for having seized the runaway Lewis for transport and sale outside the realm (the same factual situation involved in *Somerset*). During the argument, Mansfield stated that being black did not prove that Lewis was a slave; that it was doubtful that the alleged slave "could prove his own Freedom by his own Evidence"; and that whether masters "have this kind of property or not in England never has been solemnly determined." Ultimately *Lewis* had no precedential value because it turned on the factual question of whether Lewis was actually Stapleton's slave. But in colloquy with John Dunning, counsel for Lewis, Mansfield gave voice to his uneasiness at the prospect of having to pass on the larger legal issues that were at stake: "you will find more in the question then [*sic*] you see at present. . . . It is no matter mooting it now but if you look into it there is more than by accident you are acquainted with. . . . Perhaps it is much better it never should be finally discussed or settled . . . for I would have all Masters think they were Free and all Negroes think they were not because they wo'd both behave better." The "more" that Mansfield so enigmatically mentioned may have been only the value of slave property in England (which, at a conservative valuation, was £700,000[52]) or it may have been the legitimacy of slavery itself. Whichever it was, Mansfield was loath to touch the question.

In bringing test cases, Sharp was taking a long gamble. In 1770, it was distinctly possible that English courts would legitimate slavery in England, especially in light of the baneful influence of the Yorke-Talbot opinion and the scattered dicta about trover lying for a Negro. Mansfield, who had already done much to incorporate the law merchant into the common law (thereby creating the foundations of modern commercial law), might recognize property in slaves as a part of "the custom of the merchants" and adapt slavery's features to English law as easily as he had with negotiable instruments. The fact that matters turned out differently, and that Mansfield put human liberty ahead of mercantile greed, should not make us forget Sharp's grounds for pessimism.

III

James Somerset, according to the return made by the vessel master John Knowles, was born in Africa, brought to Virginia by a slaver in 1749, and bought there by Charles Stewart. Stewart then

52. This estimate, 14,000 slaves at £50 each, was made by "A West-India Planter." CONSIDERATIONS ON THE EMANCIPATION OF NEGROES AND ON THE ABOLITION OF THE SLAVE-TRADE 3 (1788). Mansfield accepted this figure. Lofft at 17.

moved to Massachusetts, where he was stationed as a customs officer, and from there went to England on business in 1769, taking Somerset along as a personal servant.[53] In October of 1771, Somerset fled, but he was recaptured by Stewart, who consigned him to Knowles to be sold in Jamaica. Through the intervention of Sharp and several others, a writ of habeas corpus was secured on Somerset's behalf from Mansfield, who referred the matter for a hearing by the full bench. To represent Somerset and the cause of antislavery, Sharp secured some of the most eminent legal talent of the day: Serjeants William Davy and John Glynn, and barristers James Mansfield[54] and Francis Hargrave. The last of these, a young man in 1772, made his reputation with his arguments in this case.

On the other side, representing Stewart, the West India Interest,[55] and the cause of slavery, were the equally eminent barristers John Dunning, who had represented the slave Lewis the previous year, and William Wallace. Apparently neither Dunning nor his nominal client relished their roles as cat's-paws for the West India Interest. Stewart wrote in 1772 that "the West India planters and merchants have taken [the case] off my hands; and I shall be entirely directed by them in the further defence of [the case]."[56] At the same time Dunning noted at the beginning of his oral argument that he had the "misfortune to address an audience, the greater part of which, I fear, are prejudiced the other way."[57]

Mansfield deferred decision for a year, and ordered a total of five separate hearings. He repeatedly urged Stewart to moot the matter by voluntarily liberating Somerset, but Stewart refused, causing Mansfield to remark plaintively and in exasperation after the last argument, "If the parties will have judgment, *'fiat justitia, ruat coelum'* ['let justice be done though the heavens fall']." There was a nettlesome policy consideration that had been aired repeatedly in the public papers and arguments of counsel on both sides of the question: delegitimation of slavery (which all assumed would discourage the further importation of slaves) would exclude from England not only the abstract legal relationship, but

53. Washburn, *Somerset's Case, and the Extinction of Villenage and Slavery in England*, [1863-1864] PROCEEDINGS OF MASS. HIST. SOC. 307, 323 (1864).

54. No relation to Lord Mansfield.

55. The West India Interest was a combination of planters resident in the colonies and the metropolis, together with the merchants trading in the islands, and their agents, attorneys, and spokesmen in the metropolis. *See* E. WILLIAMS, CAPITALISM & SLAVERY (1944).

56. Washburn, *supra* note 53, at 324.

57. Lofft at 9-10.

also the black men and women who were its victims. The exclusion of blacks would "preserve the beauty and fair complexion of our people, which otherwise is in a probable way of becoming Morisco, like the Spaniards and Portuguese"[58]—which, as Serjeant Davy warned in his argument for Somerset, "would occasion a great deal of Heart Burn."[59]

Whatever Mansfield's feelings in the matter may have been, he had little room to maneuver because of the pertinacity of Sharp and the West India Interest, both of whom saw the suit as a climacteric test case. Both tried to move the decision along by publishing legal arguments in the matter. Hargrave published his arguments before the court as *An Argument in the Case of James Sommersett a Negro* . . . .[60] The *Argument*, a carefully drawn lawyer's brief, adopted the line of reasoning suggested by Sharp: first, the laws of England had never countenanced slavery, except in the institution of villeinage, which by 1770 had been defunct for well over a century; second, slavery was antithetical to other parts of the English laws and constitution. The law of contracts would not permit an individual to enslave for life both himself and his posterity, nor permit him to subject himself to other incidents of slavery, such as salability. Thus, Hargrave summarized, if English law would not tolerate slavery by consent, much less could it permit slavery that had its origin in oppression.

Hargrave then turned to the question of the imperial relation and slavery. He argued that the statutes protecting the Royal African Company, even if construed most favorably to the interests of the slaveholders, permitted slavery to be introduced only into the colonies, not into the metropolis. Conceding its legitimacy in the colonies for the sake of argument, Hargrave denied that the *lex loci* of the slave colonies could exert any force in the metropolis, given the impolicy of introducing slavery into England. Hargrave's effort, while thorough, was pedestrian and of limited utility for those who would attack slavery in the colonies. He had set his sights low, hoping to show only that England tolerated no form of slavery but villeinage, by then extinct.

To counter Sharp and Hargrave, the West India Interest procured publication of several pamphlets defending the legitimacy

58. *Some observations upon the slavery of Negroes*, 34 SCOTS MAG. 299, 301 (1772).

59. This is from the transcript of Davy's argument in *Sharp Trans*. NYHS.

60. F. HARGRAVE, AN ARGUMENT IN THE CASE OF JAMES SOMMERSETT A NEGRO LATELY DETERMINED BY THE COURT OF KING'S BENCH: WHEREIN IT IS ATTEMPTED TO DEMONSTRATE THE PRESENT UNLAWFULNESS OF DOMESTIC SLAVERY IN ENGLAND. TO WHICH IS PREFIXED A STATE OF THE CASE (1772).

of slavery in England. They appealed most forcefully to Mansfield in Samuel Estwick's *Considerations on the Negroe Cause* . . . .[61] Relying heavily on the 1729 Yorke-Talbot opinion, Estwick insisted that Parliament, in the Royal African Company statutes, had recognized a legitimate property relationship in slaves.[62] Even though this was a form of property "established by power and maintained by force," it was legitimate both in the metropolis and in the colonies. He emphasized that since the colonial laws had to conform to the laws of England, slavery had to be a valid institution in England; else it would have been void under the conformity requirement. Circular as this reasoning was, it was responsive to the imperial relationship question and, if it had been accepted, might have validated slavery under the British constitution.

Thomas Thompson, another proslavery pamphleteer, defended the slave trade against Sharp's natural law arguments by admitting that all persons are free under natural law. "But absolute freedom is incompatible with civil establishments. Every man's liberty is restricted by national laws and natural priviledge [*sic*] does rightly yield to legal constitutions . . . ."[63] The English constitution incorporated slavery, Thompson concluded, on the captivity-in-war-rationale.

In the oral arguments, Davy and Glynn opened on February 7, 1772 (Hilary term). Mansfield ordered the case held over till Easter term, when Mr. Mansfield, Hargrave, and Alleyne concluded arguments on the slave's side. According to the notes of the reporter of the decision, Capel Lofft, Hargrave's oral argument was broader in scope than his pamphlet argument; he insisted that "freedom is the grand object of the laws" in England, overriding inconsistent laws of the plantations and foreign nations. English courts could recognize slavery only extraterritorially, therefore, under the sanction of local laws in the colonies, and not under the laws of England. Alleyne elaborated on this point: "But slavery is not a natural, 'tis a municipal relation; an institution therefore confined to certain places, and necessarily dropt by passage into a country where such municipal regulations do not subsist." Though this went a good deal further than Mansfield

61. S. ESTWICK, CONSIDERATIONS ON THE NEGROE CAUSE COMMONLY SO CALLED, ADDRESSED TO THE RIGHT HONOURABLE LORD MANSFIELD, LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH, ETC. (1772).

62. *Accord, Considerations on a late Determination in the Court of King's Bench on the Negroe Cause*, 42 GENTLEMAN'S MAG. 307-08 (1772).

63. T. THOMPSON, THE AFRICAN TRADE FOR NEGRO SLAVES, SHEWN TO BE CONSISTENT WITH PRINCIPLES OF HUMANITY, AND WITH THE LAWS OF REVEALED RELIGION 23 (1772?).