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State v. Mann: Judicial Choice or Judicial Duty

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STATE v. MANN: JUDICIAL CHOICE OR JUDICIAL DUTY?*

JUDGE JAMES A. WYNN, JR.**

Judge Thomas Ruffin was ranked by Dean Roscoe Pound as one the ten greatest jurists in American history, in part due to his use of the common law as an agent for economic change and for his influence on the laws of other states. Yet it is his decision as a new judge, in State v. Mann, *that remains his best known, both for its impact on the law of slavery at the time and its cold treatment of the slave as mere property with "no will of his own" and "no appeal from his master" to the courts. At the time of the* Mann *decision, North Carolina precedent provided grounds to disclaim a master's absolute authority over his slave. But in* Mann, *Judge Ruffin made the judicial choice to preserve the relational status quo between master and slave rather than recognize slaves as sentient beings entitled to rights afforded by the rule of law. This Essay analyzes the* Mann *decision and proposes a dissenting opinion to the reasoning and result reached by Judge Ruffin.*

INTRODUCTION

With the benefit of history and hindsight—not to mention positive social change and more enlightened thinking—we all can agree now that the result reached by Judge Ruffin in *State v. Mann*[1] is

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I dedicate this Essay to my grandfather, Andrew Jackson Wynn, born into slavery circa 1862 to his enslaved "Mah," Sadie, a contemporary of Lydia.

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

unconscionable. But the question remains as to the extent his legal reasoning was flawed. Several legal scholars have since posited that the unrelenting march and progression of the law—the precedents being set every day by judges in courts around the country—made slavery, and the position that African American men and women were mere property rather than sentient beings, increasingly untenable and unlikely to be sustained. As the law began to hold slaves responsible for their own actions, be it in criminal cases or in the context of contributory negligence in railroad accidents,[2] the notion of a slave as a mere piece of property, akin to a farm animal or plow, was becoming more indefensible as a practical and legal matter.

Nevertheless, rather than using his celebrated legal acumen to recognize that coming truth, Judge Thomas Ruffin instead clung fast in *State v. Mann* to the legal fiction of slaves as insensible property, unworthy of any sort of protection from their owners regardless of the form of cruelty or barbarity employed. From the standpoint of judicial process, was Judge Ruffin truly compelled by the state of the law and his duty as a judge to reach such an outcome, or was his holding in *State v. Mann* the result of his own choices as to which laws and precedents to follow and how to frame the legal question at issue in the case?

In this Essay, I give a brief history of Judge Ruffin and his infamous case, *State v. Mann*. Then, I discuss and conclude that his decision was one more of judicial choice than of judicial duty. Finally, I offer my own dissenting opinion to the *Mann* opinion.

I. *STATE V. MANN*

After serving in the North Carolina House of Commons and as a superior court judge, Thomas Ruffin was named in 1829 by the General Assembly to serve on the Supreme Court of North Carolina.[3]

2. *See generally* Poole v. North Carolina R.R. Co., 53 N.C. (8 Jones) 340 (1861) (holding that a railroad company was not liable for running over a deaf slave on the tracks); Herring v. Wilmington & R.R. Co., 32 N.C. (10 Ired.) 402 (1849) (holding that a railroad company was not liable for running over slaves that were sleeping on the railroad tracks).

3. *See* Memoranda, 13 N.C. (2 Dev.) 281, 281 (1829) (noting the election of Thomas Ruffin, Esq., of Raleigh, during the last session of the General Assembly to fill the vacancy on the North Carolina Supreme Court left by the death of the first chief justice, John Louis Taylor). North Carolina Supreme Court judges were not popularly elected until after the 1868 state constitution was enacted. *See* N.C. CONST. of 1868 art. IV, § 26 (1868).

He was elected chief justice by his peers in 1833,[4] serving in that capacity until 1852, when he left the court before returning for just one year in 1858.[5] Judge Ruffin also had a plantation and slaves in Alamance County, North Carolina, to which he retired following his career on the bench.[6]

In his time on the supreme court, Judge Ruffin authored over 1,300 opinions[7] and was ranked by Harvard Law School Dean Roscoe Pound as one of the ten greatest jurists in American history, in part due to his use of the common law as an agent for economic change, as well as for the impact his decisions had on laws in other states, particularly in the southeastern United States.[8]

But it is his lone decision as a new supreme court judge, in *State v. Mann*, that remains his most controversial and perhaps best-known opinion, both for its impact on the law of slavery at the time and its cold treatment of the slave as mere property with "no will of his own" and "no appeal from his master" to the courts.[9] That opinion, one of his first for the court, written four years before his election as chief justice, reversed the trial court—and went against the arguments made by the State of North Carolina through the Attorney General—to hold that "[t]he power of the master must be absolute to render the submission of the slave perfect" such that an owner is not

4. Chief Justice Leonard Henderson died in 1833 and was replaced by William Gaston, a lawyer and experienced politician credited, along with Thomas Ruffin, with making the Supreme Court of North Carolina one of the strongest in the country. *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. 24, 2009). John Hall was replaced after his death in 1832 by Joseph J. Daniel, who, incidentally, was the trial judge in *State v. Mann*. *See* Walter Clark, *A History of the Supreme Court of North Carolina*, 177 N.C. 617, 622 (1919).

5. *See* NORTH CAROLINA GOVERNMENT 1585–1974: A NARRATIVE AND STATISTICAL HISTORY 360–61 (John L. Cheney, Jr. ed., 1975) (noting that Ruffin did not return to the court as chief justice).

6. Judge Ruffin sold his plantation after the Civil War, finding that he could not maintain it profitably after the emancipation of African Americans. *See* William A. Graham, *A Memorial Oration*, *in* 1 THE PAPERS OF THOMAS RUFFIN 30 (J.G. de Roulhac Hamilton ed., 1918) (lauding Ruffin's operation of his plantation "until the year 1866, when the results of the war deprived him of laborers, and he sold the estate and removed again to Hillsborough"); *see also* Letter from Thomas Ruffin to Edward Conigland (July 2, 1866), *in* 4 THE PAPERS OF THOMAS RUFFIN 62 (J.G. de Roulhac Hamilton ed., 1920) (explaining to Edward Conigland, member of the North Carolina constitutional convention of 1865, that, "in the altered condition of the Country, I could not with any profit of satisfaction, carry on a Plantation").

7. A Westlaw search conducted on November 21, 2008, under search criteria "ju(ruffin) & da(bef 1860)" returned 1,442 documents.

8. *See* Brinkley, *supra* note 4.

9. State v. Mann, 13 N.C. (2 Dev.) 263, 266–67 (1829).

"answerable *criminaliter* for a battery upon his own slave, or other exercise of authority or force not forbidden by statute."[10]

State v. Mann came before the Supreme Court of North Carolina as an appeal by the defendant from his conviction for assault and battery upon a slave.[11] At trial, evidence showed that the defendant, John Mann, had hired Lydia, a slave owned by Elizabeth Jones, for one year.[12] During that year, Lydia had committed some offense against the defendant.[13] When Mann "undertook to chastise her," Lydia ran away, at which point he called to her to stop and then shot and wounded her when she did not do so.[14] The trial court instructed the jury that, if they believed the punishment was "cruel and unwarrantable," and "disproportionate to the offen[s]e committed by the slave," they should return a guilty verdict.[15] Defendant then appealed his conviction to the supreme court, led at that time by Chief Justice Leonard Henderson.[16]

According to the text of the opinion, Judge Ruffin's hands were tied: regardless of "the feelings of the man[,] ... the duty of the magistrate" meant that he could not "avoid any responsibility which the laws impose."[17] Judge Ruffin thus recognized that the law governing a master's actions toward his own slaves was still evolving, noting the absence of a statutory bar to forceful or violent behavior by a master.[18] Nevertheless, as a supreme court judge who was considered later in his tenure to have "transformed the common law of North Carolina into an instrument of economic change,"[19] Judge Ruffin showed a remarkable reluctance in *State v. Mann* to utilize the common law to move society forward in its attitude toward the treatment of slaves.

Indeed, while Judge Ruffin observed "[t]hat there may be particular instances of cruelty and deliberate barbarity where, in conscience, the law might properly interfere," he then stepped back

10. *Id.* at 265–66.
11. *Id.* at 263.
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* Brinkley, *supra* note 4.
16. At that point, the Supreme Court of North Carolina had only three judges in total. Aside from then-Judge Ruffin, Chief Justice Henderson and Judge John Hall—two of the original members of the court—were serving in 1829. *See* Walter Clark, *A History of the Supreme Court of North Carolina*, 177 N.C. 617, 620–22 (1919).
17. *Mann*, 13 N.C. (2 Dev.) at 264.
18. *See id.* at 268 ("[I]t will be the imperative duty ... except where the exercise of it is forbidden by statute.").
19. *See* Brinkley, *supra* note 4.

from moving the court in that direction, cautioning 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."[20] Yet, in a decision six years before *Mann*, the Supreme Court of North Carolina in *State v. Hale*[21] upheld battery by a stranger against a slave as an indictable offense.[22] The *Hale* court employed language that Judge Ruffin could have seized upon to reach a different outcome in *Mann*, by focusing on the behavior of the perpetrator, rather than the identity of the victim:

> The common law has often been called into efficient operation for the punishment of public cruelty inflicted upon animals for needless and wanton barbarity exercised even by masters upon their slaves, and for various violations of decency, morals, and comfort. Reason and analogy seem to require that a human being, although the subject of property, should be so far protected as the public might be injured through him.[23]

Despite the prerogative of the courts to shape the common law of a young nation, Judge Ruffin wrote that, "[t]he Court, therefore, disclaims the power of changing the relation [of slavery] in which these parts of our people stand to each other."[24] Rather, North Carolina and the country had to wait "until the disparity in numbers between the whites and blacks shall have rendered the latter in no degree dangerous to the former," which would be the result of increasing statutory protections, "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."[25] According to Judge Ruffin,

> [t]his result, greatly to be desired, may be much more rationally expected from [those events] than from 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 even that evil.[26]

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20. *Mann*, 13 N.C. (2 Dev.) at 267.
21. 9 N.C. (2 Hawks) 582 (1823).
22. *Id.* at 586.
23. *Id.* at 585.
24. *Mann*, 13 N.C. (2 Dev.) at 267.
25. *Id.* at 267–68.
26. *Id.* at 268.

From the plain language employed by Judge Ruffin in the opinion, he was tormented both by having to consider the question and deciding it the way he did. Even so, he repeatedly asserted that such an outcome was impossible to avoid given the state of the law:

> [T]he Court is compelled to declare 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.[27]

Nevertheless, as demonstrated by the language from *Hale*, Judge Ruffin did have a basis in the law to uphold John Mann's conviction for battery against Lydia, a slave he had hired. In the Appendix to this Essay, I offer an example of how a judge with a different judicial philosophy might have employed the precedent of *State v. Hale*—and thus, the common law existing at the time in North Carolina, including the ongoing existence of slavery as an institution—to dissent from the result Judge Ruffin claims he was "compelled" to reach in *Mann*.[28]

II. JUDICIAL CHOICE

Judge Ruffin's words in *State v. Mann* make clear that he was aware of the eroding support in legal precedents for the treatment of slaves as mere property.[29] But arguably, Judge Ruffin made the judicial choice to arrest that erosion, at least for a time. He reasserted that "[t]he end is the profit of the master, his security and the public safety," which can be accomplished only through the absolute power of the master and the perfect submission of the slave.[30] Thus, Judge

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27. *Id.*

28. *See infra* Appendix; *accord* Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 772–73 (2009); Sally Greene, State v. Mann *Exhumed*, 87 N.C. L. REV. 701, 734–35 (2009).

29. *See, e.g.*, *Mann*, 13 N.C. (2 Dev.) at 268 ("[T]he Court is compelled to declare 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."). One such statutory prohibition limiting the owner's "full dominion" over the slave was enacted twelve years before *Mann* and expressly provided that the killing of a slave by any person was a homicide, as at common law. 1817 N.C. Sess. Laws 1407.

30. *Mann*, 13 N.C. (2 Dev.) at 266 ("This discipline belongs to the state of slavery. They cannot be disunited without abrogating at once the rights of the master and absolving the slave from his subjection.").

Ruffin recognized and directly confronted the judicial choice between upholding the legality of slavery as an institution on the one hand,[31] and the recognition that slaves were, in fact, sentient beings and therefore fundamentally different from other property, on the other. This difference would ultimately be exposed through cases like *Hale* and *Mann*. The prerogative of Judge Ruffin was to couch the outcome in *Mann* as a virtual *fait accompli*—that if slavery exists as an institution, then Mann cannot be criminally liable for his battery against Lydia. In doing so, Judge Ruffin chose not to consider that the classification of slaves as insentient property was inconsistent with the laws and legal system of the United States.

Stated simply, Judge Ruffin made a deliberate choice in *State v. Mann* to continue to operate under the assumption that a slave was only a piece of property without a conscious presence as a human being, notwithstanding his own understanding of the fact that the institution's necessary conception of slaves as mere property was ultimately a legal fiction.[32] Judge Ruffin chose to focus on the trees rather than to see the forest—yet, he did so in the name of preserving

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31. *Id.* at 265 ("The established habits and uniform practice of the country . . . is the best evidence of the portion of power deemed by the whole community requisite to the preservation of the master's dominion.").

32. Prior to *Mann*, several jurisdictions recognized slaves as "persons" entitled to the protection of their criminal statutes and appropriate food, shelter, and clothing from their owners. *See generally* United States v. Brockett, 24 F. Cas. 1241 (D.C. Cir. 1823) (No. 14,651) (holding that a slave owner's vicious and unjustified assault on his slave was an indictable offense); State v. Bowen, 14 S.C.L. (3 Strob.) 573 (1849) (holding that a 1740 Act imposing criminal fines upon slave owners neglecting to provide sufficient food to their slaves was constitutional). *See also* State v. Scott, 8 N.C. (1 Hawks) 24, 24 (1820) (explaining that the Act of 1817 "gives to a slave the character of a human being, and places him within the peace of the State, so far as regards his life").

After the Civil War, Ruffin himself advocated for the inclusion of African Americans as "persons" within the meaning of North Carolina's constitution, worthy of consideration for purposes of the number of representatives each county would have in the General Assembly. *See* Letter from Thomas Ruffin to Edward Conigland, *supra* note 6, at 64. After posing the question of why white women and children, though not eligible as representatives or delegates, should be counted for purposes of representation but free African Americans should not, Judge Ruffin answered:

> The answer is plain, that, though non-voters, they are as much bound by the laws that may be made and therefore, as much interested in them as the white men, who did vote for the delegates; and therefore the delegates ought to be men, who are their neighbors, know their wants and condition and sympathise with them both in their wants and wishes . . . . My objection is, that black free persons were not also included—not as voters, but as fixing the representation in point of numbers. Every reason for including white women and infants applies with equal force to the blacks, and some of them with greater force.

Id.

the forest at large. Ruffin sacrificed loftier notions of justice in favor of a decision that looked past its immediate outcome and saw the consequences for the institution of slavery had the court reached a different result. In *Mann*, Judge Ruffin expressed his reluctance to issue a ruling that would be inconsistent with statutory law and noted that, even "[i]f we thought differently [about slavery,] we could not set our notions in array against the judgment of everybody else, and say that this or that authority may be safely lopped off."[33] He declaimed the authority of a court in such matters. Yet, the label of judicial conservatism is one he clearly discarded later in his tenure as chief justice, when he used the power of the judiciary to strengthen the common law as an agent for economic change.[34] Thus, while he embraced the use of the common law to effectuate economic change, when confronted with issues involving social norms to which he was an active participant as a slave owner, he chose to avoid common law principles that would go against those norms.

As shown by his opinions employing the common law to bring about economic change, the common law afforded Judge Ruffin the flexibility to reach a different outcome. Particularly, he could have focused on the role of the courts and the common law in criminalizing certain violent or barbaric behavior, regardless of the identity of the victim involved. By emphasizing social norms for behavior, as Chief Justice Taylor did in *State v. Hale*, Judge Ruffin could have defined John Mann's battery against Lydia as one of the "particular instances of cruelty and deliberate barbarity where, in conscience, the law might properly interfere."[35]

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33. *Mann*, 13 N.C. (2 Dev.) at 265.

34. *See* Arrington v. Wilmington & W.R. Co., 51 N.C. (6 Jones) 68, 68 (1858); Gordon v. Price, 32 N.C. (10 Ired.) 277, 277 (1849); *accord* Graham, *supra* note 6, at 28 ("[Judge Ruffin's] familiar knowledge of banking and mercantile transactions and skilfulness [sic] in accounts, gave him a conceded eminence in the innumerable causes involving inquiries of this nature."). Before joining the Supreme Court of North Carolina, Judge Ruffin was recruited in 1828 to serve as President of the State Bank of North Carolina, a time when its charter was in jeopardy. Judge Ruffin is reputed to have used his "true talent for finance" to redeem the Bank and lead it out of debt by the end of its charter. *Id.* at 24.

35. *Mann*, 13 N.C. (2 Dev.) at 267. After becoming chief justice, Ruffin himself recognized that "the master's authority is not altogether unlimited. He must not kill. There is, at the least, this restriction upon his power: he must stop short of taking life." State v. Hoover, 20 N.C. (3 & 4 Dev. & Bat.) 365, 365 (1839). In that opinion, Chief Justice Ruffin stated:

> The acts imputed to this unhappy man do not belong to a state of civilization. They are barbarities which could only be prompted by a heart in which every humane feeling had long been stifled .... Such acts cannot be fairly attributed to an intention to correct or to chastise. They cannot, therefore, have allowance, as

Interestingly, five years after the decision in *Mann*, in *State v. Negro Will*,[36] Judge Gaston authored an opinion in which then-Chief Justice Ruffin concurred, that recognized a slave's right—as a human being fighting for survival—to resist his owner's attempt to kill him even if that struggle led to the master's own death.[37] That slave was convicted of manslaughter, rather than murder, because "[t]he prisoner is a human being, degraded indeed by slavery, but yet having organs, dimensions, senses, affections, passions, like our own."[38] Further, "[t]he unfortunate man slain was for the time, indeed, his master, yet this dominion was not like that of a sovereign who can do no wrong."[39] Most significantly, the slave in that case killed his master after a struggle that began when the slave had run from the master, seeking to escape punishment, and the master had shot him in the back—just as in *Mann*.

Likewise, in *State v. Hoover*,[40] another five years later, Chief Justice Ruffin himself authored an opinion which affirmed the conviction of a master for the murder of his slave following "[p]unishment thus immoderate and unreasonable in the measure . . . [that] loses all character of correction *in foro domestico*, and denotes plainly that the prisoner must have contemplated the fatal termination, which was the natural consequence of such barbarous cruelties."[41] Thus, nearly ten years after *Mann*, Chief Justice Ruffin engaged in exactly the kind of case-by-case factual determination that he claimed in *Mann* must be avoided.

Had Judge Ruffin been willing to challenge the underlying assumption of the legality of slavery or even to consider its internal inconsistencies, perhaps he would have authored an opinion that moved society at least one small step forward in its treatment of slaves:

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being the exercise of an authority conferred by the law for the purposes of the correction of the slave, or of keeping the slave in due subjection.

Id. at 368–69. Several years later, further eroding the *Mann* holding, the Supreme Court of North Carolina concluded that "an assault made by a white man upon a slave which endangers his life or threatens great bodily harm, will amount to a legal provocation." State v. Cæsar, 31 N.C. (9 Ired.) 391, 408 (1849). However, Chief Justice Ruffin dissented from that opinion. *Id.*

36. 18 N.C. (1 Dev. & Bat.) 121 (1834).

37. *Id.*

38. *Id.* at 172.

39. *Id.*

40. 20 N.C. (3 & 4 Dev. & Bat.) 500 (1839).

41. *Id.* at 504–05.

> A more correct imagination of the inner life of black people, living in an insultingly racist regime, might not at once have brought about much change; evil can remain evil, even when it can no longer say with a straight face that it knows not what it does. But it is at least possible that a shift toward humaneness might have started sooner had the humane imagination sooner been put to work on this problem in more minds.[42]

At a time when the supreme court actively engaged in creating the common law, it appears rhetorical to ask whether Judge Ruffin could have used the court's constitutional role to interpret the law as a tool to move society forward in its treatment of minorities and other vulnerable groups. Notably, Judge Ruffin "cited no legal authority for [his] proposition; his holding was based on [his perceived] realities of the master-slave relation that made it imperative that the master have this unlimited power,"[43] suggesting that he just as easily could have reached a different outcome had he chosen to employ different reasoning.[44] As noted by Justice Benjamin Cardozo, "when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends."[45]

Judge Ruffin cast his decision and its outcome as being under the "established habits and uniform practice of the country,"[46] but he and society would have been better served had he adhered to a different judicial philosophy:

> It is the function of our courts to keep the doctrines up to date with the mores by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest

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42. CHARLES L. BLACK, JR., THE HUMANE IMAGINATION 6 (1986).

43. Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 139 (1985).

44. *See generally* Commonwealth v. Turner, 26 Va. (5 Rand.) 678 (1827) (Brockenbrough, J., dissenting) (dissenting from a case reaching the same result as *Mann* and arguing that a master's interest in the full enjoyment of the right of property in the slave would not be interfered with by reaching a different result, because cruel punishment was not necessary for enjoyment of the slave as a thing, and that the master's security interests, the peace of society, and slave subordination would all be served by criminalizing the conduct of the defendant); Fede, *supra* note 43, at 141 (noting that, in writing the *Mann* opinion, Ruffin deviated from the common law in North Carolina at the time in order to reach the result that he wanted).

45. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1921).

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

> honor; and no brave and honest judge shirks the duty or fears the peril.[47]

Given his status as a slave owner himself, perhaps Judge Ruffin was motivated by his own personal beliefs rather than being truly compelled by the status of the law at that time.[48] He unquestionably knew that, for slavery to survive, "it needed the support of elaborate human institutions, such as law."[49] His resort to the "established habits and uniform practice of the country"[50] as a rationale or justification for the outcome in *Mann* was later used—while he was still on the court—as a reason for weakening its holding.[51]

CONCLUSION

If a judicial opinion is "designed to persuade the parties and the world that the decision arrived at is just, that the evidence has been weighed, that the rules of law have been justly applied, that the rules of law themselves have been fairly determined,"[52] then Judge Ruffin likely achieved that end in the minds of his contemporaries in 1829. If, however, judicial opinions—particularly those that interpret and apply the common law, rather than statutory law—are a part of a "[c]onstitutional doctrine [that] succeeds if it expresses what turn out

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47. Arthur L. Corbin, *The Offer of an Act for a Promise*, 29 YALE L.J. 767, 771–72 (1920).

48. *See* ROBERT COVER, JUSTICE ACCUSED 119 (1975) ("In such cases, and in the law of slavery[,] . . . it is useful to ask whether we are not dealing with a different rhetorical purpose: not the justification of the result and of the underlying principles, but the justification of the judge.").

49. Alfred 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, 1124 (1998).

50. *Mann*, 13 N.C. (2 Dev.) at 265.

51. *See* State v. Cæsar, 31 N.C. (9 Ired.) 391, 409 (1849) ("I am told, that policy and necessity require that a different rule [than the common law] should exist in the case of a slave. Necessity is the tyrant's plea, and policy never yet strip[ped], successfully, the bandage from the eyes of Justice."). In the opinion, from which Chief Justice Ruffin dissented, Judge Gaston went on to state:

> I fully admit, that the degraded state of our slaves requires laws different from those applicable to white men, but I see no authority in the courts of justice to make the alteration. The evil is not one which calls upon the Court to abandon their appropriate duty, that of enforcing the law as they find it. The legislature, and only the legislature, can alter the law. It is not likely, however, that they will undertake the task, difficult as it is admitted to be, while they find the courts of justice willing to take from them the responsibility of providing for the evil.

Id. at 409–10.

52. COVER, *supra* note 48, at 119.

to be at last the authentic impulses of the nation,"[53] then Judge Ruffin unquestionably failed. Judge Ruffin elevated his own personal belief that slavery was an acceptable institution and part of American life over his realization that the institution could not survive under American law due to the multiple inconsistencies it would engender. In *State v. Mann*, he made the judicial choice to maintain the legal fiction of slaves as mere property, with no will or rights of their own, in order to sustain slavery as a whole.

53. *See* BLACK, *supra* note 42, at 6.

APPENDIX

STATE OF NORTH CAROLINA

Chowan County

v.

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

JOHN MANN,
Defendant

WYNN, J., *dissentiente.*

Because the precedent law of this Court most assuredly holds that a battery committed on a slave, with no excuse or justification, is an indictable offense, *see State v. Hale*, 9 N.C. (2 Hawks) 582, 586 (1823), this Court should affirm the jury's conviction of Defendant John Mann for the battery committed against the slave Lydia. I therefore respectfully dissent.

I disagree with my esteemed colleagues that our existing laws in North Carolina compel the result the majority opinion reaches in this matter. As in *Hale*, "there is no positive law decisive of the question" presented to us; as such, we should follow the example of our respected Chief Justice and look for "a solution . . . 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." *Id.* at 582. Indeed, the common law in our State and our Union is nascent, slowly building and developing with each decision of the judiciary; in the absence of clear statutory directions from the General Assembly as to how to decide a question of law, we must be ever cognizant of the import and impact of each opinion we issue—and ensure that we remain consistent and faithful to our past analysis and holdings, as well as to our values as a society and young nation. The predictability of the law and its outcomes are paramount to the evolution of our State and country.

Thus, I remind my esteemed colleagues of the overriding purpose of our criminal law: namely, to protect not only individual citizens but also the fabric of our society as a whole. Our criminal laws seek not to prevent any and all acts that menace the safety, health, and welfare of the community. Assuredly, mere law would never be sufficient for such protection, and we have rejected the

degree of police powers that would be necessary for that type of absolute security. Rather, our criminal laws are intended to deter abhorrent behavior while also correcting or reforming the criminal—and to remove him from contact with other, law-abiding citizens, because we determine that such conduct will not be tolerated in our society. It is for that reason that we refer to a criminal "paying his debt to society," reflecting our common belief that a crime is a breach of the social contract we hold with each other to behave in a certain manner and above all to treat sentient beings with a certain humanity. As noted by our respected Chief Justice in *Hale*,

> the offence [of assault and battery] is injurious to the citizens at large by its breach of the peace, by the terror and alarm it excites, by the disturbance of that social order which it is the primary object of the law to maintain, and by the contagious example of crimes.

Id. at 584. Thus, acts of violence are committed against individuals, yes, but are also considered to be crimes against the sovereignty of our State and the collective values embodied and reflected in the laws of our State—those that we have all decided as citizens that we hold most dear.

I emphasize again the previous observations of this Court as to the danger of allowing cruel and barbarous behavior to go unpunished in our society, regardless of the identity of the victim of such acts:

> The common law has often been called into efficient operation for the punishment of public cruelty inflicted upon animals, for needless and wanton barbarity exercised even by masters upon their slaves, and for various violations of decency, morals, and comfort. Reason and analogy seem to require that a human being, although the subject of property, should be so far protected as the public might be injured through him.

Id. at 585. Moreover, our General Assembly has seen fit to restrict the power of a master over his slave by criminalizing the killing of a slave. *See* Act of 1817, ch. 949, 1819 N.C. Laws (Potter II) 1407; *State v. Tackett*, 8 N.C. (1 Hawks) 210, 217 (1820). My colleague's majority opinion would hold that anything less than the death of a slave injured by his master—regardless of the cruel measures employed or the absence of any provocation—would not be punishable under criminal law. Thus, although the defendant *sub judice* shot an unarmed slavewoman in the back as she sought to escape his chastisement, he would not be held liable despite the foreseeability, if

not likelihood, of her death resulting from such injury, even though a jury of his peers found the circumstances to be such as to necessitate punishment. I find this refusal to condemn such a brutal act, evincing a callous disregard for human life, to be in complete opposition to the common law and general mores of our time.

I concede the majority's point that "[t]he 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." *State v. Mann*, 13 N.C. (2 Dev.) 263, 267 (1829). However, the case at bar requires us to make no such determinations, nor need we issue any sweeping rule that a master may not punish his own slave. We need merely to note that depraved indifference toward human life—and cruel and deliberately barbarous actions that reflect such an attitude—will not be tolerated in our society, and certainly not by our courts and common law. The defendant here employed a means of punishment—shooting an unarmed slavewoman in the back—that far exceeded her offense of attempting to escape chastisement. Such immoderate violence, so grossly disproportionate to the provocation, was unnecessary and unwarranted. The mere good fortune that the slave Lydia survived her wound, rather than die from it, should not be the determinative factor in whether the defendant is guilty of murder or innocent of any criminal offense. Regardless of the victim or her health, his behavior remains contrary to the decency and morals of our society. Accordingly, I would affirm his criminal conviction.