associate himself with a rule that counseled the forcible separation of four young brothers. Echoing the language of his then-recent opinion in *State v. Mann*, he acknowledged that “[i]t would certainly have been *harsh* to separate these four boys and sever ties which bind even slaves together.”<sup>211</sup> He therefore softened his stance, avowing that if an executor sold four slave brothers as a group rather than singly, “the Court would not punish him for acting on *the common sympathies of our nature* unless in so doing he hath plainly injured those with whose interest he stands charged.”<sup>212</sup>

Ruffin’s tone in *Cannon v. Jenkins* is very much of a piece with that of *State v. Mann*: Ruffin-the-judge articulates the tough rule of the law while Ruffin-the-man avows the “harshness” of the law’s result and its inconsistency with the feelings that arise from “the common sympathies of our nature.” But when it came to protecting slave families, Ruffin’s own actions repeatedly belied the paternalistic and sensitive tone of his judicial writings. Thomas Ruffin repeatedly broke up slave families or kept them apart, even in the face of moving evidence that his harshness took a severe emotional toll on his slaves.

Nowhere was this more starkly apparent than in Ruffin’s involvement in the slave trade. In the accounting that Benjamin Chambers sent to Ruffin for the partnership’s trades in 1823 and 1824, Ruffin saw that their transactions included “Mary a girl [of] 15,” bought for \$150 and sold for \$375; “Mindy a girl [of] 15,” bought for \$260 and sold for \$380; “Eliza a girl [of] 13,” bought for \$175 and sold for \$390; “Patty a girl [of] 13,” bought for \$150 and sold for \$300; “Jo a boy [of] 11,” bought for \$160 and sold for \$375; and “Kathrine a girl

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209. *Id.* at 247.

210. *Id.* at 248.

211. *Id.* (emphasis added); cf. *State v. Mann*, 13 N.C. (2 Dev.) 266 (1829) (“I most freely confess my sense of the *harshness* of this proposition.”) (emphasis added).

212. *Cannon*, 16 N.C. (1 Dev. Eq.) at 248.

[of] 11,” bought for \$140 and sold for \$300.<sup>213</sup> The partnership’s 1825 transactions included “Little Charles,” a boy of 10, and his “2 cisters [sic] younger,” whom Chambers bought for \$500 and sold for \$825; and Winny, a girl of 9, whom Chambers bought for \$240 and sold for \$310.<sup>214</sup> These were not children bought and sold with their parents or (except in the case of “Little Charles” and his “2 cisters [sic]”) with their siblings; they were children that the partnership bought and sold alone.<sup>215</sup> Each and every one of these sales separated children from parents, siblings from siblings, or both.

Yet Ruffin had emotional distance from these transactions; his partner Chambers was the one who bought these children, transported them south, and sold them. One might therefore expect that Ruffin was more tender with the slaves he knew. But often he was not. For example, in 1852, a neighbor of Ruffin’s offered him \$150 for a slave named Noah who had been Ruffin’s for many years and who was married to another of Ruffin’s slaves.<sup>216</sup> Ruffin told his wife to have someone ask Noah whether he wanted to be sold;<sup>217</sup> his daughter soon reported that Noah was “extremely anxious to spend the remnant of his pilgrimage here on earth in the society of his beloved better half.”<sup>218</sup> Ruffin disregarded Noah’s preference and sold him for \$150. When the time came for the slave to leave the Ruffin plantation, Ruffin’s daughter Sally reported to her father that “Old Uncle Noah . . . disliked parting very much.”<sup>219</sup>

Not surprisingly, Ruffin showed no greater compassion for the family relations of the slave Bridget, whom he caned for giving him an insolent look in the fall of 1831. Before 1829, Ruffin owned both Bridget and her daughter. When Archibald Murphey asked Ruffin for Bridget at the end of that year, Ruffin, who had been planning to sell Bridget so that she would “not live short of a thousand miles” away from his plantation and her daughter, agreed to give her to

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213. See An Acct of the Purchase and Sale of Slaves Made by Benjamin Chambers, (1823), in *Thomas Ruffin Papers*, *supra* note 126; Sale of Negroes in South Carolina and Georgia, (1824), in *Thomas Ruffin Papers*, *supra* note 126.

214. See Purchase of Negroes, (July 1825), in *Thomas Ruffin Papers*, *supra* note 126; Sale of Negroes in Alabamma [sic], (1825), in *Thomas Ruffin Papers*, *supra* note 126.

215. In those cases where Chambers bought and sold a family group—siblings, or a parent with children—he noted this explicitly in his accounting.

216. Letter from Thomas Ruffin to Anne Ruffin (Jan. 3, 1852), in *Thomas Ruffin Papers*, *supra* note 126.

217. See *id.*

218. Letter from Sally Ruffin to Thomas Ruffin (Jan. 11, 1858), in *Thomas Ruffin Papers*, *supra* note 126.

219. Letter from Sally Ruffin to Thomas Ruffin (Jan. 17, 1852), in *Thomas Ruffin Papers*, *supra* note 126.

Murphey instead. But he explained to Murphey that a person of Bridget's "character, temper, disposition toward me and mine, habits of life, dress, indulgences, etc." would "corrupt" her daughter and "impair" the daughter's value to him. He therefore insisted that Bridget have no contact with her daughter and forbade them "to meet or have any intercourse" whatsoever.<sup>220</sup>

Ruffin was similarly cold-hearted in rejecting another slave owner's effort to reunite a slave with his wife. In July of 1838, William Hooper of Pittsboro, North Carolina, proposed to sell Ruffin a slave named November, whose wife was a seamstress to Ruffin's wife Anne. "He seems to think his fate a hard one," wrote Hooper, "that he can go only once a month to see his wife, and then have to walk such a distance or hire a horse" in order to make the trip.<sup>221</sup> Hooper explained that November had been "in the service of the College" (presumably the University of North Carolina) but was no longer engaged there and "would do better in the country near his wife."<sup>222</sup> November was "sound & strong," "honest & sober," Hooper assured Ruffin, and "a good house servant."<sup>223</sup> Hooper asked Ruffin at least to "hire him for the rest of the year, or the next year,"<sup>224</sup> if he was not willing to buy him outright, so that November and his wife could be reunited.

Thomas Ruffin was dismayed by Hooper's request. In a letter to his wife notifying her of Hooper's request, Ruffin avowed that he had "determined never to increase my cares & troubles by any addition to any dependents or property of that species."<sup>225</sup> However, Ruffin noted ruefully,

[I]t is one of the obligations, as well as curses, on those who stand in the relation of master to that unhappy race, whether to part with one, altho' a good servant, or to purchase another, perhaps worthless, or, at the least, not wanted, rather than sever the tie of supposed affection, or the cohesion which unites them.<sup>226</sup>

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220. See Letter from Thomas Ruffin to Archibald D. Murphey, *supra* note 138.

221. Letter from William Hooper to Thomas Ruffin (July 11, 1838), in Thomas Ruffin Papers, *supra* note 126.

222. *Id.*

223. *Id.*

224. *Id.*

225. Letter from Thomas Ruffin to Anne Ruffin (July 13, 1838) in Thomas Ruffin Papers, *supra* note 126.

226. *Id.*

He told his wife that he feared that this “supposed affection” of November for his wife would make it impossible for the Ruffins to “resist” November’s wishes, and that if they complied and it turned out that November “did not suit” life on the Ruffin plantation, there “would be no such thing as getting clear of *him*, without sending *her* with him.”<sup>227</sup> Ruffin told his wife that he believed he could find “an excuse for declining” Hooper’s request on the basis that November’s “habits” would “not at all suit the situation in which he desires to place himself—where he must work” and must “lose the opportunity of traffic & merry making.”<sup>228</sup> “My own [wish] is to say promptly *nay*,”<sup>229</sup> Ruffin told his wife, but he asked her for her opinion before responding to Hooper. Five days later, Ruffin’s daughter Alice responded on her mother’s behalf, saying that “whatever [Ruffin] decide[d] on the matter” would be “entirely satisfactory to her [mother],” and that her mother had “no wish on the subject” apart from her husband’s.<sup>230</sup> The archival record does not contain Ruffin’s reply to Hooper’s request, but it seems safe to presume that Ruffin declined. He made clear in his letter to his wife that his wish was to decline unless his wife disagreed, and his financial papers reflect no purchase of a slave in 1838.<sup>231</sup> Ruffin, it appears, kept November and his wife apart.

Perhaps the most heart-wrenching of the family separations that Ruffin’s surviving papers disclose was one related to his slave-trading partnership with Benjamin Chambers. The first partnership agreement between Chambers and Ruffin recites that Chambers contributed to the enterprise “a Negro man slave called Dick about 28 years old, at the price of five hundred Dollars.”<sup>232</sup> At the settlement of the first partnership, Chambers “retained . . . Negro Dick and also his part of the profits,”<sup>233</sup> but that same day, when Ruffin and Chambers signed their second partnership agreement, they stipulated that “Chambers is to attend to the business himself & fund his assistants, that is to say, his slave Dick & two horses & a

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227. *Id.* (emphasis added).

228. *Id.*

229. *Id.* (emphasis in original).

230. Letter from Alice Ruffin to Thomas Ruffin, (July 18, 1838), Thomas Ruffin Papers, *supra* note 126.

231. It must be noted that the extant records for 1838 are considerably sketchier than those for earlier years. Those records that do exist are in the Thomas Ruffin Papers, *supra* note 126 (Box 43, Folder 669).

232. Articles of Agreement between Benjamin Chambers and Thomas Ruffin (Oct. 26, 1821), *supra* note 180.

233. Settlement Agreement (June 15, 1825), *in* Thomas Ruffin Papers, *supra* note 126.

carry-all or waggon out of his own means & without further compensation than by his part of the profits.”<sup>234</sup>

Benjamin Chambers thought highly of his servant Dick—so highly, in fact, that he tried to give Dick his freedom. In his will, Chambers stated that it was his “wish that my faithful servant Dick on account of his meritorious service rendered to me shall be taken by my executor to North Carolina and there set free; provided his freedom cannot be accomplished, I wish him to be sold to some good man near his family.”<sup>235</sup> As death approached, Chambers became even more intent on reuniting Dick with his family in North Carolina. He instructed his physician, who had also prepared his will, that in the event of his death, the doctor should give Dick a pass to go to North Carolina to be near his family.<sup>236</sup> Shortly after Chambers died on March 21, 1827, his physician wrote to Ruffin to inform him of the death. “His servant Dick is very anxious to go to North Carolina to [be] near his family,” the doctor wrote. But the doctor explained that he had thought it better not to follow Chambers’s instructions and give Dick a pass because “no such instructions [were] mentioned in the will” and he was therefore “fearful of laying [himself] liable.”<sup>237</sup>

Ruffin, whom Chambers had named executor of his will, traveled to Abbeville, South Carolina, where Chambers had died, about ten weeks later. There he renounced the office of executor and spent time trying to collect the property of the slave-trading partnership.<sup>238</sup> Ruffin learned that Chambers had left little of value behind and that he was therefore likely to lose “two or three thousand dollars” on his investment.<sup>239</sup> Ruffin then returned to North Carolina. He ignored Chambers’s desire that Dick should be freed and allowed to return to

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234. Articles of Agreement between Benjamin Chambers and Thomas Ruffin (June 15, 1825), *supra* note 182.

235. Last Will and Testament of Benjamin Chambers, (Nov. 28, 1826), in Abbeville County Estate Papers (on file with the South Carolina Department of Archives and History). Chambers may have been from North Carolina; we know that he owned land in Hillsborough, North Carolina, see Letter from Benjamin Chambers to Thomas Ruffin (March 30, 1822), in Thomas Ruffin Papers, *supra* note 126, and that he referred to a trip through North Carolina as a chance to pass through his “old naborhood” [sic] and see “a few of [his] friends.” Letter from Benjamin Chambers to Thomas Ruffin (May 21, 1824), in Thomas Ruffin Papers, *supra* note 126. If Chambers was in fact from North Carolina, then it would stand to reason that Dick, his personal servant, was also from North Carolina.

236. Letter from A.B. Arnold to Thomas Ruffin (March 27, 1827), in Thomas Ruffin Papers, *supra* note 126.

237. *Id.*

238. See Renunciation of Office of Executor (June 18, 1827), in Abbeville County Estate Papers (on file with the South Carolina Department of Archives and History).

239. Letter from Thomas Ruffin to Anne Ruffin, *supra* note 202.

his family in North Carolina. Instead, Dick remained in Abbeville awaiting appraisal and sale.

On August 6th, appraisers examined Dick and estimated his value at \$375.<sup>240</sup> That same day, Dick was offered at public auction in Abbeville, South Carolina, alongside another slave of Chambers's named Harriett, a horse, and a baggage wagon.<sup>241</sup> A man listed on the sale bill as J.C. Martin purchased Dick at a hammer price of \$360.<sup>242</sup>

Thanks to Thomas Ruffin, Dick was not freed and did not even make it back to North Carolina to be with his family.<sup>243</sup>

### CONCLUSION

Was Thomas Ruffin a man of "honour," of "humanity," and of "the kindest and gentlest feelings" who was "obliged to interpret . . . severe laws with inflexible severity,"<sup>244</sup> as Harriet Beecher Stowe saw him? Did *State v. Mann* truly open a "severe" "struggle" in Ruffin's "own breast" between his "feelings as a man" and his "duties as a Magistrate?"<sup>245</sup> Did Ruffin "feel" the "harshness" of the result in *State v. Mann* "as deeply as any man can?"<sup>246</sup>

The full archival record—rather than the sanitized one bequeathed to scholars by Ruffin's great-grandson—provides a much clearer negative answer to all of these questions than the literature has thus far reached. Thomas Ruffin engaged in the slave trade purely as a speculator at a time when that business was uncommon among men of his station, and he continued the trade while he sat on the state court bench. Thomas Ruffin battered a slave named Bridget for giving him an insolent look. And he either sold or otherwise kept many slaves of all ages—including some even younger than age nine—away from their parents, brothers, sisters, and children. The full archival record shows that on matters relating to chattel slavery, Thomas Ruffin was certainly not among the better men of his generation and may have been among the more ruthless.

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240. Appraisal, Estate of Benjamin Chambers (Aug. 6, 1827), in Abbeville County Estate Papers (on file with the South Carolina Department of Archives and History).

241. Sale Bill, Estate of Benjamin Chambers (Aug. 6, 1827), in Abbeville County Estate Papers (on file with the South Carolina Department of Archives and History).

242. *Id.*

243. I assume here that Dick's purchaser, J.C. Martin, was not a North Carolinian who traveled all the way to Abbeville, South Carolina for this particular estate sale.

244. STOWE, *THE KEY TO UNCLE TOM'S CABIN*, *supra* note 43, at 133.

245. *State v. Mann*, 13 N.C. (2 Dev.) 263, 264 (1829).

246. *Id.* at 266.

As Thomas Babington Macauley saw, the hindsight defense leaves no room for better and worse people in a generation; it insists that our ancestors lived in a “time” when “people” thought, felt, and acted in some particular way that characterized their era. The hindsight defense flattens the past and the people who lived in it, stripping prior generations of their diversity and their lives of contingency, and generalizes their colorful experiences into monotone and monolith. The rich and sobering details of Thomas Ruffin’s life as a slave owner and slave trader therefore show us just how unhelpfully generic the hindsight defense can be. The large archival record that is available to us takes us beneath the surface of the past—a surface loyally polished by Ruffin’s great-grandson. We quickly find that Ruffin lived a life of choices on slavery that were contestable even in his own time.

Worries about hindsight therefore give us little reason to refrain from judging Thomas Ruffin for his opinion in *State v. Mann*. The past may be “another country,” but a full review of Ruffin’s surviving papers shows that he chose to live in one of that country’s more backward-looking regions.

# NC CRED

NC Commission on Racial & Ethnic Disparities  
in the Criminal Justice System

April 27, 2020

The Honorable Cheri Beasley  
Chief Justice  
North Carolina Supreme Court  
P. O. Box 1841  
Raleigh, NC, 27602

Dear Chief Justice Beasley,

The North Carolina Commission on Racial and Ethnic Disparities (NC CRED) calls upon the North Carolina Supreme Court to remove the life-sized portrait of Thomas Ruffin that dominates its courtroom and the life-sized statue of him that guards the entrance to the North Carolina Court of Appeals. Ruffin was a man who trafficked in enslaved African Americans for profit, beat them with his own hands, tore apart their families, and reshaped the law to allow limitless violence to their bodies. Yet his likeness has been the visual focal point for every visitor to our state's highest courts for over a century. The time has come to remove him from this position of special veneration.

Ruffin, born into a slave-owning Virginia family in 1787, was not predestined to a path of racial brutality. He left the South to attend Princeton at the age of sixteen, at a moment when New Jersey was enacting a law to end slavery. The experience moved him to write home “greatly lamenting” the “uncommon hard fate” of enslaved people and despairing of “any means by which it may be ameliorated.”<sup>1</sup> The young Ruffin was asking himself questions about the

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<sup>1</sup> Sterling Ruffin to Thomas Ruffin (June 1804), in 1 THE PAPERS OF THOMAS RUFFIN 54 (J.G. de Roulhac Hamilton ed., 1918). The son's letter to his father does not survive; the quoted words are the senior Ruffin's summary of what his son wrote him.

# NC CRED

NC Commission on Racial & Ethnic Disparities  
in the Criminal Justice System

morality of slavery that were not uncommon in his generation. Some of his contemporaries, like Ruffin's eventual Supreme Court colleague William Gaston, carried those doubts forward in their lives and acted on them, to the benefit of the enslaved.<sup>2</sup>

Thomas Ruffin left his doubts behind. He received ten slaves as a wedding gift in 1809<sup>3</sup> and then continued to acquire more. Plantation life for these men and women was shockingly abusive, and Ruffin knew it. In 1824, for example, a friend alerted him to the "evil and barbarous Treatment of [his] Negroes" by overseers on his plantation, including the "barbecu[ing], pepper[ing]and salt[ing]" of one named Will.<sup>4</sup> Ruffin himself took the rod to an enslaved woman named Bridget for giving him a look he found insolent.<sup>5</sup>

Of course, many men in Ruffin's circles owned slaves, and ruthless discipline was not unique to Ruffin's plantation. But Ruffin also did something his peers did not: he launched a slave-trading partnership with an associate named Chambers that bought human beings in the border states and sold them at a profit in the deep south. By the 1820s, slave trading was hardly the most reputable of businesses, and Ruffin knew it. A colleague Ruffin invited to join the partnership in 1822 turned him down flat, saying that the "feelings of his mind in some measure revolt[ed]" against "the trafic [sic]" in human beings.<sup>6</sup> The disrepute of the enterprise did not

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<sup>2</sup> Barbara A. Jackson, *Called to Duty: Justice William A. Gaston*, 94 *NC L Rev* 2051 (2016).

<sup>3</sup> Sally Hadden, "Judging Slavery: Thomas Ruffin and *State v. Mann*," in *LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH 5* (Christopher Waldrep & Donald C. Nieman eds., Univ. of Georgia Press, 2001).

<sup>4</sup> Letter from A.D. Murphey to Thomas Ruffin (June 3, 1824), in *Thomas Ruffin Papers*, Southern Historical Collection, UNC Chapel Hill.

<sup>5</sup> Letter from Thomas Ruffin to Archibald D. Murphey, (Oct. 29, 1831), in *Thomas Ruffin Papers*.

<sup>6</sup> Letter from Quinton Anderson to Thomas Ruffin (Jan. 15, 1822), in *Thomas Ruffin Papers*.

# NC CRED

NC Commission on Racial & Ethnic Disparities  
in the Criminal Justice System

stop Ruffin from participating; it simply led him to conceal his role. He drafted the partnership agreement to require Chambers to carry on the business in his name alone.<sup>7</sup>

Ruffin was a devoted husband and father, but the family ties of the African Americans he owned and traded meant nothing to him. When it made financial sense, he sold husbands away from wives and children away from parents. Offered \$150 for an older enslaved man named Noah who had been with him for years, Ruffin asked Noah whether he wanted to be sold. He did not; he was “extremely anxious to spend the remnant of his pilgrimage here on earth in the society of his beloved better half.” Ruffin sold him off anyway.<sup>8</sup> And the ledgers of his slave-trading business show sales of many parentless children, like “Little Charles,” a boy of ten, and his “two cisters younger,” on whom Ruffin turned a profit of \$325 in 1825.

Ruffin inflicted his most grievous injury on enslaved African Americans in his 1829 opinion for the Supreme Court in the case of *North Carolina v. Mann*, unquestionably one of the most brutal in the entire law of American slavery. A jury in Edenton took the extraordinary step of convicting John Mann of the crime of assault for shooting an enslaved woman named Lydia in the back as she ran from his discipline.<sup>9</sup> Mann was not Lydia’s owner; he had merely rented her for a time. This important fact would have allowed the Supreme Court to leave his conviction in place. But Judge Ruffin exonerated Mann. Even as a renter of Lydia, Mann had an “uncontrolled authority over [her] body” that extended all the way to shooting her. Slavery

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<sup>7</sup> Articles of Agreement between Benjamin Chambers and Thomas Ruffin (Oct. 26, 1821), in Thomas Ruffin Papers.

<sup>8</sup> Letter from Thomas Ruffin to Anne Ruffin (Jan. 3, 1852), Letter from Sally Ruffin to Thomas Ruffin (Jan. 11, 1858), Letter from Sally Ruffin to Thomas Ruffin (Jan. 17, 1852), all in Thomas Ruffin Papers.

<sup>9</sup> Sally Greene, “*State v. Mann* Exhumed,” 87 N.C. L. Rev. 701 (2009).

# NC CRED

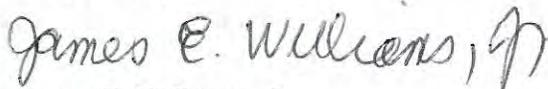
NC Commission on Racial & Ethnic Disparities  
in the Criminal Justice System

depended on the total submission of the slave to the master, Ruffin argued, and “the power of the master must be absolute to render the submission of the slave perfect.”<sup>10</sup>

The law did not compel this outcome or this way of expressing it. This is what Thomas Ruffin chose. He claimed to find the *Mann* case lamentable, a matter he would have preferred to avoid. A lifetime of callousness and brutality toward African American slaves suggests otherwise.

Thomas Ruffin’s record on slavery and the rights of African Americans is a blight on our state’s legal history. Even in the context of his own time his views and actions were regressive and malign. For these reasons, NC CRED respectfully requests the removal of Thomas Ruffin’s life-sized portrait and statue from the places of reverence they now occupy.

Respectfully,



James E. Williams, Jr.

Board Chair

North Carolina Commission on Racial and Ethnic Disparities

cc: Amanda Culbreth Bryan, Michelle Lanier

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<sup>10</sup> North Carolina v. Mann, 13 N.C. 263, 266 (1829).



PENNY RICH, CHAIR  
RENEE PRICE, VICE CHAIR  
JAMEZETTA BEDFORD  
MARK DOROSIN  
SALLY GREENE  
MARK MARCOPILOS  
EARL MCKEE

**Orange County Board of Commissioners**  
**Post Office Box 8181**  
**200 South Cameron Street**  
**Hillsborough, North Carolina 27278**

May 6, 2020

Chief Justice Cherie Beasley  
Supreme Court of North Carolina  
PO Box 2170  
Raleigh, NC 27602

Dear Chief Justice Beasley,

The Orange County Board of Commissioners was contacted by James Williams, Chair of the North Carolina Commission on Racial and Ethnic Disparities (NC CRED), for their endorsement of a letter he had recently sent to you calling upon the North Carolina Supreme Court to remove the life-sized portrait of Thomas Ruffin that dominates its courtroom and the life-sized statue of him that guards the entrance to the North Carolina Court of Appeals.

Mr. Williams said in his letter that Mr. Ruffin was a man who trafficked in enslaved African Americans for profit, beat them with his own hands, tore apart their families, and reshaped the law to allow limitless violence to their bodies. Yet his likeness has been the visual focal point for every visitor to our state's highest courts for over a century. He indicated that the time had come to remove him from this position of special veneration.

The Orange County Board of Commissioners wholeheartedly endorses NC CRED's request to remove the life-sized portrait of Thomas Ruffin that dominates the North Carolina Supreme Court and the life-sized statue of him that guards the entrance to the North Carolina Court of Appeals.

Sincerely,

A handwritten signature in black ink that reads "Penny Rich". The signature is written in a cursive style with a large, prominent "P" and "R".

Penny Rich, Chair  
Orange County Board of Commissioners



OFFICE OF MAYOR PAM HEMMINGER  
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 405 Martin Luther King Jr. Blvd.  
 Chapel Hill, NC 27514

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[www.townofchapelhill.org](http://www.townofchapelhill.org)

June 19, 2020

Chief Justice Cherie Beasley  
 PO Box 1841  
 Raleigh, NC 27602  
 United States

Dear Chief Justice Beasley,

James Williams, Chair of the North Carolina Commission on Racial and Ethnic Disparities (NC CRED), recently sent a letter calling upon the North Carolina Supreme Court to remove the life-sized portrait of Thomas Ruffin that dominates its courtroom and the life-sized statue of him at the North Carolina Court of Appeals.

Mr. Williams stated in his letter that Mr. Ruffin was a man who trafficked in enslaved African Americans for profit, beat them with his own hands, tore apart their families, and reshaped the law to allow limitless violence to their bodies. He was one of the largest slaveholders in Alamance and Orange Counties. Mr. Ruffin also penned a state supreme court decision in *State v. Mann*, which was among the most notorious judicial opinions ever rendered in support of the institution of slavery. This decision protected slaveholders from criminal indictment for beating, injuring and maiming enslaved people. Yet Mr. Ruffin's likeness has been the visual focal point for every visitor to our state's highest courts for over a century. Mr. Williams has indicated that the time has come to remove him from this position of special veneration.

The Town of Chapel Hill Mayor and Town Council wholeheartedly endorse NC CRED's request to remove the life-sized portrait of Thomas Ruffin that dominates the North Carolina Supreme Court and the life-sized statue of him that guards the entrance to the North Carolina Court of Appeals.

Sincerely,

Pam Hemminger, Mayor

Michael Parker, Mayor Pro Tem  
 Jessica Anderson, Town Council Member  
 Allen Buansi, Town Council Member  
 Hongbin Gu, Town Council Member  
 Tai Huynh, Town Council Member  
 Amy Ryan, Town Council Member  
 Karen Stegman, Town Council Member  
 Planning Manager, Town of Chapel Hill



ORANGE COUNTY  
- COMMUNITY -  
REMEMBRANCE  
- COALITION -

15 May 2020

The Honorable Cheri Beasley  
Chief Justice of the North Carolina Supreme Court  
Post Office Box 1841  
Raleigh, NC, 27602

Dear Chief Justice Beasley,

The Orange County Community Remembrance Coalition [OCCRC] respectfully urges that North Carolina Supreme Court remove both the portrait of Thomas Ruffin that hangs in its courtroom, as well as the statue of him that stands at the entrance of the North Carolina State Court of Appeals Building. Given the reprehensible and unconscionable abuses perpetrated by Ruffin throughout his career, particularly upon enslaved and free African Americans, no longer can we, nor shall we, tolerate representations of him in public spaces of honor.

For several generations, the people of North Carolina have known of the reputation and the legacy of horror of Thomas Ruffin, and yet, those in power have chosen to celebrate him and his misdeeds. The time is long overdue for the State of North Carolina to demonstrate its commitment to fairness and equal justice toward all people.

OCCRC is comprised of community organizations and individuals seeking to highlight and remember the victims of racial terror lynching in Orange County. We established ourselves as a coalition in 2018 in response to the opening of the National Memorial for Peace and Justice in Montgomery, Alabama, and the launching of the community remembrance projects sponsored by the Equal Justice Initiative. Our work is to disrupt and overcome the systems and sentiments of racism and discrimination that have plagued us for generations.

With a focus on civil rights, equality and justice for all, OCCRC joins the North Carolina Commission on Racial & Ethnic Disparities in calling for the removal of any likeness of Thomas Ruffin in public places of veneration. No longer can we, the people, be silent and condone shameful conduct and immoral values. For the sake of humanity—past, present and future—please allow dignity and virtue to permeate our civic and community spaces.

Sincerely,

A handwritten signature in cursive script that reads "Renée A. Price".

Renée A. Price, Co-Chair

Orange County Community Remembrance Coalition

c: James E. Williams, Jr., Co-Chair

Orange County Community Remembrance Coalition



ORANGE COUNTY  
- COMMUNITY -  
REMEMBRANCE  
- COALITION -

**ORANGE COUNTY COMMUNITY REMEMBRANCE COALITION**

Free Spirit FREEDOM  
Chapel Hill Carrboro Chapter of the NAACP  
Human Kindness Foundation  
Women's International League for Peace & Freedom  
Rogers-Eubanks Neighborhood Association  
Marian Cheek Jackson Center  
United Church of Chapel Hill  
Sonja Haynes Stone Center at UNC-CH  
Center for Civil Rights: UNC School of Law  
Center for the Study of the American South  
Chapel Hill Public Library  
Orange County Human Relations Commission  
Orange County Arts Commission  
Interested Individuals