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Author(s): Russell Smandych

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“To Soften the Extreme Rigor of Their Bondage”: James Stephen’s Attempt to Reform the Criminal Slave Laws of the West Indies, 1813–1833

RUSSELL SMANDYCH

In 1813, James Stephen, Jr., a twenty-four-year-old lawyer, was appointed part-time by the British Colonial Office to write legal opinions on the validity of colonial laws. In 1825, he began working full-time as legal advisor to the Colonial Office and held this position until 1836 when he was promoted to the top-ranking post of permanent under-secretary of the Colonial Office, which he held until 1847. During these years, Stephen frequently played a key role in influencing the direction taken by policies and reforms initiated through the Colonial Office. In particular, his important role in shaping Colonial Office “native policy” after the mid-1830s has been documented by several historians,¹ and much has been written about

1. See T. J. Barron, “James Stephen, the ‘Black Race’ and British Colonial Administration, 1813–47,” *Journal of Imperial and Commonwealth History* 5 (1977): 131–50; Elizabeth Elbourne, *Blood Ground: Colonialism, Missions, and the Contest for Christianity in the Cape Colony and Britain, 1799–1853* (Montreal: McGill-Queen’s University Press, 2002); Richard Ely, “From Sect to Church: Sir James Stephen’s Theology of Empire,” *Journal of Religious History* 19 (1995): 74–91; Edward Hughes, “Sir James Stephen and the Anonymity of the Civil Servant,” *Public Administration* 36 (1958): 29–36; Paul Knaplund, *James Stephen*

Russell Smandych is a professor in the department of sociology at the University of Manitoba <rsmandy@cc.umanitoba.ca>. Funding for this research was provided by the Social Sciences and Humanities Research Council of Canada. The author would like to thank the reviewers for *Law and History Review* and Louis Knafla for their insightful comments on earlier drafts of this paper, along with Lenore Woodward and Tara Baxter for their excellent research assistance.

his connection—through his anti-slavery father, Stephen, Sr., and his uncle William Wilberforce—to the famous Evangelical “Clapham Sect” that took a leading role in promoting a number of different humanitarian and social reform causes in the first half of the nineteenth century.²

Although throughout his career, Stephen, Jr., was conscious of the expectation of his political superiors that he should keep within the circumscribed boundaries of his role as a legal advisor and civil servant, this did not stop him from using what influence he had to work for humanitarian causes that deeply affected his conscience. From 1813 to 1833, Stephen, Jr., spent as much time as he could endure—and that his Evangelical conscience would allow him—working for the protection of slaves in British colonial law and, ultimately, for the abolition of slavery throughout the British Empire. During this period, one way in which he attempted to offer better protection to slaves was through invoking key principles of English law and criminal procedure including, importantly, the fundamental ideas of the rule of law and equality before the law. In this article, I examine data that highlight the key role James Stephen played in the fight undertaken by the Colonial Office after 1813 to provide better legal protection to slaves in the West Indies. This account is based primarily on reports and correspondence contained in the Colonial Office Law Officers’ Reports for 1813 to 1833, now held in the British Public Record Office.³ To my knowledge, the following account is the first published study of Stephen’s role in the reform of early nineteenth-century West Indian criminal slave laws that uses this amazingly rich data source.

While historians are accustomed to reading colonial laws as windows into the minds of the colonists, the study of Stephen’s attempt to force reforms to West Indies criminal slave laws sheds light on what actually happened

and the British Colonial System, 1813–1847 (Madison: The University of Wisconsin Press, 1953); Samuel Clyde McCulloch, “James Stephen and the Problems of New South Wales, 1838–1846,” *Pacific Historical Review* 26 (1957): 353–64; Jane Samson, “British Voices and Indigenous Rights: Debating Aboriginal Legal Status in Nineteenth-Century Australia and Canada,” *Cultures of the Commonwealth* 2 (1997): 5–16; Alan G. L. Shaw, “Orders from Downing Street,” *Journal of the Royal Australian Historical Society* 54 (1968): 113–34; Alan G. L. Shaw, “James Stephen and Colonial Policy: The Australian Experience,” *Journal of Imperial and Commonwealth History* 20 (1992): 11–34; Alan G. L. Shaw, “British Policy Towards the Australian Aborigines, 1830–1850,” *Australian Historical Studies* 25 (1992): 265–85; Russell Smandych, “Contemplating the Testimony of ‘Others’: James Stephen, The Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, circa 1839–1849,” *Australian Journal of Legal History* 8 (2004): 237–83.

2. Examples of this writing are cited below in footnotes on Stephen’s early upbringing and important influences on his life and career.

3. Public Record Office (hereafter PRO), Colonial Office (hereafter CO) 323, Law Officers’ Reports, 1813–1833.

to colonial statutes when they reached the Colonial Office.⁴ Throughout this period final decisions on the allowance or disallowance of colonial legislation were made by Colonial Office legal advisors and Law Officers of the Crown. Typically, in the period after Stephen joined the Colonial Office, all of the laws passed by colonial legislatures were required to be sent to the Colonial Office, where they were carefully scrutinized, reported on, and then either approved, amended, or disallowed. On far less frequent occasions, when a specific colonial act was seen to raise an issue relating to a fundamental principle of British jurisprudence, it could be forwarded to the attorney and solicitor general of England, who would then appoint legal counsel to write a legal opinion.⁵ In theory, the Colonial Office had up to two years to disallow a received act. However, as we will see shortly in the case of West Indies criminal slave laws, this was not always possible and the procedure for reviewing colonial acts could be complicated for a number of reasons. These ranged from governors ignoring ordered statutory amendments to the practice of enacting legislation that was timed to expire before it could be formally reviewed by the Colonial Office. The study of the treatment of slaves in colonial criminal courts of the West Indies is also important in its own right, given the relatively small amount of published research on nineteenth-century West Indian slave laws⁶ compared to the amount written about antebellum slave laws of the United States.⁷

4. I would like to acknowledge my appreciation to one of the anonymous reviewers for *Law and History Review* who made this point, which was essential to but missing from my original manuscript.

5. D. B. Swinfen, *Imperial Control of Colonial Legislation, 1813–1865: A Study of British Policy Towards Colonial Legislative Powers* (Oxford: Clarendon Press, 1970).

6. Relevant studies include: Neville Hall, "Law and Society in the Barbados at the Turn of the Nineteenth Century," *Journal of Caribbean History* 5 (1972): 20–45; Anthony De V. Phillips, "'Doubly Condemned': Adjustments to the Crime and Punishment Regime in the Late Slavery Period in the British Caribbean Colonies," *Cardozo Law Review* 18 (1996): 699–715; Mindie Lazarus-Black, "Slaves, Masters, and Magistrates: Law and the Politics of Resistance in the British Caribbean, 1736–1834," in *Contested States: Law, Hegemony and Resistance*, ed. M. Lazarus-Black and S. Hirsch (New York: Routledge, 1994), 252–81; Mindie Lazarus-Black, *Legitimate Acts and Illegal Encounters: Law and Society in Antigua and Barbuda* (Washington: Smithsonian Institution Press, 1994); James Walvin, *Black Ivory: Slavery in the British Empire*, 2d ed. (Oxford: Blackwell, 2001), esp. chap. 15 on "Violence."

7. For examples of recent secondary literature on the pre-Civil War United States, see Paul Finkelman, ed., *Slavery and the Law* (Madison: Madison House, 1997); Thomas Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996); Judith Kelleher Schafer, "'Under the Present Mode of Trial, Improper Verdicts Are Very Often Given': Criminal Procedure in the Trials of Slaves in Antebellum Louisiana," *Cardozo Law Review* 18 (1996): 635–77; Jenny BourneWahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998); Christopher Waldrep and Donald Nieman, eds., *Local Matters: Race,*

In particular, legal historians have given little attention to the treatment of slaves in West Indies criminal courts in the two decades preceding the formal abolition of slavery across the British Empire in 1833 and the role played by British Evangelicals and anti-slavery advocates in attempting to lessen the perceived inhumanity of West Indies criminal slave laws. As I show in the following study, James Stephen played a central role in this movement.

James Stephen's Career in the "Colonial Department"

According to the "biographical notice" written later by one of his famous sons, Sir James Fitzjames Stephen,⁸ James Stephen, Jr., "was born at Lambeth, on the 3rd of January 1789 and completed his education at Trinity Hall, Cambridge, where he took the degree of LL.B., in the year 1812. Having kept his terms at Lincoln's Inn during his residence at Cambridge, he was called to the bar in 1813 and was shortly afterwards appointed by Lord Bathurst to be legal advisor to the Colonial Office."⁹ James Stephen began working for the Colonial Office part-time mainly to write legal opinions on the validity of colonial laws, while maintaining a private practice as a barrister "at the equity bar."¹⁰ According to his son James Fitzjames, due to "a very severe illness" and "weakness of eye-sight, which for many years limited his exertions," in 1824 James Stephen gave up his private legal practice and accepted the dual office of legal "Counsel to the Board

Crime, and Justice in the Nineteenth-Century South (Athens: University of Georgia Press, 2001); William Wiethoff, *The Insolent Slave* (Columbia: University of South Carolina Press, 2002). See also Robert J. Cottrol, "Outlawing Outcasts: Comparative Perspectives on the Differing Functions of the Criminal Law of Slavery in the Americas," *Cardozo Law Review* 18 (1996): 717–52; and Raymond T. Diamond, "Condemned by Substance and Process: A Comment on "'Doubly Condemned': Adjustments to the Crime and Punishment Regime in the Late Slavery Period in the British Caribbean Colonies and 'Under the Present Mode of Trial, Improper Verdicts are Very Often Given': Criminal Procedure in the Trials of Slaves in Antebellum Louisiana," *Cardozo Law Review* 18 (1996): 753–65, for rare but important recent comparative discussion of slave laws in the West Indies and pre-Civil War United States.

8. Leslie Stephen (author of), *Life of Sir James Fitzjames Stephen, Bart., K.C.S.I.: A Judge of the High Court of Justice* (London: Smith, Elder, and Co., 1895). Sir James Fitzjames Stephen gained fame as a leading English High Court judge and legal codifier, while another son, Sir Leslie Stephen, became famous as an author and one of the first editors of the *British Dictionary of National Biography*.

9. James Fitzjames Stephen, "Biographical Notice of Sir James Stephen," in Sir James Stephen, *Essays in Ecclesiastical Biography*, new edition (London: Longmans, Green, Reader, and Dyer, 1868), xi–xvi, at xi.

10. *Ibid.*

of Trade” and “legal advisor to the Colonial Office,” which he held until 1834 when he was appointed assistant under-secretary, and then later, in 1836, permanent under-secretary of the Colonial Office.¹¹ According to all accounts, despite his weak eyesight and recurrent bouts of disabling illness, James Stephen, Jr., was a prodigious and influential civil servant, who in effect later came to rule over the Colonial Office and guide much of its activity and policy.¹²

Sir Henry Taylor, a close friend and colleague of James Stephen in the Colonial Office, wrote in his autobiography that “For a long period . . . Stephen might better have been called the ‘Colonial Department’ itself than ‘Counsel to the Colonial Department.’”¹³ More specifically, as his son James Fitzjames pointed out, “The position which Sir James Stephen occupied in the Colonial Office was a very singular one. The British colonies are a collection of many separate states, of every degree of importance, from nations like Canada and New South Wales down to the rock of Heligoland, inhabited by a few Germans.” “To know exactly what were the powers and what the rights of the English government in respect of each of these communities, to know the history of all the relations between the United Kingdom and each of its dependencies, and to be able to give an account of the state of parties and local politics in every one of them, was one part that was required of the Under-Secretary of State for the Colonies.” In addition to supplying “successive Secretaries of State” with the “special knowledge” they needed in order to make important policy decisions, it

11. *Ibid.*, xii. Although not mentioned by his son, there is good reason to suspect that the “severe illness” experienced by James Stephen, Jr., may have been due to the mental stress caused by overwork. There is scattered evidence of a history of depression and “nervous breakdowns” in the extended Stephen family and during his career James Stephen, Jr., is reported to have suffered severe bouts of “nervous exhaustion” on at least three occasions, in 1824, 1832, and 1846. See Noel Annan, *Leslie Stephen: The Godless Victorian* (London: Weidenfeld and Nicolson, 1984), especially at 14–15, 126–45; T. Barron and K. J. Cable, “The Diary of James Stephen, 1846,” *Historical Studies* 13 (1969): 503–19; Christopher Tolley, *Domestic Biography: The Legacy of Evangelicalism in Four Nineteenth-Century Families* (Oxford: Clarendon Press, 1997).

12. Stephen’s eyesight was so weak that he dictated most of his correspondence and legislative drafting to a clerk or amanuensis. Despite this, however, when not working at the Colonial Office or on behalf of one of his various Evangelical humanitarian causes, Stephen spent much time reading and writing, most often on religion, history, and obliquely on current affairs. Upon his retirement in 1847, Queen Victoria honored him by having him knighted (as knight commander of Bath) and made a member of the Privy Council. In 1849, Stephen was appointed to the Chair of Regius Professor of Modern History at Cambridge University, which he held until shortly before his death on the 5th of September 1859. Knaplund, *James Stephen*, 12–17; J. F. Stephen, “Biographical Notice of Sir James Stephen,” xii.

13. Sir Henry Taylor, *Autobiography* (1885); cited in L. Stephen, *Life of Sir James Fitzjames Stephen*, 44–45.

was Sir James Stephen's duty "to prepare drafts of almost all of the more important despatches, and of the numerous Acts of Parliament which were required by every colony."¹⁴ From 1813 to the early 1830s, Stephen, Jr., also had the job of scrutinizing every law that West Indian Colonial Assemblies passed and then forwarded to London for review and possible disallowance.¹⁵ In his study of Stephen's role in the control of colonial legislation in the first half of the nineteenth century, D. B. Swinfen points out that: "Stephen's whole approach to his duties as counsel was much more thorough and painstaking than that of his predecessors. His comments were frequent, lengthy, well informed, and wide ranging. Clearly in command of the legal knowledge required, he was also prepared to be explicit in his criticism of the practical effect of defective laws."¹⁶ In this context, it is also revealing to note the comments made by the biographer of James Stephen's other famous son, Leslie Stephen, about his relations with his political superiors in the Colonial Office. According to Noel Annan, James Stephen's "encyclopaedic memory gave him command over the details of the politics, administration and constitution of all the colonies, and the various Secretaries of State who flitted briefly in and out of office were compelled to rely on his fabulous comprehension. Members of Parliament began to complain that here was a man who had not won his power in the political arena and yet was able to influence governments. For Stephen was an official with a policy: whereas the Government's policy was to 'meliorate' the position of the slaves, Stephen intended to free them."¹⁷

In order to appreciate why, of all of his many duties, Stephen devoted a disproportionate amount of his time and energy to invoking principles of English law in ways that would help the cause of slave emancipation, it is necessary to look more closely at his family connections and broader personal role in the anti-slavery movement.

14. J. F. Stephen, "Biographical Notice of Sir James Stephen," xii–xiii.

15. Swinfen, *Imperial Control of Colonial Legislation, 1813–1865*, 2–3.

16. *Ibid.*, 27.

17. Annan, *Leslie Stephen: The Godless Victorian*, 11. D. J. Murray offers a similar account of James Stephen, Jr.'s "indispensable" role in the Colonial Office, specifically in relation to his assistance as "an expert in West Indian Law." According to Murray: "Stephen had a religious devotion to his work which he saw as a service in the cause of the slaves and yet he had all the fairmindedness lacking in his father." D. J. Murray, *The West Indies and the Development of Colonial Government, 1801–1834* (Oxford: Clarendon Press, 1965), 121–22.

The “Clapham Sect” and Uncle Wilberforce: James Stephen’s Place in the Anti-Slavery Movement

James Stephen’s early upbringing had a profound effect on the work he later took up in the Colonial Office. Most important, the approach he took to his work in the Colonial Office and in other areas of his life was indelibly influenced by his childhood in the “Clapham Sect,” or inner circle of families and friends surrounding William Wilberforce, that led in campaigns for both the abolition of the slave trade in 1807 and the eventual abolition of slavery throughout the British empire in 1833. The “Clapham Sect” got its name from the fact that after 1785 the families of a small collective of leading Church of England Evangelicals often spent time visiting and socializing—and more important to them, planning and working for causes like the abolition of slavery—at estates they owned south of London near Clapham Common.¹⁸ In the essay he wrote in the mid-1840s, in which he reflected on his experience of having grown up as a child of the “Clapham Sect,” Stephen portrayed the center of this circle to include: “the banker Henry Thornton; the anti-slavery patriarch Thomas Clarkson; his own father, the Master in Chancery, James Stephen; his uncle, the omnifaceted William Wilberforce; the grave-mannered and powerful director of the East India Company Charles Grant; the Cambridge-educated missionary translator of the New Testament into Persian Henry Martyn; the former Governor-General of India Lord Teignmouth; another Cambridge don, Charles Simeon; and the prolific journalist and pamphleteer Zachary Macauley.”¹⁹ Stephen’s essay on “The Clapham Sect” shows the profound influence Wilberforce and other “Saints” of the anti-slavery movement had in shaping his beliefs about Evangelical religious faith and his view of the God-ordained role that was bestowed on its leaders. Members of the Clapham Sect who sat in Parliament with William Wilberforce were commonly referred to as the “Saints,”²⁰ and they tended to vote together as a block on important issues of the day.²¹ Another prominent figure in

18. James Stephen, “The Clapham Sect,” in *Essays in Ecclesiastical Biography*, new edition (London: Longmans, Green, Reader, and Dyer, 1868), 523–84.

19. Ely, “Sir James Stephen’s Theology of Empire,” 80.

20. See Furneaux, *William Wilberforce*, 116; Ely, “Sir James Stephen’s Theology of Empire,” 80; Ian Bradley, *The Call to Seriousness: The Evangelical Impact on the Victorians* (London: Johathan Cape, 1976), 17; Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1795–1865* (Oxford: Clarendon Press, 1988), 7. James Stephen, Jr., also used the endearing term “Saints” in his later essay on the “Clapham Sect.”

21. For an example of this, see Richard R. Follett, *Evangelicalism, Penal Theory and the Politics of Criminal Law Reform in England, 1808–30* (Houndmills, Basingstoke, Hampshire: Palgrave, 2001), 69.

the Clapham Sect was the Reverend John Venn, a leading Evangelical preacher and one of the original founders of the Church Missionary Society in 1799. John Venn was also the father of Jane Catherine Venn, who, in 1814, married James Stephen, Jr. James and Jane Stephen eventually had five children.²²

The "Claphamites," as they later came to be called, represented "the moderate" and "respectable" branch of Evangelism within the Church of England.²³ Nineteenth-century British Evangelism was of course tied not only to the Church of England. Elements of Christian Evangelical thought were also part of the faith of Methodists, Quakers, and other nonconformist religions.²⁴ The Venn family, which James Stephen married into, "stood at the centre of the Evangelical movement within the Church of England."²⁵ Members of the Clapham Sect, in common with other nineteenth-century British Evangelicals, shared a number of specific religious beliefs. David Bebbington has set out four defining characteristics of Evangelism.²⁶ These included first, "conversionism," or an "emphasis on the conscious, personal, and emotional process of recognizing one's sinfulness, repenting of it, and placing one's faith in Christ for salvation." Second was "Biblicism," or the belief in the Bible "as the revelation of God's will toward human beings." Third was "crucicentrism," or the belief in the central Biblical tenet that Jesus Christ died on the cross to atone for human sinfulness. And fourth was "activism," which was seen to be "the logical extension of taking one's conversion and theology seriously." The demands of Evangelical faith were simple; "Man must experience God. He must evangelise among his fellow men. He must listen to God's word; and since God speaks through the conscience, this meant following the inner light wherever it shone."²⁷ Ian Bradley remarks that the form of Christianity practiced by nineteenth-century Evangelicals "was intensely emotional and experiential," and this "vital religion," as they often called it, centered in essence "around the doctrine

22. L. Stephen, *Life of Sir James Fitzjames Stephen*; David D. Zink, *Leslie Stephen* (New York: Twayne Publishers, 1972), 35; Tolley, *Domestic Biography*.

23. Hilton, *The Age of Atonement*, 10.

24. For a discussion of different forms of Church of England and non-conformist Evangelism, see Annan, *Leslie Stephen: The Godless Victorian*, 146; Follett, *Evangelicalism, Penal Theory and the Politics of Criminal Law Reform in England, 1808–30*, 14; Bradley, *The Call to Seriousness*, 16; Hilton, *The Age of Atonement*, 7.

25. Annan, *Leslie Stephen: The Godless Victorian*, 10.

26. David Bebbington, *Evangelism in Modern Britain: A History from the 1730s to the 1980s* (London: Unwin Hyman, 1989), 2–17; Follett, *Evangelicalism, Penal Theory and the Politics of Criminal Law Reform in England, 1808–30*, 15–16. The following discussion of the core religious beliefs of Evangelicals also draws on the well-regarded work of Bradley, *The Call to Seriousness*, and Hilton, *The Age of Atonement*.

27. Annan, *Leslie Stephen: The Godless Victorian*, 147.

of salvation by faith in the atoning death of Christ.”²⁸ While Richard Follett notes that “Love of one’s neighbor . . . meant not only concern for his eternal soul, but for his present suffering also.” Consequently, “Evangelicals undertook many projects of charity and social improvement through a multitude of voluntary societies and associations. The campaign against slavery was but the most famous effort to bring Christian ethics to bear on public policy.”²⁹

William Wilberforce, who died in 1833 at the age of seventy-four, clearly lived his life according to these religious precepts, as did his close friend and brother-in-law, James Stephen, Sr., who lived from 1758 to 1832. James Stephen, Sr., was a barrister who left England in 1783 to start a law practice on the island of St. Christopher (also known as St. Kitts) in the West Indies. Before leaving for St. Kitts, Stephen married Anne Stent, whom he had courted from the age of fourteen.³⁰ Although living in the West Indies for almost eleven years, James Stephen, Sr., never owned a slave. Rather, it is known that during this time he built up a virulent hatred of slave owners and the slave system. Stephen witnessed the barbaric treatment of slaves by plantation owners and the legal system first hand soon after he arrived in the West Indies. On his first voyage to St. Kitts in 1783, his ship stopped over on the island of Barbados, where he first saw a slave auction.³¹ It was also during this stop over that Stephen “arrived in a Barbadian court and watched, with mounting horror, a travesty of a trial that ended with two slaves being sentenced to be burnt alive.”³² As a result of his firsthand experience with the horrible consequences of slavery, “Stephen, more than any other man, gave passion to the Abolitionist movement.”³³ According to one of Wilberforce’s biographers, Stephen “was impetuous, emotional and combative; if Wilberforce’s greatest temptation was towards the frittering away of his time, Stephen’s was towards duelling; although a religious man he would have derived a deep satisfaction from putting a bullet into the skins of owners, drivers or shippers of slaves.” The depth of Stephen’s obsessive hatred of slavery can be seen in one quotation attributed to him: “I would rather be on friendly terms with a man who had strangled my

28. Bradley, *The Call to Seriousness*, 15–16.

29. Follett, *Evangelicalism, Penal Theory and the Politics of Criminal Law Reform in England, 1808–30*, 16.

30. James Stephen (Senior), *The Memoirs of James Stephen, Written by Himself for the Use of His Children*, edited with an introduction by Merle M. Bevington (London: The Hogarth Press, 1954). Bevington (at 13) notes that Stephen sent for his wife after he arrived at St. Christopher and began practicing at the bar.

31. Knaplund, *James Stephen*, 8.

32. Furneaux, *William Wilberforce*, 85.

33. *Ibid.*; Knaplund, *James Stephen*, 8.

infant son than support an administration guilty of slackness in suppressing the Slave Trade.”³⁴

It is quite clear from all accounts that James Stephen, Jr., came to share his father’s hatred of slavery. Stephen, Jr., was born in 1789, during a return visit his father and mother made to England. It was also during this visit that James Stephen, Sr., first met with William Wilberforce and other leaders of the anti-slavery movement and began to work with them to provide information on slavery in the West Indies that would help in the anti-slavery crusade. James, Sr., and his family returned to St. Kitts in 1789 and stayed until 1794, when they returned permanently to England.³⁵ Two years later, in 1796, Anne Stephen died during childbirth, reportedly leaving her husband “desolate and pathetic,” since “(h)is hatred of slavery, and a love for her that had lasted since he was fourteen, were the two great emotions which dominated his life.” James Stephen, Sr., did not join the inner circle of Wilberforce’s friends until his wife died in 1796. However, afterward, it was Wilberforce who “comforted him in his misery and slowly coaxed him out into the world. During this time they became close friends and in 1800 Stephen joined Wilberforce’s family by marrying his widowed sister Sarah.”³⁶

Stephen, Sr., began practicing in “the prize appeals court of the Privy Council—a very busy court in the period of almost continuous and very extensive naval warfare (between 1793 and 1815)” and he “soon proved himself so useful to the government that a seat was found for him in the House of Commons.” As a close friend of Prime Minister Spencer Perceval, he also “secured from the government an appointment as master in chancery.”³⁷ Throughout this period, Stephen, Sr., alongside Wilberforce and others, played a key role in the campaign for the abolition of the slave trade. In the late 1790s, he offered his services as a barrister to examine witnesses called before the House of Lords to testify about their knowledge of the slave trade in the colonies,³⁸ and 1804, he was elected along with Henry Brougham and Zachary Macaulay to serve on the Committee for the Abolition of the Slave Trade that was originally formed by Thomas Clarkson in 1787 to gather evidence against slavery.³⁹ In addition, Stephen, Sr., was the mastermind behind the strategy used by Wilberforce and Spencer Perceval to bring about the enactment of abolition of the slave trade acts in Parliament in 1806 and 1807.⁴⁰

34. Furneaux, *William Wilberforce*, 85.

35. Knaplund, *James Stephen*, 8; Tolley, *Domestic Biography*.

36. Furneaux, *William Wilberforce*, 140.

37. Knaplund, *James Stephen*, 9.

38. Furneaux, *William Wilberforce*, 195.

39. *Ibid.*, 70, 227.

40. For a detailed account of James Stephen’s role, see Ann M. Burton, “British

Stephen, Sr., was also directly involved in initiating the first significant step taken after the abolition of the slave trade in 1807 to introduce a method of preventing slave interests from circumventing the law. In 1812, Wilberforce persuaded Prime Minister Perceval to pass an Order in Council requiring Trinidad to introduce a slave registration system to compel owners to register their slaves.⁴¹ Again, the original idea of introducing a compulsory system came not from Wilberforce, but from Stephen, Sr., and he personally drafted the Trinidad Order in Council.⁴² Both Stephen and Wilberforce intended that the Trinidad Order in Council would be followed with a Bill to make slave registration compulsory in all British colonies. However, when Lord Liverpool and his ministers later refused “to support the Bill on the pretext that there was no evidence of smuggling,” Stephen became so disgusted by their decision that he resolved to leave Parliament.⁴³ A “Registration Bill” was eventually introduced in the House of Commons in 1815 after James Stephen, Sr., resigned his seat.⁴⁴ Although it also failed to be passed, the intent of the bill was partly achieved when the government agreed to urge the Colonial Assemblies in West Indian slave colonies to pass their own slave registry bills. Since “the registers

Evangelicals, Economic Warfare and the Abolition of the Atlantic Slave Trade, 1794–1810,” *Anglican and Episcopal History* 65 (1996): 197–225. See also Helen Taft Manning, *British Colonial Government after the American Revolution, 1782–1820* (New Haven: Yale University Press, 1933), 485–86. Manning also notes that from 1807 to 1815 “Stephen was constantly consulted by the colonial department on matters having to do with slavery and the black race,” and that consequently he came to be regarded by West Indian slave interests “as the evil genius of the Colonial Office” in this period.

41. Furneaux, *William Wilberforce*, 342. The slave registration system that was put into place in Trinidad in 1812 was also soon imposed in St. Lucia and Mauritius, since these were Crown colonies that did not yet have their own legislative assemblies and therefore legislative measures intended for them could be passed by Order in Council.

42. A. Meredith John, *The Plantation Slaves of Trinidad, 1783–1816* (Cambridge: Cambridge University Press, 1988); Robert L. Schuyler, “The Constitutional Claims of the British West Indies: The Controversy over the Slave Registry Bill of 1815,” *Political Science Quarterly* 40 (1925): 1–36. In the “anti-slavery recollections” George Stephen (1794–1879), the younger brother of James Stephen, Jr., wrote later at the request of Harriett Beecher Stowe to help the cause of the abolition of slavery in the United States, he recalled the specific circumstances under which his father “Mr. Stephen concocted his great measure for the registration of slaves,” noting that it was designed to fill “a large loop-hole for malpractices” left open by both the *Act for the Abolition of the Slave Trade* of 1807 and the *Slave Trade Felony Act* of 1811. Sir George Stephen, *Anti-Slavery Recollections: In a Series of Letters Addressed to Mrs. Beecher Stowe, written by Sir George Stephen, at Her Request* (London: Thomas Hatchard, 1854), 10, 18. George Stephen also played a key role in the anti-slavery movement of the 1820s and early 1830s as chairman of the national Anti-Slavery Society.

43. Furneaux, *William Wilberforce*, 342.

44. G. Stephen, *Anti-Slavery Recollections*, 26, 35. George Stephen notes that Wilberforce’s “Registration Bill” of 1815 “was essentially the same as the order in council of 1812, but with a few variations to adapt the provisions of it to the chartered colonies.”

would be safely in their own hands, the Colonial Assemblies were happy to make this meaningless gesture.”⁴⁵ By 1817, most if not all of the other West Indian slave colonies had enacted their own slave registry acts.

While Stephen, Sr., is credited with the idea of a slave registry system, the task of examining the adequacy of the slave registry legislation passed by Colonial Assemblies in the West Indies after 1816 was assigned to his son, Stephen, Jr., who was now twenty-eight years old and working part-time as legal advisor to the Colonial Office. In May and October of 1817, Stephen, Jr., submitted lengthy reports on the slave registry acts of Jamaica and nine other colonies, and the following April he reported on another similar “batch of slave registration laws.” Stephen concluded that all of these laws were defective. He noted in particular that all of them were “badly drawn, confused, self-contradictory, and at variance both with the Trinidad order in council [of 1812] and Wilberforce’s bill [of 1815].”⁴⁶ In addition to showing the inadequacy of existing slave registry laws, he noted that “the benefits anticipated from these Laws” would “never be obtained” unless a more uniform system of slave registration was put into place that was based on the same principles as the Trinidad Order in Council of 1812.⁴⁷

At least in part as a result of “the efforts of the younger James Stephen”⁴⁸ in 1819 Parliament significantly tightened the slave registration system by requiring that duplicates of the registers be sent to London, while at the same time ordering that the sale or mortgage in England of any slave not entered in a slave register would be invalid. Consequently, by January 1820, a more uniform system of compulsory slave registration was put into effect in all British slave colonies.⁴⁹ A great deal of James Stephen’s work at the Colonial Office over the next thirteen years would involve reporting

45. Furneaux, *William Wilberforce*, 345.

46. Knaplund, *James Stephen*, 100. Stephen’s original report of 31 May 1817 on Jamaican slave registration laws is contained in PRO, CO 323/40, folios 175–92. His subsequent report of 6 October 1817 is contained in PRO, CO 323/40, folios 218–59, where he reviewed the slave registry laws of Barbados, Tobago, St. Vincent, Demerara, Dominica, Nevis, Grenada, Antigua, and St. Kitts. In 1818, Stephen completed a further report on the laws passed in the Bahamas, Fortola, Berbice, and Montserrat. PRO, CO 323/40, folios 307–18. Stephen to Bathurst, 28 April 1818.

47. PRO, CO 323/40, folio 318.

48. Knaplund, *James Stephen*, 101.

49. The act passed by Parliament (59 Geo. III, c. 120) provided that after January 1, 1820, it would not be lawful for any British subject in the United Kingdom “to purchase, or to lend or advance any money, goods, or effects upon the security of any slave or slaves in any of his Majesty’s colonies or foreign possessions unless such slave or slaves shall appear by the return received therein to have been first duly registered in the said office of the Registrar of Colonial Slaves.” Cited in Frank J. Klingberg, *The Anti-Slavery Movement in England: A Study in English Humanitarianism* (London: Archon Books, 1968), 174–75, note 13. See also Sir Reginald Coupland, *The British Anti-Slavery Movement*, 2d ed. (London: Frank Cass & Co. Ltd., 1964), 115–16; Furneaux, *William Wilberforce*, 345.

on the effects of colonial slave registry laws and other legislation that was enacted by the Colonial Assemblies in the West Indies for the claimed purpose of improving the condition of slaves.

The difficulty Stephen, Jr., had in attempting to monitor the effect of slave registry laws cannot be understood clearly without appreciating the great lengths that the Colonial Assemblies went to in order to undermine the movement toward slave emancipation. Throughout the period from the 1790s to the early 1830s, West Indian Colonial Assemblies attempted to placate anti-slavery crusaders in England by enacting their own “ameliorative” slave protection laws.⁵⁰ As we shall see shortly, these attempts at placating anti-slavery crusaders also extended to West Indian legislators enacting ostensibly more humane laws governing the criminal trial and punishment of slaves. Stephen’s job was also made more difficult because his close ties to the anti-slavery movement made him an easy target of West Indian slave interests and those who supported them in Parliament. For example, as early as 1817 “the West India interest had singled him out for attack” because of this father’s role in proposing a slave registration system,⁵¹ and his initial full-time salaried appointment as legal counsel to the Colonial Office and Board of Trade in 1825 was opposed in the House of Commons by Joseph Hume because “he was the son of the ardent abolitionist James Stephen senior.”⁵² Hume argued that it was “highly objectionable” to hire the son of “the person whom the colonists supposed to be their greatest enemy; and to put him in an office in which every communication to and from the colonies must pass through his hands.”⁵³ At the same time, there is evidence that his political superiors in the Colonial Office, at least occasionally, tried to shield him from these types of attacks.⁵⁴ As

50. A good account of this is provided in Robert E. Luster, *The Amelioration of the Slaves in the British Empire, 1790–1833* (New York: Peter Lang, 1995). See also J. R. Ward, *British West Indian Slavery, 1750–1834: The Process of Amelioration* (Oxford: Clarendon Press, 1988).

51. Hughes, “Sir James Stephen and the Anonymity of the Civil Servant,” 29–36.

52. D. B. Swinfen, *Imperial Control of Colonial Legislation, 1813–1865*, 22.

53. *Hansard*, N.S., XIV 1081, 3 March 1826; cited in Swinfen, *Imperial Control of Colonial Legislation, 1813–1865*, 22.

54. D. B. Swinfen notes that “Wilmot Horton, the Permanent Under-Secretary, denied that there was any sort of understanding between father and son, and offered as proof the fact that James Stephen senior had published a pamphlet in which he described an Order-in-Council drawn up by his son as a ‘parcel of trash.’ Wilmot Horton claimed that Stephen was merely a civil servant who ‘could do no more than obey the instructions of the head of the department.’ In spite of Wilmot Horton’s defence, Stephen continued to suffer criticism from the public; so much so that in 1830 he felt driven to complain to Sir George Murray (then Secretary of State) that, in accepting his post, he had made a ‘most improvident and foolish contract, if my interests and comfort only were to be considered’” (Swinfen, *Imperial Control of Colonial Legislation, 1813–1865*, 22; citing National Library of Scotland, Murray Papers, Statement of Stephen, 16 Feb. 1830, vol. 171, folio 55).

we shall see shortly, Stephen, Jr.'s close association with Wilberforce and his father's anti-slavery crusade also led West Indian slave interests to attempt to discredit the effort he made to reform the criminal slave laws of the West Indies.

In addition to the many other ways in which James Stephen, Sr., rendered outstanding service to the cause of slave emancipation, it is said that "his greatest service consisted of providing his exceedingly able son, Stephen, Jr., with a cause and mission."⁵⁵ It is also clear, however, that William Wilberforce also had a profound influence on Stephen's thinking about Evangelism and personal moral virtue.⁵⁶ Perhaps the best example of this, contained in private family correspondence, is the letter he wrote to his wife Jane in July 1829, in which he explained that although he was too busy at work to do this on his own, would she mind making sure that their (then) seven-year-old son Herbert observe Mr. Wilberforce "and try to fix in the dear child's mind some recollection of him"; since "He may live to be as old as Mr. W. himself without every meeting any man whose image would be so well worth retaining."⁵⁷

In 1829, Stephen, Jr., also wrote to his cousin Alfred in New South Wales describing his professional work as legal counsel to the Colonial Office and the Board of Trade. It must have been one of Stephen's less frantic days and one in which he felt optimistic about the outcome of his anti-slavery work, for he related that: "The last ten years of my life have been very busy ones, devoted not exclusively but mainly to promoting, as far as was compatible with the duties of my office, the extinction of slavery. This task devolved upon me by inheritance, and although I believe that nothing further remains for me to do, and that therefore my conscience is acquitted from all further solicitude on the subject, I should carry away from England a very heavy heart if I left that question under any degree of doubt."⁵⁸

55. Knaplund, *James Stephen*, 15.

56. In fact, Knaplund argues that "It is highly probable that Wilberforce's influence on James Stephen, Jr., exceeded that of [his] father, though both left indelible marks on the life and thought of the young man." Knaplund, *James Stephen*, 15.

57. James Stephen to Jane Stephen, 24 July 1829. In Caroline E. Stephen, *The Right Honourable Sir James Stephen . . . Letters with Biographical Notes by His Daughter Caroline Emelia Stephen* (Gloucester: John Bellows, printed for private circulation only, 1906), 17.

58. In C. Stephen, *The Right Honourable Sir James Stephen*, 16. Alfred Stephen was the son of James Stephen, Sr.'s brother John, which made him James Stephen's first cousin. Like his brother, James, Sr., John Stephen was also a barrister who emigrated to St. Kitts, and Alfred was born there in 1802, later returning to England to study law. John Stephen and his family later emigrated to New South Wales, where he was appointed as a judge of the supreme court in 1825. Upon traveling to Australia after completing his legal studies, Alfred Stephen was appointed as solicitor-general of Tasmania in 1825, as a judge of the supreme

Wilberforce died on the eve of the abolition of slavery in 1833. However, he lived long enough to look with pride on the anti-slavery work of his nephew. While Wilberforce lay on his deathbed in early July 1833, Stephen, Jr., was assigned by Lord Stanley to draft the "Abolition of Slavery Bill." Stephen labored day and night for two and a half days to write the Bill in time for it to be introduced in Parliament on July 5th. Historians of the anti-slavery movement have noted that this was "one of the two sole occasions in his life" on which Stephen consented to work on Sunday.⁵⁹ William Wilberforce died three weeks later, on 29 July 1833, knowing that the *Abolition of Slavery Act*, written by his nephew, would soon be passed in Parliament.⁶⁰ Thus, through his influence behind the scenes in the Colonial Office, Stephen, Jr., was one of the principal agents of the anti-slavery campaign that swept the British Empire in the 1820s and early 1830s. While working in the Colonial Office for twenty years prior to slave emancipation, Stephen also used what influence he had to ameliorate the suffering of slaves in the colonies. One way he did this was through exposing the inhumanity of laws enacted by colonial legislatures concerning the criminal processing and punishment of slaves.

James Stephen and the Fight for the Protection of Slaves in English Colonial Criminal Law, 1813–1833

Stephen's concern for the well-being of slaves is evident from the outset of his association with the Colonial Office in 1813. His legal reports on the West Indies touched on virtually every aspect of slavery and British colonial slave laws. One of the first colonial acts Stephen reviewed for the Colonial Office was one passed by the president, council, and assembly

court of New South Wales in 1839, and as chief justice of the supreme court of New South Wales from 1843 to 1873. L. Stephen, *Life of Sir James Fitzjames Stephen*, 24–29; G. D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Sydney: The Federation Press, 2002).

59. Sir Reginald Coupland, *The British Anti-Slavery Movement*, 141. In her account of Stephen's role in writing the *Abolition of Slavery Act*, Edith Hurwitz notes that: "For Stephen this was a memorable task. He was the son of one of the original founders of the movement, James Stephen, and the brother of George Stephen. As the only abolitionist in the Colonial Office, he was greatly honoured to draft the instrument of Negro emancipation. With an energy which reflected his dedication to the cause, Stephen drafted the entire statute of sixty-four clauses in one week-end." Edith Hurwitz, *Politics and the Public Conscience: Slave Emancipation and the Abolitionist Movement in Britain* (London: George Allen and Unwin, 1973), 66.

60. The *Abolition of Slavery Act* was passed on 29 August, 1833, and put into effect on 1 August, 1834.

of the Island of Grenada.⁶¹ The act stipulated the provision that was to be made for “the payment of advances and supplies for the cultivation of plantations and the payment of all labour and work done thereon.” In the legal opinion he wrote for Lord Bathurst, Stephen noted he was pleased that this Act appeared “to have been framed for the humane and benevolent purposes of securing to the Negroes on the several estates of the Island sufficient food, clothing, and medical aid, by making the land, and not the proprietor only, responsible for all advances made for their supporting and for all medical care and attention, which they may have required.”

This early legal opinion captures the spirit of many of the reports on colonial slave laws that James Stephen would write over the next twenty years. He offered similar balanced and well-reasoned assessments of other general laws passed in the West Indies for ameliorating the condition of slaves. A common refrain of this writing was the injustice and inhumanity of laws that treated enslaved fellow human beings as property or chattel.⁶² Another common theme was his insistence on the equal rights of all human beings, regardless of their color, state of servitude, or gender or age. Indicatively, in a legal opinion he wrote in 1822, he questioned the humanity of an Act (No. 1780) passed by the Legislature of the Island of Jamaica that empowered the commissioners of the board of works to sell slaves who could no longer be used because of age and infirmities.⁶³ As Stephen pointed out, this Act “recited that the several slaves purchased by the public for the use of the King’s house have, from their increase, *and from the age and infirmities of some of them*, and from other causes, formed an establishment very expensive to the Governor, and ill adapted to the purposes for which they were originally purchased.” The Act therefore

61. PRO, CO 323/39, folios 175–78. Stephen to Bathurst, 13 November 1813.

62. See, for example: PRO, CO 323/40, folios 345–54 containing Stephen’s report on an act passed by the Legislature of Antigua in 1818 entitled “An Act, to vest in Trustees for Sale, certain Negro Slaves, devised by the will of Robert Pearne.” In this report, Stephen dealt with an act passed originally in 1785 allowing the sale of slaves as part of an estate. Stephen’s analysis of this complicated case of wills and estates was one of the many reports in which he expounded on the injustice and inhumanity of treating slaves as a chattel. See also PRO, CO 323/44, folios 95–106. Stephen to Bathurst, 2 February 1827, on an Act (No. 1895) passed by the Legislature of the Island of Jamaica in 1825 entitled “An Act to enable Slaves to receive bequests of money or other personal estate.” In the course of his discussion of this Act, Stephen provided his view of the historical origins of property law as related to the ownership of property by slaves. Stephen noted that he could not agree with the preamble of the Act which declared that “all Legacies and Bequests given to Slaves are void by Law.” Stephen argued that one had to look back to “the ancient Law of Villeinage,” Roman law, and custom followed in the West Indies, to understand this complicated aspect of slave law.

63. PRO, CO 323/42, folios 195–200. Stephen to Bathurst, 25 October 1822.

directed “that they should be sold for the best price that can be obtained.” Stephen said he could not “abstain from remarking that it seems a harsh and severe measure to sell the unfortunate slaves who have been worn out by age and infirmity in the public service.” In this case, he clearly saw the tragic irony in the selling of worn-out slaves, while even at that time free domestic servants at least had the hope of a small “repose and a moderate provision for the remainder of their days” after many years of faithful service to their employers.⁶⁴

However, Stephen also tried to balance his concern for the basic human rights of slaves with his concern for respecting the legitimate legal claims of white plantation owners and creditors. For instance, in 1823 he wrote a legal opinion on an Act passed by the Legislature of the Island of Nevis that provided that “All persons in possession of plantations and slaves” were “authorized to draw bills of exchange or to render themselves debtors by written contracts for the value of ‘negro provisions.’”⁶⁵ It stated that the “debts thus contracted” were “to constitute the first charge upon the lands and slaves” and were “to take precedence of all existing mortgages and judgments.” Stephen reasoned that: “It is not, I conceive, to be denied as a general principle, that the proper subsistence of the labourer is the highest claim upon the soil and its produce in point of natural equity, and that therefore it ought to take precedence of all other demands in point of positive law.” He said however that: “On the other hand, I think it not less clear that in giving effect to this imperious claim of justice the rights of other claimants should be steadily kept in view and should be sacrificed only where they are incompatible with the prior right of the labourer himself to a reasonable subsistence. In this Act the Legislature have I therefore conceive judged rightly in giving every possible encouragement to those who are willing to provide food for the slaves—But I submit to your Lordship that in the mode of giving this encouragement they have fallen into an important error, because they have, I think needlessly sacrificed the rights of the existing mortgagees and creditors.”

Stephen’s legal opinions, as shown above, dealt with many different realms and principles of law that impinged on the lives of slaves and free colored persons. In his examination of Stephen’s role in colonial administration from 1813 to 1847, T. J. Barron argues that “It is hardly surprising to discover that Stephen was a keen advocate of the doctrines of equality before the law and of equality of privileges for all entitled to protection

64. The emphasis in this quotation, and in others that follow, is James Stephen’s underlining, which he used to highlight particular concerns he had about the colonial acts he was reviewing.

65. PRO, CO 323/42, folios 254–59. Stephen to Bathurst, 19 September 1823.

of the law. As a government lawyer, he could hardly profess less.”⁶⁶ At the same time, however, Barron notes correctly that when it came to protecting slaves and free colored persons, Stephen went much further than arguing points of law. Indeed, “[n]o effort was spared [by Stephen] to ensure that their interests were safeguarded with every new piece of legislation. If privileges were extended to the whites, they must also be extended to the non-whites, including such fundamental propositions as equality before the law, the right to own property, eligibility for civil office, and admission to the legislative council when properly qualified.”⁶⁷ The following account documents more specifically Stephen’s commitment to enforcing the ideals of equality before the law and the rule of law in criminal proceedings involving slaves. It is divided into four sections corresponding to the four themes most evident in Stephen’s reports on West Indian slave laws written in the period from 1813 to 1833. These include: Stephen’s views on and employment of the concept of “the rule of law”; his views on the legality of the treatment of runaway slaves; his views on West Indian laws relating to the criminal trial and punishment of slaves; and his stand on the issue of the admissibility of slave evidence in criminal trials.

The Rule of Law

In recent years, a number of legal historians have begun to examine the manner in which English notions of equality before the law and the rule of law were applied in nineteenth-century British colonial settler societies.⁶⁸ However, as far as I have been able to determine, with the exception

66. Barron, “James Stephen,” 141.

67. *Ibid.*, 140.

68. See, for example, Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); Hamar Foster, “‘The Queen’s Law Is Better Than Yours’: International Homicide in Early British Columbia,” in *Essays in the History of Canadian Law*, vol. 5, *Crime and Criminal Justice*, ed. J. Phillips, T. Loo, and S. Lewthwaite (Toronto: The Osgoode Society, 1994), 41–111; Sidney L. Harring, *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: The Osgoode Society, 1998); Douglas C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Vancouver: University of British Columbia Press, 2001); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Sydney: Allen and Unwin, 1995); John McLaren, “Reflections on the Rule of Law: The Georgian Colonies of New South Wales and Upper Canada, 1788–1837,” in *Law, History, Colonialism: The Reach of Empire*, ed. D. Kirkby and C. Coleborne (Manchester: Manchester University Press, 2001), 46–62; David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991); Stefan Petrow, “Policing in a Penal Colony: Governor Arthur’s Police System in Van Diemen’s Land, 1826–1836,” *Law and History Review* 18 (2000): 351–95; Jane Samson, *Imperial Benevolence: Making British Authority in the Pacific Islands* (Honolulu: University of Hawai’i Press, 1998).

of Mindie Lazarus-Black's important study of the use that slaves made of colonial courts to seek protection from slave owners,⁶⁹ there are no comparable studies that have looked at how the rule of law was either applied, or alternatively, not applied, in the criminal courts of British slave colonies of the same period. Moreover, in the few studies that have examined the treatment of slaves in nineteenth-century criminal courts in the West Indies, no attention is given to the important role played by James Stephen, Jr., in arguing that, as a general rule, the English law should be applied uniformly to all of His Majesty's subjects in the West Indies, including white people, free colored people, and slaves.⁷⁰ The legal opinions Stephen wrote in the period from 1813 to the late 1820s highlight his obsessive attention to scrutinizing West Indian slave laws in order to ensure that, in so far as possible, they were consistent with his thinking regarding the rule of law.⁷¹

Stephen objected to laws passed in the West Indies aimed at policing the movement of "free coloured persons" and slaves who may have escaped and were "pretending to be free." In his review of legislation passed on the Island of Tobago in 1815, he criticized the reintroduction of an Act (No. 96) that authorized magistrates to jail any person who landed on the island and did not report immediately to the governor to "give to him an account of themselves, and of the length of their intended stay," and the attempt which was now being made to render this Act perpetual.⁷² Stephen noted that it was first introduced in November 1811, under the pretense that "extraordinary measures" were required to prevent undesirable people from coming to the island. He recognized that the Act was at least in part designed to police the movement of free colored people and others who may be "pretending to be free." This was suggested in clause 4, which read that: "... it shall and may be lawful for the sitting Magistrates, or any other two or more Magistrates, to summon to appear before them any free Coloured person or persons, or any Coloured person or persons pretending to be free, who have resorted or shall resort to this Island, who do not carry on any trade, or appear to have any occupation or sufficient means of livelihood, and to inquire of the freedom, names, qualities, and intentions of such persons. . . ." He also objected to the vague wording of

69. Lazarus-Black, "Slaves, Masters, and Magistrates"; Lazarus-Black, *Legitimate Acts and Illegal Encounters*.

70. See, for example, Cottrol, "Outlawing Outcasts"; Diamond, "Condemned by Substance and Process"; Lazarus-Black, "Slaves, Masters, and Magistrates" and *Legitimate Acts and Illegal Encounters*; Phillips, "'Doubly Condemned.'"

71. Stephen's legal opinions were painstakingly detailed and complete, with some amounting to well over one hundred hand-written pages. Therefore, it is important to acknowledge that those discussed here are only a limited number of representative examples.

72. PRO, CO 323/40, folios 113–15. Stephen to Bathurst, 9 February 1816.

clause 3, which provided that “the Commander in Chief, with advice of the Council” might release persons who had been committed to jail “or cause them to depart from the Island at such time and in such manner as he might think fit.” Most problematically, however, he noted that while the original Act of 1811, which granted “extraordinary powers” to the magistrates and the governor of Tobago, was “justified on the ground of the existence of ‘alarming circumstances’ and the apprehension of the ‘most dreadful dangers,’” it was not clear whether this justification was still valid. Consequently, Stephen suggested to Lord Bathurst that the governor of Tobago be required to provide “an explanation of the reasons upon which he was induced to assent to this Act,” before it was forwarded to His Majesty for his approval.

In 1818, Stephen objected to another similar Act (No. 134) passed by the Legislature of the Island of Tobago.⁷³ He objected on grounds that it required “that the importers of slaves into the Island of Tobago to make [an] oath that such slaves have not been transported for any criminal offence, but were esteemed in the Colony where they had resided for one year next before the time before such importation, as persons of good, fair, and respectable character.” Slaves landed without a certificate, which was to be granted by two justices after the oath was made, were “to be committed to jail” until they were “sent off the Island.” He was especially concerned that this Act would unfairly punish innocent slaves by having them committed to jail, while at the same time undermining the intent of the *Act for the Abolition of the Slave Trade* passed in 1807, which, (as Stephen’s father intended), “cautiously defined what traffic in slaves shall be illegal.”

Stephen also routinely criticized statutes that gave too much unchecked discretionary power to both slave owners and the courts. One example of this is the report he wrote in 1817 on an Act (No. 624) passed in the Bahamas for establishing and regulating public workhouses, houses of correction, and hospitals that allowed for the imprisonment of slaves at the discretion of their owners.⁷⁴ The key offending clause stated “that in all cases where any owner or possessor of a slave shall send him or her to the said work house for any offence, the supervisor or intendant thereof shall forthwith take and receive such slave into custody” and keep him or her “at hard labour, unless such slave be infirm or sickly” or “until such slave shall be released by the person or persons who committed him or her.” With what appears to be a tinge of cynicism, Stephen noted that the chance of slave owners abusing the authority they were given by this statute might not

73. *Ibid.*, 325–27. Stephen to Bathurst, 4 August 1818.

74. *Ibid.*, 154–60. Stephen to Bathurst, 7 March 1817.

be great, “first, because the slave may be presumed to have in the justice and humanity of his owner a protection against an oppressive use of this authority; and secondly because the owner would in fact by a causeless imprisonment of his slave deprive himself of the services of a valuable labourer.” Nevertheless, he advised Bathurst that “still the possibility of the greatest abuses is apparent, and it is for his Majesty’s Government to decide whether there is any sufficient ground of public policy to justify such an enactment.” He pointed out that “As the workhouse is by this Act declared to be the place of imprisonment for rogues and vagabonds, and other offenders, a detention there must of course be considered in the light of a serious punishment.” In the same report he also objected to an Act (No. 625) enacted in order to revive and continue an Act for “more effectually preventing the desertion of slaves.” Stephen objected to numerous sections including the one that required “free persons of Colour” to obtain a certificate of registration from the “office of police,” and the section that ordered that “free people of Colour” between the ages of sixteen and sixty had a legal obligation (above and beyond the duty of white residents of the Island) “to turn out” in search of runaway slaves. With respect to the section concerning the legal duty to assist in the pursuit of runaway slaves, he questioned the fact that it declared “the penalty to which free persons of Colour refusing obedience are to be subject” but provided “no penalty . . . in the case of white persons who may refuse to accompany them.”

While unwavering from his general commitment to the notions of the rule of law and equality before the law, Stephen also recognized the need to allow for exceptions to take into account peculiar local circumstances. This is revealed both in Stephen’s reports on legislation passed in the West Indies, as well as in the detailed reports he wrote on the colonial acts passed in other mid-century British African, North American, and Australasian colonies.⁷⁵ While clearly appreciative of the need to consider local circumstances, this did not stop Stephen’s persistent questioning of the justness of local amelioration laws passed by colonial legislatures in the West Indies for the ostensible purpose of improving the lot of slaves. In December 1818, he reviewed an Act (No. 58) passed by the Legislature of the Island of Nevis that was aimed at extending a previous Act to

75. See, for example, CO, 323 Law Officers’ Reports on Mauritius, Sierra Leone, Nova Scotia, Upper Canada, and New South Wales, 1813–1833. Stephen’s recognition of the fact that English law needed to be adapted to local circumstances is also noted in several studies that have dealt with his role in shaping Colonial Office native policy and monitoring the legislation of colonies outside of the West Indies. For example, see Barron, “James Stephen”; Elbourne, *Blood Ground*; Harring, *White Man’s Law*; Kercher, *An Unruly Child*; Samson, “British Voices and Indigenous Rights” and *Imperial Benevolence*; Shaw, “James Stephen and Colonial Policy”; Smandych, “Contemplating the Testimony of ‘Others.’”

“more effectually . . . provide for the support and . . . protection of slaves to promote and encourage their increase and generally to meliorate their condition.”⁷⁶ He objected to the fact that the Act protected slave owners from charges of abuse by providing, through threat of criminal punishment, that in the case of every complaint given “in malice against the owners and directors of Slaves” that was found to be groundless, the names of the “informer or informers” must be given to “the injured party” so that he “may be enabled to seek redress by Laws.” Stephen reasoned that

No rule can be more just or more consonant to the spirit of the Law of England, than that every person accused before the magistrate, should know the name of his accusers, and the particulars of his accusation. If the present Act had simply laid down that rule I should have thought it open to no legal objection. But the law as now drawn may lead to an inference which cannot reasonably be supposed to have been intended by the legislature. It may be said that the act has declared it penal to prefer a groundless accusation to a public magistrate—an opinion which would effectually prevent the detection of all crimes, except such as were immediately capable of the most clear and conclusive proof.

Consequently, he recommended that on a future occasion “an explanatory act should be passed, declaring that nothing in the present Act—contained shall be construed to render liable to civil actions or prosecutions, any person preferring a complaint with probable cause of suspicion, or without a malicious intent.”

On the same day, Stephen reviewed an Act (No. 261) passed by the Legislature of the Island of Dominica “for regulating the government and conduct of slaves and for their more effectual protection encouragement and the general melioration of their condition.”⁷⁷ Although he was of the opinion that it would “in general be materially conducive” to improving the well-being of slaves, he noted that there were still issues raised in the legislation that required consideration. Again, his main concern with this legislation was the way it left loopholes that allowed for the unequal application of criminal law to slaves. Specifically, he noted the problem inherent in the wording of clauses 12 and 19, which provided that “the wilful murder of a slave by a free person, or of a free person by a slave, is made punishable by death, *or such other punishment as the court may direct.*” Stephen remarked that: “The punishment by death if properly applicable in any case, is so unquestionably in the case of wilful murder, and the mitigation of that punishment seems to be left with much more propriety to the Royal Mercy, than to the discretion of the Judge. Under

76. PRO, CO 323/40, 373–74. Stephen to Bathurst, 31 December 1818.

77. Ibid., 375–76. Stephen to Bathurst, 31 December 1818.

the Act as it now stands the measure of punishment for this crime, must till the day of trial, remain a matter of uncertainty. I can see no reason why there should be any difference in the punishment of murder when committed by or upon slaves, and when committed by one free person on another." Stephen saw a similar problem with another clause (No. 15) of the same Act that imposed a penalty of ten pounds currency on "any free person" who took "any article or thing" that was "the property" of a slave, providing of course that the slave was "not his own property." On default of paying the fine, the offender was "liable to a months imprisonment and the Justices if they think proper [might] dispose of the fine to the slave, as a compensation for his loss." Stephen reasoned that this clause failed to adequately protect slaves from robbery and theft, noting that: "As the words of this Enactment are sufficiently large to comprise the case of robbery or felonious taking, I cannot but think a penalty of ten pounds currency a most lenient and inadequate punishment for such a crime. It might even be an advantage to the criminal to commit the crime, and pay the penalty, because the goods taken might much more than cover the amount of it."

Stephen's concern with the rule of law is also reflected in the careful attention he gave to ensuring that slaves charged with "the practice of obeah" (or traditional healing and witchcraft) were dealt with fairly and impartially by the courts. Several West Indian legislatures passed legislation prohibiting the practice of obeah, and Stephen examined all of these statutes closely. An Act (No. 367) passed by the Legislature of the Island of Barbados in July 1819 made the crime of "maliciously carrying on the practice of obeah" a capital offense punishable by either death or transportation.⁷⁸ He found this statute to be fundamentally flawed, since it did not contain a definition of "obeah." Specifically, he remarked that: "No definition of this word is to be found in the Act, and I consider this a material omission. A crime which is to be visited with capital punishment should, of course, be defined with all possible precision in the enactments imposing that penalty. Thus use of loose or popular language on such a subject, is unusual, and may occasion great practical injustice." Stephen was equally critical of another section which made it a capital offense for "any person wilfully and maliciously in the practice of obeah, *or otherwise*" to prepare or to have in his possession "any poison *or noxious* or destructive substance or thing with an intent to administer" it to any other person. He cautioned that "It is not easy to conceive how so severe an enactment can be required by the real necessity of the case." Stephen also reviewed a statute (No. 383) passed by the Legislature of the Island of Barbados later in 1819, which dealt more specifically with the procedures to be followed in trying offenders charged

78. PRO, CO 323/41, folios 56–57. Stephen to Bathurst, 31 December 1819.

with the crime of obeah.⁷⁹ In addition to once again criticizing the Act for not defining obeah, he lamented that the statute provided that “the offender, when a slave, is to be tried without a jury,—without the presence, either at the Bar or on the Bench, of any lawyer,—without any previous inquest of a grand jury,—without any indictment, or in short, any of those formalities which, in criminal cases especially, constitute much of the very essence of justice.” Stephen went on to contrast the practice in Barbados with the apparent greater respect for the rule of law elsewhere, noting:

It is an inflexible rule of law, not of England only, but (I think) of every civilized nation, that no man should bid for his life even before the most solemn tribunals, except on a written accusation specifying with the utmost precision the nature of the crime imputed to him. I can suggest no plausible reason why in a British colony alone, an exception from this rule should be established,—why, in England, the accused, protected as he is by the previous inquest of the grand jury & the regular constitution of the court, and the learning and experience of the Judge, should be yet further protected by the technical form of the indictment,—and in Barbados, a person exactly in the same situation (except his servile state renders him comparatively helpless & ignorant) when tried summarily & for his life on the vague & indefinite charge of “obeah” before five men professing neither the habits nor the education of lawyers, should be denied the advantage of having the accusation drawn up in any precise or determinate form.

It is important to know that Stephen, Jr., was not alone in his criticism of laws dealing with the practice of obeah. In the attack he continued in the first volume of his book on *The Slavery of the British West India Colonies Delineated* published in 1824, Stephen’s father questioned why the practice of obeah was a capital offense in Jamaica and Dominica when it could be proved that it was for the most part a “fanciful” practice with no real proven harmful effects.⁸⁰ In his *An Appeal to the Religion, Justice and*

79. Ibid., 76–80. Stephen to Bathurst, 28 April 1820.

80. James Stephen, *The Slavery of the British West India Colonies Delineated*, vol. 1 (London, 1824), 305. This is the first volume of a massive two-volume book Stephen, Sr., published under the full title, *The Slavery of the British West India Colonies Delineated, as it exists, Both in Law and in Practise, and Compared with the Slavery of other Countries, Ancient and Modern*, 2 vols. (London, 1824, 1830). Collectively, these two volumes “represented a detailed and exhaustive analysis of the legal structure of the slave society and its labour practices.” Hurwitz, *Politics and the Public Conscience*, 36. Not surprisingly, soon after the publication of the first volume, it also became a lightening rod for the counterattack launched against abolitionists by slave interests in the West Indies. For example, see Alexander Barclay (lately and for twenty-one years resident in Jamaica), *A Practical View of the Present State of Slavery in the West Indies; or, an examination of Mr. Stephen’s “Slavery of the British West India Colonies:” containing more particularly an account of the actual condition of the Negroes in Jamaica; with observations on the decrease of the slaves since the abolition of the slave trade, and on the probable effects of legislative emancipation*, third edition, with additions (London: Smith, Elder and Co., 1828).

Humanity of the Inhabitants of the British Empire in Behalf of the Negro Slaves in the West Indies written in 1823, William Wilberforce similarly asserted that “The Jamaica planters” have long wrongly “imputed the most injurious effects on the health and even lives of their slaves, to the African practice of Obeah.”⁸¹ Not surprisingly, leading defenders of Jamaican slave interests tried to discredit the view that James Stephen, Jr., shared with his father and William Wilberforce regarding the crime of obeah. The controversy surrounding this provides a concrete example of how West Indies legislatures and the slave interests they represented responded to James Stephen’s disapproval and frequent disallowance of West Indian slave laws. Clearly, pro-slavery governors and legislatures in the West Indies knew that Stephen, Jr., had close ties to the anti-slavery movement. Therefore they did everything they could to discredit his legal opinions and legislative reform recommendations.⁸² As discussed below, further evidence of this can be seen in the way colonists responded to Stephen’s disapproval of slave evidence laws.

Stephen generalized from his examination of the law on obeah that “I am aware that many examples—might be quoted of similar enactments; but it would to the best of my judgment be inconsistent with the spirit & principles of the law of England to perpetuate such a practice [of the summary trial and punishment of slaves],—however ancient, & however established.” Ironically, in the same report he wrote in 1820, he criticized another statute (No. 379) enacted in Barbados that extended the old English practice of the benefit of clergy to some—that is, all except the slave—residents of the Island. Specifically, it extended “the *benefit of clergy* to all white persons, free persons of colour, and free Negroes, who may be unable to read.”⁸³ Although he was not opposed to extending the benefit of clergy, he said he was “unable to discover”—or perhaps morally unable to accept—why it was “confined to the case of free persons only.” Stephen related his understanding of the protection offered by invoking the benefit of clergy, and the unfairness of not explicitly extending this protection to slaves, noting:

The principle of the law I conceive to be this,—that involuntary ignorance is an extenuation, rather than an aggravation, of crimes;—and this principle applies at least as strongly to men in a servile as in a free condition. I conceive, however, that before this act, and independently of it, persons convicted in Barbados of felonies were entitled to the benefit of clergy, whether able to

81. Wilberforce, *An Appeal to the Religion*, 22–23; also cited in Joseph J. Williams, *Voodooes and Obeahs: Phases of West India Witchcraft* (New York: Dial Press, 1932), 176.

82. See George Wilson Bridges, *A Voice from Jamaica; in reply to William Wilberforce* (London, 1823); and Barclay, *A Practical View of the Present State of Slavery in the West Indies*, 185.

83. PRO, CO 323/41, folios 76–80. Stephen to Bathurst, 28 April 1820.

read or not. If so, the act, instead of being remedial, is in reality restrictive;—it gives to free men no privilege which they had not before; and by manifest implication it takes away from the slaves a right they formerly enjoyed.

Stephen took advantage of any opportunity he had to argue for the equal treatment of slaves in English law. For instance, Act No. 191 was passed on the Island of Tobago for the purpose of spelling out legal rules and conditions for the institutional commitment of insane persons. In his view it contained two rather odd and irreconcilable parts.⁸⁴ The first contained a clause stating that “any two or more Justices of the Peace” were authorized “to issue their warrant for the apprehension of any Lunatic or Insane person, and to order him to be confined in some secure place in the Town of Scarborough, as long as his Insanity shall continue.” He observed that the main problem was “that the Justices are to be the sole Judges of the Sanity or Insanity of the supposed Lunatics, and on their own authority are to place them in confinement.” The problem with this, he said, was that “(t)he question of Sanity, however, is one upon which persons who have not received a medical education can hardly be supposed to be competent Judges; and I conceive that the certificate of a medical practitioner ought in every case to have been required.” The second part contained two clauses that Stephen said were related “to a subject of great importance”—specifically, the manumission or granting of freedom to slaves—which, he noted, might appear at first glance to be a subject that did not have “any very natural or obvious connection with the subject of the preceding Sections.” However, Stephen, in his usual subtle and astute manner, then went on to point out how the two parts of the statute were indeed closely connected in the purpose they were designed to achieve.

The legal manumission or freeing of slaves by their owners or as part of the division of the estate of a deceased owner was a long recognized legal practice in the West Indies and other slave colonies.⁸⁵ Rather than including standard clauses concerning the steps to be followed in manumitting slaves, however, the statute Stephen reviewed included clauses that, in his view, made it nearly impossible for a slave owner to ever free a slave who did not have an indisputably sound mind and sound body. The first proof of this, he noted, was the fact that Act No. 191 provided that while a lunatic or insane person could be committed on a warrant signed by two JPs, it

84. PRO, CO 323/42, folios 326–29. Stephen to Bathurst, 18 September 1823.

85. See generally Michael Craton, *Empire, Enslavement and Freedom in the Caribbean* (Kingston: Ian Randle Publishers, 1997); Morris, *Southern Slavery and the Law, 1619–1860*; Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*; Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989).

required that three medical practitioners currently practicing on the Island of Tobago had to certify “that they have thoroughly and minutely examined the person intended to be manumitted and that he or she is ‘of sound mind’ and in good bodily health, and *perfectly* capable to ‘work for’ his or her ‘own maintenance and support.’” He went on to argue that: “From this Enactment the following consequences will arise.—First; no person can be manumitted except those in whom the three requisites concur, of Sanity, and good health, and *perfect* capacity of working for their own support. Consequently, a person for whom an adequate provision may have been made by the bounty of a Testator, or of any other Benefactor, must continue in Slavery, and, if a Female, must transmit that condition to her children, if she is not perfectly capable of hard labour or is subject to any infirmity of body or mind,” and secondly, “If among three medical practitioners two should consider a slave in good bodily health and one should dissent from that opinion, the slave must continue in his servile condition unless he can find a fourth medical practitioner who—will concur with the two first—But in so small a Society as that of Tobago it may frequently happen that there will not be four resident persons of the medical profession.” In addition, Stephen pointed to the practical fact that “As the practitioners of medicine are not required to make the examination and sign the certificate gratuitously, a considerable expense in obtaining medical opinions must be incurred in order to . . . [secure] the emancipation of a slave.”

Stephen said that “the reasons which led to this Enactment” were explained in the Act’s—albeit “not very intelligibly written”—preamble, which mentioned that slave owners “*may* [try to] manumit slaves, who in consequence of Lunacy, Old Age, Contagious Diseases and other Bodily Infirmities are unable to provide for their own maintenance, and to avoid paying the public taxes and supporting them when no longer able to work.” Consequently, he advised Bathurst that if the intention of the legislature was to prevent manumitted slaves from becoming a drain on the public purse, then other forms of legislative intervention would have been more appropriate to introduce. For instance, the legislature could enact “that the person manumitting them should not, by the Act of manumission, cease to be liable to make the same provision for their support which, had they continued in Slavery, he would have been liable to make.”

A report Stephen submitted to Wilmot Horton in 1827 provides a final example of how he attempted to better protect the legal rights of slaves while at the same time work toward slave emancipation. This was written in response to a dispatch received by the Colonial Office from the governor of Barbados.⁸⁶ In his original dispatch, the governor requested a legal opinion

86. PRO, CO 323/44, folios 51–55. Stephen to Wilmot Horton, 4 August 1827. Wilmot

from the attorney general of England on an Act passed by the legislative council of the island that imposed the punishment—of up to “eighteen stripes”—of the whip on both male and female slaves found guilty of hawking goods without a license. In light of the fact that he “considered that the flogging of females was not in conformity with the law for punishing women” then “in force in England, and that the allowance of such an Act would be at variance with his recent Instructions on the subject of slavery,” the governor of Barbados refused to give assent to the Act until he received a legal opinion from the attorney general in England. Following this, two concurring legal opinions from the attorney general were sent to the governor and transmitted to the council, to the effect that “the punishment of females was inconsistent with the Law of England, and that His Majesty’s Instructions rendered it proper for the Governor to refuse his consent to the Bill.” The council remonstrated against both of these legal opinions, pointing out—quite accurately in Stephen’s opinion—that “if the Law of the Island was in every respect to be assimilated to that of England, the state of slavery must be absolutely abolished,” and that “they knew of no Instructions which prohibited the Governor from assenting to such an Act.” In the end, Stephen was asked to offer his opinion on whether the governor “judged rightly in refusing his consent to the Bill”; on which he replied:

It appears to me, that the Governor has involved this subject in a needless difficulty by referring to the Attorney General as a mere matter of Law, a question which it rather belonged to himself to decide on the more general grounds of policy. It certainly has never been required that the Law of England should be made the inflexible model for all Colonial Legislation, and the Council very justly observe that the disregard of local circumstances which an Instruction of that nature would imply, must be subversive of all the Institutions of the Colony. The question proposed to the Attorney General respecting the Law of England, was therefore, as I humbly conceive, an irrelevant enquiry. The question proposed to him as to the duty imposed on the Governor by his recent Instructions, was a question which I think the Governor was far more competent to have answered for himself.

According to Stephen’s reasoning, the real difficulty in this case arose “from treating the subject [of the whipping of female slaves] as a mere matter of Law depending upon the interpretation of a legal Instrument instead of considering it in its true light as a question of general policy upon which the Governor is bound to think and act for himself.” While he felt

Horton was the under secretary of the Colonial Office from 12 December 1821 to 15 October 1827. J. C. Saintly, *Office-Holders in Modern Britain*, vol. 6, *Colonial Office Officials* (London: University of London, Institute of Historical Research, 1976).

the argument raised by the legislative council of Barbados, “that the fundamental distinction in the condition of free women in England and Slaves in Barbados” justified a “corresponding difference in the Laws relating to those two classes of females,” was undeniably valid as a matter of law, the role of the governor should have been to temper the law with more wise and humane government policy. As we will see further in the following discussion of his views on the treatment of runaway slaves, Stephen was fully aware of the limits of colonial criminal law as a vehicle for protecting and enhancing the basic human rights and dignity of slaves.

The Treatment of Runaway Slaves

Stephen was also deeply touched by the plight of runaway slaves. In 1817, he reported on an Act (No. 245) passed by the Legislature of the Island of Dominica “to establish a Company of Rangers, for the apprehending and suppressing of Runaway Slaves.”⁸⁷ This Act made provision for paying the wages and expenses of officers of the proposed “Company of Rangers” along with covering the cost of the purchase of eighteen slaves who were “to serve as privates in the said Company, for employing them in tracing and keeping in repair roads across the country, and for granting encouragement for the apprehending or suppressing of any of the Runaways.” It also empowered “Magistrates or Captains Commandants of Parishes or Districts” to issue warrants “to call to the assistance of the said Company of Rangers a certain number of slaves from the neighbouring Plantations in cases of emergency, and to prevent the importation of slaves convicted or known to have been guilty of murder, insurrection, or other capital offences, and to prevent the sale of gunpowder fire arms or other offensive weapons to Runaways.”

In his report on this Act, Stephen showed an astute ability to use the wording of the law against those who wrote it in the first place, the legislators of Dominica and the slave interests they represented. He noted that many provisions appeared “to be loosely and improvidently worded” and, as such, possibly “productive of very injurious or inconvenient consequences.” He went on to dissect the wording of specific clauses, noting that the twelfth clause authorized “Magistrates to inflict such punishment on runaway slaves who may be taken as they may think proper,” while the seventeenth clause enacted “that white or free persons of colour giving Tickets to conceal runaway slaves or to prevent their being apprehended” would suffer “such punishment as the Court of Kings Bench and Grand

87. PRO, CO 323/40, folios 265–66. Stephen to Bathurst, 22 November 1817.

Sessions of the Peace in their discretion shall think proper to inflict." Stephen objected to these clauses, arguing that: "Both . . . clauses seem to me objectionable in point of law, in as much as the quantity and nature of the punishment is left undefined." Similarly, he criticized the eighteenth clause, which declared "that if any person shall knowingly and fraudulently be aiding or abetting any slave in going off, *or shall carry any slave off the Island*, such persons shall be guilty of a felony without benefit of clergy and *shall suffer death*." Stephen objected that: "If this enactment were limited to the case of runaway slaves, and to persons carrying off the Island runaways who were not their own property, even then I should apprehend that the penalty would be excessive, and unnecessarily severe." Even worse, however, he noted that in addition "the words of the section are extensive enough to include the case of a person sending his own slaves for sale to any other British colony; a case unquestionably not in the contemplation of the Legislature."

Stephen's criticism of these, along with several other, clauses of the statute was framed mainly in terms of his objection to the way in which they violated fundamental principles of English law. But he also again went beyond his prescribed role as legal advisor to the Colonial Office to criticize the statute on grounds of humanity and his view of wise government policy. For example, Stephen objected to clause 21, noting: "The 21st Clause enacts that no white person or free person of colour shall *give*, sell, or barter any gunpowder fire arms, or other offensive weapons, salt, salt provisions, clothes *or other necessities whatever*, or hold any intercourse or correspondence directly or indirectly to or with any runaway slaves or slave knowing them to be such, under penalty on conviction of suffering death as a felon, or such other punishment as may be awarded by the Court." In his assessment, this enactment appeared "to confound offences varying essentially from each other both in their danger and in their malignity." According to Stephen, "[t]o sell gunpowder to a runaway slave is a far more mischievous and culpable proceeding than to give him food or to hold intercourse with him," since "[t]he latter acts indeed in many cases which might be suggested, may be even praiseworthy and meritorious." He concluded his report by deferring to Lord Bathurst, to judge for himself, the "necessity of so severe a penalty" as one that "inflicts the penalty of death on slaves absenting themselves or running away . . . from the plantation to which they belong, and continuing absent [for more than] three days."

In 1818, Stephen reviewed another Act (No. 249) passed by the Legislature of the Island of Dominica designed to provide for the trial and punishment "of runaway or other slaves."⁸⁸ He again pointed to the "unu-

88. *Ibid.*, 329–30. Stephen to Bathurst, 15 August 1818.

sually extensive” powers it gave the courts in allowing them “*to vary, or mitigate* the mode of punishment in all cases of slaves convicted of crimes.” According to Stephen, “the court would have the power of increasing, as well as of mitigating the penalties of the Law, and consequently, the criminal must, till judgment, remain in uncertainty as [to] the utmost possible degree of punishment to which he may have rendered himself liable.” He concluded that “such a discretionary authority of increasing punishments, is inconsistent with the general principles of criminal jurisprudence, and might be subversive of some of its most salutary effects.”

In 1820, Stephen made full use of another opportunity to attack the institution of slavery by pointing to the draconian nature of an Act passed on the island of St. Vincent regarding fugitive slaves.⁸⁹ The Act (No. 230) was passed by the Legislature of the Island of St. Vincent in April 1819 “to prevent the taking and carrying away of vessels and negroes from any of the islands within this government without consent of their owners.” In addition to criticizing the form in which it was written—complaining that it was vague and at times “not even expressed in grammatical or intelligible language”—Stephen argued that the substance of the Act was even “more objectionable than its form.” Specifically, he went on to elaborate that to his knowledge this was “the first time that an escape from slavery, or the assisting another to effect such an escape, has, within His Majesty’s Dominions, been declared a capital offence.” According to Stephen, no one could “seriously consider such an act as in itself a crime of great malignity,” and neither did “the danger of its frequent recurrence appear so imminent as to require the last and most severe means of prevention.” Moreover, he said: “It is difficult to suppose that a fugitive slave could, without detection and punishment, effect a landing in any neighbouring colony; and therefore it seems unreasonable to suppose that many will be induced by such expectations to attempt an escape from St. Vincent’s.—The Act makes no provision for the many possible cases in which the runaway would in conscience be fully justified for deserting his Master. Such, for example is the case (infrequent, perhaps, but by no means impossible) of intolerable ill usage or oppression.”

In 1822, Stephen again revealed his deep religious-based commitment to the cause of slave emancipation in a memo he wrote to Robert Wilmot Horton on an Act passed recently by the Legislature of the Island of Dominica concerning the treatment of fugitive slaves who were lucky enough to have escaped from the French islands of Martinique and Guadeloupe.⁹⁰ Stephen objected to the Act, which allowed escaped slaves to be sent back to the

89. PRO, CO 323/41, folios 62–65. Stephen to Bathurst, 1 March 1820.

90. PRO, CO 323/42, folios 147–51. Stephen to Wilmot Horton, 18 February 1822.

neighboring French colonies, on the grounds of the inhumane punishment they would suffer as a result, including torture and death. In his memo to Wilmot Horton, dated Lincoln's Inn, 18 February 1822, Stephen wrote that: "I am very conscious how far I am travelling beyond the boundaries of my own peculiar province in suggesting to you any objections to a colonial act, resting not on principles of law, but on general grounds of policy and humanity. In the particular instance, however, I am satisfied that you will excuse the trouble I give you. I should consider myself really criminal if I did not make every effort in my power to prevent the confirmation of an act which, if allowed by His Majesty, may have the effect of consigning a multitude of unhappy fugitives to these inhumane punishments."

This was by no means the last time Stephen would ignore his duty as a civil servant not to offer recommendations based more on the grounds of policy and humanity than on principles of law. Specifically, this approach is also evident in the way Stephen, Jr., along with his father and Wilberforce, also viewed colonial laws relating to the criminal trial and punishment of slaves and the admissibility of slave testimony in criminal courts.

The Criminal Trial and Punishment of Slaves

And though I confess, that it is of less concern to a slave, under what laws he lives, than what is the character of his master, yet if the laws had extended to them favour and protection instead of degradation, this would have tended to raise them in the social scale, and, operating insensibly on the public mind, might, by degrees, have softened the extreme rigour of their bondage.⁹¹

From the perspective of anti-slavery crusaders, the criminal punishment of slaves was one of the most revolting aspects of slavery. Prior to the start of the enactment of more humane slave codes in the 1780s, the punishments inflicted on slaves were indisputably grotesque, whether inflicted by their masters or through the courts. In 1756, Thomas Thistlewood, a Jamaican slave owner, said about the punishment he had inflicted on one of his slaves: "Derby caught by Port Royal eating canes. Had him well flogged and pickled, then made Hector shit in his mouth." On another occasion when some of Thistlewood's slaves were out searching for runaways and absented themselves, he had them punished with 100 to 150 lashes, the branding of the face or the loss of an ear.⁹² Although the slave codes that

91. Wilberforce, *An Appeal to the Religion*, 10.

92. D. Hall, ed., *In Miserable Slavery: Thomas Thistlewood in Jamaica, 1750–1786* (London: Macmillan, 1989), 72. Cited in Walvin, *Black Ivory: Slavery in the British Empire*, 206.

existed in British West Indian slave colonies varied to some extent from one colony to another, in general until the late 1700s laws remained on the books permitting mutilation and execution by slow burning or starving to death in gibbets for the worst offenses.⁹³ With respect to the slave law of Jamaica, it has been noted that prior to 1788 all that existed “was a series of *ad hoc* laws, most of which were prompted by sheer necessity, and were largely confused, vague, in parts . . . [and] contradictory.”⁹⁴ Despite this, in Jamaica, and elsewhere, “brutality to slaves was the norm.”⁹⁵ Indicatively, Sir Hans Sloane, a traveler to Jamaica writing in the early 1700s, noted that the punishment for rebellion was:

Burning them by nailing them down on the ground with crooked sticks on every limb and then applying the Fire by degrees from the feet and hands, burning them gradually up to the head, whereby their pains are extravagant. . . .

For crimes of lesser nature Gelding, or chopping off halve of the foot with an Ax. . . . For running way they put Iron Rings of great weight on their Ankles, or Pottocks about their Necks, which are Iron Rings with two long Necks riveted to them, or a Spur in the Mouth. . . . For Negligence, they are usually whipt by the overseer with Lance-wood Switches, till they be bloody, and several of the Switches broken, being first tied up by the hands in the Mill-Houses. . . . After they are whip'd till they are Raw, some put on their Skins Pepper and Salt to make them smart; at other times their Masters will drop melted Wax on their skins and use several exquisite tortures. . . .⁹⁶

93. Craton, *Empire, Enslavement and Freedom in the Caribbean*, 151.

94. Orlando Patterson, *The Sociology of Slavery: An Analysis of the Origins, Development and Structure of Negro Slave Society in Jamaica* (London: MacGibbon & Kee, 1967), 71.

95. Patterson, *The Sociology of Slavery*, 82. For other similar descriptions of seventeenth and eighteenth-century American and West Indies criminal slaves laws, see Howard A. Ferguson, “The Early Laws of Montserrat (1668–1680): The Legal Schema of a Slave Society,” *Caribbean Quarterly* 24 (1978): 34–43; David B. Gaspar, “‘To Bring Their Offending Slaves to Justice’: Compensation and Slave Resistance in Antigua, 1669–1763,” *Caribbean Quarterly* 30 (1984): 45–59; David B. Gaspar, “‘Rigid and Inclement’: Origins of the Jamaica Slave Laws of the Seventeenth Century,” in *The Many Legalities of Early America*, ed. C. Tomlins and B. Mann (Chapel Hill: University of North Carolina Press, 2001), 78–96; E. V. Goveia, *Slave Society in the British Leeward Islands at the End of the Eighteenth Century* (New Haven: Yale University Press, 1965); E. V. Goveia, *The West Indian Slave Laws of the Eighteenth Century* (Lodge Hill, Barbados: Caribbean Universities Press, 1970); Bradley J. Nicholson, “Legal Borrowing and the Origins of Slave Law in the British Colonies,” *American Journal of Legal History* 38 (1994): 38–54; Diana Paton, “Punishment, Crime, and the Bodies of Slaves in Eighteenth-Century Jamaica,” *Journal of Social History* 34 (2001): 923–54.

96. Sir Hans Sloane, *A Voyage to the Islands of Madera, Barbados, Nieves, S. Christophers, and Jamaica, with the natural history . . . of the last of those islands; to which is prefixed an introduction wherein is an account of the inhabitants . . . trade, etc.*, 2 vols. (London, 1701–1725), vol. 1, introduction; cited in Patterson, *The Sociology of Slavery*, 82–83.

While the period to 1813 witnessed some amelioration in the severity of criminal punishments imposed on slaves, when James Stephen first joined the Colonial Office the slave codes of the West Indies were still extremely harsh. As Anthony Phillips has noted in his study of reforms made to the crime and punishment regime in the late slavery period in the British Caribbean colonies, "Even after some crudities had been removed, slavery was still hell."⁹⁷ For example, it was not until 1816, three years after Stephen began at the Colonial Office, that Jamaica reformed its slave code to limit the punishment of whipping slaves to no more than "thirty-nine lashes at any one time," while also providing that "any punishment of more than ten lashes was to be given in the presence of the overseer, who supervised all work gangs, or the attorney, the owner's representative." The Jamaican slave code of 1816 also provided that in "the case of improper punishment the slave had a right of appeal to the magistrates and vestry, sitting as a council of protection, which could prosecute the offender." However, it has been noted that the few cases of this sort later brought to the attention of the Colonial Office, "demonstrated both how ineffectual this mechanism was and that the legal limits of floggings were not observed."⁹⁸ It was within this context, that Stephen began his work.

From very early in his career as legal counsel for the Colonial Office, Stephen paid particular attention to laws concerning the treatment of slaves in colonial criminal courts. One early example of this occurred in July 1815, in a report he wrote for Lord Bathurst on an act passed by the Legislature of the Island of Tobago regarding the forced labor and public chaining of slaves awaiting trial on criminal charges. In this case, Stephen objected to allowing the amendment and reintroduction of an act that made provision for forcing accused slaves to work on chain gangs on public work projects while waiting for their criminal trials.⁹⁹ Two years later, he objected to another Act (No. 115) passed by the Legislature of the Island of Tobago for the similar purpose of consolidating local regulations "respecting the punishment of slaves by commitment to the public chain."¹⁰⁰

97. Phillips, "Doubly Condemned," 714.

98. Mary Turner, *Slaves and Missionaries: The Disintegration of Jamaican Slave Society, 1787-1834* (Urbana: University of Illinois Press, 1982), 43. Patterson, *The Sociology of Slavery*, 78-79, argues that although the melioration acts passed in Jamaica between 1780 and 1817 "did to some extent reflect a genuine improvement in the general condition of the slaves," the acts passed after this point began to reflect a "new spirit of severity" on the part of Jamaican slave owners represented in the Colonial Assembly, who recognized that they were fighting a losing battle against the anti-slavery movement and therefore adopted the general attitude of exacting "as much labour from slaves as possible before emancipation."

99. PRO, CO 323/40, folios 77-79. Stephen to Bathurst, 18 July 1815.

100. Ibid., 202-4. Stephen to Bathurst, 19 July 1817.

Stephen started by noting that: "If this measure were now for the first time submitted to the consideration of his Majesty's Government, I should feel it my duty to request your Lordships [sic] attention to the question whether this mode of punishment is consistent with the spirit and principles of the Law of England." Stephen described the practice of the public chaining and forced labor of slaves in gruesome detail, showing how inhumane it was for slaves of various types—including accused and convicted men and women, the sick and infirm, and suspected runaways and slaves committed by their masters—to be subjected to the same criminal punishment of public chaining. In summary, he noted that the punishment "consists in compelling the persons subjected to it, to work in public fastened to each other by a chain. This . . . is attached to an iron collar, fitted either to the neck, or some other part of the person of each culprit. The chain is of course sufficiently long to afford the proper space for the labour of each of the sufferers; and sufficiently heavy to prevent any person from breaking it. The whole weight to be borne by each must of course be considerable." Displaying the usual subtle approach he took to trying to influence Lord Bathurst's thinking on slavery issues, Stephen also remarked that: "It is therefore a severe, as well as an ignominious punishment—whether improperly so or not, is a question which it may perhaps be not too late to consider and on which I am hardly entitled to offer an opinion."

While Stephen refrained—as much as his conscience would allow him—from questioning the legality of public chaining as a form of criminal punishment, he did not refrain from criticizing the way it was used in practice on the island of Tobago. The main problem with the legislation, from his perspective, was that it did not distinguish between convicted criminals, who might arguably be deserving of such an ignominious punishment, and other types of unfortunate slaves. On the contrary, the preamble to the Act stated that public chaining could be used more generally as a remedy to deal with "Negroes and other slaves" who "from time to time are committed to Gaol for various offences, *and from neglect of prosecution or of being claimed*, they remain in confinement, whereby their health is injured, and their morals corrupted, as well as their labour lost to their owner, and the Community." In addition to being unjustly applied to accused persons and suspected runaway slaves, he noted, in turn, at least seven other problems, including: the failure to distinguish between "male and female prisoners"; the failure to exempt "infirm, sick or disabled persons"; the failure to recognize the importance of the distinction between "slave committed by their owners" and those committed by JPs; the provision for inflicting the same punishment on all prisoners regardless of the nature and degree of "imputed" guilt; the failure to include "express regulation as to the weight of the chain, or the nature of the padlocks"; the lack of a remedy for the

delay or neglect of prosecution; and finally, the fact “that an unclaimed runaway, if he remained unclaimed, may, under this Act, be worked in the chain for life.”

Although Stephen was aware that he could not in his role as legal counsel go so far as to recommend that the entire Act be disallowed “on general grounds of policy and humanity,” he did manage to find sufficient legal grounds for recommending that the Act be disallowed in any case. Specifically, he suggested to Lord Bathurst that if he was of the opinion that the Act was “not in principle generally objectionable,” he should still consider advising His Majesty to disallow it unless specific “qualifications to the system as those I have noticed are adopted by the colonial Legislature.” Stephen offered five specific “qualifications” which included: establishing “rules for the prevention of abuses, with minute directions as to the weight, and length of the chain, and as to the form and nature of the irons which it will be in the power of the overseer to employ”; exempting “females and persons in an infirm state” from the operations of the Act; making provision “for bringing to trial slaves accused of crimes, and for disposing of persons who may be proved to be runaway slaves”; prohibiting chaining as a punishment for any persons who have not been convicted of a crime; and lastly, that it should not “be left in any case to the master on his own authority” to have this punishment inflicted on his slave. Stephen justified his last proposed qualification with another one of his typically ironic twists, remarking to Lord Bathurst that: “I conceive that it is recognized throughout the West Indies as both just and politic, to prohibit the master from subjecting his slave by his own domestic authority, to a public and disgraceful punishment as a criminal.”

Stephen would provide many similar equally detailed and critical reports on laws regulating the criminal trial and punishment of slaves over the next decade and a half. For example, in 1827 he reviewed a major consolidated act passed “to alter and amend the Slave Laws” of Jamaica, which contained numerous clauses on the criminal trial and punishment of slaves that he found problematic.¹⁰¹ This Act was passed in consequence of instructions that Lord Bathurst issued to the governor of Jamaica, the Duke of Manchester, in 1826 before Lord Viscount Goderich succeeded Bathurst as secretary of state for the Colonial Office. Included with his instructions to reform Jamaica’s slave law, Bathurst transmitted to the Duke of Manchester the drafts of eight distinct bills “in which were comprised the

101. PRO, CO 323/44, folios 107–55. Stephen to Goderich, 5 May 1827. This Act has also been referred to as the Jamaica Consolidated Slave Act of 1826. See Stiv Jakobsson, *Am I Not a Man and a Brother: British Missions and the Abolition of the Slave Trade and Slavery in West Africa and the West Indies, 1786–1838* (Uppsala, Sweden: Gleerup, 1972), 398.

substance of those Enactments which His Majesty's Government thought proper to recommend to the Legislative Council and Assembly of the Island for their adoption." Stephen wrote a report that was close to one hundred pages long, in which he compared the newly amended slave law of Jamaica with legislative provisions contained in the draft legislation sent previously to the governor.

Stephen commented in particular on part of the amended slave law that "was intended to prevent the excessive punishment of Slaves, whether inflicted in due course of Law or by the domestic authority of the owner." He noted that this was an improvement in that as a general rule capital sentences could no longer "be carried into effect except by the warrant of the Governor." However, an exception to this was provided "in the case of 'rebellion and rebellious conspiracy,' in which the Court may immediately order the execution of the offender." He also found the bill problematic in that it did not define the terms "rebellion and rebellious conspiracy," and he was not aware that they had been defined in any previous law passed in Jamaica. Stephen said it was also "to be regretted that no provision is made for securing the attendance of regular lawyers upon the Bench on the trial of slaves" even though the current law provided that "a slave is to be defended at the public expense by a person of that profession." In addition to enumerating and discussing at length all of the criminal offenses defined in the Jamaica's amended slave law, he scrutinized the procedural rules put into place for the criminal trial of slaves. Stephen objected in particular to a clause that gave three JPs the power to impose any punishment they "may think proper to inflict"—"short of death or transportation for life"—on slaves convicted of "travelling on the Public Roads with Dogs or offensive weapons without a Ticket from the master, or hunting in his absence with any deadly weapons." He argued that the criminal provisions of the amended Jamaican slave law were inadequate due in part to the huge amount of unchecked discretionary power they left in the hands of magistrates. More generally, he lamented: "The effect of this mode of Legislation is in truth to delegate the legislative authority to the Justices, or to the Court before who the Slave is tried. Unbounded latitude is therefore given for the operation of prejudice and partiality for and against particular slaves; and the maxims and policy of the Law fall into needless and irremediable obscurity. The power of mitigating punishments ought as I humbly conceive to be left to the Governor of the Colony instead of being committed as at present to the local magistracy."¹⁰²

The Colonial Office subsequently disallowed this law in October 1827, which led the Colonial Assembly of Jamaica to reintroduce the Slave Law

102. PRO, CO 323/44, folios 107–55, Stephen to Goderich, 5 May 1827, at folio 152.

of 1816. This was followed by several more attempts made by the Colonial Assembly between 1828 and 1830 to pass revised slaves laws that did not incorporate the recommendations originally proposed by Bathurst. In the appendix to his book in which he vigorously defended the interests of West Indian slave owners, Alexander Barclay included a copy of William Huskisson's letter, dated 22 September 1827, which outlined the objections that led to the disallowance of the Jamaican consolidated slave law of 1826 and included a copy of the report that the house of assembly of Jamaica wrote in reply to these objections.¹⁰³ It is clear, therefore, that Stephen's efforts to reform the slave laws of Jamaica were persistently frustrated at least until the early 1830s. This also provides another example of one of the ways in which legislatures in the West Indies responded to James Stephen's recommendations to disallow laws that they passed.

In fairness, it needs to be pointed out that Stephen also gave credit to legislators when he felt newly amended slave laws might ameliorate the condition of slaves. For example, he commented favorably on an Act passed by the Legislature of the Island of St. Kitts in 1827 "for further improving the condition of the Slave Population."¹⁰⁴ Stephen reviewed this in the usual manner, laying before the secretary "a comparison of the provisions of this law with the corresponding suggestions contained in the despatch addressed by Lord Bathurst to the Governor of Saint Christopher on the 21st of May 1826." In general, Stephen concluded: "Upon the whole on the subject of the punishment of Slaves the conformity of this Act with the suggestions contained in Lord Bathurst's Despatch is very remarkable, notwithstanding the particular instances in which those recommendations have not been followed." He expressed positive views about several aspects of the Act. For example, with regard to provisions "Respecting Punishments inflicted by the domestic authority of the owner" he noted that "The prohibition of the use of the Whip in the Field may, I think, be stated to be complete—a circumstance highly worthy of notice; since this is a Regulation to which, in almost every other Colony, the most strenuous opposition has been made." However, despite such praise, Stephen observed that this part of the statute could be further improved by introducing an amendment that would remove the phrase that the whipping of slaves could not be carried out using a whip "commonly called a Cart whip." Stephen suggested that additional words should be added, "as would effectually prevent any such evasion of the Law" that could occur if another type of whip was used

103. Barclay, *A Practical View of the Present State of Slavery in the West Indies*, 433–72. See also Jakobsson, *British Missions and the Abolition of the Slave Trade*, 403; Luster, *The Amelioration of the Slaves in the British Empire, 1790–1833*, 42–43.

104. PRO, CO 323/45, folios 125–37. Stephen to Huskisson, 23 February 1828.

instead. On another more general positive note, he pointed out that the Act contained “a very copious and exact prohibition of the infliction of any other or heavier punishments by the domestic authority of the owner than are expressly sanctioned.” As we will see shortly, Stephen also had favorable things to say about how the legislature of St. Kitts dealt with the issue of the admissibility of slave evidence in criminal trials.

The Issue of Slave Evidence in Criminal Trials

Of all of the legal conundrums involving slaves that James Stephen wrote about in his legal reports from 1813 to 1833, the issue of the admissibility of slave evidence in criminal trials was the one he addressed most often. It is also an issue that Stephen, Jr., clearly viewed in the same light as his father and Wilberforce. In the famous pamphlet he published on the condition of negro slaves in the West Indies in 1823, Wilberforce commented that another “degradation by law, which, in its effects, most perniciously affects their whole civil condition” is the fact of “their evidence being inadmissible against any free person.”¹⁰⁵ Proof of this existed in the testimony given to the Committee for the Abolition of the Slave Trade by both the late chief justice of St. Vincent and the former governor of Tobago. Specifically, Wilberforce argued that the effect of the inadmissibility of slave evidence “cannot be stated more clearly or compendiously than in the memorable evidence of a gentleman eminently distinguished for the candour with which he gave to the Slave Trade Committee the result of his long personal experience in the West Indies,—the late Mr. Otley, Chief-justice of St. Vincent’s,—himself a planter,” who stated in his own words that “‘As the evidence of Slaves is never admitted against White men, the difficulty of legally establishing the facts is so great, that White men are in a manner put beyond the reach of the law.’”¹⁰⁶ Wilberforce also noted that even the late Sir William Young, the former governor of Tobago, and “long one of the most active opponents of abolition,” acknowledged “as a radical defect in the administration of justice, that the law of evidence ‘covered the most guilty European with impunity.’”¹⁰⁷ The issue was also dealt with in

105. Wilberforce, *An Appeal to the Religion*, 11–12.

106. This statement by Chief Justice Otley was made in response to a Parliamentary inquiry carried out in 1790 (Britain: House of Commons Select Committee in the Slave Trade, 1790–1791). The same statement is cited in William Goodell, *The American Slave Code in Theory and Practice: Its Distinctive Features shown by Its Statutes, Judicial Decisions, and Illustrative Facts*. Originally published in 1853 by the American and Foreign Anti-Slavery Society (New York: Negro Universities Press, 1968), 302.

107. Wilberforce, *An Appeal to the Religion*, 11–12.

essentially the same way by James Stephen, Sr., in the first volume of this indictment of slavery in the West Indies published in 1824.¹⁰⁸

Like his father and Wilberforce, Stephen viewed the state of colonial slave evidence law as key factor that enabled White slave owners to remain “beyond the reach of the law.”¹⁰⁹ In order to understand how this was so, one needs to appreciate how colonial slave evidence laws in effect in the early nineteenth century made it impossible for slaves to have a fair chance in criminal trials in which they were either victims or the accused. The state of the law of evidence as applied to slaves in the West Indies is highlighted by Wilberforce’s biographer, Robin Furneaux, who notes that: “In Barbados, where the harshest code was to be found, it was no offence for a master to kill his slave in the course of punishment, while an outsider who murdered a slave laid himself open only to a small fine.” Furneaux goes on to summarize: “In some colonies the murder of a slave was theoretically punishable by death. But in no British colonies did the courts allow the testimony of a slave against his master. Since the only witnesses of punishment were likely to be the other slaves this law allowed the master to do anything he wished. The excuse for the exclusion of their evidence was that the slaves, because of their ignorance of Christianity, could not understand the significance of oaths. But this was part of a vicious circle which held out no hope of an improvement in the slaves’ conditions.” This vicious circle ensued from the fact that whatever laws were passed had to “be enforced by the courts; the courts could not act without evidence; evidence could only be provided by other slaves; slaves could not testify until they were Christians; [and] their masters would not allow them to become Christians.”¹¹⁰

The study of Stephen’s approach to responding to the slave evidence bills passed by West Indian legislatures in the 1820s provides further significant insight into how he tried to give legal protection to slaves through forcing reforms to colonial slave law. It also offers a more detailed picture of how West Indian slave interests reacted to attempts made to undermine their putative legal authority and control of slaves. In August 1821, Stephen reported on an Act (No. 294) passed by the Legislature of the Island of

108. Stephen, *The Slavery of the British West India Colonies Delineated*, vol. 1 (London, 1824).

109. Wilberforce, *An Appeal to the Religion*, 11–12.

110. Furneaux, *William Wilberforce*, 408. Other secondary literature on both West Indian and pre-Civil War American colonial slave evidence laws that I have examined in the course of my research offers much the same view as Furneaux. See Lazarus-Black, “Slaves, Masters, and Magistrates”; Morris, *Southern Slavery and the Law, 1619–1860*; Schafer, “‘Under the Present Mode of Trial’”; Walvin, *Black Ivory: Slavery in the British Empire*; Watson, *Slave Law in the Americas*.

Antigua that enabled slaves to testify in court without taking an oath.¹¹¹ He noted that: "Upon the Act No. 294, which establishes a Judicature for the trial of slaves, I have to remark that by one of the clauses, the testimony of slaves for and against one another is declared admissible,—but with this peculiarity,—that their evidence is to be given *without oath*, 'as has always heretofore been usual and customary in this island.'" Stephen obviously did not know of any formal precedent for this claimed customary practice, since he noted in turn: "I am unable to conceive any solid reason on which this practice can have formally rested, or which could justify an adherence to it in future." Regardless, it is clear that by the early 1820s it was common for the unsworn testimony of slaves to be admitted for or against other slaves in West Indian criminal courts.¹¹²

The need for reforming West Indian laws on the admissibility of slave evidence was recognized by the House of Commons in 1823, in a resolution passed instructing governors and local legislatures to introduce changes to colonial slave laws that were "the earnest desire of His Majesty's Government to carry into effect."¹¹³ This resolution was a product of a special committee of the House of Commons organized by Thomas Fowell Buxton to investigate the condition of slaves in the West Indies.¹¹⁴ In the circular letter he sent out communicating the resolutions that were unanimously agreed to by the House of Commons, Lord Bathurst advised that

a law should be passed, declaring that the evidence of a slave shall be received in all, except perhaps certain cases, if upon his appearing in Court to give testimony, he shall produce, under the hand of some of the parochial Clergymen, or of the religious Teacher authorized by the master or overseer to instruct him, a certificate, stating that the proposed witness has been so fare [sic] instructed in the principles of religion as, in the judgement of the party certifying, adequately to understand the obligation of an oath. The cases to be considered must be those in which the master of the slaves is directly concerned, and such as would affect the life of a white person.

111. PRO, CO 323/41, folios 197–99. Stephen to Bathurst, 11 August 1821.

112. Thomas Morris suggests that the practice of allowing slaves to testify against other slaves, which started in Virginia in 1723, was introduced in order to increase the chance of convicting slaves accused of committing crimes against their masters when no other (white) witnesses were present. The same reasoning was likely also followed in the West Indies. Morris, *Southern Slavery and the Law, 1619–1860*, 232–33.

113. Great Britain, Parliamentary Papers, 1824, XXIV, 427, schedule 1, pp. 8–13. Lord Bathurst, 9 July 1823, Copy of a (Circular) Letter Addressed to Governors of Colonies Having Local Legislatures. Contained in Klingberg, *The Anti-Slavery Movement in England*, Appendix B, 338–50.

114. Luster, *The Amelioration of the Slaves in the British Empire, 1790–1833*, 6–7.

Bathurst further recommended that: "For the better preventing the fabrication of certificates, it may be necessary to keep parochial registers of the persons whose competency to give evidence shall from time to time have been certified by the proper authority, and the being enrolled in such a list [sic] may be made an object of laudable ambition, and a stimulus to attention and good conduct."¹¹⁵

In January 1824, Stephen reported to Bathurst on an Act (No. 195) passed by the Legislature of the Island of Tobago, which dealt in part with the admissibility of slave testimony.¹¹⁶ This was the first of several lengthy reports on West Indian slave evidence bills that Stephen wrote for Bathurst and subsequent secretaries of state for the Colonial Office who were appointed in the late-1820s and early-1830s.¹¹⁷ He informed Bathurst that in writing this report, he followed the command he was given to compare the legislation passed in Tobago with "the various recommendations for the improvement of the laws affecting the slave population" included in the circular dispatch "addressed by your Lordship, in the month of July last, to the Governors of His Majesty's Colonies in the West Indies." He noted that the act transmitted from Tobago was "totally silent with respect to many of the suggestions which are to be found in Lordships [sic] despatch"; the first one being that it did not provide for "[t]he admissibility of the evidence of slaves against free persons . . . except in the three cases of murder, mayhem, and cruelty," and that therefore such testimony would still "be excluded in all civil cases, and in every criminal case also which may not fall within one or other of the three preceding descriptions." Stephen provided a lengthy description of his view on how the law of evidence should be applied in the case of slaves. This description, most significantly for our purposes, reflected how Stephen used careful legal reasoning to arrive at the irrefutable conclusion that the law of evidence should, as far as possible, be exactly the same for slaves, free colored people, and white slave owners. According to Stephen:

On the trial of all crimes committed by slaves, whether capital or otherwise, the evidence of slaves is to be admitted absolutely, and without any qualification. This is a common provision in the statutes of most of the West Indian

115. Great Britain, Parliamentary Papers, 1824, XXIV, 427, schedule 1, pp. 8–13. Lord Bathurst, 9 July 1823, Copy of a (Circular) Letter Addressed to Governors of Colonies Having Local Legislatures. In Klingberg, *The Anti-Slavery Movement in England*, 339–40.

116. PRO, CO 323/42, folios 332–41. Stephen to Bathurst, 13 January 1824.

117. Bathurst's successors during this period were Viscount Goderich (30 April 1827 to 2 September 1827), W. Huskisson (3 September 1827 to 29 May 1828), Sir G. Murray (30 May 1828 to 21 November 1830), Viscount Goderich (22 November 1830 to 2 April 1833), and Hon. E. G. Stanley Smith (3 April 1833 to 5 June 1834). Saintly, *Office-Holders in Modern Britain*, vol. 6, *Colonial Office Officials*, 8.

colonies. At the present period however, when the slave codes have so peculiarly engaged your Lordships [sic] attention, it may not be improper to notice particularly even those enactments which long usage may seem, in some degree, to have sanctioned.—It is not I think easy to discover a satisfactory principle, justifying the distinction between the absolute admission of this testimony when the life of a slave is in jeopardy, and its absolute rejection when the life or liberty or property of a white person is at stake. The moral competency or incompetency of the witness cannot depend upon the free or servile condition of the culprits.

Stephen argued that while “[i]t may be said, and with great apparent justice, that the necessity of the case requires that slaves should be admitted to give evidence against slaves, because their crimes are seldom perpetrated except in the presence of each other.—But does not the same necessity exist, and the same reasoning apply to the case of those free persons whose lives are passed on the plantations, with few if any witnesses of their conduct except the slaves under their controul? [sic].” In turn, he suggested to Bathurst that “the practical question” for consideration was “whether the same cautious rules of excluding and admitting slave testimony, which are prescribed in your despatch, should be applied indifferently on the trials of free men and slaves, or whether, in the latter case, all such restrictions should be absolutely done away.” He then noted that: “In favour of the uniformity of proceedings in the two cases, it may be urged, that it would give the owners of slaves a strong motive for adopting vigorous measures to qualify them, by religious instruction, to become witnesses in Courts of Justice.—The inconvenience of rejecting their testimony would be sensibly felt, and actively remedied, if they could not be produced as witnesses against other slaves. If the only difficulty were, that they could not prove the crimes of freemen, the latter class would not have a very strong interest in remedying this state of the law.” Stephen reproduced this argument in many subsequent reports.

In August 1824, Stephen reported to Bathurst on an Act (No. 720) passed by the Legislature of the Bahama Islands that included provisions concerning the trial of slaves for capital crimes and the use of slave evidence in criminal trials.¹¹⁸ He ironically noted that while its stated purpose was to amend and consolidate laws enacted for the benefit of slaves, in fact the legislation contained “a great number of clauses the object of which is the security and peace of society at large, rather than the protection of the slave population.” With respect specifically to clauses concerning slave evidence, Stephen observed, as in his earlier report to Bathurst, that: “The evidence of a slave against a slave is, in all cases, to be received. This rule

118. PRO, CO 323/42, folios 120–37. Stephen to Bathurst, 5 August 1824.

seems to originate in the necessity of the case, in as much as slaves must frequently be the only witnesses of crimes committed by their own class. But the same reasoning is equally applicable to the case of those free persons, whose lives are passed almost exclusively among slaves, and in superintending their labour." Stephen also questioned the fairness of another clause, which provided that freed or manumitted slaves could be tried in "Slave Courts" and convicted solely on the basis of slave evidence for all but capital crimes. Stephen, again clearly conscious of the importance of the anti-slavery point he was making, told Bathurst:

I do not remember any precedent for such an Enactment as this, nor can I understand upon what sound principle, free men can be thus deprived of the benefit of a legal trial by jury. Among the number of those who are not born free, are frequently to be reckoned the children of the White proprietors of the Country, a class of persons among whom are to be found many who have received a liberal education in Europe, and who are themselves owners of considerable property. Such persons must, or course, regard this law as an intolerable hardship and degradation.

However, in the same report, Stephen commented more favorably on another Act (No. 710) passed by the Legislature of the Bahama Islands to extend the "privilege" free colored people were given to testify in court, even though it imposed several restrictions. Among others, these included that "the witnesses must have been born free in the Bahama Islands, or if born elsewhere must have resided in those Islands for five years," and that "If born in a state of slavery he must have been lawfully manumitted, and must have resided in the Colony five years at least after his manumission." Although far from perfect, Stephen acknowledged that the law at least represented an improvement over earlier Bahaman law, which, unlike the slave codes of other West Indies colonies, did not allow free persons of color to testify in court. Consequently, he advised Bathurst: "I humbly conceive that the present Act will admit of material amendment, yet your Lordship will probably regard it as an important advance towards the establishment of a more wise and equitable Law of Evidence than has hitherto prevailed in this Colony." It is clear that Bathurst endorsed Stephen's view of the adequacy of the proposed Act, since the reply eventually sent to Major General Grant, the governor of the Bahama Islands, informing him of his decision on the Act contained the same view expressed in essentially the same words.¹¹⁹

Laws allowing free colored people to testify in court had already been enacted in other colonies. For example, in 1824 Stephen also reported to

119. *Ibid.*, 138–40. Draft of letter, dated Downing Street, London, December, 1824, to Major General Grant, Bahamas.

Bathurst on legislation that was amended and passed in Grenada¹²⁰ and in Jamaica¹²¹ authorizing free colored and free black persons to give evidence in all cases that were brought before the courts. Stephen was pleased with the law passed in Grenada. However, again revealing his anti-slavery sentiments, he complained about the legislation passed in Jamaica because it distinctly recognized “the doctrine that, in the case of every person of Colour, the legal presumption [was] in favor, not of his Freedom, but of his Slavery—a doctrine than which nothing can tend more powerfully to obstruct the gradual and progressive emancipation of this class of persons.”

After his appointment as full-time legal advisor to the Colonial Office in 1825, Stephen’s workload increased substantially. Whereas the Colonial Office ledger for 1825 shows that Stephen reported on 168 colonial laws, the ledger for 1826 shows that this increased to about 530.¹²² As before, the most detailed reports penned by Stephen dealt with West Indian slave laws. For example, in 1825, he wrote comprehensive critical reports on the slave laws of Barbados¹²³ and Grenada.¹²⁴ He followed this, in 1826, with similar reports on the revised slave codes of the islands of Saint Vincent¹²⁵ and Dominica.¹²⁶ In January 1827, he reviewed another slave code passed by the governor, Council, and Assembly of the Island of Barbados, which, like most other slave codes passed in the West Indies in the 1820s, included revised clauses on the admissibility of slave evidence.¹²⁷ Stephen, and his new superior in the Colonial Office, Huskisson, who took over from Bathurst in September 1827, also devoted similar close attention to the provisions concerning slave evidence contained in the proposed, but later disallowed, Jamaican consolidated slave code of 1826.¹²⁸

In the dispatch he sent to the lieutenant governor of Jamaica, Sir John Keane, notifying him of the disallowance of the Act of 1826, Huskisson noted that: “On the important subject of the evidence of slaves, his Majesty is graciously pleased to signify his approbation of the advance which

120. Ibid., 188–90. Stephen to Bathurst, 12 April 1824.

121. Ibid., 221–34. Stephen to Bathurst, 21 August 1824.

122. PRO, CO 323/43, folios 2–3. List of acts reported on by James Stephen in 1825–1826.

123. Ibid., 46–73. Stephen to Bathurst, 6 August 1825.

124. Ibid., 161–95. Stephen to Bathurst, 21 September 1825.

125. Ibid., 273–305. Stephen to Bathurst, 7 September 1826.

126. Ibid., 140–59. Stephen to Bathurst, 20 November 1826.

127. PRO, CO 323/44, folios 11–43. Stephen to Bathurst, 29 January 1827.

128. Huskisson took over as secretary of state on 3 September 1827, and his letter to the lieutenant governor of Jamaica disallowing the consolidated slave act is dated 22 September 1827. Saintly, *Office-Holders in Modern Britain*, vol. 6, *Colonial Office Officials*, 8. A copy of Huskisson’s dispatch of 22 September 1827 is contained the appendix to Barclay, *A Practical View of the Present State of Slavery in the West Indies*, 433–44.

has been made towards a better system of law; but, in reference to this subject, I am to observe that this law appears to contemplate the admission of evidence of slaves in those cases of crimes only in which they are usually either the actors or the sufferers, excluding their evidence in other cases—a distinction which does not seem to rest on any solid foundation.” In addition, undoubtedly following Stephen’s advice, he noted that: “The rule, which requires that two slaves at the least shall consistently depose to the same fact on being examined apart, before any free person can be convicted on slave testimony, will greatly diminish the value of the general rule. In some particular cases, such for example as the case of rape, such a restriction might secure impunity to offenders of the worst description. The rejection of the testimony of slaves twelve months after the commission of the crime, would be fatal to the ends of justice in many cases, nor is it easy to discover what solid advantage could result from it in any case.” Moreover, Huskisson pointed out: “If the owner of a slave is convicted of any crime on the testimony of that slave, the court has no power of declaring the slave free, although it may exercise that power when the conviction proceeds on other evidence. Highly important as it is to deprive a slave of every motive for giving false evidence against his owner, that object might be secured without incurring the inconvenience of leaving the slave in the power of an owner convicted of the extreme abuse of his authority.”¹²⁹ Huskisson also objected to the way in which the Legislature of Jamaica rejected Bathurst’s earlier proposal “for establishing a record of the names of all slaves sufficiently instructed to be competent witnesses.” Huskisson said that by doing this “the colonial legislature appear to have neglected the means of providing a cheap and effectual encouragement to good conduct, and of investing the religious teachers of the slaves with a powerful and legitimate influence over them.”

Huskisson’s criticism of the slave evidence provisions contained in the proposed Jamaican slave code of 1826 became a lightning rod for the counterattack launched by slave interests represented in the Jamaican House of Assembly. This is further evidence for the importance of the issue to the fight undertaken by James Stephen to provide better protection to slaves in English colonial criminal law. It also demonstrates how West Indian slave interests responded to Stephen’s criticisms of colonial legislation. In the subsequently published “Report from [the] Committee of the House of Assembly, appointed to take into consideration the Letter from Mr. Huskisson to his Honour the Lieutenant-Governor,” committee members criticized “his Majesty’s advisors” for failing to offer an objective and fair

129. Huskisson to Lieut. Governor Sir John Keane, 22 September 1827; cited in the appendix to Barclay, *A Practical View of the Present State of Slavery in the West Indies*, 440–41.

comparison of the proposed slave code of 1826 with the earlier Jamaican slave code of 1816, instead of passing “sentence on a law designed for the regulation of slaves, as if it were an act to fetter the minds and persons of a free people.”¹³⁰ With respect to the issue of slave evidence, the committee claimed “That the disallowed slave act, in the admission of slaves to given evidence in criminal cases, went beyond the expressed recommendation of the King’s government,” which had resolved in Parliament that “the admission of the evidence of slaves is not to extend to cases, where a white person or person of free condition shall be charged with or prosecuted for any capital crime.” Contrary to this restriction, the committee argued: “not only are slaves by the disallowed act permitted to give evidence in cases where white and free persons are prosecuted for capital crimes, but their evidence has actually been admitted in two such cases during the short operation of the act. In one, the offender, a white man, was convicted, partly on slave evidence, of murder, and, in the other, a man of colour was convicted of manslaughter solely on such evidence.” The committee returned to these examples later in its Report, to add weight to another criticism of Huskisson’s letter, specifically pointing out that:

It is an error to suppose that the evidence of slaves is only admitted when they are actors or sufferers. No pleader would dare to make the assertion in our courts. . . . The object of the legislature, in excluding the evidence of unbaptized slaves, was the encouragement and promotion of Christianity, and it was also considered that the indiscriminate admission of slave evidence, and the attaching thereto the weight that before only belonged to the evidence of free persons, would be too sudden an innovation on long established usage, and moreover, as will hereafter appear, the propositions of Lord Bathurst did not invite the house to the indiscriminate admission of slave evidence.

In response to Huskisson’s concern about courts not having the power to free a slave “if the owner of the slave is convicted of any crime on the testimony of that slave,” the committee acidly noted: “But if Mr. Huskisson would have slaves manumised in all cases, where the owner is convicted of any offence on their testimony, the house have only to reply that no further enactment will be necessary to insure the speedy manumission of all the slaves of the island, unless indeed our juries reject such suspicious testimony, to avert the ruin that must follow its reception”; while in response to his proposal for establishing a record of the names of all slaves, sufficiently instructed to be competent witnesses, the committee, in an equally defiant tone, stated that “the colonial legislature was governed by the assurance that such (a) registry would be burthensome and useless.” The claimed reason for this view, expressed by the committee, was that it

130. *Ibid.*, Appendix No. 1, “Papers Relating to the Disallowed Act of 1826,” 433–72, at 448.

was "customary in slave-courts to examine slaves respecting their knowledge of the nature of an oath, and the punishment they become subject to, if they tender false evidence," and that this custom "has been proved by experience to be a sufficient protection to prisoners."¹³¹

It is quite clear from this that the admissibility of slave evidence was a key contentious issue fought over by anti-slavery crusaders and the defenders of West Indian slave interests. This debate lasted until 1833, when it was finally put to rest with the enactment of the *Abolition of Slavery Act*. Stephen continued to scrutinize all West Indian slave codes passed between 1826 and 1833, and he found most of them to be deficient regarding rules proposed for allowing slave evidence. These deficient codes included the revised slave laws enacted in Grenada (1826),¹³² the Bahamas (1826),¹³³ St. Lucia (1827),¹³⁴ and Bermuda (1827).¹³⁵ As I have attempted to illustrate through the examples presented here, the study of the controversy surrounding slave evidence acts provides revealing evidence of how West Indian legislatures reacted to the disallowance of legislation by the Colonial Office. However, it is equally clear that more research needs to be done by legal historians toward developing a more detailed general picture of the consequences of Stephen's frequent disapproval of colonial statutes as seen from the perspective of the colonists, not only in other colonies of the West Indies, but also in other British slave and settler colonies that Stephen oversaw from the Colonial Office over the course of his long career.¹³⁶

Yet, as we have seen, Stephen also praised colonial legislators when he felt they were doing a good job, and especially when he saw that the laws they passed would at least work to soften the bondage of slaves. This is further exemplified in the reports Stephen wrote on the progress that some West Indian colonies were making toward enacting slave evidence bills that embodied Bathurst's recommendations. Stephen was particularly pleased with the slave evidence provisions included in the revised slave codes of St. Kitts (1827),¹³⁷ Grenada (1828),¹³⁸ and Nevis (1828),¹³⁹ while he accepted, with some reservations, the slave evidence provisions contained

131. Ibid., 464–65.

132. PRO, CO 323/44, folios 88–91. Stephen to Huskisson, 13 December 1827.

133. PRO, CO 323/45, folios 13–34. Stephen to Huskisson, 27 February 1828.

134. PRO, CO 323/44, folios 174–94. Stephen to Bathurst, 2 January 1827.

135. PRO, CO 323/45, folios 256–77. Stephen to Huskisson, 22 February 1828.

136. For examples of significant studies of mid-nineteenth-century British colonial law outside the West Indies that can be used as a foundation for further research along these lines, see Benton, *Law and Colonial Cultures*; Haring, *White Man's Law*; Kercher, *An Unruly Child*; McLaren, "Reflections on the Rule of Law"; Samson, *Imperial Benevolence*; Smandych, "Contemplating the Testimony of 'Others.'"

137. PRO, CO 323/45, folios 125–37. Stephen to Huskisson, 23 February 1828.

138. PRO, CO 323/46, folios 52–55. Stephen to Murray, 5 February 1829.

139. Ibid., 79–90. Stephen to Murray, 27 January 1829.

in the revised slave codes of Antigua (1830),¹⁴⁰ Barbados (1830),¹⁴¹ and Jamaica (1831).¹⁴² With regard to the slave evidence provisions included in the slave code of St. Kitts, he noted that “a very near approach [was] made to a complete adoption of Lord Bathurst’s recommendations.”¹⁴³ Stephen also noted with evident satisfaction that the revised slave code passed in Grenada in 1828 admitted slave evidence in law courts “in the most absolute and unqualified terms.” More specifically, he praised the Act (No. 231) passed in Grenada in 1828, on the grounds that it established “in the most unequivocal terms the broad principle that the servile condition of a witness is not to prevent the admission of his testimony upon any trial or judicial proceeding, civil or criminal.”¹⁴⁴ The revised slave code enacted in Nevis in 1828 earned similar praise from Stephen. In his view, the Nevis code constituted “the most perfect approach which has hitherto been made in any part of the West Indies to the Slave Code recommended by His Majesty’s Government for adoption in those Colonies.”¹⁴⁵ With regard to the slave evidence provisions included in the code, he noted that the clauses appeared to him “to approach very nearly the suggestions of Lord Bathurst, and even to make some important improvements upon the plan which His Lordship proposed.” Stephen was particularly pleased with how the law went further than Bathurst recommended, noting that: “The certificate of a religious teacher as to the competent understanding of the slave, is entirely dispensed with;—an improvement as I conceive, on Lord Bathurst’s suggestion, of great value.”

Although questioning why the law passed in Antigua in 1830 rendered the evidence of slaves admissible in criminal cases but not in civil cases, Stephen noted that the Act was “a decided and important improvement, and ought, as I humbly conceive, to be sanctioned by His Majesty.”¹⁴⁶ Stephen also had specific reservations about the Act (No. 531) enacted in Barbados in 1830 aimed at “removing restrictions affecting the testimony of slaves,”¹⁴⁷ pointing out, for instance, that although the Act “in effect, abolished all restrictions upon the admission of slave evidence,” it however “required that if any free person should be charged with the commission of an offence not bailable, and the charge be supported by the testimony of slaves only, any two Justices of the Peace may admit the offender to bail ’till he can be tried.” Stephen disliked this clause, reasoning that: “This

140. PRO, CO 323/48, folios 112–13. Stephen to Goderich, 10 October 1831.

141. Ibid., 127–29. Stephen to Goderich, 15 November 1831.

142. Ibid., 206–17. Stephen to Goderich, 14 June 1831.

143. PRO, CO 323/45, folios 125–37. Stephen to Huskisson, 23 February 1828.

144. PRO, CO 323/46, folios 52–55. Stephen to Murray, 5 February 1829.

145. Ibid., Stephen to Murray, 11 May 1830, at folio 88.

146. PRO, CO 323/48, folios 112–13. Stephen to Goderich, 10 October 1831.

147. Ibid., 127–29. Stephen to Goderich, 15 November 1831.

Rule appears to me at variance with the general spirit of the law, as well as inconvenient and objectionable in itself.” As an illustration of why it was objectionable, he said: “Suppose, for example, the case of rape or murder established to the entire satisfaction of the Magistrates on slave testimony, the right of admission to bail would probably insure the impunity of the criminal. If the testimony be entitled to credit, I cannot perceive the justice or policy of affording such a shelter to the accused party. If, on the other hand the testimony be not entitled to credit, the Magistrate, before whom the charge was preferred, would neither be bound, nor at liberty, to issue his Warrant of Commitment.” Notwithstanding such reservations, he said that the Act appeared to be “of great value and importance” and he had “no legal objection” to it being put into force.

Stephen offered a similar cautious and utilitarian view of the slave evidence provisions contained in the revised Jamaican slave code of 1831, noting to Viscount Goderich that on the subject of evidence the Act dispensed “with the obligation formerly imposed of producing a certificate of the Baptism of the witness,” and that instead of requiring two slaves to provide a deposition on the same fact or circumstance, it was declared “sufficient if one slave and one free person should so depose.” “But, on the other hand,” Stephen observed, it was “now, for the first time, provided that no free person should be committed for trial, or held to bail, on the evidence of a simple slave unless that evidence would be confirmed by the deposition of some other person, slave or free, to the same fact or circumstances the witnesses being examined apart from each other.” Stephen argued that given such restrictive provisions, “In the case of rape, and in some other cases, it would therefore seem scarcely possible that a conviction should be obtained.” Nevertheless, Stephen did not reject outright Jamaica’s yet-again revised slave code of 1831. Instead, he offered his own new master in the Colonial Office, Viscount Goderich, the practical, and in hindsight, astute short-term advice that the Act be approved temporarily, but made subject to future amendments. Specifically, he advised that “as all the objectives which W. Huskisson repeatedly urged against the Statute of 1826 remain in full force, with the exception of the clauses respecting the religious worship, and with the few other exceptions which I have already noticed, I submit to Your Lordship that, if this Act be left to its operation, the attention of the Council and Assembly should be recalled to the Despatches in which those objections were copiously explained.” Reflecting again his first and foremost concern for the protection of slaves, Stephen reasoned that should the Act be disallowed, “[s]uch a measure would remit the slaves to a worse state of law, than that which this Act would establish.”¹⁴⁸

148. *Ibid.*, 206–17. Stephen to Goderich, 14 June 1831.

Conclusion

While Stephen acknowledged improvements that were made to criminal slave laws enacted in a number of the West Indies colonies after 1823, overall he remained displeased with the lack of progress made in the West Indies toward enacting more humane slave laws. Lord Stanley echoed this sentiment in May 1833, when he finally introduced the government's formal plan for the emancipation of slaves.¹⁴⁹ By the spring of 1833, Stephen also recognized, evidently with some gratification, that in spite of the persistent opposition of West Indian slave interests his long fight to protect slaves by way of forcing reforms to colonial slave laws would soon be over.¹⁵⁰ It is doubtful, however, that Stephen knew at the time he would be called upon to write the *Abolition of Slavery Act* that would be passed by the end of the summer, formally setting the date for the abolishment of slavery throughout the British Empire. Yet, even after August 1833, Stephen was not about to relax his guard against the forces that could work to undermine the intent of the Act he finally wrote. For example, in September 1833, he provided Lord Stanley with a critical opinion on an Act passed on the Island of Barbados to restrict manumitted slaves who did not own property from joining the colonial militia.¹⁵¹ Stephen reasoned that if this type of law was not disallowed, society, "even after the extinction of slavery, would not be amalgamated into one general body, of which all the different members would be capable of the same civil rights and duties. An invidious discrimination would survive the change."

It was Stephen's Evangelically based belief that ultimately all recognized "British subjects" should be given the opportunity to live in a society where they "would be capable of the same civil rights and duties." It was this belief that to a large part inspired his twenty-year campaign for slave emancipation. There is evidence that it was the same belief that inspired the approach he took to developing Colonial Office "native policy" after 1833, and also the key role he later played in attempting to develop more

149. Great Britain, *Hansard, Parliamentary Debates*, 3d ser., vol. 18, pp. 1193–1231. "Speech of Edward Stanley, Secretary of State for the Colonies, Introducing the Government Plan for the Emancipation of Slaves, 14 May 1833." Extract included in Hurwitz, *Politics and the Public Conscience*, 145–55.

150. PRO, CO 323/49, folios 43–45. Stephen to Goderich, 22 January 1833. Revealingly, in this report Stephen commented on a consolidated slave act (No. 447) passed in Bermuda aimed at revising an earlier Act he had reported on originally in 1828, noting: "The whole discussion on the subject of Slavery has, since the date of that Report, been brought into a posture so entirely new, that, pending the enquiries of Parliament upon the general subject, I presume that His Majesty's decision upon this Act must be suspended."

151. *Ibid.*, 66–69. Stephen to Stanley, 3 September 1833.

adequate means of safeguarding the legal rights of Indigenous peoples in the legal systems being set into place in nineteenth-century British settler colonies. This later chapter in his life, alongside the more detailed story of his attempt to reform the criminal slave laws of the West Indies, still begs to be written. Beyond providing added insight into the life of James Stephen, this study has contributed in drawing the attention of legal historians to the rich body of yet largely unexplored data on nineteenth-century British colonial law administration contained in the British Public Record Office. In doing so, it will hopefully encourage more in-depth and broader ranging research in the field of comparative colonial common law legal history that takes into account this immensely rich data source. More of this type of comparative research is needed before any adequate generalizations can be made about changes that affected the way in which colonial "others," including slaves and Indigenous peoples, were treated in the legal systems of evolving colonial common law jurisdictions in the nineteenth century.