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A Jurisprudence of Power

*Victorian Empire and
the Rule of Law*

R. W. KOSTAL

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For Leslie

General Editor's Preface

One of the standard justifications for British imperialism was that it brought colonial territories and their inhabitants within the rule of law. Until the British Empire was dismantled in the second half of the twentieth century this justification continued to be regularly offered as a counter to the anti-colonial movement. And even today, when the Empire is no more, legality and respect for the rule of law continue to feature in attempts by historians to produce balance sheets of the merits and demerits of British imperialism. It was in the Victorian period, at the height of British imperialism, that the role of legality in colonial administration became a subject of a particularly impassioned public controversy. The occasion was the violent suppression, in 1865, under martial law – whatever that meant – of a supposed insurrection in the Morant Bay area of Jamaica, the Governor at the time being Edward Eyre. Underlying this controversy was the uncomfortable realization that there exists a symbiosis between law and the violence employed to maintain its authority when that authority is thought to be threatened. Both before and after the Governor Eyre controversy there have been other occasions when the suppression of colonial insurrections has given rise to public debate, and there is currently such a historical debate over the suppression of the 'Mau Mau' rising in Kenya in the 1950s. But somehow the intellectual heavyweights of Victorian Britain conducted such debates with a touch of class which is no longer available.

There have been a number of studies of the Jamaica affair, but when Professor Kostal approached me some time ago to discuss the possibility of producing a new study I encouraged him to do so; the end product seems to me to have shown that I was right. He has made a major contribution to the understanding of Victorian thought and Victorian attitudes to colonialism, and in particular to the place of legalism in those attitudes, a subject which historians of colonialism have rather neglected. And the issues which so excited the Victorian intelligentsia – the role of respect for legality in countering feared challenges to government under law – have, as is particularly obvious as I write this, a timeless quality. It is a pleasure to welcome Professor Kostal's book to this Modern Legal History Series.

A. W. Brian Simpson

Preface

How is a constitutional nation to contend with the nakedly brutal realities of empire? Can such a country rule over alien lands and peoples without corrupting its defining ideals? In the late 1860s the English governing class was frequently absorbed and deeply perplexed by these questions. When I first came upon this fact, while reading contemporary newspapers and journals for another book several years ago, I had never heard of the Morant Bay rebellion or of Governor Edward Eyre. But after only a little reading it was evident that in early November 1865 news had reached England that the colonial authorities in Jamaica had ruthlessly suppressed an uprising among the island's black peasantry, and that they had done so under a proclamation of martial law. It was also apparent that these reports quickly had become the subject of controversy, and that the controversy involved an explosive convergence of politics (the formal exertion of power) and law (the formal restraint of power). A casual glance at published sources indicated that the Jamaica suppression, patently an official campaign of terror and punitive violence, had brought about some very interesting effects in England. From the outset, leading English politicians and thinkers began to discuss the episode in terms of legal principles and procedures. In time, moreover, the politicians and thinkers seemed largely to have surrendered the dispute to lawyers and judges. The combatants also appeared broadly to agree that the Jamaica controversy was not only about politics, but the basic legal rules governing politics. For an historian of Victorian law and society, this seemed a story worthy of more systematic investigation.

I have been at work on this project for many – too many – years and in that time have accumulated a great many academic debts. The project was financed principally by a generous Program of Research Grant from the Social Science and Humanities Research Council of Canada. While undertaking the majority of the archival research for the book, I was a Visiting Scholar to the School of Advanced Study at the University of London. I am extremely grateful to the kindness and hospitality shown me there by Dr. Terry O'Brien and his staff at Senate House. I also benefited from use of the facilities at the Institute of Historical Research, and from the seminar in imperial history conducted by Dr. Andrew Porter. In this time-frame, I profited immensely from conversation and correspondence with Gad Heuman, Stefan Collini, Josh Getzler, Miles Taylor, Bernard Semmel, Michael Taggart, David Sugarman, and Richard Cosgrove. During a research trip to Jamaica I was hosted by my friend Las Neuman, and with him as my expert guide made an unforgettable trip to Morant Bay. At the National Library of Jamaica nothing would have been accomplished but for the skilful assistance of Mrs. Eppie D. Edwards.

At my home institution at the Faculty of Law, the University of Western Ontario, I have enjoyed the unflagging support and patience of Dean Ian Holloway, and that of my colleagues. I am also grateful to the Law Foundation of Ontario, and to the Work Study Program of the Province of Ontario for underwriting the cost of student research assistance. In 1997, the law student (and now Crown Attorney) David King prepared an archival research brief of simply astonishing comprehensiveness and accuracy. I subsequently benefited from the diligent work of law students Risa Kirshblum, Kelly Gonsalves, Michael DeVries, Phillip Casey, and Martin Painter. I want to extend special thanks to law students Darryl Keen, John Nicholson, and Roslynn Kogan, all of whom made crucial contributions to the project in its final phase. Frances Lethbridge, Veronica D'Souza, and Tigger Jourard provided invaluable service in the preparation of the text. Leslie Lauinger helped shape up the bibliography. I would be remiss if I failed to acknowledge the unrivalled expertise and efficiency of Western Ontario's Legal Research Librarian, Marianne Welch. Finally, I want to acknowledge the personal and intellectual debt owed to my friend and mentor, Professor Craig Simpson. Craig has been my main confrère from the beginning to the end of this work.

Turning to the staff, past and present, of Oxford University (Clarendon) Press, I do not like to think where my writing career would be were it not for the support of Richard Hart. Richard commissioned my first work for the Clarendon Press, and encouraged me in the proposal of this book. The book was proposed under Richard's auspices, but was warmly endorsed and carried to fruition under the direction of the Senior Commissioning Editor, John Louth. I am also grateful to Gwen Booth for her skill and diplomacy in shepherding me through the arduous process of making a manuscript into a book. The book's prose and scholarship were greatly enhanced by the meticulous reading and judicious advice of Anna Hodson, the copy-editor. My largest debt at the Oxford Press is owed to Brian Simpson, the General Editor of *Oxford Studies in Modern Legal History*. Brian took great pains with a rather raw first draft of the present script. My work has benefited enormously from his knowledge and suggestions, and from his unflinching professional courtesy and respect. Of course, for the errors and misjudgments that have gone uncorrected, I alone am responsible.

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Abbreviations

<i>Adm</i>	Admiralty Records, National Archives of England
<i>BFASS</i>	British and Foreign Anti-Slavery Society, Rhodes House, Oxford
<i>BL</i>	British Library
<i>CUL</i>	Cambridge University Library
<i>CD</i>	Diary of Frederick Chesson, John Rylands Library, Manchester
<i>CL</i>	Cornell Library
<i>CO</i>	Colonial Office, National Archives of England
<i>DNB</i>	Dictionary of National Biography
<i>FHP</i>	Frederic Harrison Papers, London School of Economics
<i>GSP</i>	Goldwin Smith Papers, Cornell University
<i>JC Minutes</i>	Minutes of the Jamaica Committee, Rhodes House, Oxford
<i>JRC</i>	Jamaica Royal Commission, British Parliamentary Papers
<i>JRO</i>	Jamaica Record Office, Spanish Town, Jamaica
<i>NLS</i>	National Library of Scotland
<i>PP</i>	British Parliamentary Papers
<i>SLSA</i>	State Library of South Australia
<i>WO</i>	War Office, National Archives of England
<i>UCL</i>	University College London

Introduction

History is made up of episodes, and if we cannot get inside these, we cannot get inside history at all.

Edward Thompson, *The Poverty of Theory*

This book is about the centrality of law in the world-view of the English political class of the 1860s. Its more specific subject-matter is the prolonged conflict that arose in England over the suppression of the Morant Bay uprising in Jamaica. On 11 October 1865, a crowd of black men and women attacked and burned the courthouse at the southeastern vestry town of Morant Bay. The chief magistrate and seventeen other persons, most of them white men, were beset and killed as they fled. When apprised of these events, the Governor of Jamaica, Edward John Eyre, proclaimed martial law in the afflicted district, and despatched regular soldiers and militia to put down the insurrection. This the soldiers did with vigour, killing and torturing hundreds of black Jamaicans – that is to say, British subjects – in the process. When reports of these events reached England during the first week of November 1865, they became the focus of what *The Times* later called ‘one of the most acute public controversies of the later half of the nineteenth century.’¹

Although the ‘Jamaica affair’ (as contemporary writers often called it), has not been the subject of a general historical treatment for more than forty years,² the incident has generated an extensive, rich, and varied historiography.³ We have detailed accounts of the causes and contours of the Morant Bay uprising and suppression.⁴ There are compelling histories of the subsequent controversy in England from the standpoints of imperial policy, social psychology, and race relations.⁵ Historians also have commented extensively on the role in the affair of

¹ ‘Death of Ex-Governor Eyre’, *The Times* (3 Dec. 1901), 8.

² See Bernard Semmel, *The Governor Eyre Controversy* (London, 1962).

³ These works are more closely examined *infra*, Appendix.

⁴ See generally, Thomas C. Holt, *The Problem of Freedom: Race, Labor and Politics in Jamaica and Britain, 1832–1938* (Baltimore, Md., 1992); Gad Heuman, *‘The Killing Time’: The Morant Bay Rebellion in Jamaica* (Knoxville, Tenn., 1994); Mimi Sheller, *Democracy after Slavery: Black Publics and Peasant Radicalism in Haiti and Jamaica* (Gainesville, Fla., 2000), 203–46; Catherine Hall, *Civilizing Subjects: Colony and Metropole in the English Imagination, 1830–1867* (Chicago, Ill., 2002).

⁵ These works are more closely examined *infra*, Appendix.

prominent intellectuals such as Thomas Carlyle⁶ and John Stuart Mill.⁷ However, a premiss of the present study is that these works, while worthy enough on their own terms, have failed to apprehend that the Jamaica affair was understood, described, and contested largely in terms of legal language and procedures. Historians of the Jamaica affair, put off perhaps by the ‘maze of technicalities’ associated with legal matters,⁸ have overlooked an exceptional opportunity to identify and analyse the legal components of English political language and behaviour in the mid-Victorian era. Similarly, in their broad indifference to the history of the mid-Victorian legal system, scholars have barely considered how political ideas and concerns might have affected the legal writing, pleading, and decision-making spawned by the episode. This book, therefore, describes the Jamaica controversy as an important episode in the legal history of English politics, and the political history of English law.

Before elaborating more fully on the main historical sources, questions, and theses of this study, it will be useful to survey the main contours of Jamaican constitutional and socio-political history in the years immediately preceding the Morant Bay uprising. What was the structure of colonial government in Jamaica? How were legal powers divided between colonial and imperial authorities? What circumstances led to the uprising and suppression in Jamaica during October 1865? What laws governed public emergency?

Jamaica formally became a British territory in 1670, fifteen years after Cromwell’s naval forces defeated the Spanish garrison on the island.⁹ The ensuing evacuation of Spanish people and institutions in Jamaica later created uncertainty about the laws governing British immigrants to the island,¹⁰ uncertainty arising from a peculiar distinction in British imperial law between ‘conquered’ and ‘settled’ colonies.¹¹ In conquered territories, any ‘civilized’ laws in place at the moment of conquest continued in force until expressly discontinued by Parliament or the Crown. In settled colonies, on the other hand, British

⁶ For Carlyle and the Jamaica affair, see particularly, Gillian Workman, ‘Thomas Carlyle and the Governor Eyre Controversy: An Account with Some New Material’, 18 *Victorian Studies* (1974), 77–102; Holt, *The Problem of Freedom*, 284–6; Catherine Hall, ‘The Economy of Intellectual Prestige: Thomas Carlyle, John Stuart Mill, and the Case of Governor Eyre’, 22 *Labour/Le Travail* (1989), 167–96; Catherine Hall ‘Competing Masculinities: Thomas Carlyle, John Stuart Mill and the Case of Governor Eyre’, In C. Hall (ed.), *White, Male and Middle-Class: Explorations in Feminism and History* (London, 1992), 255–93, 268–76.

⁷ For Mill and the Jamaica affair, see Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain, 1850–1910* (Oxford, 1991); Bruce L. Kinzer, Ann P. Robson, and John M. Robson, *A Moralist In and Out of Parliament: John Stuart Mill at Westminster, 1865–1868* (Toronto, 1992), 184–217.

⁸ George Ford, ‘The Governor Eyre Case in England’, 17 *University of Toronto Quarterly* (1947–8), 219–33, 233.

⁹ For a narrative overview of the political history of British Jamaica in the seventeenth century, see Clinton V. Black, *The Story of Jamaica: From Prehistory to the Present* (London, 1965), 42–51.

¹⁰ This uncertainty is reflected in a memorandum written in the wake of the Morant Bay suppression by the law officers of the Crown to the Colonial Secretary, Edward Cardwell. See ‘Disturbances in Jamaica’, 24 Jan. 1866, CO 885/2.

¹¹ Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London, 1966), 540–2.

immigrants were entitled to all of the legal privileges and immunities of British subjects in their homeland.¹² By this reckoning, British Jamaica was a legal hybrid. It was a conquered colony which only briefly contained a conquered population with ‘civilized’ laws. In 1662, Lord Windsor, the new British governor of the island, introduced a constitution and commenced to govern Jamaica as a ‘settled’ colony,¹³ the operative premiss of Jamaican government for the next two hundred years. However, in the aftermath of the martial law of 1865, a number of basic questions about the legal status of Jamaica and its population were revisited and contested. According to the letter of imperial law, was Jamaica a ‘conquered’ or ‘settled’ colony? Were its British settlers entitled to the same protections (as against, for instance, the introduction of martial law) enjoyed by citizens in Britain? Did the legal rights and immunities of white British settlers in Jamaica extend to the black men and women whose ancestors had been brought to the colony in chains?

In the late seventeenth and eighteenth centuries, British Jamaica was developed as a slave colony dominated by local and absentee planters of sugar cane. It was the site of almost ceaseless conflict between the planter oligarchy and the colony’s governors, and as between the white minority and the enslaved majority. These struggles unfolded within a ‘representative’ constitution,¹⁴ the central feature of which was a Legislative Assembly elected by a tiny elite of enfranchised white planters. Insofar as the Jamaica constitution had a fixed purpose, it was to provide the planter class with the legal powers needed to foster the production and export of sugar while it safeguarded the scattered white population from the perils of slave insurrection. The guiding principle of Colonial Office policy in this era was that the planters were to be left to pursue these goals with a minimum of interference from the imperial government and its agents.¹⁵ However, this policy did not ensure that relations between legislative and executive branches of colonial government would be free of friction. In fact, such friction was an endemic feature of Jamaican politics.

The first principle of Jamaica’s constitution was that the Legislative Assembly, elected by the colony’s wealthiest landowners, would be the principal source of public law and revenue in the colony.¹⁶ Its second principle was that these functions were to be subject to the influence and oversight of the colony’s chief executive officer, the Governor. Appointed by the Colonial Office, holding the commission of the Sovereign, the Governor had powers enough to obstruct but

¹² Ibid. See also D. B. Swinfen, *Imperial Control of Colonial Legislation, 1813–1865: A Study of British Policy towards Colonial Legislative Powers* (Oxford, 1970), 6.

¹³ Ibid. Lord Windsor also introduced a Royal Proclamation which purported to bestow the legal rights of British citizenship on the offspring of British settlers in Jamaica. Black, *Story of Jamaica*, 50–1.

¹⁴ W. P. Morrell, *British Colonial Policy in the Mid-Victorian Age* (Oxford, 1969), 378–9; C. V. Gocking, ‘Early Constitutional History of Jamaica (with Special Reference to the Period 1836–1866)’, 6 *Caribbean Quarterly* (1960), 114–33.

¹⁵ Michael Craton, *Empire, Enslavement and Freedom in the Caribbean* (Kingston, Jamaica, 1997), 1–25.

¹⁶ Gocking, ‘Early Constitutional History’, 116.

not to control the business of the Assembly.¹⁷ In Jamaica, however, by law and convention, the will of the Assembly prevailed over the will of the Governor, especially in fiscal matters.¹⁸ The Governor might delay, but could not override legislation. And while the Colonial Office had the power to disallow colonial legislation,¹⁹ in practice disallowance was regarded as an ‘extreme remedy’, one to be used sparingly.²⁰ In 1865, Parliament passed the *Colonial Laws Validity Act*, which provided that a colonial statute was to be regarded as legally valid unless it was clearly repugnant to an Act of the imperial Parliament.²¹ This development had at least one important consequence for the history of the Jamaica controversy. The statutes passed by the Jamaica Assembly governing the use of martial law, and later governing indemnification for the use of martial law, were good laws until such time as the Government in London took active steps to invalidate them.

In the mid-nineteenth century Jamaica’s political and constitutional history was shaped by two pivotal events: the complete emancipation of the slaves by Parliament (after five years of transitional ‘apprenticeship’) in 1838,²² and the collapse of sugar prices after the repeal of imperial protective tariffs in 1846.²³ The prevailing view in the Colonial Office in this period was that Jamaica’s planter oligarchy was too racist and dissipated to govern justly in the post-emancipation era. So long as the black freedmen were unenfranchised (and the Colonial Office thought them unready for the vote), there was no way of curbing the dogmatic race and class politics of the old white elite. In 1839, Lord Melbourne’s government fell on a bill that would have placed Jamaica under the direct government of the Crown.²⁴ For the next fifteen years economic and political conditions in the colony continued to decline. By 1854 Jamaica’s public finances were a shambles. Facing fiscal disaster, the colony’s Legislative Assembly agreed to relinquish some of its powers in exchange for new imperial loans.²⁵ Henceforth, political authority was to be shared between the Assembly (forty-seven members elected by 2000 enfranchised persons), a Legislative Council (seventeen Crown appointees), the Governor, and an Executive Committee (the Governor and three Assemblymen). However, these changes quickly led to political gridlock,²⁶ and Jamaica’s formal politics became even more deeply divided by class and racial enmities. Relations between governors and legislators went from bad to worse. The constitutional

¹⁷ The Governor possessed a ‘vaguely defined delegation of the royal prerogative to him as agent of the King’, *Ibid.*, 115.

¹⁹ Swinfen, *Imperial Control of Legislation*, 4.

²⁰ *Ibid.*

²¹ *Ibid.*, 172–3.

¹⁸ *Ibid.*, 116.

²² Among white Jamaican planters, the emancipation of the slaves was an unwelcome imposition, one which was fiercely resisted. See Holt, *Problem of Freedom*, 1–35; Hall, *Civilizing Subjects*, 174–208.

²³ The price of sugar began to decline in 1816. Imperial preferences on sugar were not completely removed until 1854. Morrell, *British Colonial Policy*, 377.

²⁴ Gocking, ‘Early Constitutional History’, 119–23. Ten years later, the Jamaica Assembly declined responsible government on the theory that it would decrease its power over fiscal policy. Morrell, *British Colonial Policy*, 382–9; 399–403.

²⁵ Swinfen, *Imperial Control of Legislation*, 4.

²⁶ In general, the remnants of the old planter elite lined up against a shifting coalition of urban merchants, professionals, ‘coloured’ persons, and Jews. Morrell, *British Colonial Policy*, 402–3.

'reforms' of 1854 had only aggravated the colony's crushing social and political problems.

In the winter of 1862, Edward John Eyre, who had held appointments in the colonial service intermittently since 1845, was appointed Acting Governor of Jamaica. In May 1864 (before it was obvious to the Colonial Office that he was in over his head) Eyre was given the office outright. It was Eyre's enduring misfortune to have assumed full executive authority in a colony wracked by economic depression, racial hatred, and political paralysis.²⁷ In confronting the crisis, the new Governor faced two significant disadvantages. First, Eyre was ill-equipped both by temperament and intellect to navigate in a financial, political, and racial maelstrom. Second, he would have advantage of almost no useful assistance from the colonial elite. In the early 1860s, Jamaica was notoriously short of wise statesmen.²⁸

The colony was short of statesmen but not population. In 1864 Jamaica contained some 440,000 citizens, more than 350,000 of whom were former slaves or the progeny of former slaves.²⁹ Approximately 80,000 colonists were regarded as persons of 'coloured' or mixed race. Fewer than 14,000 were viewed as 'white' persons. With few exceptions, black and coloured Jamaicans were desperately poor. There was little cash employment. In droves they had abandoned (irregular and irregularly paid) employment on the sugar estates to squat on vacant land in the rugged hills. In the early 1860s the inevitable hardships of back-country farming were exacerbated by prolonged drought. The general distress of the peasantry intensified when the exigencies of the American Civil War began to chase up the price of food and other essential goods.³⁰ And then there was the colony's antiquated system of local justice. In Jamaica, mundane legal disputes over land, labour, and petty crime invariably were tried before lay magistrates recruited from among the planters and their close associates. Local justice, the most important surface of contact between the black poor and the colonial state, was meted out mainly by habitually racist white men who had class (sometimes directly personal) interests in the outcome of prosecutions and trials. It was not wholly by chance, therefore, that the Morant Bay uprising began at a parish courthouse.

For two years preceding the Morant Bay rebellion, black and coloured community leaders, supported by a handful of white missionaries and assorted malcontents, pressed the colonial government for social, economic, and political reforms.³¹ George William Gordon, a prominent coloured landowner, legislator, and Native Baptist convert, was the most conspicuous and tenacious advocate of these claims.³² In this period Gordon was in constant collision with Governor

²⁷ See generally, Ronald V. Sires, 'Governmental Crisis in Jamaica, 1860-1866', 2 *Jamaican Historical Review* (1953), 1-26, 15; Heuman, 'The Killing Time', 44-5.

²⁸ Sires, 'Governmental Crisis', 16.

²⁹ These statistics cited by *The Times* (15 Mar. 1866), 8.

³⁰ Sires, 'Governmental Crisis', 19; Heuman, 'The Killing Time', 44-5.

³¹ *Ibid.*, 63-77; Sheller, *Black Publics*, 212-18.

³² Gordon was born in 1820, the son of a wealthy planter and a slave woman. He inherited a number of large landholdings, some of which were located in the parish of St. Thomas-in-the-East,

Eyre and the white planter elite. Gordon was not alone in this role. In St. Thomas-in-the-East, the southeastern parish of the colony, Paul Bogle, a black Native Baptist preacher (and associate of Gordon), led a populist movement for political and land reform. However, the agitation spearheaded by Gordon, Bogle, and other reformers failed to produce tangible results. As the suffering of Jamaica's black communities increased in 1864, and as one after another reformist initiatives were rejected or ignored by the authorities, the political tension became palpable. Protest meetings were more frequent, political rhetoric more heated. By the end of 1864, rumours of impending violence abounded. Then, in January 1865, Edward Underhill, an official of the Baptist Missionary Society in England, sent a letter to the Colonial Office documenting the plight of the Jamaican peasantry, and the potential for violence.³³ If the island was to avert open rebellion, Underhill warned, the Government needed to take urgent steps to address the grievances of black Jamaicans. During the first months of 1865, Underhill's letter received wide publicity in England, and was the focal point of a series of angry public meetings in Jamaica. But the Colonial Office did not take any remedial action. As for Governor Eyre, he did not budge from his long-held belief that the principal cause of distress among Jamaica's blacks was their stubborn unwillingness to work.³⁴

The bitter political conflicts of the early 1860s were the direct by-products of Jamaica's convulsive past. The most important fact about Jamaica in this era, indeed, in the entire arc of its history as a British colony, was slavery. Jamaica's legal and political culture was forged within a brutally coercive but endemically insecure system of unfree plantation labour.³⁵ The survival of the slave system had depended on the ability of scattered pockets of white men to maintain control over large and recalcitrant concentrations of black men. This had not been a simple task. In 1673, fewer than twenty years after the British conquest of Jamaica, the island experienced the first of a long succession of bloody slave revolts and suppressions.³⁶ From these experiences white Jamaicans learned a visceral fear of the island's black population. In 1865, nearly twenty years after emancipation, Jamaica's whites remained haunted by the spectre of black violence. The catastrophic slave revolt in nearby Saint Domingue (Haiti) in 1791 had never been forgotten. The Jamaican slave revolt of Christmas 1831 was part of the active memory of elderly white colonists.³⁷ There was also the fresh recollection of the Indian Mutiny. The massacre of white soldiers and civilians by Indian army mutineers in 1857–8 only intensified the dread among white Jamaicans that one

the site of the uprising of 1865. By the early 1860s, profligacy and careless investments had left Gordon deeply in debt. Heuman, *Oxford DNB*, online 74415.

³³ Heuman, *'The Killing Time'*, 55–60.

³⁴ Morrell, *British Colonial Policy*, 406–7; Heuman, *'The Killing Time'*, 48.

³⁵ For a stark and comprehensive account of the brutal character of Jamaican slavery, see generally, Trevor Burnard, *Mastery, Tyranny and Desire: Thomas Thistlewood and his Slaves in Anglo-American World* (Chapel Hill, NC, 2004).

³⁶ For a concise survey of slave revolts in Jamaica, see Heuman, *'The Killing Time'*, 33–42.

³⁷ Mary Reckord, 'The Jamaica Slave Rebellion of 1831', 40 *Past and Present* (1968), 108–25, 120.

day they might be overwhelmed and exterminated by the black majority. The civil unrest associated with the Jamaican tax riots of 1859 further heightened this anxiety.³⁸

The insecurity of whites had always been the central premiss of public law and planning in the colony. In 1681 the Legislative Assembly passed the first of an unbroken chain of statutes permitting the Governor and his privy councillors, on any credible news of slave conspiracy or rebellion, to proclaim martial law and apply maximum military force against rebels. In 1866, Alexander Heslop, Jamaica's English-educated Attorney General, summarized this point: '[F]rom the time of the actual settlement of [Jamaica] as a British possession,' he stated, 'there never has been a day during which martial law, or the power of declaring martial law, has not been a normal provision of the statute book.'³⁹ The imperative of the colony's emergency law was to provide the military with the legal powers necessary to crush insurrectionary activity before it could become dangerously widespread. Given that everywhere on the island whites were vastly outnumbered by blacks, and that regular army and militia forces were small and ill-equipped, the main tenet of colonial security doctrine was to institute a reign of state-backed terror against black rebels and their communities. Terror – the ruthless and sometimes indiscriminate use of torture, burnings, and summary execution – was seen as having two salutary effects: it broke the morale of active rebels while it deterred potential rebels. The quick and unhindered application of terror, it was further reckoned, would tend to undermine the plausibility of insurrection as a practical political option.

It is unremarkable that Jamaica's colonial officials were often preoccupied with public security. More intriguing is that the same officials, in the face of dire public emergency, were also preoccupied with legality. Even during the period of slavery in Jamaica, the operative assumption among executive decision-makers was that their actions had to conform with the strictures of law. In ordinary times, this meant conformity with statutory and common law. In extraordinary times, in the context for instance of slave insurrection, it meant conformity with the requirements of 'martial law'. When in December 1831 the western parishes of Jamaica were the scene of widespread slave insurrection,⁴⁰ the authorities did not simply lash out. On receiving word of the uprising, the Governor (the Earl of Belmore) took pains to abide by the statute governing the proclamation and enforcement of martial law. When the military quickly suppressed the rebellion and captured scores of suspected rebels, most prisoners were tried (either before military tribunals or civilian slave courts) before they were punished. While clearly many of these trials were *pro forma* (and they led to the conviction and execution of no fewer than 344 enslaved men⁴¹), remarkably, some accused slaves were acquitted.⁴²

³⁸ Heuman, 'The Killing Time', 38–42

³⁹ JRC Minutes, Q. 16,245–16,247.

⁴⁰ Reckord, 'Jamaica Slave Rebellion', 121.

⁴¹ Holt, *Problem of Freedom*, 14.

⁴² For records pertaining to these trials, see CO 137/185. See generally, Reckord, 'Jamaica Slave Rebellion', 121–2.

That in the aftermath of a slave rebellion the authorities had observed even cursory legal constraints suggests a deeply ingrained deference to the forms of law.

The same fastidiousness about legal proprieties was displayed by Edward Eyre during the Morant Bay rebellion. Before he would move to proclaim martial law, Eyre was cautious to consult the senior law officers of the Crown, and to heed their advice regarding proper procedures.⁴³ And when some members of the Privy Council urged him to proclaim martial law over the whole of the colony, Eyre, troubled by the legal and economic ramifications of this move, limited its purchase to a single parish. This was only prudent. As the Governor of a British colony, Eyre did not possess an arbitrary discretion to spill blood, even that of dark-skinned rebels. Eyre knew this, just as he knew that one day his superiors at the Colonial Office would invite him to prove that in putting down the rebellion he had acted in accord with local and imperial law. In the result, Eyre struggled with this proof.

Edward Eyre was not the first British colonial governor to become embroiled in controversy over the proclamation or implementation of martial law. Before 1865, there had been at least five such cases. In 1824, Governor John Murray of Demerara was castigated in Parliament for the profligate use of military tribunals in the aftermath of a slave revolt.⁴⁴ In 1848, the use of martial law by Governor Ward to crush an insurrection in Cephalaria⁴⁵ led to controversy at home, if one quickly overtaken by the fierce and sustained conflict sparked by the martial law of the Governor (Lord Torrington) of Ceylon in 1848.⁴⁶ Torrington's conduct became the subject of a parliamentary select committee investigation in 1849 and a motion of censure in 1851. The process ultimately led to Torrington's dismissal and disgrace. Seven years later, in 1858, martial law was once again the subject of controversy in England, this time with regard to the suppression of the Indian Mutiny. During the insurrection, Indian rebels had occasion to massacre English civilians, including (in the notorious incident at Cawnpore) women and children. The English political class broadly supported the savage suppression which followed, a suppression facilitated by martial law. In this case, the Governor-General of British India, Lord Canning ('Clemency Canning', as he was branded by critics), was bitterly assailed in England for having taken steps to *limit* the punitive discretion of the army under martial law.⁴⁷

⁴³ These decisions will be more carefully documented and examined *infra*, Ch. 2.

⁴⁴ Particularly controversial was the court martial of the English missionary John Smith. Charles M. Clode, *The Military Forces of the Crown: Their Administration and Government* vol. ii (London, 1869), 482–3. This and the other controversies involving British governors and martial law are discussed at greater length *infra*, Ch. 4.

⁴⁵ *Ibid.*, 502–03.
⁴⁶ The implementation of martial law in Ceylon touched off the most prolonged and intense controversy over the subject before the Jamaica affair. See my article, 'A Jurisprudence of Power: Martial Law and the Ceylon Controversy of 1848–51', 28 *Journal of Imperial and Commonwealth History* (2000), 1–34.

⁴⁷ See generally, Michael Maclagan, 'Clemency Canning: Charles John, 1st Earl of Canning' (London, 1962), 114, 135–43; S. Gopal, *British Policy in India, 1858–1905* (Cambridge, 1965), 1–2; Saul David, *The Indian Mutiny, 1857* (London, 2002), 237–8.

Although these clashes produced a body of professional and lay commentary on the law of martial law, they did not give rise to an authoritative treatise or high court precedent. As a consequence, when Edward Eyre began to weigh his response to news of the Morant Bay uprising in October 1865, the law in this field was perilously uncertain. The fact of the matter was that Eyre's legal advisers – although they acted on the contrary assumption – could not provide dependable answers to some basic very basic questions. What *was* martial law? What did it mean to proclaim it over a territory? What new powers and immunities, if any, did it call into being? Did the power to proclaim martial law flow from statute or Royal Prerogative? These questions raised still others: did martial law apply exclusively to armed insurrectionists in the field, or did its powers extend to detainees? In other words, was the ambit of martial law limited to the immediate and local restoration of the peace, or did it go further to license exemplary and deterrent punishments?⁴⁸ If martial law extended to detainees, were they entitled to a military trial prior to punishment? In either event, were officials accountable to the common law for actions taken under martial law? Was it conceivable that in a British territory some uses of military power stood outside the ambit of law? The Jamaica controversy can plausibly be described as an attempt by an alliance of English intellectuals, politicians, and social activists to settle these questions decisively.

As matters stood in October 1865, English lawyers did not agree even on the definition of the term 'martial law'. The relevant literature contained at least three distinct meanings.⁴⁹ According to the famous statement of Lord Wellington during the Ceylon debate of 1851, the term was a misnomer; martial law was not law at all, but the 'will of the General who commands the Army'.⁵⁰ Under a proclamation of martial law, Wellington contended, the General's will was constrained only by his practical judgement. In another account, one later endorsed by the Lord Chief Justice of England,⁵¹ martial law was the temporary displacement of civilian rule by 'military law' (the body of laws passed by Parliament governing the military forces of the Crown)⁵² while the army defeated armed invasion or insurrection. These definitions were similar in describing martial law as standing apart from the common law. But according to yet another and radically different account of the term, martial law was nothing more than an exotic instance of the common law defence of public necessity.⁵³ It was a defence

⁴⁸ For a discussion of this line of debate, see A. W. Brian Simpson, *Human Rights and the End of Empire* (Oxford, 2001), 58–62.

⁴⁹ The competing definitions of martial law were summarized in the *Solicitors' Journal* (16 Dec. 1865), 140–1.

⁵⁰ *Hansard*, cxv (1 Apr. 1851), 880.

⁵¹ See Frederick Cockburn (ed.), *Charge of the Lord Chief Justice of England to the Grand Jury in the Case of The Queen against Nelson and Brand* (London, 1867), 82–91.

⁵² Taken together this law was known as the 'Military Code', consisting of the Mutiny Act and the Articles of War. Judge-Advocate General, Sir David Dundas M.P., *Second Report of the Select Committee on Ceylon*, PP (1850), xii, Q. 5431.

⁵³ As we will see in Ch. 5 *infra*, this theory of martial law was advanced by the great jurist and barrister James Fitzjames Stephen. For a summary of the theory, see *Law Times* (20 Jan. 1866), 163. The theory was later defended by Dicey. See Simpson, *End of Empire*, 60–2.

pleaded by public officials when called into court to justify an intentional interference with the person or property of another. Martial law was a legal privilege or excuse for any conduct undertaken (reasonably and honestly) in order to subdue the armed enemies of the Crown. The privilege of martial law was a means of legitimating an action, usually an extreme and violent action, otherwise culpable. By this account, importantly, martial law did not provide public officials with an unfettered discretion. Nor did it sanction an arbitrary or wanton use of force. Martial law was not the absence of common law, but a continuation of a subset of common law principles during the temporary abatement of the common law courts.

The definition of martial law was one vexed question, the nature of the legal authority to proclaim martial law another. While it was broadly accepted that the sovereign Parliament was entitled to introduce any law, including a law proclaiming martial law in a British territory, at this point agreement ended.⁵⁴ In 1865, the character of martial law, indeed, whether such a thing continued to exist as a 'prerogative' (or 'exclusive')⁵⁵ authority of the Crown and its agents, was a tangle of conflicting propositions. According to one school of thought, the Petition of Right (approved by Parliament in 1628) had terminated the royal prerogative to proclaim martial law in Britain or her colonies, full stop. Other legal commentators agreed that the Petition of Right had terminated martial law in Britain, but claimed that it did not apply in the colonies. Still others asserted that the Petition of Right applied in the colonies, but could be overridden by a valid colonial statute. If this were not perplexing enough, still other lawyers contended that the only effect of the Petition of Right was to extinguish the royal prerogative to proclaim martial law in *peacetime*. It had nothing at all to do with the legal rights and immunities of the Crown during a public emergency. In this view, executive officials, in Britain and the empire, possessed an unassailable common law prerogative to proclaim martial law in the face of armed invasion or insurrection.

In October 1865, the law of martial law was dauntingly complex, perhaps utterly incoherent. But these difficulties did not make it any less pertinent. The academic fact that the law of martial law was unsettled did not alter the practical fact that it was an essential part of the security apparatus of many colonies in the empire. To officials like Governor Eyre, officials charged with the awesome responsibility of preserving white British lives and property in the empire, martial law was not a debating point. In the advent of an emergency such men had to act with (in the often-repeated phrase) 'promptitude and vigour' even if, as agents of the British Crown, they also had to act within a framework of law. Remote in time

⁵⁴ These points are discussed and documented in detail *infra*, Ch. 4.

⁵⁵ In this technical sense the term 'prerogative' denoted the exclusive legal powers of the Crown and its agents as established by common law. Here the state (the 'Crown') was comprehended as an entity distinct from Parliament. A prerogative power, then, was one that might be exercised by an agent of the Crown (a colonial Governor, for instance) without the sanction of Parliament or a subordinate legislature created by Parliament. See generally, O. Hood Phillips and Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law*, 6th edn (London, 1978), 266–71.

and space from London, there was nothing for an executive official to do but make decisions, if on best available legal advice. As for Governor Eyre, when he received word that the black peasantry in the southeastern parish of Jamaica were in open rebellion, he followed the well-established protocol. His first move was to consult with the colony's senior military officer, Major-General L. S. O'Connor, about the deployment of armed forces. But his second move, not incidentally, was to consult with his senior legal officer, Attorney General Heslop, about the use of these forces in accordance with the emergency laws of the colony. O'Connor advised the Governor to deploy troops. Heslop advised the Governor to convene a Council of War with a view to proclaiming martial law.

Eyre accepted this advice without apparent hesitation, and in so doing committed himself to his Attorney General's very sure (if not unproblematic) views on what this signified.⁵⁶ The central thrust of these views was that for 200 years the imperial government in London had permitted the Jamaica Assembly to promulgate a body of security law that suited local conditions. As Heslop summarized in 1866, '[T]he sun never rose and set on Jamaica as a country in which the English law prevailed with regard to martial law.'⁵⁷ Statutes governing the proclamation and use of martial law had been on the books in Jamaica since the 1670s. None of these statutes, including those passed and amended after emancipation, had ever been disallowed by the Colonial Office.⁵⁸ It had been clearly understood by both parties that where British colonists were vastly outnumbered by black men and women, martial law was a wholly indispensable and legitimate facet of a colony's legal arsenal.

During the suppression of the Morant Bay rebellion and afterward, Heslop was steadfast in his opinion that Governor Eyre, if he followed the procedures laid down in the colony's martial law statute, was legally entitled to proclaim martial law over all or any part of the colony. Heslop was equally confident that the proclamation of martial law meant that civilian law was suspended in favour of the unhindered discretion of military commanders in the field and that this discretion applied both to active combatants and to men captured in the field. But the Attorney General was less certain that martial law entailed comprehensive legal immunity for the exercise of this discretion. While it was possible that martial law provided this immunity,⁵⁹ it was also possible that it did not. On this point, Heslop hedged his bet. When the rebellion was suppressed, he advised Jamaica's Executive Council to introduce a bill to the Assembly which, when passed, would permit the Governor to issue certificates of legal indemnity (or immunity) covering any person who had taken any action in an honest effort

⁵⁶ Heslop testified on these points before the Jamaica Royal Commission. See, for instance, *JRC Minutes*, Q. 16,200. Heslop's views on martial law are discussed at length, *infra*, Ch. 2.

⁵⁷ *Ibid.*

⁵⁸ Moreover, on three occasions after emancipation, but prior to the Morant Bay uprising, the Colonial Office had consented to amendments to the martial law statutes. *Ibid.*, Q. 16,200–16,240.

⁵⁹ This position was later defended by the leading scholar on martial law. See W. F. Finlason, *Commentaries upon Martial Law* (London, 1867), 267.

to suppress the rebellion. If immunity was not provided by the common law of martial law, surely it would be provided by the Governor exercising a statutory power. This otherwise sound course had one potential flaw: a colonial indemnity act, while valid *per se*, could be disallowed by the Government in London.⁶⁰

This brings us back to our narrative overview of the Jamaica uprising and its subsequent suppression under martial law.⁶¹ In October 1865 the black peasantry of the eastern parish of St. Thomas-in-the-East (in the county of Surrey) were especially hard-hit by the effects of drought. The essentials of life were scarce, suffering great. The simmering anger of this community had been given sharp political focus by George Gordon, a landowner in the parish, and by the preacher firebrand, Paul Bogle. In a succession of public meetings during the previous year Gordon and Bogle had made provocative (Governor Eyre later called them 'openly treasonous') remarks about the obstinacy and venality of the colonial regime.⁶² By the summer of 1865 Bogle began openly to discuss the possibility of armed resistance. There is evidence that his followers began to drill.⁶³ By October 1865, mounting political tension in the parish was exacerbated by a series of angry clashes at the petty sessions of the peace held in Morant Bay. For Bogle and his followers, the courthouse at Morant Bay had become a symbol of their oppression.

On 9 October, Baron von Ketelholdt, an expatriate German and planter-magistrate in St. Thomas parish, issued a warrant for the arrest of Bogle and a score of others. The next day an attempt was made to effect their arrest in their upland villages. This ended in the rough ejection of the police, accompanied by threats against von Ketelholdt's life. In response, the Baron mustered the local white militia and sent an urgent plea to the Governor for help. These precautions in place, von Ketelholdt decided to convene a vestry meeting at the Morant Bay courthouse on 11 October. Late in the afternoon of that day, a large and variously armed group of black Jamaican men and women followed Bogle into the main square. Von Ketelholdt came into the square with a squad of militiamen and ordered the people to disperse. When they did not, von Ketelholdt read the Riot Act. When the crowd still did not disperse, and after a hail of stones was directed at the Magistrate, the militia was ordered to fire on the crowd. The crowd temporarily fell back and then surged forward. Von Ketelholdt and his retainers fled inside the courthouse. After a further exchange of gunfire, the building was put to the torch. When the occupants attempted to flee, eighteen of their number (including von Ketelholdt, an Anglican clergyman named Herschell, and some

⁶⁰ In May 1866, the Colonial Office asked the Attorney and Solicitor General of England for their advice regarding the legal consequences of their disallowing Jamaica's Indemnity Act. For inquiries and answers, see Law Officers to Edward Cardwell, 8 June 1866, CO 885/11. The point is discussed *infra*, Ch. 2.

⁶¹ This account has been assembled from contemporary and subsequent magazine articles, and from the accounts provided in Holt, *Problem of Freedom*, 263–309; Heuman, 'The Killing Time', 1–130; Hall, *Civilizing Subjects*, 243–65.

⁶² Heuman, 'The Killing Time', 59.
⁶³ Heuman argues that the Morant Bay uprising was deliberately planned and organized, and Bogle was at the centre of these activities. *Ibid.*, 80–3.

coloured vestrymen) were swarmed and killed. Some thirty-five others escaped. Although there were other unprotected white and coloured persons present in the town, Bogle and his followers did not seek them out. Instead, they melted away into the hills. In the course of the next two days two bands of armed blacks – neither party led by Bogle – killed two more white planters on their remote sugar estates.

When Eyre was apprised of these events, there was reason for nervousness. The Governor had fewer than 1,200 uniformed soldiers (500 of whom were black West Indians), two field guns, and two small naval vessels at his disposal.⁶⁴ When he proclaimed martial law and moved to suppress the uprising, Eyre was able to spare only 500 regular troops and a few companies of lightly armed militia. This gave rise to a contention repeated many times by Eyre and his apologists in subsequent months: in order to forestall a more general and potentially catastrophic rebellion in Jamaica, it had been imperative to break rebel morale by recourse to a reign of terror under martial law.

When pressed with credible evidence of widespread revolt, Eyre's response was swift, fierce, and, as he endeavoured to make certain, fully sanctioned by Jamaican law. In a series of actions which will bear closer scrutiny in the second chapter of this study, Eyre consulted with his legal officers and called for the Council of War to convene the next morning. On 13 October, after a heated debate concerning the geographic scope of the proclamation, the Council unanimously agreed that martial law would be proclaimed in the 'county of Surrey, except in the city and parish of Kingston'. In the next handful of days, the colonial government's makeshift military, facing no organized resistance and without the loss of a single man, quickly restored order in the eastern districts of the colony. It was what happened *next* which became the source of nearly four years of rancorous debate and litigation in England.

Although the period of martial law lasted thirty days, the resistance was crushed in the first seven. For the remainder of the period, and often with the direct knowledge and approval of Governor Eyre, the military engaged in what one commentator later called a 'hell-like saturnalia' of retaliatory violence.⁶⁵ Under the proclamation of martial law, no fewer than 439 black Jamaicans, as an English magazine story later recounted, 'were either shot down or executed, sometimes with, sometimes without the formality of a trial, and over 600, amongst whom were included a number of women, were flogged, in some cases with revolting cruelty'.⁶⁶ The black population of St. Thomas parish, in short, was subjected to a protracted and calculated reign of terror. Its most celebrated victim was the coloured landowner–politician, George Gordon. When the Morant Bay courthouse was attacked on 11 October, Gordon was at his house near Kingston. While

⁶⁴ Colonel North, quoted in *Hansard*, ccxii (8 July 1872), 819.

⁶⁵ Charles Roundell, as quoted in John Gorrie, *Illustrations of Martial Law in Jamaica, Jamaica Papers No. VI* (London, 1867), 3.

⁶⁶ 'The Case of Governor Eyre', *Cornhill Magazine*, n.s. xii (1902), 209.

his role in the uprising remains murky, it was not alleged, then or later, that Gordon had been directly involved in acts of violence. Nor did he try to take flight. On 14 October, Gordon, still at his home in Kingston, learned that a warrant had been issued for his arrest. On 17 October, he surrendered to the authorities.

Before the uprising, Gordon had been Eyre's most persistent and influential critic. With Bogle he had also been one of the two main lightning rods of black discontent in the eastern section of the colony. After consulting with Attorney General, the Governor personally oversaw Gordon's arrest on charges of high treason and sedition. Then, with Gordon in custody, Eyre made a stunning move. He ordered the prisoner removed from the civilian jurisdiction of Kingston for trial by a military tribunal at Morant Bay. Gordon was put ashore there on 21 October. Denied access to a lawyer, and most other vestiges of civilian criminal justice, he was tried, convicted, and sentenced to execution. On 23 October, after the proceedings and verdict had been reviewed and approved of by Eyre, Gordon was hanged 'from the centre arch of the ruined courthouse'.⁶⁷ Eyre later explained to the Colonial office that he had taken these steps both because Gordon had conspired to foment armed rebellion and because he was a potential rallying point for further rebellion. Eyre emphasized that the senior law officers of the Crown had wholly endorsed his decision and its reasoning.

News of the massacre of whites at Morant Bay reached England on 3 November. During the next two weeks it became clear, to general relief, that the uprising had been short-lived. But, on 17 November, the Jamaica story took a strikingly different turn. English readers learned that in the aftermath of the rising the people of the eastern parish of the island had been subjected to a prolonged and ruthless regime of martial law. Sensational stories began to circulate that as many as 2,000 persons had been massacred by the military, and that 'eight miles of dead bodies' had been left to rot along a Jamaican road.⁶⁸ It was also learned that the coloured politician George Gordon (and scores of other prisoners) had been executed by military courts. Immediately a clamour was raised. As the journalist Justin McCarthy recalled of December 1865, 'For some weeks there was hardly anything talked of, we might say hardly anything thought of, in England, but the story of the rebellion in Jamaica, and the manner in which it has been suppressed.'⁶⁹ In its initial phase, the loudest and most persistent critics of the suppression were members of Christian missionary and philanthropic groups with links to Jamaica. Their principal allegation was that Governor Eyre had personally sanctioned and supervised a campaign of brutal (and *illegal*) retaliatory

⁶⁷ 'The Case of Governor Eyre', *Cornhill Magazine*, n.s. xii (1902), 209.

⁶⁸ In the immediate aftermath of the suppression, the Jamaican authorities themselves believed the correct figure to be in the range of 2,000 dead. 'Jamaica', *Dublin Review* vii (1866), 406–7. However, *The Times* (7 Apr. 1866), 8, was vindicated in its refusal to lend any credence to the early casualty figures.

⁶⁹ Justin McCarthy, *A History of Our Own Times*, vol. iii (New York, 1895), 356.

violence against the black people of St. Thomas-in-the East. The arrest, trial, and execution of Gordon was cited as only the most shocking example of this official lawlessness. By mid-December, some prominent Liberal and Radical parliamentarians (John Bright, Thomas Hughes, Peter Taylor, and, from his retreat in France, John Stuart Mill) also had spoken out against the Jamaica suppression. Behind the scenes Bright began to urge that a 'powerful committee' be formed to coordinate the protest. If Bright was to have his way (and, in the end, he did), the newly formed 'Jamaica Committee' would raise funds for a very specific purpose. He wanted the Committee to engage 'able lawyers' and to prosecute Governor Eyre for the murder of Gordon.⁷⁰

English conservatives were quick to respond to these developments. In late December 1865, both Thomas Carlyle and John Ruskin published letters defending Eyre and denouncing his critics. It was agreed that, should the need arise, the two men would organize a committee devoted to the vindication of the beleaguered Governor. With regard to the Jamaica question, the *Daily Telegraph* glumly observed in 1867, 'our greatest men are most remarkably divided. We have eminent philosophers divided into hostile camps; distinguished scientific men take opposite sides; professed philanthropists act apart; and the names of Liberal politicians, popular writers, famous travellers, and leading divines might be taken from the list of supporters on both sides.'⁷¹

The Jamaica Committee, this grand coalition of Christian activists and secular liberals, was formed at a London hotel on 19 December 1865. During the next three years the Committee instigated most of the main developments of the Jamaica affair. The Committee espoused two aims, one short and one longer term. First, to persuade the Government to institute a thorough investigation of events in Jamaica. Second, to persuade the Government to prosecute criminal wrongdoers in the English courts of law. The second aim, temporarily shelved until the final report of the Jamaica Royal Commission was released in June 1866, was the primary objective of most of the Committee's leadership cadre. Their mission was to cause leading members of the Government and judiciary to state unequivocally that a proclamation of martial law did not license officials to kill and torture with impunity. The Committee wanted official acknowledgements that serious crimes – even murders – had been committed during the Jamaica suppression, and that the culprits would be prosecuted in England for these crimes. Put more sweepingly, the Committee wanted senior officials of state to admit that civilian and military agents of the Crown were always and everywhere legally accountable for their official acts, even when those acts took place under a proclamation of 'martial law'. At the end of the Parliament of 1866, however, the senior ministers of Lord Derby's Conservative government not only refused to admit these things but endorsed the contrary view. In suppressing the uprising,

⁷⁰ Bright to McCarthy, 6 Dec. 1865, as quoted in Justin McCarthy, *Reminiscences*, vol. i (New York, 1899), 80–1.

⁷¹ *Daily Telegraph* (8 Feb. 1867).

Disraeli stated, the former Governor Eyre and his regular military officers had acted both rightly and legally. Neither Eyre nor his officers would be prosecuted on the initiative of the Government or its law officers.

On this news, the Jamaica Committee quite literally took the law into their own hands. In the course of the next thirty months, they instituted no fewer than three private criminal prosecutions in the English courts (two for murder) against Edward Eyre, and another murder prosecution against two regular military officers, Colonel Abercrombie Nelson and Lieutenant Herbert Brand. These cases, the *Newcastle Chronicle* commented in 1866, 'raised issues of the deepest and gravest importance'.⁷² When after many months of litigation these prosecutions ended indecisively, the Committee threw its support behind a private civil lawsuit against Eyre. Although none of these cases delivered a positive verdict, the Committee's legal programme generated a vast body of commentaries, opinions, legal treatises, and judicial pronouncements on the English law of emergency and political violence. In the result, in fact, the Jamaica Committee succeeded in provoking the most protracted and significant public discussion of the idea of the rule of law during the Victorian era.

If the advent of the Jamaica controversy proved one thing, it was that in November 1865 little about the law of martial law was certain. It was obvious only that martial law existed as a feature of colonial law and that, when activated, it almost invariably generated protest and recrimination. It was not obvious, however, whether martial law had a legitimate existence within imperial law and, if it did, whether it existed within or outside the common law. Much of the confusion stemmed from the fact that the subject of martial law raised fundamental questions about British politics and jurisprudence. Martial law was proclaimed only when the very existence of the state was in doubt, only when the civilian legal system was under siege. Inevitably, then, martial law was about taking extreme and extra-legal measures in order to rescue the basis of all law, the state. Could these measures be subject to law? Was 'martial law' law, or was martial law a state of non-law, a state of official and pragmatic *lawlessness*? This order of inquiry, at bottom philosophical in nature, was beyond the ken of most lawyers, certainly of most politicians and imperial administrators.

The Jamaica affair, of course, did not unfold in an historical vacuum. On the contrary, the reason why the suppression became (and then remained) controversial was that it so closely linked in the public mind to other contentious social and political issues. Anti-slavery activists were attracted to the Jamaica affair, not only because of fellow-feeling for black Jamaicans, but because the actions of Governor and the military (and the approval those actions had received in some quarters in England) was seen to reflect a rising tide of anti-black racism among the English governing classes. Liberals and Radicals were attracted to the Jamaica case because they saw the suppression, and more particularly the unwillingness of conservatives

⁷² *Newcastle Chronicle* (14 July 1866).

to condemn the suppression, as evidence of a resurgent authoritarianism in English politics. In these circles, the agitation surrounding the Second Reform Bill (introduced to Parliament by the Liberals in 1866) and the Jamaica affair were of a piece: both were attempts to introduce or reinforce the accountability of political actors to law and law-makers; both were sites for contesting the fundamental questions of English political jurisprudence. How, and by whom, was political power to be assigned or withdrawn? What were the boundaries of legitimate political dissent? Did some public officials possess a prerogative to suspend the operation of the common law? What was martial law, and did it exempt officials from subsequent legal accountability? If it did provide this exemption, where did that leave the central precept of English jurisprudence that laws always were to prevail over men?

Such questions, when treated as historical inquiries, can have substance only in the context of relevant and accessible source materials. Like previous scholarly works on the Jamaica affair, this book makes substantial use of newspaper and journal literature, as well as published essays, letters, and pamphlets. A private diary and some unpublished letters also figure here, as do the transcribed speeches of politicians and other public orators. The enormous body of relevant government documents is another rich source of primary materials. As has been stated, however, the present study is founded on the observation that a complete history of the Jamaica affair must also be a history of legal ideas and courtroom conflicts. Political and intellectual luminaries such as Carlyle, Mill, Ruskin, and Bright propelled the affair, but they did not do so alone. The interventions of English lawyers and judges – James Fitzjames Stephen, Hardinge Giffard (Lord Halsbury), W. F. Finlason, Lords Cockburn and Blackburn, to preview only the most well-known figures – had as much, sometimes far more bearing on the shape and outcome of the Jamaica controversy. Accordingly, the book delves into a set of sources which have *not* been examined systematically by previous scholars: the plethora of published legal literature – articles, essays, treatises, memoranda, commentaries, oral submissions, jury charges, pleadings, and reported judgments – on the Jamaica conflict.

Taken together, this material provides ample documentation of the perceptions and actions of members of what I will call, somewhat inexactly, the English ‘political class’ of the late 1860s. Here I am referring to that aggregate of persons – thinkers, journalists, social activists, officeholders, and politicians – who by their documented writings, speeches, and actions, created the amalgam of thoughts and deeds that came to be known as ‘the Jamaica controversy’. The political class were the persons who actively instigated, resisted, described, and sustained the Jamaica affair, the persons who gave it pith and substance. The body of *A Jurisprudence of Power* should be read as a long answer to an integrated set of historical questions about their habits of thought and action. Some of these questions are specific to the empirical content of individual chapters, and are set forth and answered in those chapters. Some of these questions, however, resonate throughout all seven chapters of the book.

Why, for instance, only a handful of years after the traumatic Indian Mutiny, did the suppression of a rebellious community of black men and women become the subject of prolonged conflict in England? What patterns are discernible in the way in which English journalists and political activists described and comprehended the Jamaica affair? How and why did law, lawyers, and litigation become so central to the controversy? Why did the Jamaica affair generate such a large and divisive literature on 'martial law'? How did writers comprehend the legal nature of martial law, and its place in the English constitution? How did the Jamaica episode fare in the courts of law? Is it correct, as one important historian of the Jamaica affair has suggested,⁷³ that the legal initiatives of the Jamaica Committee 'had absolutely no effect'? Is it correct, then, that the repeated attempts by lawyers and judges to make sense of the law of martial law were of little historical moment or consequence? If this suggestion is incorrect, what might be the basis of the contrary hypothesis? What contribution did the Jamaica litigation make to the unfolding English jurisprudence concerning the use and abuse of political and military power? How did the English governing class answer a question posed repeatedly in the context of the Jamaica affair: 'How is a country committed to the rule of law to administer a vast and sometimes dangerously recalcitrant empire?' Finally, what does the Jamaica affair reveal of the broader political psyche of the English governing class in the late 1860s?

A Jurisprudence of Power advances two sets of ten theses. The first concerns the Jamaica affair itself, its language and its internal dynamics. The second set concerns the larger significance of the episode for our understanding of English political consciousness in the mid-Victorian era. By their nature the first set of theses are directly accountable to the empirical content of the book's seven chapters. Borrowing Edward Thompson's words, they are about 'getting inside' an episode of English history. The second set of ten theses, by *their* nature, are necessarily more speculative and conjectural. In fact, these theses are offered to readers not so much as arguments but as plausible inferences. They are a self-conscious attempt to get 'outside' the episode.

The first ten theses are as follows:

- (1) That the language used by the English governing class to describe and evaluate news of the Jamaica suppression reflected the deep penetration into public discourse of legal terms, criteria, and concepts. From its inception, the 'Jamaica affair' was understood and transacted largely in terms of law and legality.
- (2) That the legal-minded discourse of the Jamaica affair was rhetorically powerful and widely embraced. It tended to accentuate matters which the governing class cared about a great deal (the legal regulation of political and

⁷³ Catherine Hall, 'Rethinking Imperial Histories: The Reform Act of 1867', 208 *New Left Review*, (1994), 3–29, 13. For a similar view, see Collini, *Public Moralists*, 146.

military power) and marginalize matters which it cared about a great deal *less* (the status of dark-skinned persons in the empire).

- (3) That by the end of December 1865, it was broadly agreed that the Jamaica suppression had exposed some stark and alarming ambiguities in the English jurisprudence pertaining to martial law, and the use of political and military power during public emergencies.
- (4) That in keeping with the legal-mindedness of the Jamaica debate, the Russell government instituted an official inquiry dominated by lawyers and legal conventions. One of the central purposes of the inquiry was discover the degree to which the suppression had conformed to the law of martial law.
- (5) That the enduring purpose of the Jamaica Committee was to cause the English courts of law to pronounce definitively on martial law, and on the principle of the universal legal accountability of political and military actors and conduct. In pursuit of this goal the Jamaica Committee evinced an unflagging faith in the acuity and integrity of English high court judges.
- (6) That the Jamaica affair spurred English lawyers to create a new but highly disputatious technical literature on the law of martial law. This material was written to influence public debate, and did so appreciably. However, the legal propositions advanced in these texts were strongly influenced by *a priori* political tenets and preoccupations. The legal literature of martial law became a site of political and ideological conflict.
- (7) That when the leaders of the Jamaica Committee decided to pursue the Jamaica controversy in the courts of law, they relinquished control over their project to the professional judgment, language, and procedures of lawyers. The process of litigation inevitably involved the inexact translation of the aspirations of the Committee into legal pleadings and submissions.
- (8) That English law lacked for an effective mechanism for the resolutions of constitutional conflict. The private criminal prosecution, while it afforded access to the courts, was an maladroit means of pursuing abstract legal and political goals. The constitutional aims of the Committee were consistently derailed by the practical concerns and sympathies of English grand juries.
- (9) That while English high court judges enjoyed great prestige, and were seen as having a crucial role in resolving the Jamaica controversy, the judges ultimately proved unable to distil a coherent body of principles concerning the law of martial law. Judicial pronouncements on martial law were confounded by personal ambivalence and political confusion.
- (10) That the Jamaica Committee failed to achieve a decisive legal precedent about the law of martial law, but succeeded in causing the English governing class to confront the contradiction between the love of power and the love of law.

The second set of theses arises from a single question, one which will be discussed at some length in the concluding essay of the book: through the keyhole of the Jamaica affair, what can be seen of the general moral and political consciousness of the English political class of the late 1860s? What can be detected of their most fundamental assumptions and habits of thought?

The second set of ten theses is as follows:

- (1) That the English political class of the late 1860s were Hobbesian pessimists about human nature. In this view, human beings, when left to their own devices, were naturally inclined to egotism, aggression, and violence.
- (2) That the political class increasingly embraced the idea that secular law and legality – not Christian religion – was the essential bulwark of a society against the natural licentiousness of men. The moral imagination of the English, even among the most pious Christians, fundamentally was a legal imagination.
- (3) That the Jamaica suppression became controversial because it called into question the moral – hence legal – integrity of the English people. There was general unease, skilfully exploited by the Jamaica Committee, not only that English officials had engaged in a vicious and prolonged reign of terror in Jamaica, but that they should later claim that what they had done was completely *lawful* under the doctrine of martial law.
- (4) That the Jamaica affair mainly concerned the moral and legal framework governing white Englishmen at home, not black subjects abroad. The suppression became controversial in England because it exposed the tectonic stresses created by the nation's embrace both of the will to power and the rule of law.
- (5) That Jamaica suppression was sustainable as a subject of controversy because it aroused the nation's Burkean qualms about the potentially corrosive effects of empire on the English national character. Even the rising tide of 'scientific' racism could not fully eliminate the intuition – reinforced by the Indian Mutiny – that the non-white empire depended on coercion not consent, and that coercion would corrupt the coercer.
- (6) That by broad consent the Jamaica affair was channelled into the English legal system. Because of its growing commitment to secular modernity, the English governing class not only tolerated but institutionalized the legal investigation and evaluation of the suppression. The final reconstruction and assessment of the Jamaica affair was assigned to judges, not clerics. Public sin was rightly expunged in courtrooms, not churches.
- (7) That for most members of the English governing classes, conservatives and liberals, the principle of political and military accountability to law was sacrosanct. The radicalism of the Jamaica Committee was in insisting on

the legal accountability even of imperial officials who crushed insurrection among the dark-skinned peoples of the empire. The conservatism of their opponents was in insisting on an imperial exception to the rule of law in the governance of alien peoples.

- (8) That the Jamaica litigation stimulated a fierce, prolific, if ultimately indecisive exchange among English lawyers, jurists, and judges over whether there could be a doctrinal accommodation between imperialism and constitutionalism, between mastery and legality. This exchange focused on the history, legal pedigree, and political implications of the law of martial law.
- (9) That the English constitutional law operated less as body of substantive principles than as a reservoir of legal narratives about state power and its proper limits and constraint. When the judges pronounced on the law of martial they drew on these narratives according to their sense both of legal propriety and political expedience.
- (10) That although the moral, political, and legal issues raised by the Jamaica affair were not resolved by debate or litigation, the English governing class, more candidly and openly than the elites of other European states, were willing (at this historical moment) to confront the contradictions generated by their political choices in the world. More than the elites of other states they were willing to engage in a vigorous if ultimately indecisive reassessment of their jurisprudence of power.

The ensuing study consists respectively of seven analytical narrative chapters, an epilogue, a final thematic essay and an historiographical appendix. The seven empirical chapters trace the historical development of the Jamaica affair in rough chronological order. Chapter 1 examines the way in which the English governing class described and conceptualized news of the Jamaica suppression. The second chapter considers the investigation and litigation of the Jamaica affair in Jamaica during the first half of 1866. Chapter 3 examines how, in the second half of 1866, the Jamaica affair was revitalized as an English political and legal controversy. This chapter focuses on how English ideologues and intellectuals formed alliances to define and litigate the issues arising from the suppression in Jamaica. The fourth chapter delves into the voluminous technical legal literature which was generated in response to the Jamaica affair and litigation. This section considers the doctrinal content and also the political mainsprings of this writing, and how it affected the larger public debate on the affair. Chapter 5 examines the first attempts by the Jamaica Committee to bring the controversy to a decisive conclusion in the English criminal courts, and the motives, strategies, and decisions of the lawyers and magistrates who litigated the Jamaica cases. The sixth and seventh chapters focus on the content of and public reaction to the grand jury charges, first of Lord Chief Justice Cockburn in the case of *The Queen v. Nelson and Brand*, and then of Justice Blackburn in *The Queen v. Eyre*. These chapters closely examine the legal

and political underpinnings of the charges, the public reaction they engendered, and the unprecedented dispute that arose between the judges. The Epilogue provides an account of the civil litigation in *Phillips v. Eyre*, and the final winding down of the Jamaica affair in 1870. It also provides a postscript to the law and politics of martial law in the later British empire. The book is then brought to a close with an interpretative essay, 'A Jurisprudence of Power', which attempts to elaborate on the principal themes of the book.