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The Jurisprudence of Thomas Jefferson

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THE JURISPRUDENCE OF THOMAS JEFFERSON

L. K. CALDWELL

The two hundredth anniversary year of the birth of Thomas Jefferson affords an appropriate occasion for a review of the contribution of America's second lawyer president to the theory and application of law.

In the two centuries which have elapsed since Jefferson's birth at Shadwell in Albemarle County, Virginia, April 13 (April 2nd, old calendar) 1743, there have been few issues in the realm of law and politics to which Jefferson has not in some respect contributed. But the continuing relevance of Jefferson's thought is not due so much to an unusual gift of political prescience as to a concern with the fundamental bases of human conduct. Jefferson's approach to law was characterized by a searching inquiry into its purposes and hence to its origins. It is this aspect of his legal philosophy which is of perennial interest to students and practitioners of the law. With the views of Jefferson on the judiciary we shall not here be concerned. The story of his feud with John Marshall and the Federalist judges may be left to Corwin, Warren, and Beveridge who have told it fully and told it well. Rather the purpose of this article is to present Jefferson's understanding of the nature and purpose of law in the American commonwealth and to ascertain the nature of his contribution to American jurisprudence.

I

Jefferson's legal experience began in 1760 when he enrolled in the College of William and Mary at Williamsburg, capital of colonial Virginia. Here he became a student and friend of George Wythe, the most distinguished legal scholar of the Old Dominion. And after two years of general education in the college and of cultural and intellectual growth obtaining from contact with such liberal and versatile men as Francis Fauquier, acting Governor of the Colony, and Dr. William Small, professor of mathematics and philosophy, Jefferson at the age of 19 entered Wythe's law office to prepare for the bar examinations. There being no regularly

* Executive Secretary, Indiana University, South Bend-Mishawaka Extension Center.
organized law school at Williamsburg, candidates for the legal profession had to prepare on their own initiative for examinations administered by leading members of the Bar. The usual procedure was to study under the direction of an established lawyer, to attend the sessions of the court, to prepare sample briefs, and read the basic tracts on law. The length of training depended upon the application and self-assurance of the candidate. Patrick Henry is said to have passed his examination after six months of study, whereas the more thorough and less confident Jefferson did not consider himself prepared for the Bar until six years had elapsed.1 It was during these years that Jefferson developed an interest in the history and sociology of law which he retained throughout his life and long after the routine practice of law had ceased to interest him.

Concerning Jefferson's career as a lawyer, comparatively little appears to be known.2 His biographers agree that he was an excellent office-lawyer, preparing his cases with unusual thoroughness and great erudition.3 But as a court room lawyer he does not seem to have been promising. His knowledge of law was unquestionably deep, his capacity for analytic thinking exceptional, but he was deficient in the forensic art which was the sine qua non of success in the legal practice of his time. Nevertheless during the years that he engaged in law he was retained in an increasing number of cases and appears to have derived a fair income from his effort. Retiring from the law in 1774, he turned over his business to Edmund Randolph; and although he retained his interest in the profession, he never again engaged in regular practice.

In the speculative side of law Jefferson showed little concern, but he became increasingly interested in the relation of law to politics and to social institutions.4 His reading in Lord Kame's Historical Law Tracts, in Sir John Dalrymple's

2. Little has been written aside from the general biographies about this aspect of Jefferson's life; however, G. A. Finkelnburg wrote an article on "Thomas Jefferson as a Lawyer," 39 Am. L. Rev. 321-329 (1905). The article appears to have been largely based on the biographical sources.
Essay toward a General History of Feudal Property, and in Francis Stoughton Sullivan's An Historical Treatise on the Feudal Laws and the Constitution of the Laws of England aroused his interest in the legal institutions of Saxon times and he developed a curious theory of constitutional history which governed much of his subsequent thinking on legal and judicial questions. The Anglo-Saxons he believed had originally lived under a code of unwritten custom and natural law. The perversion of this simple code of law into a complex and tortured system of judicial metaphysics Jefferson described as the work of Norman lawyers, pious judges and grasping clerics. Writing to Major John Cartwright in 1824 he declared of the early Saxons:

Having driven out the former inhabitants of that part of the island called England, they became aborigines as to you, and your lineal ancestors. They doubtless had a constitution; and although they have not left it in a written formula, to the precise text of which you may always appeal, yet they have left fragments of their history and laws, from which it may be inferred with considerable certainty. Whatever their history and laws show to have been practised with approbation, we may presume was permitted by their constitution; whatever was not so practiced was not permitted. And although this constitution was violated and set at naught by Norman force, yet force cannot change right. A perpetual claim was kept up by the nation, by their perpetual demand of a restoration of their Saxon laws; which shows they were never relinquished by the will of the nation. In the pullings and haulings for these ancient rights, between the nation, and its kings of the races of Plantagenets, Tudors and Stuarts, there was sometimes gain, and sometimes loss, until the final re-conquest of their rights from the Stuarts. The destitution and expulsion of this race broke the thread of pretended inheritance, extinguished all regal usurpations, and the nation re-entered into all its rights; and although in their bill of rights they specifically reclaimed some only, yet the omission of the others was no renunciation of the right to assume their exercise also, whenever occasion should occur. The new King received no rights or powers, but those expressly granted to him. It has ever appeared to me, that the difference between the whig and the tory of England is, that the whig deduces his rights from the Anglo-Saxon source, and the tory from the Norman.

Upon this conception of legal history Jefferson based his

first major political treatise, *A Summary View of the Rights of British America*, prepared in 1774 to influence the deliberations of a general convention of the colony meeting at Williamsburg to consider the growing contention with the mother-country. In this exposition, which Jefferson himself declared was considered too bold to be adopted, he asserted:

... that our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness. That their Saxon ancestors had, under this universal law, in like manner left their native wilds and woods in the north of Europe, had possessed themselves of the island of Britain, then less charged with inhabitants, and had established there that system of laws which has so long been the glory and protection of that country. Nor was ever any claim of superiority or dependence asserted over them by that mother country from which they had migrated; and were such a claim made, it is believed that his Majesty's subjects in Great Britain have too firm a feeling of the rights derived to them from their ancestors, to bow down the sovereignty of their state before such visionary pretensions. And it is thought that no circumstance has occurred to distinguish materially the British from the Saxon emigration. America was conquered, and her settlement made, and firmly established, at the expense of individuals, and not of the British public. Their own blood was split in acquiring lands for their settlements, their own fortunes expended in making that settlement effectual; for themselves they fought, for themselves they conquered, and for themselves alone they have right to hold.7

Jefferson's understanding of the relation of law to social institutions was revealed in his denial of the title of the British crown to the unoccupied lands of the colonies. Developing his theme that law other than the law of nature was binding only on the community which created it and not upon those who emigrated to other lands, Jefferson denied that the Norman system of land tenure could be applied to America without the consent of the colonial inhabitants. "Feudal holdings," he asserted, "were but ... exceptions out of the Saxon laws of possession under which all lands were held in absolute right," and added, "... America was not conquered by William the Norman nor its lands surrendered to him, or

any of his successors." Referring to this notion of legal evolution, Jefferson inquired into the sources of the laws of primogeniture, of entail and of the established church of Virginia, and became convinced that these measures had no basis in the law of nature observed by the Saxons. He therefore concluded that these laws represented the successful efforts of medieval priests, jurists, and nobles to cover their usurpation of popular liberties with the cloak of legality. He concluded that such legalized privileges had no place in a commonwealth of free men, and he labored with ultimate success to secure their abolition in Virginia.

The natural law basis of Jefferson's legal philosophy underlay all of his discussion on the causes and objectives of the American revolution and achieved most notable expression in The Declaration of Independence. With certain of the revolutionary leaders, notably John Adams and young Alexander Hamilton, the natural law arguments of the Declaration were valuable primarily as political weapons to combat the pretensions of the British ministry—arguments which had served their purpose when independence was won. Not so with Jefferson. Throughout his political and administrative career as Governor of Virginia, Minister Plenipotentiary to the Court of France, Secretary of State for George Washington, Vice President of the United States, and finally as President, he refused to deviate from the principles which he had expounded in the Summary View of 1774.

In his official opinion as Secretary of State upon the question whether the President should veto the bill, declaring that the seat of government should be transferred to the Potomac in the year 1790, Jefferson took occasion to reiterate his assumptions concerning the natural rights and law of men.

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8. Ibid., p. 85.
separating, depend on their own will; they make a part of the natural right of self-government. This, like all other natural rights, may be abridged or modified in its exercise by their own consent, or by the law of those who depute them, if they meet in the right of others; but as far as it is not abridged or modified, they retain it as a natural right, and may exercise them in what form they please, either exclusively by themselves, or in association with others, or by others altogether, as they shall agree.  

Jefferson never provided a complete catalogue of the natural rights of men, but in a letter written in 1817 to Dr. John Manners he listed some of them. He declared that the right of expatriation belonged to men by natural law and added that "the evidence of this natural right, like that of our life, liberty, the use of our faculties, the pursuit of happiness, is not left to the feeble and sophistical investigations of reason, but is impressed on the sense of every man." Natural right and natural law in Jefferson's mind seemed to demark the sphere of individual conscience and ethics from the area of political or social action. Natural law ruled in those areas of conduct where he held that civil law might not rightfully interfere to restrict. But to clearly perceive the line between the two areas of law was not always easy.

The acquisition and ownership of property was deemed by Jefferson a civil rather than a natural right. How far he believed the civil regulation of property might rightfully interfere with "the guarantee to everyone of a free exercise of his industry, and the fruits acquired by it" which he held the first principle of association, does not appear in his writings; but he did maintain that the rights of an individual—civil or natural—never extended to permit harm to the equal rights of others. Thus the acquisition and ownership

13. Ibid. In a "Note on the Crimes Bill" (Writings ed., Washington, I, 156) Jefferson suggested that severe punishment for minor offenses was contrary to the laws of nature.
15. Note on Destutt de Tracy's Political Economy, April 6, 1816, Writings, ed. Washington, VI, 575. Nevertheless in a letter to Isaac McPherson, August 13, 1813 (Jefferson's Writings, Memorial edition [Washington, D.C.: T. Jefferson Mem. Asso. 1903-05] XIII, 332-33) he declared that exclusive property rights in ideas or inventions did not flow from natural law and questioned whether the civil rights granted by society for these improvements were not of greater embarrassment than advantage to society.
of property, according to Jeffersonian theory, appeared subject to civil control in so far as the support of government, the prevention of injustice, and the provision for equal opportunity for all necessitated. But the distinction of property ownership as a civil right did not imply an absolute right of regulation upon the part of society. The latter-day distinction between "property rights" and "human rights" did not therefore exist in Jeffersonian democracy, for the right to the inoffensive possession of property was a human right albeit not a natural right, and its guarantee was one of the objects for which men formed societies.

Jefferson's contention that there were only two legitimate sources of law in America—the law of nature and the law enacted by the American people—is illustrated by his opposition to the efforts of judges to read into the law of the American commonwealth the English common law and the precepts of the Christian church. He recognized the existence of the common law in the states where by specific legislative action it had been adopted. But the allegations of certain federal judges during the controversy over the Alien and Sedition Act of 1798 that the common law was in force and cognizable in federal courts, he described as the most formidable doctrine yet broached by the federal government. Writing to Edmund Randolph in 1799, he described this move of the federal judiciary as an "audacious, barefaced and sweeping pretension to a system of law for the United States, without the adoption of their Legislature." He declared that if this assumption be yielded to, the state courts might as well be shut up, "as there will then be nothing to hinder citizens of the same State suing each other in the federal courts in every case."

Jefferson noted in March of 1800 that the existence of a federal common law was one of the heretical doctrines being maintained in the United States Senate. In April of that same year he observed, however, that the federalists were

16. Opinion on the question whether the United States have a right to renounce their treaties with France, or to hold them suspended till the government of that country shall be established, April 28, 1793 (Writings, ed. Washington, VII, 618).
18. Ibid.
19. Ibid.
beginning to qualify their arguments on behalf of federal common law jurisdiction.\textsuperscript{21}

Writing to John Tyler in 1812, Jefferson described his understanding of the degree to which the common law of England could be properly applied in Virginia:

I deride with you the ordinary doctrine, that we brought with us from England the \textit{common law rights}. This narrow notion was a favorite in the first moment of rallying to our rights against Great Britain. But it was that of men who felt their rights before they had thought of their explanation. The truth is, that we brought with us the \textit{rights of men}; of expatriated men. On our arrival here, the question would at once arise, by what law will we govern ourselves? The resolution seems to have been, by that system with which we are familiar, to be altered by ourselves occasionally, and adapted to our new station. . . . But the state of the English law at the date of our emigration, constituted the system adopted here. We may doubt, therefore, the propriety of quoting in our courts English authorities subsequent to that adoption; still more, the admission of authorities posterior to the Declaration of Independence, or rather to the accession of that King, whose reign, \textit{ab initio}, was the very tissue of wrongs which rendered the Declaration at length necessary.\textsuperscript{22}

Thanking the author of a volume on \textit{American Jurisprudence}, Jefferson reiterated his opinion that the common law existed in America only by specific enactment and observed with satisfaction that the Supreme Court had given up its earlier pretensions on this subject.\textsuperscript{23}

I am now too old to read books solidly, unless they promise present amusement or future benefit. To me books of law offer neither. But I read your 6th chapter with interest and satisfaction, on the question whether the common law (of England) makes a part of the laws of our general government? That it makes more or less a part of the laws of the States is, I suppose, an unquestionable fact. Not by \textit{birthright}, a conceit as inexplicable as the trinity, but by adoption. But, as to the general government, the Virginia Report on the alien and sedition laws, has so completely pulverized this pretension that nothing new can be said on it. Still, seeing that judges of the Supreme Court, (I recollect, for example, Elsworth and

\textsuperscript{21} Ibid., pp. 357-58.
\textsuperscript{22} June 17, 1812, Writings, ed. Washington, VI, 65.
Story) had been found capable of such paralogism, I was glad to see that the Supreme Court had given it up. In the case of Libel in the United States district Court of Connecticut, the rejection of it was certainly sound; because no law of the general government had made it an offence. But such a case might, I suppose, be sustained in the State Courts which have state laws against libels. Because as to the portions of power within each State assigned to the general government, the President is as much the Executive of the State, as their particular governor is in relation to State powers.24

A favorite legal heresy which Jefferson continued to combat was the notion that Christianity was a part of the common law. In the appendix of Jefferson's Report of Cases Determined in the General Court of Virginia is a curious disquisition apparently written about 1764, which in his words concerns "the most remarkable instance of Judicial legislation that has ever occurred in English jurisprudence or perhaps in any other. It is that of the adoption in mass of the whole code of another nation, and its incorporation into the legitimate system by the usurpation of the Judges alone, without a particle of legislative will having ever been called on, or exercised towards its introduction or confirmation."25 The gist of Jefferson's argument was that the "pious judges" of England by twisting the opinion of the Chief Justice, Prisot, in a case heard during the reign of Henry VI had covered all of the Hebrew Old Testament precepts, Christian scriptures and ecclesiastical law into the common law of the realm. "What a conspiracy this between Church and State," exclaimed Jefferson, "sing Tantarara, rogues all!"26

Jefferson subsequently described this conspiracy to his friend Thomas Cooper and to Major John Cartwright. When, in October 1824, Edward Everett informed him that his article was appearing in the newspapers, the octogenarian iconoclast was disturbed at the prospect of drawing upon him an angry "host of judges and divines."27 But he affirmed that his argument was sound and that although "they may cavil they cannot refute it."28

27. To Edward Everett, October 15, 1824, ibid., VII, 381.
28. Ibid.
To the historical accuracy of Jefferson's natural law theories objections might easily be raised, and as one of his more penetrating biographers has suggested, his legal notions constituted "a sort of sublimation and legal justification of the pioneer spirit." But the importance of these theories to the history of American law and government should not be underestimated. Although gradually falling into disrepute among the multitude of law-makers, administrators and judges, the Jeffersonian conception of law was embodied in the basic political document of the republic, the Declaration of Independence and by virtue of the Bill of Rights was incorporated into the Constitution of the United States, which in other respects represented a departure from the natural law enthusiasm of 1776. Regardless of the law of Saxon England or of the legal rights of the newcomers to the American wilderness, a conception of law had been embodied in the political tradition of the American people which affirmed the existence of natural right and natural law. This theory of law embodied in the documents which declared the fundamental principles of the republic, though often ignored, has never been repudiated by the great mass of the American people; and no single individual is more responsible than Thomas Jefferson for the persistence of the natural law concept in American life.

The natural rights argument has been preeminently an opposition argument, and as such has served better those who disliked the course of political action than those who were charged with the administration of public affairs. Nevertheless the argument of Jefferson remained in the patriotic tradition of the nation and could always be drawn upon with good effect in cases where encroachment upon the traditional freedom of the American people seemed real. Thus the body of natural law-natural rights tradition, even in disuse, has afforded a salutory check upon the ambitions of public officials and has been indeed an invisible bulwark against the undue centralization of public power.

II

Jefferson's interest in the origin and application of law led him to view it as a part of a more comprehensive science of society. His understanding of the relation of law to other

branches of knowledge is indicated by his advice to youthful students on how best to prepare for the legal profession. Writing to his cousin’s son, Jefferson prescribed a course of legal study which reflected his conception of the broad range of the subject:

All that is necessary for a student is access to a library, and directions in what order the books are to be read. This I will take the liberty of suggesting to you, observing previously that as other branches of science, and especially history, are necessary to form a lawyer, these must be carried on together. I will arrange the books to be read into three columns, and propose that you should read those in the first column till 12 o’clock every day: those in the 2d. from 12. to 2. those in the 3d. after candlelight, leaving all the afternoon for exercise and recreation, which are as necessary as reading: I will rather say more necessary, because health is worth more than learning.

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Hawkin’s Pleas of the crown.

Blackstone. Montesquieu’s Spirit of law.

Virginia laws. Smith’s wealth of nations.

Beccaria.

Kaim’s moral essays.

Vattel’s law of nations.

Should there be any little intervals in the day not otherwise occupied fill them up by reading Lowthe’s grammar, Blair’s lectures on rhetoric, Mason on poetic & prosaic numbers, Bolingbroke’s works for the sake of the stile, which is declamatory & elegant, the English poets for the sake of style also.30

Politics, history, and treatises on public law occupy fully half of the course which Jefferson prescribed. In a letter of similar advice to Thomas Mann Randolph, Jefferson declared The Wealth of Nations the best book on political economy extant, and recommended the Spirit of the Laws on government, but warned against the political heresies which it contained. “Locke's little book on government is perfect as far as it goes,” he declared, and added, “Descending from theory to practice there is no better book than the Federalist.” Burgh’s Political Disquisition he considered good “especially after reading De Lolme.” In addition he suggested several of Hume’s political essays, works by Turgot and the economists of France, and for parliamentary knowledge Lex parlamentaria.31

In a letter to Dabney Terrell, February 26, 1821, Jefferson recommended a course of reading which in addition to six hours of law per day, prescribed six or eight hours for history, politics, ethics, physics, oratory, poetry and criticism—all of which he declared “as necessary as law to an accomplished lawyer.”32


Very likely Jefferson's ideas of legal training reflected his conviction that men of ability should devote a portion of their careers to the public service. "There is a debt of service due from every man to his country, proportioned to the bounties which nature and fortune have measured to him," he maintained. To a political career he deemed a knowledge of law essential. "Carry on the study of the law with that of politics and history," he wrote to young T. M. Randolph, "Every political measure will, forever, have an intimate connection with the laws of the land; and he who knows nothing of these, will always be perplexed and often foiled by adversaries having the advantage of that knowledge over him."

Jefferson's observations concerning the conduct of lawyers in politics were not always complimentary. Writing to President James Madison shortly before the outbreak of war with Great Britain in 1812, Jefferson expressed his doubt "whether in case of war, Congress would find it practicable to do their part of the business," and added, "that a body containing 100 lawyers in it, should direct the measures of a war, is, I fear impossible." Jefferson declared in a letter to Benjamin Austin of Vermont written in 1816 that lawyers had multiplied in Virginia "as to be almost a grievance, and by their numbers in the public councils, have wrested from the public hand the direction of the pruning knife."

Writing to Dr. Thomas Cooper in 1814 he remarked, "I am sure you join me in lamenting the general defection of lawyers and judges from the free principles of government. I am sure they do not derive this degenerate spirit from the father of our science, Lord Coke. But it may be the reason why they cease to read him and why they are now called "Blackstone lawyers.""

Jefferson's objection to the young lawyers of his day seems to have derived, in part at least, from his belief that

37. Jefferson's admiration for Coke was evidently a product of maturity for as a law student in 1762 he wrote a friend, "Well, Page, I do wish the Devil had old Coke, for I am sure I never was so tired of an old dull scoundrell in my life." (December 25, 1762, Writings, Memorial edition, IV, 3).
few of them were properly qualified to pursue their profession. Writing to John Tyler in 1810, Jefferson declared:

"I have long lamented with you the depreciation of law science. The opinion seems to be that Blackstone is to us what the Alcoran is to the Mahometans, that everything which is necessary is in him, and what is not in him is not necessary. I still lend my counsel and books to such young students as will fix themselves in the neighborhood. Coke's institutes and reports are their first, and Blackstone their last book, after an intermediate course of two or three years. It is nothing more than an elegant digest of what they will then have acquired from the real fountains of the law. Now men are born scholars, lawyers, doctors; in our day this was confined to poets." 39

In another letter to Tyler written two years later, Jefferson declared that Blackstone's book "although the most elegant and best digested in our law catalogue, has been perverted more than all others, to the degeneracy of legal science. A student finds there a smattering of everything," he explained, "and his indolence easily persuades him that if he understands that book, he is master of the whole body of the law. The distinction between these, and those who have drawn their stores from the deep and rich mines of Coke Littleton," he added, "seems well understood even by the unlettered common people who apply the appellation of Blackstone lawyers to these ephemeral insects of the law." 40

Writing to Horatio G. Spafford in 1814, Jefferson again deplored the defection of the lawyers in England and America from the free principles of their constitutions. 41 In truth Blackstone and Hume had made tories of all England, he declared, and asserted that they were making tories of those young Americans whose native feelings of independence did not place them above the wily sophistries of these publicists. He averred that the books of these two "have done more toward the suppression of the liberties of man, than all the millions of men in arms of Bonaparte," and added, "I fear nothing for our liberty from the assaults of force; but I have seen and feel much, and fear more from English books,"

40. June 17, 1812, ibid., VI, 66.
41. March 17, 1814, ibid., VI, 335.
English prejudices, English manners, and the apes, the dupes and designs among our professional crafts.”

The close relationship which Jefferson saw in law to politics strengthened his belief that law must apply political opinion, and where it fails to reflect the considered judgment of the community it should no longer be held valid. In this conception of law as an instrument of political action lies the explanation of many of Jefferson’s better known constitutional principles: his opposition to judge-made law; his belief that the laws of one generation could not rightfully bind another; his insistence on the equal right of the three departments of government to construe the meaning of the law in areas of their respective jurisdiction.

He declared that laws and institutions must go hand in hand with the progress of the human mind. “As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, the manners and opinions change with the change of circumstances, institutions must change also, and keep pace with the times.” He maintained that “we might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.”

“Each generation,” said Jefferson, “has the usufruct of the earth during the period of its continuance. When it ceases to exist, the usufruct passes on to the succeeding generation, free and unincumbered, and so on successively, from one generation to another forever.” He believed that each generation should be considered as a distinct nation “with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the

42. Ibid; Jefferson particularly disliked involved and technical legal language. Sending a draft of An Act for Establishing Elementary Schools he apologized for neglecting to employ the conventional legal terminology. “You however, can easily correct this bill to the taste of my brother lawyers, by making every other word a ‘said’ or ‘aforesaid’ and saying everything over two or three times, so that nobody but we of the craft can untwist the diction, and find out what it means.” September 9, 1817, Writings, Memorial edition, XVII, 418.
43. To Samuel Kercheval, July 12, 1816, Works, ed. Ford, XII, 12.
44. Ibid.
inhabitants of another country." 46 By calculation Jefferson concluded that at intervals of approximately nineteen years the majority of the adults of one generation would be replaced in active life by their decedents. Hence, he believed that the constitution and laws of nations should be submitted for reconsideration at intervals of not more than twenty years 47 and held that the public debt of a nation should never be spread over more than a nineteen year interval for amortization. 48

When Jefferson was asked to recommend a constitution for a French Agricultural and Manufacturing Society which proposed to establish a colony on the Tombigbee River, he refused, explaining that "the laws which must effect this (their happiness) must flow from their habits, their own feelings, and the resources of their own minds. No stranger to these," he explained, "could possibly propose regulations adapted to them." 49

The adaptability of law to human needs was Jefferson's test of its moral justification. Where the law impeded social welfare, Jefferson declared the law unjust and advocated its change. 50 Yet he would guard against too rapid change for he recognized the necessity of stability in the social structure. Writing to Madison in 1787, he declared, "The instability of our laws is really an immense evil," 51 and proposed a twelve-month interval between the engrossing of a bill and the passing of it or passage by a two-thirds rather than a majority vote if speedier action was needful.

Jefferson's conception of law is well illustrated by his theories concerning its interpretation. In his opinion on the validity of the French treaties, April 28, 1793, he described the method by which natural law was to be ascertained:

Questions of natural right are triable by their conformity with the moral sense and reason of man. Those who write treatises of natural law, can only declare what their own moral sense and reason dictate in the several cases they state. Such of them as happen to have feelings and a reason coin-

46. Ibid.
50. To LaFayette, April 11, 1787, Writings, Memorial edition, VI, 108.
cedent with those of the wise and honest part of mankind, are respected and quoted as witnesses of what is morally right or wrong in particular cases. Grotius, Puffendorf, Wolf, and Vattel are of this number. Where they agree their authority is strong; but where they differ, (and they often differ), we must appeal to our own feelings and reason to decide between them.52

In the interpretation of natural law no man nor division of the government held a monopoly; and similarly in the construction of the constitution of the republic, Jefferson held that each of the agencies entrusted by the people with the upholding of the constitution was entitled to judge of its meaning in cases properly within its jurisdiction. "The leading principle of our Constitution is the independence of the Legislative, Executive and Judiciary of one another," he declared.53 Accordingly he held that each division of the government "has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action, and especially where it is to act ultimately and without appeal."54 Whether Jefferson's argument merely amounted to a denial that the judiciary could bind the executive or legislature on political questions or extended to an independent right of general constitutional interpretation is not clear.55 Jefferson declared that he pardoned offenders of the Sedition Act of 1798 because although passed by the Congress and therefore presumably deemed constitutional by it, Jefferson declared that he, as President, considered the measure unconstitutional, null, and therefore refused to enforce it.56

In the interpretation of statutory law the executive enjoyed no such independence of construction, for if the measure was within the scope of permissive constitutional power, Jefferson held that the intention of the legislature governed its construction. "The true key for the construction of everything doubtful in a law, is the intention of the law-makers," he declared to Albert Gallatin.57

52. Writings, ed. Washington, VII, 618.
54. To Judge Spencer Roane, September 6, 1819, ibid, XII, 137.
55. To consider judges as final arbiters of constitutional questions he described as "a very dangerous doctrine indeed, and, one which would place us under the despotism of an oligarchy." (To William Jarvis, September 28, 1820, Writings, Memorial edition, XV, 277.)
56. To Judge Spencer Roane, loc. cit.
To the criterion of legislative intention as a guide to executive interpretation of statutes Jefferson repeatedly referred. Writing to Albert Gallatin on a point of law, he declared, "We are to look at the intention of the Legislature, and to carry it into execution while the lawyers are nibbling at the words of the law. It is well known," he added, "that on every question the lawyers are about equally divided, as is seen in the present case, and were we to act where no contrary opinion of a lawyer can be had, we should never act." In cases where the word of the law could bear two meanings, the true purpose of the legislature in enacting the measure was to determine its application. "In a statute as in a will, the intention of the party is to sought after," he said.

In a letter to W. H. Cabell, the Governor of Virginia in 1807, Jefferson developed at some length his theory of the executive interpretation:

In the construction of a law, even in judiciary cases of meum et tuum, where the opposite parties have a right and counter-right in the very words of the law, the judge considers the intention of the law-giver as his true guide, and gives to all the parts and expressions of the law, that meaning which will effect, instead of defeating, its intention. But in laws merely executive, where no private right stands in the way, and the public object is the interest of all, a much freer scope of construction, in favor of the intention of the law, ought to be taken, and ingenuity ever should be exercised in devising constructions, which may save to the public the benefit of the law. Its intention is the important thing: the means of attaining it quite subordinate. It often happens that, the Legislature prescribing details of execution, some circumstance arises, unforeseen or unattended to by them, which would totally frustrate their intention, were their details scrupulously adhered to, and deemed exclusive of all others. But constructions must not be favored which go to defeat instead of furthering the principal object of their law, and to sacrifice the end to the means. It being as evidently their intention that the end shall be attained as that it should be effected by any given means, if both cannot be observed, we are equally free to deviate from the one as the other, and more rational in postponing the means to the end.

... It is further to be considered that the Constitution gives the executive a general power to carry the laws into execution. If the present law had enacted that the service of thirty thousand volunteers should be accepted, without saying anything of the means, those means would, by the

59. Ibid., July 29, 1808, V, 328.
Constitution, have resulted to the discretion of the executive. So if means specified by an act are impracticable, the constitutional power remains, and supplies them. Often the means provided specially are affirmative merely, and, with the constitutional powers, stand well together; so that either may be used, or the one supplementary to the other. This aptitude of means to the end of a law is essentially necessary for those which are executive; otherwise the objection that our government is an impracticable one, would really be verified. 60

To this notion of executive discretion in the method of effecting the purpose of the legislature, Jefferson did not read an independence of executive judgment as sweeping as one might infer from his language. In times of national danger this latitude of discretion was expanded, and as governor of revolutionary Virginia he had admonished the county magistrates that "he is a bad citizen who can entertain a doubt whether the Law will justify him in saving his Country, or who will scruple to risk himself in support of the spirit of a Law, where unavoidable accidents have prevented literal compliance with it." 61

In a letter written in 1810 Jefferson described the occasions upon which he deemed the performance of ultra vires acts the duty of a public officer:

The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. 62

That he did not consider the exceeding of lawful powers as permissible on any except the most urgent occasions and then only upon the part of the highest officers of the state, appears from his explanation that justification for ultra vires acts did not apply "to the case of persons charged with petty duties where the consequences are trifling, and time

allowed for a legal course, nor to authorize them to take such cases out of the written law.” In these, he believed, “The example of overleaping the law is of greater evil than a strict adherence to its imperfect provisions. It is incumbent on those only who accept of great charges,” he declared, “to risk themselves on great occasions when the safety of the nation or its very high interests are at stake.” He confessed that the line of discrimination between proper and improper occasions for the exceeding of powers might be difficult to ascertain, but he declared, “The good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.”

III

Unquestionably the greatest constructive contribution of Thomas Jefferson to the development of American law and jurisprudence was his work in the rebuilding of the legal system of Virginia, destroyed by the revolution. As a member of the Virginia Committee of Revisors appointed November 5, 1776, he worked during the following three years to bring the legal system of the independent commonwealth into line with republican principles. Although much of this effort was devoted to clearing away the debris of the aristocratic colonial order, his proposed bill for religious freedom, for the creation of public schools, and for the establishment of free public libraries remain a monument to his intelligence and civic spirit. The details of Jefferson's work as a revisor of the laws of Virginia are recounted in his Autobiography and have been more objectively related by his biographers. To the student of jurisprudence, the significance of Jefferson's proposals is in the utilitarian attitude with which he approached legal questions.

For Jefferson the law held no peculiar mystery, no particular claim to reverence. His interest in law was in its social, its political application. He found in law a useful instrument for effecting social reform. He did not believe

63. Ibid, p. 544.
64. Ibid.
65. The other revisors were George Wythe, Jefferson's old mentor; George Mason, Edmund Pendleton and Thomas L. Lee. The retirement of Mason and the death of Lee left Jefferson, Wythe, and Pendleton to complete the work.
66. E.g. Randall, Chinard, Tucker, etc.
that law was designed to preserve the status quo. On the contrary, he believed its adaptive change to social needs the best guarantee of a peaceful and progressive society. He had seen the static order of old France break down into chaotic revolution, and attributed the collapse of the old regime throughout all Europe to the resistance of the privileged orders to legal change.\textsuperscript{67} It is in this idea of law as an instrument of peaceful social change that Jefferson reconciled order with his conception of progress. Yet he did not strain the meaning of order. "I like a little rebellion now and then," he wrote to Abigail Adams, "It is like a storm in the atmosphere."\textsuperscript{68} Nor did his conception of progress require vast changes in the social system of America. Slavery he would see abolished; manufacturing he would restrain to the necessities for American health and comfort; great inequalities in wealth he would discourage; public education he would provide for all—but beyond these things American life, as it was, seemed good to him. A comparison of America with Europe he likened to a comparison of Heaven with Hell, with England in an intermediate station.\textsuperscript{69}

Of the liberal, humane and progressive character of Jefferson's jurisprudence there can be no question. For him the ends of law and politics were identical with the purpose of government: "to secure the greatest degree of happiness possible to the general mass of those associated under it."\textsuperscript{70} The method of progress toward this goal was gradual, and, where the laws were wisely framed and administered, it was peaceful. Jefferson preached no world-shaking social turnover, and only as a patriot of 1776 was he revolutionary. No better descriptive title has been accorded him than the one with which the historian John Fiske entitled a biographical sketch: "Thomas Jefferson the Conservative Reformer."\textsuperscript{71}

\textsuperscript{67} To Samuel Kercheval, July 12, 1816, Work, ed. Ford, XII, 12.
\textsuperscript{68} To Mrs. John Adams, Feb. 22, 1787, Works, ed. Ford, V, 263.
\textsuperscript{69} To Joseph Jones, August 14, 1787, ibid., V, 332.
\textsuperscript{70} To Vander Kemp, March 22, 1812, Writings, ed. Washington, VI. 45.
\textsuperscript{71} Essays, Historical and Literary, No. I (New York: Macmillan Co., 1902).
The Legislative Reference Bureau has compiled a digest of the Acts passed by the 1943 Indiana General Assembly. Members of the Association may obtain copies of this digest by writing to the Secretary, Thomas C. Batchelor, 703 Union Title Building, Indianapolis.