State v. Mann: Why Ruffin

Mark Tushnet

STATE v. MANN: WHY RUFFIN?*

MARK TUSHNET**

Why did Thomas Ruffin write his opinion in State v. Mann *as he did and when he did? This Article argues that he did so to establish himself as a judge who would fulfill the obligations of an honorable Southerner to demonstrate courage and eloquence. The opinion in* Mann *may also reflect some of the tensions between proslavery ideology and the South's Christian commitments, as well as ideas about the proper distribution of authority over slavery's regulation between judges and juries as representatives of the community.*

INTRODUCTION

Those who study *State v. Mann*[1] persistently ask three questions: Why him? Why then? And why that? Take the final question first: why does Judge Thomas Ruffin's opinion so strongly defend the harshest imaginable account of the master's power over slaves?[2] The answer that scholars tend to give is that Ruffin's opinion was correct

---

** William Nelson Cromwell Professor of Law, Harvard Law School. This Article benefited from helpful comments made at a session of the Working Group on Slavery and the Law convened by the Gilder-Lehrman Center for the Study of Slavery, Resistance, and Abolition, Yale University.

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

2. The question is particularly pressing because no other Southern jurist appears to have taken as strong a position, at least as early as Ruffin did. Ruffin's opinion attracted the attention of Northern opponents of slavery such as Weld and Stowe. *See* HARRIET BEECHER STOWE, *DRED*: A TALE OF THE GREAT DISMAL SWAMP, at iv (Boston, Phillips, Sampson & Co. 1856) (citing a decision by Judge Ruffin as a key plot device); THEODORE D. WELD, AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES 60 (William Loren Katz ed., Arno Press, Inc. 1968) (1839) (discussing *State v. Mann*).

in the sense that it accurately described what the Southern slave system required of the law in order for slavery to survive.[3] That response supports an answer to the first question, "Why Ruffin," as well: Judge Ruffin was the one to write the opinion because he was an especially talented judge, as indicated by Roscoe Pound's inclusion of Ruffin on his short list of great American judges.[4] The "When" question is more difficult, but discussions of the decision center around the possibility that Ruffin was aware of the then-recent slave disturbances in Virginia, of which he might have learned from a relative.[5]

In Part I, this Article posits that the "Why him" and "Why then" questions should be answered in a somewhat simpler way that focuses on Ruffin's biography but locates Ruffin within Southern society and culture.[6] Then, even more speculatively, this Article suggests in Part II that the "Why that" question can be answered with reference to the way Christianity simultaneously justified slavery to slave owners and challenged them to avoid the sins that inevitably accompanied slave ownership. By contrasting *Mann* with a decision Ruffin wrote a decade later, Part III examines the role that Ruffin's understanding of the judiciary played in the *Mann* opinion. The conclusion then builds on the discussion of Christian morality to discuss briefly some of the implications of the moralized terms in which today's historians deal with *State v. Mann.*

I. *STATE V. MANN* AS PART OF RUFFIN'S BIOGRAPHY

Ruffin was just beginning his career on North Carolina's highest court when he wrote *State v. Mann.*[7] If one thinks of him as a

3. For my earlier discussions of *State v. Mann*, see MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST 54–65 (1981) [hereinafter Tushnet, AMERICAN LAW OF SLAVERY]. *See generally* MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: *STATE V. MANN* IN HISTORY AND LITERATURE (2003) [hereinafter Tushnet, SLAVE LAW] (discussing *State v. Mann*'s role in history and literature).

4. *See* Tushnet, SLAVE LAW, *supra* note 3, at 74–81 (discussing several of Ruffin's other opinions and agreeing with Pound as to Ruffin's talent).

5. *See id.* at 73–74.

6. The information about Ruffin unearthed by Professor Eric Muller, in particular about his involvement with the sales of slaves, provides additional support for the view taken here that he was a man of his time, not exceptionally good or bad. *See* Eric L Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 778–97 (2009) (discussing Professor Muller's historical findings about Thomas Ruffin's personal and professional life). This information does not, in my view, fundamentally change our understanding of Ruffin.

7. Ruffin was born in 1787 and was in his early forties when he was elected by the General Assembly to the Supreme Court of North Carolina in 1829, the same year that

"young" judge, one might profit from reflecting on the implications of recent scholarship dealing with antebellum Southern views about what young men should do.[8] The short answer is that young men—and so, perhaps, men starting new careers—should be ambitious and courageous.[9] As Lorri Glover puts it, "if a boy wanted to become recognized as a man, he simply had to excel professionally."[10]

Most often, it appears, "courage" referred to physical courage—fearlessness in the face of physical danger, for example. But moral courage counted as well. Moral courage consisted, in part, of standing up for what was right, even in the face of potential disapproval. Moral courage thereby converged with another desired attribute—frankness in expression.[11] When successful, performances of moral courage could pretermit the disapproval that its authors might have imagined would follow their action. The mere fact that a performance of moral courage did *not* elicit disapproval would support the claim that the author had indeed exhibited moral courage in saying what he said. One might think, then, that it was courageous to act when anticipating disapproval even if that disapproval never materialized.

Jurists at the time were men whose words were their deeds. One can see *State v. Mann* as demonstrating Ruffin's moral courage within his slaveholding society. There he spoke truths that others, less courageous because less willing to face up to slavery's true meaning, could not—in particular, that slavery required the complete

---

Mann was decided. For biographical details, see William A. Graham, *Thomas Ruffin*, *in* LIVES OF DISTINGUISHED NORTH CAROLINIANS, WITH ILLUSTRATIONS AND SPEECHES 284–301 (Raleigh, North Carolina Publishing Society 1898) (discussing the biographical details of Thomas Ruffin's life).

8. *See generally* PETER S. CARMICHAEL, THE LAST GENERATION: YOUNG VIRGINIANS IN PEACE, WAR AND REUNION (2005) (relying primarily on college essays as the basis for a discussion of the views of Southern young men in the late antebellum period); LORRI GLOVER, SOUTHERN SONS: BECOMING MEN IN THE NEW NATION (2007) (relying primarily on letters from parents and sons as the basis for a discussion of the education and character development of Southern young men during the early Republic).

9. *See* ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, THE MIND OF THE MASTER CLASS: HISTORY AND FAITH IN THE SOUTHERN SLAVEHOLDERS' WORLDVIEW 99–103 (2005) (discussing the complex of virtues associated with ambition in the antebellum South); *see also* GLOVER, *supra* note 8, at 64 (asserting that college "boys sought renown as independent, respected men, which they understood came from earning the approval of their classmates").

10. GLOVER, *supra* note 8, at 149.

11. *See* FOX-GENOVESE & GENOVESE, *supra* note 9, at 101–02 (examining the relationship between courage and frankness).

domination of the master over the slave.[12] And, of course, precisely for that reason, Ruffin's moral courage served his ambition as well. It singled him out from other jurists who knew in their hearts that Ruffin was right but could not bring themselves to say so as forthrightly. Recognizing Ruffin's courage, they would celebrate him and make him the leading jurist that he (it is assumed) aspired to be. Ruffin's celebrated rhetoric of "reluctance" and compulsion served to emphasize his courage: only men like him, his language suggested, could face up to the necessities imposed by slavery on the legal system.[13]

Chivalry, which includes notions of courage, also played an important part in Southern thought.[14] By extending courage to encompass moral courage as well as physical courage, perhaps we can understand additional elements in *State v. Mann*. As Ruffin's opinion said, people like Mann were, after all, "barbarians," who were regularly and increasingly condemned by their communities:

> We are happy to see that there is daily less and less occasion for the interposition of the Courts. The ... frowns and deep execrations of the community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave ... 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.[15]

Mann was a moral weakling. The community surrounding him—exemplified in part by the jurors who mistakenly convicted but correctly condemned Mann—was courageous.

Yet, these answers to the "Why him?" and "Why then?" questions may be unsatisfying because they contain an internal tension. Physical courage could serve ambition because placing oneself in physical danger means running a risk of physical harm.

---

12. In Ruffin's words, "The power of the master must be absolute to render the submission of the slave perfect." State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829).

13. *See id.* at 263–64 ("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."); *see also id.* at 268 ("I repeat that I would gladly have avoided this ungrateful question. But being brought to it the 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.").

14. For an extensive discussion of chivalry in antebellum Southern thought, see FOX-GENOVESE & GENOVESE, *supra* note 9, at 329–82.

15. *Mann*, 13 N.C. (2 Dev.) at 267–68.

Being morally courageous in the sense I have sketched poses no risks, or at least poses different ones. The only risk Ruffin's decision exposed him to was the possibility that he would seem foolish rather than morally courageous, which is only to say that he might have discovered—though he did not—that being morally courageous was a bad strategy for an ambitious jurist to adopt. Or, put another way, "moral courage" is only metaphorically courageous and, for that reason, might not lead to a person gaining the regard that physical courage produced in antebellum Southern culture.

Other virtues were associated with chivalry, and so with physical and moral courage. Describing his father, one Southerner recited that he seemed "the gentlest, the tenderest, the most loving, the most eloquent, the most earnest, the most fearless, the most impassioned, or the fiercest man [a stranger] had ever met."[16] Eloquent, fearless, and fierce, but also gentle and tender—this was the slave owner at his best. What would such a person do when confronted with another's unjustified violence and brutality?

One would meet violence with violence when it was directed against oneself, and sometimes even when it was directed against others, such as women and children. That was the spontaneous response, aimed at terminating on-going violence. Unjustified violence against slaves was different, though, in part because it might not occur in the chivalrous slave owner's immediate presence,[17] and in part because the contours dividing the justified from the unjustified were less clear. The proper response to brutality directed at slaves was public disapproval. Fox-Genovese and Genovese support the observation that "[l]eaders of public opinion did their best to uphold the honor and reputation of the slaveholders and defend a social system that taxed patience and ingenuity to the limit" by quoting a statement made in 1846 by an Alabama agricultural society:

> Your Committee feels well warranted in adding that the master who could disregard all those motives for good treatment of slaves, must be brutal indeed, and must be so obtuse in his intellect as to act against the plainest principles of reason. For such cases your Committee invokes the rigid enforcement of

16. FOX-GENOVESE & GENOVESE, *supra* note 9, at 333–34.

17. When it did occur in the slave owner's presence, I suspect, the ideology of chivalry would have the chivalrous slave owner intervene to stop the violence.

> the laws, and *the expression of a strong condemnation by public sentiment.*[18]

This "condemnation" is precisely Ruffin's point in *State v. Mann*.[19]

State v. Mann, this Article suggests, can be seen as Ruffin's bid for recognition as a leading jurist and intellectual. *Mann* is the work of an ambitious man embarking on a career as a judge who demonstrated moral courage in his work and located his legal ruling within the larger framework of a Southern chivalric tradition—a tradition that left disapproval of brutality against slaves to public opinion rather than law. Another dimension of Southern thought, though, might have countered this bid.

II. THE POSSIBLE ROLE OF CHRISTIANITY IN THE BACKGROUND OF *MANN*

Southerners were Christians too and had to reconcile the violence associated with slavery and chivalry with their Christianity. Their basic approach, this Article suggests, was threefold.[20] First, violence directed at slaves was a sin associated with but not entailed by slavery as such; second, a Christian master struggled against sin of all sorts, including the sin of violence; and third, the sins associated with slavery were not different in kind from any of the other sins to which man was prone to commit.[21] The effect of this approach was to normalize violence directed at slaves—that is, to shift it from the domain of slavery to the domain of humankind generally.

By the 1820s, religious discourse around slavery had settled into three forms. For some, the ownership of one person by another was itself a sin committed by the owner. For others, slave ownership was not itself sinful, but was a moral evil of a lesser degree.[22] But,

---

18. *See* FOX-GENOVESE & GENOVESE, *supra* note 9, at 373 (emphasis added); *see also id.* at 374–78 (discussing, in more detail, legal enforcement against and public disapproval of brutality directed at slaves); GLOVER, *supra* note 8, at 83 ("[A] young man's future hung on public perceptions.").

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

20. *See generally* FOX-GENOVESE & GENOVESE, *supra* note 9, at 505–27 (providing an overview of the religion-related arguments that Southerners made in slavery's defense).

21. Later in the antebellum period the specific "comparator" for slavery as the locus of sin became the Northern industrial factory: slavery provided no greater inducement to sin than did Northern factory production. The classic expression can be found in WILLIAM J. GRAYSON, *The Hireling and the Slave*, *in* THE HIRELING AND THE SLAVE, CHICORA, AND OTHER POEMS 21 (Charleston, S.C., McCarter & Co. 1856). My sense is that this argument was not well developed in 1829, but the comparison between slavery and every other human institution obviously was available.

22. For a useful discussion of these alternatives, see generally RICHARD FULLER & FRANCIS WAYLAND, DOMESTIC SLAVERY CONSIDERED AS A SCRIPTURAL

whether slavery was sin or mere moral evil, Christians ought to do what they could to eliminate it.[23] The final form of discourse, of course, was the slave owners': slavery was neither sinful nor in itself a moral evil.[24] The phrase "in itself," though, was important. Slave owners might believe that slaves were "a sacred trust to whom they owed kindness and paternal care,"[25] and that slavery "created a bond of interest that encouraged Christian behavior."[26] Yet, they knew that people were not always trustworthy, and that encouragement sometimes failed. A master who abused his slaves did so "not simply as a master, but as a wicked master."[27]

For slaveholders, power, not slavery itself, created the risk of sin:

> Slaveholders protested that every social system suffered unspeakable atrocities because men are frail creatures bound to abuse power.... [I]f all social systems require concentration of some men's power over others, and if the sinful nature of all men tempts them to abuse it, then slavery, which especially concentrates power, stands convicted as the least defensible of human relations.[28]

Concentrated power does indeed tempt people to abuse power, which is why Ruffin was properly concerned that his legal interpretation might be misunderstood as licensing abuse.[29] Slave owners had to achieve mastery over their slaves, and, in the course of doing so, by using violence they might lose mastery over themselves. They needed a "practiced domination,"[30] but masters could easily slip into mere domination. As Ruffin explained in his important opinion in *State v.*

INSTITUTION: IN A CORRESPONDENCE BETWEEN THE REV. RICHARD FULLER, OF BEAUFORT, S.C., AND THE REV. FRANCIS WAYLAND, OF PROVIDENCE, R.I. (5th ed., New York, Lewis Colby & Co. 1847) (containing a series of correspondences between two ministers who discussed and advocated these alternative viewpoints).

23. As one proslavery minister put it, "[i]f ... slavery be a sin, surely it is the immediate duty of masters to abolish it." *Id.* at 3; *see also* FOX-GENOVESE & GENOVESE, *supra* note 9, at 505 (quoting another proslavery minister: "If slavery be thus sinful, it behooves all Christians who are involved in the sin, to repent in dust and ashes, and wash their hands of it.").

24. *See* FOX-GENOVESE AND GENOVESE, *supra* note 9, at 515 (describing the mentality that slavery was neither sinful nor a moral evil).

25. *Id.* at 237.

26. *Id.* at 368.

27. *Id.* at 621 (quoting Presbyterian theologian James Henry Thornwell).

28. *Id.* at 381.

29. That concern is implicit in Ruffin's paragraph expressing satisfaction that the occasions for intervention against masters were decreasing. *See* State v. Mann, 13 N.C. (2 Dev.) 263, 263–64 (1829).

30. GLOVER, *supra* note 8, at 178.

Hoover,[31] a decade after *Mann*, slave owners suffered the "infirmity of our nature" and the possibility that they might be caught up in a "*brief fury*" when they were punishing their slaves.[32] All men are sinful, and slave owners had no reason to believe that the temptations to sin occasioned by slavery were different from the temptations men faced every day in every human institution.

This Article suggests that Christianity reinforced slavery by treating the sins associated with slavery as indistinguishable from all other sins. Misplaced violence was sinful whether it was directed at a slave or at an unoffending passerby. And, of course, the honorable slave owner would always be alert to threats to his honor, which meant that misplaced violence—sin—in daily life was a real possibility. Put another way, the power concentrated in the slave owner's status did increase the likelihood that a slave owner would abuse his slaves, but the honor associated with that status also increased the likelihood of misplaced violence in daily life. Christianity, understood in this way, normalized the sins associated with slavery.

III. *MANN* AND THE JUDICIAL ROLE

State v. Mann was an opinion at least as much about the proper role of judges in regulating a master's violence as it was about what the overall law of slavery—statutory as well as judge-made—required.[33] Which institution—law, public opinion, or religion—was best suited to regulate violence? *Mann* said that public opinion (and religion) were better than law when mere assaults were involved.[34] *Hoover* said, in contrast, that the law had a role to play when violence resulted in death:

> A master may lawfully punish his slave; and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned. But 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.[35]

---

31. 20 N.C. (3 & 4 Dev. & Bat.) 365 (1839).

32. *Id.* at 369 (emphasis in original).

33. For my discussion of this point, see Tushnet, AMERICAN LAW OF SLAVERY, *supra* note 3, at 901–21.

34. *See* State v. Mann, 13 N.C. (2 Dev.) 263, 267–68 (1829).

35. *Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) at 368 (citing *Mann*, 13 N.C. (2 Dev.) 263 (1829)).

There are, however, two anomalies here. First, Ruffin's opinion in *Mann* never directly explains why the jury in a criminal case could not be taken to express the community's condemnation of the master's misconduct. Juries, that is, might have been taken as bodies that instantiate public opinion within a legal framework. We might read some sentences in *Mann* as an indirect explanation for Ruffin's refusal to see the jury as the community's voice. Ruffin wrote:

> 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. No man can anticipate the many and aggravated provocations of the master which the slave would be constantly stimulated by his own passions or the instigation of others to give.[36]

Consider the implications of these observations for criminal prosecutions. An indictment would describe the circumstances under which the defendant assaulted his slave. The defendant would say that the circumstances described showed facially that his violence was justified by the slave's provocation. The court would have to rule on the legal question of whether, on the facts alleged, the master's violence was indeed justified. Judges, that is, would screen cases out of the legal system before they reached juries, which therefore could *not* serve as the community's voice. But according to Ruffin, the judicial screen would have to make impossible any jury consideration of the master's conduct. Ruffin said: "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."[37] Prosecutions for assaults were generally decided by judges well before cases reached juries. In this view, then, the jury as spokesperson for the community would play a smaller role than we might think, smaller than the overall community's role had to be in controlling masters' misconduct.

Second, as Professor Anthony Baker points out, *Hoover* sits uneasily with *Mann* regarding the role of the judge in regulating slavery.[38] In *Hoover*, Ruffin expressed incredulity that the trial judge had given an instruction—which the jury plainly found inapplicable on the facts presented—dealing with the possibility that an assault resulting in death might be manslaughter rather than murder "[i]f

36. *Mann*, 13 N.C. (2 Dev.) at 267.

37. *Id.*

38. *See* Anthony V. Baker, *Slavery and Tushnet and* Mann, *Oh Why?: Finding "Big Law" in Small Places*, 26 QUINNIPIAC L. REV. 691, 700–01 (2008).

death unhappily ensue from the master's chastisement of his slave, inflicted apparently with a good intent, for reformation or example, and with no purpose to take life, or to put it in jeopardy."[39] But, Ruffin pointed out, the facts of the case showed "barbarities which could only be prompted by a heart in which every humane feeling had long been stifled."[40] Still, as Professor Baker properly observes, Ruffin's conclusion in *Hoover* does not really address the concerns about legal regulation of the master-slave relation expressed in *Mann*.[41]

The problem with the jury instruction is not with the truly brutal master; it is with the master who worries that a jury might mistakenly conclude that "moderate" chastisement that happened to result in death was actually the product of a depraved heart. Nor is it sufficient to say, as Ruffin seemed tempted to do in *Hoover*, that judges could confine juries to the extreme cases through proper instructions, for that point could have been made in *Mann* as well. In *Mann*, Ruffin objected to even the most modest supervision of a master's violence against his slaves as incompatible with slavery's presuppositions because allowing such supervision would communicate to slaves the erroneous message that they had someone to appeal to other than the master.[42] The same could be said of the rule adopted in *Hoover*.[43]

Combine these observations with Ruffin's emphasis on the role of public opinion in controlling a master's violence, and the claim that his opinion demonstrates moral courage might weaken considerably. Ruffin's opinion in *Mann* might exemplify moral courage, but to do so Ruffin had to eliminate the possibility that any other judge would

---

39. *Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) at 368.

40. *Id.* Ruffin described the facts in these terms:

> He beat her with clubs, iron chains, and other deadly weapons, time after time; burnt her, inflicted stripes over and often with scourges, which literally excoriated her whole body; forced her out to work in inclement seasons, without being duly clad; provided for her insufficient food; exacted labour beyond her strength, and wantonly beat her because she could not comply with his requisitions.

Id. at 369.

41. *See* Baker, *supra* note 38, at 698–701.

42. *See Mann*, 13 N.C. (2 Dev.) at 268 (recognizing the "full dominion of the owner over the slave").

43. Jennifer Wahl suggested in comments on this Article that the difference between *Mann* and *Hoover* might reside in the fact that assaults were likely to be common, yet deaths (relatively) uncommon. Erroneous intrusions on the master-slave relation in assault cases would therefore be more frequent than similarly erroneous intrusions in murder cases, and the adverse effects on the institution of slavery would be smaller.

ever be called upon to do the same. And *Hoover* might show that Ruffin did not have the courage of his convictions.[44] Even more, what is so courageous about deflecting responsibility for addressing the sins to which all men are subject to one's neighbors? If there is any answer, it must lie in the fact that Northern observers, at least, commended Ruffin for his honesty and forthrightness[45] and that his Southern colleagues might have overlooked the diffusion of responsibility in his opinion.[46]

CONCLUSION

Ruffin's decisions in *State v. Mann* and other cases involving slave law might raise not the hindsight defense that Professor Muller discusses,[47] but what we might call foresight anxiety. Put aside Ruffin's slave-law decisions and his other involvements with slavery, and he would seem to be an extremely competent judge and a decent human being—if not quite the exemplar of "The Chivalry," then certainly a person who deserves the ordinary respect we give each other.

What then do we make of Ruffin's blindness to the moral evil of slavery?[48] Various answers suggest themselves, but I want to put them aside and ask, what might Ruffin have thought of himself, and what implications does that have for us? Surely Ruffin did not think that his actions needed a defense of any sort, not even the hindsight defense. As Professor Muller observes, criticisms of slavery as a moral evil abounded in Ruffin's intellectual universe but did not sway Ruffin, presumably because he found them mistaken.[49] So too with many of our practices—rarely does anyone believe that he or she has committed himself or herself to defending and advancing evil. We judge ourselves and others according to our own lights and treat those who criticize us and our practices as mistaken.

---

44. Perhaps we might dissolve the tension between *Mann* and *Hoover* by invoking psychology: Ruffin wrote *Mann* to establish his reputation, and once that had happened he had no need to push *Mann*'s reasoning further to the point where almost everyone—North and South—might have regarded him as morally obtuse.

45. *See* Tushnet, SLAVE LAW, *supra* note 3, at 52–55 (discussing the Abolitionist response to Ruffin's opinion).

46. Perhaps, though, my reading here is a bit too Straussian, mistakenly divining a concealed subtlety in Ruffin's opinion.

47. *See generally* Muller, *supra* note 6 (arguing that Ruffin was aware of, and dismissed, critiques of slavery as a moral evil).

48. *See supra* notes 22–27 and accompanying text (discussing the difference between the evils associated with slavery and the evil of slavery itself).

49. *See generally* Muller, *supra* note 6 (discussing Ruffin's awareness and dismissal of critiques of slavery).

Ruffin shows us that people who regard themselves as basically decent human beings can make deeply wrong judgments. Perhaps that could induce in ourselves an appropriate humility. By condemning Ruffin for accepting and defending slavery, an unquestionable moral evil, perhaps we prepare ourselves for a certain self-satisfaction: no matter what you might say about some of our practices, at least they are not as bad as slavery was.[50] And yet, what we today treat as normal and morally defensible may turn out in the fullness of time to be quite evil. Perhaps even more disturbing, what we treat today as evil and morally indefensible may turn out in the fullness of time to be morally commendable.[51] The foresight anxiety is this: we cannot know—today—which of our judgments falls into which category, and so perhaps we should be more temperate in our judgments, perhaps even in our judgments of men like Ruffin.

Increased temperance and humility in our judgments does not mean we must refrain from condemnation. The foresight anxiety should not disable us from assessing the behavior of our predecessors because in principle it applies as much to our contemporaries, and we certainly do not want the foresight anxiety to bar us from honoring those we admire today. So, we should use figures like Ruffin as objects for thoughtful reflection on why and how people—in the past and today—should be honored or repudiated.

50. This "defense" surfaced in discussion of whether waterboarding is torture, when some who found themselves unable to condemn what the Bush administration had authorized distinguishing the form of waterboarding U.S. employees used from the form of water torture used during the Spanish Inquisition. For relevant material, see Posting of Marty Lederman to Balkinzation, http://balkin.blogspot.com/2008/02/lowering-bar-well-at-least-were-not-as.html (Feb. 14, 2008, 17:51 EST).

51. I sometimes think of this as the "Sleeper" principle, after Woody Allen's film of the same name. Allen is awakened after a two hundred year coma in the film and discovers that many things thought bad for people in his time, such as fatty foods and smoking, have since been shown to be quite good for people. So, for example, should we worry that many people today eat cows, or that not enough people today eat cows?