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# The Romance of Force: James Fitzjames Stephen on Criminal Law

Richard A. Posner\*

I have long been fascinated by James Fitzjames Stephen, but my fascination heretofore has been limited largely to the attack on John Stuart Mill's *On Liberty* that Stephen mounted in his book *Liberty, Equality, Fraternity*.<sup>1</sup> I welcome this opportunity both to rethink my views of Stephen and to expand my canvas to his writings on the criminal law,<sup>2</sup> which along with his work on the law of evidence, which I shall not discuss, are the basis of his scholarly reputation, as distinct from his reputation as a polemicist—what today we would call a “public intellectual.” He wrote extensively about criminal law, culminating in his three-volume, 1500-page *A History of the Criminal Law of England*, published in 1883 (a much earlier work of note was his *General View of the Criminal Law*, published in 1863); that work will be my main focus, although I will make frequent reference to *Liberty, Equality, Fraternity* as well.

I am not a legal historian, or for that matter any kind of historian, so I will not try to evaluate the accuracy or originality of Stephen's criminal-law history. I will merely report the opinion of experts that while it has been superseded in a number of respects, as one would expect of a work written more than a century ago on a topic that continues to attract scholarly interest, it was for its time a very considerable addition to legal scholarship. It has been superseded first and most obviously by the fact that another century and a quarter of history has elapsed since the book was written and second by the fact that a good many sources of English common law have come to light that were unknown to Stephen, who relied heavily on a rather unrepresentative published collection of old judicial opinions, *State Trials*, which, as the name implies, concerns matters of public importance rather than run-of-the-mine criminal cases.<sup>3</sup> We can be grateful for this imbalance,

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\* Judge, United States Court of Appeals for the Seventh Circuit, and Senior Lecturer, University of Chicago Law School. This is the revised text of a talk given on April 9, 2005, at a conference on James Fitzjames Stephen at Boston University entitled “A Massive and Rugged Intellectual Sanity.” I thank Victoria Lovei for helpful research assistance and Marc DiGirolami, John Langbein, and Stephen Morse for helpful suggestions.

<sup>1</sup> Richard A. Posner, *Foreword* to JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS* 7–19 (Univ. Chicago Press, 1991) (1874); RICHARD A. POSNER, *OVERCOMING LAW* 259–70 (1995).

<sup>2</sup> Besides his history of English criminal law, cited in the text, his principal works on criminal law were *A DIGEST OF THE CRIMINAL LAW* (1877) and *A DIGEST OF THE LAW OF CRIMINAL PROCEDURE* (1883).

<sup>3</sup> John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 264–67 (1978). The modern, specialized literature on the history of English criminal law is illustrated by J.M.

however, as Stephen's narratives of the great political trials of medieval and early modern England are especially riveting. His failure to search judicial archives for the decisions recorded there but not published anywhere was another limitation, though hardly a culpable one; it was not yet an established practice in his era to base legal history on archives, and anyway he had no time for archival research because throughout the entire period in which he was writing his history of the criminal law he was a full-time judge.

Stephen was a judge, not an academic, let alone a modern one, and his history is deliciously miscellaneous and written with the incomparable vividness and force that are the trademarks of the Stephen style. It is judgmental, opinionated, erudite, meandering, and peppered with proposals for reforming criminal law and procedure; for Stephen was an avid law reformer in the Benthamite tradition.<sup>4</sup> I quote a summary of the proposals found in the history and in his other writings as well:

The changes he proposed in the criminal law were many and substantial. But in the recapitulation that follows, based upon a study of all his writings, including the Code, only the major and more controversial proposals are noted: the removal of the distinction between felonies and misdemeanours, with its consequences upon arrest and mode of trial; a general re-grouping of crimes; the omission, as far as possible, of the word "malice" in all definitions of offences; a broadening of the concept of insanity as understood for the purpose of assessing criminal liability; a restriction in the use of compulsion as a defence; the abolition of the presumption of coercion of wives by their husbands; the riddance of the distinction between accessories before the fact and principals in the second degree; the widening of the definition of attempts; the prohibiting of the application of common law principles to certain acts or omissions so as to constitute them offences involving a public mischief; the repeal of certain provisions relating to high treason and a redefinition of others; changes in the definition of an unlawful assembly; a clarification of the legal position of a military force used in the suppression of riots; alterations in the scope of offences of judicial and official corruption, conspiring to make false accusations, or to defeat justice, and more particularly in perjury; the recasting and amending of the offence of escape; the drastic remodeling of the offence of blasphemous libel so as to ensure freedom of opinion for all religious

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BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800* (1986); PETER KING, *CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740-1820* (2000); and JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003). Langbein describes Stephen as "[t]he first great historian of the early modern criminal trial." *Id.* at 62.

<sup>4</sup> Like his great predecessor, he was a passionate advocate of codification. See, e.g., Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1121-30 (1978).

beliefs; changes in the offences of bigamy and of seduction of a woman under age; and alteration in the law against gambling, necessarily slight as relating to an extremely delicate subject; rather novel proposals for a more effective suppression of the practice of boycotting; a redefinition of murder entailing the elimination of the elements, malice aforethought and implied malice, and the widening of the concept of provocation; the reduction from murder to manslaughter of the offence committed by a mother who causes her new born child's death, on the ground that her power of self-control at the time is greatly weakened, and the constitution of a new offence, that of killing a child in the act of birth, before it is fully born; a fundamental revision of the definition of theft and of certain other related offences; and several material alterations in the powers of arrest . . . .

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He criticised [sic] Bentham for ignoring the vital principle that one of the great objects of the law of judicial evidence "is to prevent fraud and oppression in their worst form, to keep out prejudices which would be fatal to the administration of justice[.]" which may be so abused "as to make it a subject of universal horror, and to cause people to fear any connection with it like the plague. Rules of evidence which prevent these evils are not to be lightly tampered with[.]" His main proposal in this sphere, and one to which he reverted on many occasions, was to allow the cross-examination of accused persons, and to make them competent witnesses . . . .

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He warmly advocated an extension of the practice of assigning counsel to undefended prisoners, and the selection of competent barristers for this purpose who should be given enough time to master their briefs. He was averse to any alteration in the jury system and under no circumstances would he have agreed to relax the rule of unanimity. He favoured [sic] a reorganisation [sic] of the executive branch of the judiciary [sic] with a view to bringing about a closer co-ordination between the clerks of the peace attached to courts of quarter sessions, the staff of the assize courts and that of the superior courts, which would make the working of the judicial machinery more steady and economical and would secure a better distribution of cases . . . . He believed in the value of preserving the division in the profession between solicitors and barristers, and emphasised [sic] the vital function of the former, worthy

of attracting men of legal distinction and high social standing.<sup>5</sup>

Many of his proposed reforms were eventually adopted. They are not my concern either. Stephen Morse has argued persuasively that Stephen's conception of criminal responsibility was thoroughly modern.<sup>6</sup> But that issue too is to one side of my concern in this paper.

I want to focus on just two questions, which turn out to be related. The first is whether and in what sense he adopted, as is generally believed,<sup>7</sup> a theory of criminal law based not on utilitarianism (though he considered himself a utilitarian) but on "legal moralism." The second is what his philosophy of life was. But in emphasizing these questions I don't want to lose sight of the tone and texture, the *character*, of his criminal-law history. I do think he had a theory of criminal law and a philosophy of life, but he was not a systematic or disciplined thinker, and this allowed him to make observations that owe nothing to theory, that are simply shrewd and sensible, as when he explains why abortion shouldn't be classified as murder—why, that is, murder should be deemed to begin "at the point when it [the newborn] has completely proceeded into the world from the mother's body":

The practical importance of the distinction [i.e., between the fetus and the infant] is that it draws the line between the offence of procuring abortion and the offences of murder or manslaughter, as the case may be. The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are also so dissimilar, that it is well to draw a line which makes it practically impossible to confound them.<sup>8</sup>

But this is not *Roe v. Wade*, for Stephen makes no objection to recognizing "the offence of procuring abortion." But let me come to my chosen topics. The utilitarian view of the criminal law,<sup>9</sup> which is also the modern economic view,<sup>10</sup> is

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<sup>5</sup> LEON RADZINOWICZ, SIR JAMES FITZJAMES STEPHEN, 1829-1894, AND HIS CONTRIBUTION TO THE DEVELOPMENT OF CRIMINAL LAW 25-27 (1957) (footnotes omitted); see also K. J. M. SMITH, JAMES FITZJAMES STEPHEN: PORTRAIT OF A VICTORIAN RATIONALIST 44-72 (1988); JAMES A. COLAIACO, JAMES FITZJAMES STEPHEN AND THE CRISIS OF VICTORIAN THOUGHT 74-96 (1983); Kadish, *supra* note 4, at 1128-29.

<sup>6</sup> Stephen J. Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, 5 OHIO ST. J. CRIM. L. 505, 505 (2008).

<sup>7</sup> See, e.g., H. L. A. HART, LAW, LIBERTY, AND MORALITY 36 (1963); Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 157 (2001); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 118, 123 (1999); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 74 (1995); Carl F. Cranor, *Legal Moralism Reconsidered*, 89 ETHICS 147, 147 (1979).

<sup>8</sup> 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 2 (1883).

<sup>9</sup> First clearly formulated in Jeremy Bentham, *An Introduction to the Principles of Morals*

that the primary function of punishment is to deter crime by subjecting the criminal to a degree of disutility that exceeds the utility he would obtain from the crime. (A secondary function is incapacitation of criminals regarded as undeterrable.) If the defendant were affluent, the requisite disutility could often be imposed by fining the defendant rather than by imprisoning or executing him. And it is on this basis that Stephen rejected the utilitarian theory. He thought the public wouldn't be satisfied to see a criminal fined. It would not quench the public's thirst for vengeance. And he thought it important that punishment quench that thirst, because he considered the purpose of the criminal law to be to provide a civilized substitute for vengeance.

As he famously (or notoriously) put it, "it is morally right to hate criminals."<sup>11</sup> In fact, "it [is] highly desirable that criminals should be hated."<sup>12</sup> Vengeance is powered by hatred, in the sense that if one didn't hate the person who had done one (or one's family, or nation, etc.) an injury, one would hardly bother to incur the cost and possibly the risk involved in attempting to inflict a return injury on him.<sup>13</sup> It is therefore important that criminals be hated, because if they're not there wouldn't be strong pressure to enforce the criminal law unless people understood the utilitarian benefits of such enforcement. Which they would be unlikely to do—Stephen, who was contemptuous of the intelligence of the average person,<sup>14</sup> probably thought that the public couldn't understand those benefits and therefore that the cooperation of victims and other private persons in the enforcement of the

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and Legislation, in A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 293–94 (W. Harrison ed., 1948).

<sup>10</sup> See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169 (1968); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 273–313 (8th ed. 2011).

<sup>11</sup> STEPHEN, *supra* note 8, vol. 2, at 81.

<sup>12</sup> *Id.* at 82.

<sup>13</sup> I assume a case of pure vengeance, rather than one in which the motivation for going after one's oppressor is to prevent him from doing further injury or to recover property or obtain any other benefit or reward—except the satisfaction of satisfying one's desire for vengeance.

<sup>14</sup> As when he said that as for

practically unlimited freedom of political discussion . . . if in the course of time governments should come to be composed of and to represent a small body of persons who by reason of superior intellect or force of character or other circumstances have been able to take command of the majority of inferiors they will not be likely to tolerate attacks upon their superiority, and this may be a better state of things than the state of moral and intellectual anarchy in which we live at present.

2 STEPHEN, *supra* note 8, vol. 2, at 376. Here is another example of Stephen's condescension toward the average man:

No one can fail to be touched when he sees a judge, who has reached the bench by an unusual combination of power, industry and good fortune, bending the whole force of his mind to understand the confused, bewildered, wearisome, and half-articulate mixture of question and statement which some wretched clown pours out in the agony of his terror and confusion.

JAMES FITZJAMES STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 232 (1863).

criminal law depended on their emotion—and the relevant emotion was that of wanting revenge. Law, in short, is “an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought . . . to be satisfied in a regular public and legal manner.”<sup>15</sup>

Stephen’s emphasis on vengeance was natural because in his day, and certainly historically (and remember that he was writing history), the criminal law was privatized to a degree we would find strange. Prosecutors were private lawyers hired on an ad hoc basis to prosecute criminal defendants; they were not public employees. Merchants could hire lawyers to prosecute thieves. Public police were a relatively recent innovation. Criminal law enforcement was far less professional and bureaucratized than it has since become, and closer therefore to its roots in vengeance.

And the criminal law *is* rooted in vengeance. Vengeance is the stage in the control of antisocial behavior that precedes law and leaves its shape upon law.<sup>16</sup> There was human society long before there were governments that could enforce laws against antisocial behavior. The control of such behavior in such pre-statist times was dependent on the threat of vengeance, a threat precipitated by aggression and made credible by emotion.

So was Stephen a moralist, because he thought it morally right to hate criminals? I don’t think so, though it is the conventional view of him. As I’ll soon argue, it would be out of character for Stephen to mount a moral high horse. He thought it *useful* to encourage, in the name of morality, the hatred of criminals because, as I have already noted, he feared that without popular hatred of criminals the criminal law wouldn’t “work.” It was important, for rather obvious reasons, that it work. This is still the case, because while our criminal law system (and England’s as well) is now dominated by professionals, who chase and prosecute and punish criminals not out of hatred but because they are paid to do those things, these professionals depend heavily on private citizens for aid in enforcement, including crime victims, the victims’ families, bystanders, jurors, and others who usually have no pecuniary stake in assisting in the apprehension and prosecution of criminals. The widespread popular support for capital punishment and other severe punishments, and the widespread popular opposition to legislators and judges perceived as “soft on crime,” are based to a great extent on hatred of murderers; and so if you fear crime and believe in deterrence, you think it morally right to hate criminals.

Utilitarianism is a moral theory, so there is nothing anomalous about thinking it morally right to hate criminals; as I have just argued, it is a moral conception ancillary to utilitarian morality. There is also no inconsistency between a utilitarian theory of punishment and a recognition that emotion plays and should play a role in criminal law enforcement. Emotion, specifically vengefulness, is simply an alternative motivator to career incentives for bringing criminals to

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<sup>15</sup> STEPHEN, *supra* note 1, at 152.

<sup>16</sup> See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE* 75–86 (3d ed. 2009).

justice. Stephen was a utilitarian: “Before an act can be treated as a crime it ought to be . . . of such a nature that it is worthwhile to prevent it at the risk of inflicting great damage, direct and indirect, upon those who commit it.”<sup>17</sup> And therefore,

[A] law which enters into a direct contest with a fierce imperious passion, which the person who feels it does not admit to be bad, and which is not directly injurious to others, will generally do more harm than good; and this is perhaps the principal reason why it is impossible to legislate directly against unchastity, unless it takes forms which every one regards as monstrous and horrible.<sup>18</sup>

Stephen’s theory of criminal law would turn into a moral theory if one thought not just that criminals should be hated but that people who are hated should be punished as criminals. A utilitarian might argue that if people get pleasure from seeing the people they hate punished, this is an independent reason for criminal law. But that seems not to have been Stephen’s view. He was fiercely critical of witchcraft trials, even though the women tried and executed as witches had been greatly feared and hated, as well as of the trials of Catholics falsely accused of plotting regicide, though they too had been greatly feared and hated. It was not that he thought hatred was the basis of criminal law, but that he thought the law would not be effective unless criminals were hated. Indeed, he famously said that criminal law was to the passion for revenge as marriage is to sexual passion:<sup>19</sup> that is, designed to channel and regularize, not to magnify. He might have agreed with the philosopher Andrew Oldenquist that retributive justice is nothing more than “sanitized revenge.”<sup>20</sup>

Oliver Wendell Holmes, Jr., possibly influenced by Stephen, whom he met and became friends with in his frequent trips to England, also related the criminal law (and more) to vengeance, though his focus was on the roots of law in vengeance,<sup>21</sup> rather than on the role of vengeance in modern law. It is an interesting question why these two were so interested in vengeance. I don’t think a purely intellectual answer is plausible. I think the real answer is that both of them thought that physical force (and, in Stephen’s case, closely analogous forms of psychological pressure) was about the most interesting and important thing in the world.<sup>22</sup> This is a currently unfashionable view with which I however have a great

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<sup>17</sup> *Id.* at 151.

<sup>18</sup> *Id.* at 152.

<sup>19</sup> 2 STEPHEN, *supra* note 8, vol. 2, at 82.

<sup>20</sup> Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464, 464 (1988).

<sup>21</sup> JUSTICE OLIVER WENDELL HOLMES, JR., *THE COMMON LAW*, lectures 1–2, at 1–75 (1881); 2 MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES 170–71* (1963).

<sup>22</sup> On Stephen’s obsession with force, see John D. Heydon, *Reflections on James Fitzjames Stephen*, 29 U. QUEENSLAND L.J. 43, 57 (2010); cf. Russell Kirk, *The Foreboding Conservatism of Stephen*, 5 W. POL. Q. 563, 573–74 (1952).



deal of sympathy.

In Stephen, force talk becomes obsessive—producing, incidentally, a perfect correlation between style (as forceful as anyone’s) and content. The obsession is illustrated by Stephen’s remarks, in his history of the English criminal law, in extenuation of the (to us) grotesque sixteenth and seventeenth-century political trials, as when he says that “[q]uestions of sovereignty can be determined only by force, and I cannot see how Henry [VIII] was to make himself the sole ruler of the English people as he wished to do, and to a great extent actually did, without striking terrible blows against his antagonist and his adherents.”<sup>23</sup> Or,

[i]n judging of the trials of the period in question we must remember that there was no standing army, and no organised police on which the Government could rely; that the maintenance of the public peace depended mainly on the life of the sovereign for the time being, and that the question between one ruler and another was a question on which the most momentous issues, religious, political, and social, depended. In such a state of things it was not unnatural to act on a different view as to the presumptions to be made as to guilt and innocence from that which guides our own proceedings. Suspected people, after all, are generally more or less guilty, and though it may be generous, for the reason already given, to act upon the opposite presumption, I do not see why a Government not strong enough to be generous should shut their eyes to real probabilities in favour of a fiction. This principle must be admitted, and the procedure of the period in question must be judged in the light of it, before it can be fairly criticised.<sup>24</sup>

The best examples of Stephen’s force talk are found, however, in *Liberty, Equality, Fraternity*:

If . . . it is said that [Pontius] Pilate ought to have respected the principle of religious liberty as propounded by Mr [sic] Mill, the answer is that if he had done so he would have run the risk of setting the whole province in a blaze.<sup>25</sup>

[T]he Sermon on the Mount [is] a pathetic overstatement of duties.<sup>26</sup>

[I]f in the course of my life I come across any man or body of men who treats me or mine or the people I care about as an enemy, I shall treat him as an enemy with the most absolute indifference to the question

<sup>23</sup> STEPHEN, *supra* note 8, vol. 2.

<sup>24</sup> *Id.* at 354–55.

<sup>25</sup> STEPHEN, note 2, at 115.

<sup>26</sup> *Id.* at 259.

whether we can or cannot trace out a relationship either through Adam or through some primeval ape.<sup>27</sup>

Struggles there must and always will be, unless men stick like limpets or spin like weathercocks.<sup>28</sup>

Disguise it how you will, it is force in one shape or another which determines the relations between human beings.<sup>29</sup>

[I]t is impossible to lay down any principles of legislation at all unless you are prepared to say, I am right, and you are wrong, and your view shall give way to mine, quietly, gradually, and peaceably; but one of us two must rule and the other must obey, and I mean to rule.<sup>30</sup>

[L]aw is nothing but regulated force.<sup>31</sup>

Persuasion, indeed, is a kind of force. It consists in showing a person the consequences of his actions.<sup>32</sup>

Parliamentary government is simply a mild and disguised form of compulsion. We agree to try strength by counting heads instead of breaking heads, but the principle is exactly the same. . . . The minority gives way not because it is convinced that it is wrong, but because it is convinced that it is a minority.<sup>33</sup>

It is quite true that we have succeeded in cutting political power into very little bits, which with our usual hymns of triumph we are continually mincing, . . . [but the result] is simply that the man who can sweep the greatest number of them into one heap will govern the rest.<sup>34</sup>

The difference between a rough and a civilised [sic] society is not that force is used in the one case and persuasion in the other, but that force is (or ought to be) guided with greater care in the second case than in the first. President Lincoln attained his objects by the use of a degree of

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<sup>27</sup> *Id.* at 240.

<sup>28</sup> *Id.* at 111.

<sup>29</sup> *Id.* at 209.

<sup>30</sup> *Id.* at 90.

<sup>31</sup> *Id.* at 200.

<sup>32</sup> *Id.* at 129.

<sup>33</sup> *Id.* at 70.

<sup>34</sup> *Id.* at 207, 211.

force which would have crushed Charlemagne and his paladins and peers like so many eggshells.<sup>35</sup>

To say that the law of force is abandoned because force is regular, unopposed, and beneficially exercised, is to say that day and night are now such well-established institutions that the sun and moon are mere superfluities.<sup>36</sup>

Two themes run through Stephen's reflections on the role of force in human society. One, epitomized by his remarks on political trials in a tense period of English history and by his rehabilitation of Pontius Pilate, is the omnipresent threat of disorder. Stephen's fear of it (which was not, by the way, shared by Holmes) may well have been connected to his contempt for the character and intellect of the average person:

Estimate the proportion of men and women who are selfish, sensual, frivolous, idle, absolutely commonplace and wrapped up in the smallest of petty routines, and consider how far the freest of free discussion is likely to improve them. The only way by which it is practically possible to act upon them at all is by compulsion or restraint.<sup>37</sup>

The Sermon on the Mount was an incitement; the proper role of religion is to quiet and intimidate: "almost all men require at times both the spur of hope and the bridle of fear, and . . . religious hope and fear are an effective spur and bridle."<sup>38</sup> Stephen's contempt for the common man, by the way, does not sort well with his enthusiasm for trial by jury, noted in the passage that I quoted earlier from Radzinowicz.<sup>39</sup> That enthusiasm may have been the result of chauvinism—trial by jury distinguished English from Continental legal procedure—or of his work on the law of evidence, a body of law designed mainly for jury control (and hence largely absent from Continental law). He may have thought that the law had evolved to the point where the jury would be sufficiently guided by the judge to avoid errors resulting from the limitations of jurors' intellectual capacities. Also, in Stephen's day, jurors tended to be drawn from the propertied class, rather than being a cross-section of the population.<sup>40</sup>

The second theme in Stephen's criminal-law jurisprudence, which, however, is closely allied to the first, is that human life, like the life of all other living things,

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<sup>35</sup> *Id.* at 71.

<sup>36</sup> *Id.* at 206.

<sup>37</sup> *Id.* at 72.

<sup>38</sup> *Id.* at 98.

<sup>39</sup> See *supra* text accompanying note 5.

<sup>40</sup> Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 399-400 (1996).

is simply a struggle for survival and dominance,<sup>41</sup> “civilization” is a veneer, or, at best, an instrument, a form, of force. This is an insight that long antedates Darwin, whose significance lay in relating the struggle to the changes over time in life forms (“evolution”). You can find the insight stated two and a half millennia ago by Heraclitus.<sup>42</sup> The association of Stephen with it is only slightly obscured by his emphasis on religion and morality; he himself seems to have been an atheist,<sup>43</sup> for whom religion, morality, and criminal law had the identical function, which is that of repression. They are instruments for enforcing the dominance of the ruling class. Stephen thought the rulers benign, and so his power worship could coexist comfortably with his utilitarianism. His difference with Mill came down to his believing that Mill didn’t understand the necessity for force to prevent the utilitarian apple cart from being overturned.

I use the phrase “power worship” deliberately because of the relish with which Stephen proclaims the law of force. An atheist is simply someone who doesn’t think that God or gods exist; he may have the same religious emotions as a theist, simply deflected to another object. Stephen seems to have had the same reverence for force that a diminishing number of his Victorian contemporaries had for the Christian God. Reading the passages I have quoted, you can’t doubt the *delight* he took in the idea of Lincoln’s armies crushing Charlemagne’s knights like so many eggshells, or in Pilate’s firmness in condemning a dreamer like Jesus Christ, or in the politicians who pull the wool over the eyes of their constituents and rule in the name of “democracy” as effectively as Henry VIII had done in the name of monarchy. (The remarks on politics that I quoted from *Liberty, Equality, Fraternity* anticipate the influential theory of democracy of the economist Joseph Schumpeter.<sup>44</sup>) It was natural for Stephen, as a member of the governing class of a great empire, to revel in dominance, and primatologists would have no difficulty offering a Darwinian explanation for the strength of his emotion. The celebration of dominance and the contempt for the average, the weak, and hence for equality, are two sides of the same coin, which can help us understand Stephen’s famous put-down of America: “It is also a question . . . whether the enormous development of equality in America, the rapid production of an immense multitude of commonplace, self-satisfied, and essentially slight people is an exploit which the whole world need fall down [before] and worship.”<sup>45</sup> Struggle is bracing, and produces

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<sup>41</sup> See, e.g., John Roach, *Liberalism and the Victorian Intelligentsia*, 13 CAMBRIDGE HIST. J. 58, 65–66 (1957).

<sup>42</sup> “It is necessary to know that war is common and right is strife and that all things happen by strife and necessity.”

Heraclitus of Ephesus, *Fragment 80*, in G. S. KIRK, J. E. RAVEN & M. SCHOFIELD, *THE PRESOCRATIC PHILOSOPHERS: A CRITICAL HISTORY WITH A SELECTION OF TEXTS* 193 (2d ed. 1983).

<sup>43</sup> SMITH, *supra* note 5, at ch. 8.

<sup>44</sup> JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269–73 (1942); see also RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 14–19, index references to “Schumpeter” (2003).

<sup>45</sup> STEPHEN, *supra* note 1, at 220.

winner and loser. Equality is tepid; it homogenizes the winners and losers, devalues struggle, and produces mediocrity. Struggle is interesting; equality is good. If you prefer the former, your outlook is aesthetic; if the latter, your outlook is ethical.

To call Stephen a moralist is therefore misleading. No one doubts that there are such things as moral codes and that they have an influence on behavior. A moralist is someone who thinks that a moral code is not merely a social phenomenon, but a body of beliefs that can be shown to be right or wrong. Stephen shows no interest in the normative issue: his implicit view is that a moral code is a morally indifferent body of regulations imposed by the strong on the weak. Nietzsche thought a moral code is something imposed by the weak on the strong, but it comes to the same thing; the weaklings are the strong because they bind the naturally strong with intellectual chains.

Stephen does not seem to have been interested in criticizing prevailing moral beliefs, whether of his society or any other. He didn't ask whether the Romans ought to have been ruling Palestine. I don't think he believed that might makes right in a moral sense; I think rather that he didn't consider the question whether a particular moral code was right or wrong an interesting one, or at least one that interested him, as a practical man.

The result need not be conservative in a political sense, though that will usually be the tendency. One of the strikingly liberal features of Stephen's ideas about criminal law was that "irresistible impulse" should be a defense to a criminal charge. When he wrote, and indeed until much later, the defense of insanity was limited to cases in which the defendant by reason of his insanity didn't know that what he was doing was wrong; maybe he thought his victim was a hamster rather than a human being, or that God had commanded him to kill. But Stephen recognized that a person might know that what he was doing was wrong yet be unable to prevent himself from doing it, and I think that what made him sensitive to this possibility was not a belief that people shouldn't be punished for involuntary conduct—he took that for granted—but the fact that it was natural for him to view the human psyche as a scene of struggle between opposing forces.

One way in which it can be misleading to think of Stephen as a moralist is that it ranges him against Oliver Wendell Holmes (an acquaintance and contemporary), whom no one has ever accused of being a moralist. There were indeed differences between them on issues of criminal law,<sup>46</sup> but they were as one in believing that struggle was life's essence. Indeed it is a subject on which it is as easy to quote Holmes as Stephen; consider this early statement of Holmes's theory of legislation:

All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the

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<sup>46</sup> HOWE, *supra* note 21, at 213, 227, 267–68.

community . . . The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.<sup>47</sup>

And from Holmes it is just a step to Nietzsche, another contemporary of Stephen (and Holmes)—and not just to the *Genealogy of Morals* but also to the “will to power” and the rejection of the ethical conception of human destiny in favor of an aesthetic.<sup>48</sup> The law members of this trio of the tough-minded have bequeathed us a substantial legacy. They were right that law is force shaped and applied to conform to the interests of the dominant forces in a particular society. Morality is merely another force, with a similar origin in self-interest. Our judges are Pilates too, and the Sermon on the Mount continues to be observed exclusively in the breach. Brutally expressed as Stephen’s apothegms are, they contain more truth than falsehood. We have outlived James Fitzjames Stephen, and virtually forgotten him. We have not outgrown him.

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<sup>47</sup> Anonymous [Oliver Wendell Holmes, Jr.], *The Gas-Stokers’ Strike*, 7 AM. L. REV. 582, 583 (1873).

<sup>48</sup> On the affinities between Holmes and Nietzsche, see Brian Leiter, *Holmes, Nietzsche & Classical Realism* (Univ. of Texas Sch. of Law, Pub. Law and Legal Theory Working Paper No. 003, 2000) available at [http://papers.ssrn.com/paper.taf?abstract\\_id=215193](http://papers.ssrn.com/paper.taf?abstract_id=215193); Brian Leiter, *Classical Realism*, 11 PHIL. ISSUES 244 (2001); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 239–42 (1990).

