

Whig Lawyering in the Legal Education of Thomas Jefferson
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Thomas Jefferson's career as a practicing attorney in the formative years of his career before 1774 has not escaped the notice of historians, but even the most significant Jefferson scholars relegate it to secondary importance. In part, this results from the fact that Jefferson practiced law for barely eight years, a period that began in 1767 and ended when he began his celebrated career as statesman and theorist of American independence and democracy. His correspondence before 1774, when at the age of 31 he turned over all remaining legal business to Edmund Randolph, is scanty and unrevealing. His major biographers pay little attention to his legal practice or denigrate it. Saul Padover implicitly accepts our culture's bias against lawyers and uses Jefferson's legal work pejoratively as a useful tactic for showing how great, by contrast, his *other* skills were.

Padover writes that Jefferson

was not cut out to be a lawyer. His mind was too inquisitive, too speculative, and, above all, too much given to ideas as such to be happy in jurisprudence. The literary artist in Jefferson found legal language repugnant. A man with an innate sense of style, Jefferson was repelled by the dry flatulent legal verbiage with its plethora of "whereases" and its underlying chicanery. He often jeered at [things] "lawyerish."¹

This portrayal reflects a scarcely suppressed anti-lawyer bias, which other Jefferson scholars have not shared. Marie Goebel Kimball, daughter of the great legal

¹ *Jefferson* (1942; abr.ed., 1952). Padover's book was among the first paperback editions of a Jefferson biography, and had enormous popular influence.

scholar Julius Goebel, provides a more sensitive appreciation, especially of his legal studies, in the first volume of her multivolume work.² Dumas Malone includes a chapter on “The Young Lawyer” in volume one of his multivolume biography of Jefferson, but it is more concerned with Jefferson’s life *while* a lawyer than with his life or work *as* a lawyer. Malone rests his examination of Jefferson’s legal career on the long-held error that he had an “extensive” county court practice which, we now know thanks to Frank Dewey, he never had. Malone’s Jefferson is a rural courthouse practitioner – a country lawyer, in other words – attending to the tedium of real state and other mundane matters. Giving this experience the best possible interpretation, Malone labels it, without further explanation, as “preparation, and an exceedingly important one,” for the great things that would follow.³

Jefferson has received the attention of two fine legal minds, Frank Dewey and Judge Edward Dumbauld⁴, who have vastly advanced our understanding of Jefferson the lawyer. As lawyers themselves, they appreciated the technical expertise of Jefferson’s mastery of the modalities of law and legal reasoning, as well as the challenges and moral ambiguities inherent in the practice of law. Even so, both men approach their subject with, at times, a tone of apology and inadequately concealed embarrassment. Dumbauld was a great admirer of Jefferson, and a scholar whose explication of technical pleadings and examination of Jefferson’s legal erudition provide us with an unparalleled

² Marie Kimball, *Jefferson. The Road to Glory 1743 to 1776* (New York, 1943), esp. Chapter Five, “Old Coke.”

³ Dumas Malone, *Jefferson the Virginian* (Boston, 1948) devotes two chapters to the subject: Chapter Five, “Williamsburg: Introduction to the Law 1762-1765,” and Chapter Nine, “The Young Lawyer 1767-1771.” Note that the final three years of practice, 1771-1774, are not treated. These, like other legal activities, appear throughout subsequent volumes, but are not analyzed. “The Myth of Jefferson’s County Court Practice” is put to rest in the best study of his legal practice, Frank L. Dewey, *Thomas Jefferson Lawyer* (Charlottesville, 1986), 122-26.

⁴ Edward Dumbauld, *Thomas Jefferson and the Law* (Norman, 1977).

appreciation of Jefferson's legal skills. Nevertheless, he offers faint praise for its importance and leaves us without a sense of the significance of the law in getting at any "essential Jefferson." Making a clear distinction between Jefferson's legal skills and his well-known greatness in other areas, Dumbauld writes, "The glamor of his political career and his prodigious versatility in many fields of intellectual endeavor overshadow his achievements in the prosaic realm of law."⁵

Frank Dewey, who has given us the best account of Jefferson's actual lawyering, provides examples of legal activity that today would be considered unethical (and in their time were definitely questionable) as well as the details of Jefferson's complicity in providing legal assistance to a group of men trying to corner the land market in Virginia. Speculating that the chagrin Jefferson the lawyer suffered from the latter experience began to turn him away from the practice of law, Dewey observes that Jefferson's professional efforts were subsequently marred by "neglect of the mechanics of lawyering." Ultimately, Dewey, concedes, "it is probably fair to say that his experience in the practice was a disappointment, professionally as well as financially." Trying to be fairminded and balanced, however, Dewey adds, "Still, Jefferson's years as a trial lawyer were not lost. They honed his forensic and writing skills."⁶ An example of faint praise in an otherwise impeccable study, it leaves us without a fuller appreciation of the life and mind of Thomas Jefferson.

The ambivalence implicit in these careful studies might be blamed on Jefferson himself, for he was deeply divided in his feelings about the practice of law. Of his own attitude toward the law, he confessed, "I was bred to the law; that gave me a view of the

⁵ Ibid., xi.

⁶ Dewey, *Jefferson Lawyer*, 111-13.

dark side of humanity.”⁷ The result is that standard interpretations of Jefferson, which emphasize his optimism and faith in human progress, dismiss his legal activities as aberrations. As if that were not enough, Jefferson complained in his autobiography that a lawyer’s “trade ... is to question everything, yield nothing, & talk by the hour.”⁸ The mystifications of the law, which he had had to suffer through so painfully in his legal education, he regarded with the same disdain he held for those of organized sectarian religion, lumping them together as “lawcraft and priestcraft” that “throw dust into the eyes of the people.”⁹ Disdainful of the new breed of post-Revolutionary lawyers whom he dismissed as “ephemeral insects of the law,”¹⁰ he advised the son of a friend choosing between law and medicine as careers,

Law is quite overdone. It is fallen to the ground, and a man must have great powers to to raise himself in it to either honor or profit. The mob of the profession get as little money and less respect, than they would by digging the earth.... Then physician is happy in the attachment of the families in which he practices.... If, to the consciousness of having saved some lives, he can add that of having, at no time, from want of caution, destroyed the boon he was called on to save, he will enjoy, in age, the happy reflection of not having lived in vain; while the lawyer has only to recollect how many, by his dexterity, have been cheated of their right and reduced to beggary.¹¹

And this he wrote to a judge.

Jefferson assailed such practitioners because as superficially self-educated “Blackstone lawyers” they ignored the deeper study of law, but – and much more

⁷ Cited by Douglas L. Wilson, “Thomas Jefferson’s Early Notebooks,” *William and Mary Quarterly*, 3rd ser., 42 (1985), 442.

⁸ Jefferson, “Autobiography,” in Merrill Peterson, comp., *Thomas Jefferson Writings* (New York, 1984), 53. [Hereinafter, *Writings*]

⁹ Jefferson to Elbridge Gerry, 28 August 1802, in Paul Leicester Ford, ed., *The Writings of Thomas Jefferson* (10 vols., New York, 1892-99), 8: 170.

¹⁰ Jefferson to Judge John Tyler, 17 June 1812, in Andrew A. Lipscomb and Albert Ellery Bergh, eds. *The Writings of Thomas Jefferson* (20 vols., Washington, DC, 1905), 13: 166-67 [Hereinafter, *WTJ*].

¹¹ Jefferson to Judge David Campbell, 28 January 1810, *WTJ*, 12: 356-57.

importantly -- as practitioners they discredited a profession for which he had vastly optimistic hopes and an ambitious agenda for the reform of American society along the lines fought for by whig lawyers in England. Such goals, translated and redirected by republican revolution after 1776, would continue to guide him in his project to use law as an instrument of reform. Once independence had been declared and he could return to Virginia, he could redirect his pre-Revolutionary concerns as a whig lawyer into wholesale reformation, “that our whole code must be reviewed, [and] adapted to our republican form of government.”¹²

Before that time, however, Jefferson was no less committed to a concept of lawyering that undertook to resist arbitrary power in its many forms. Like reformist lawyers and legal writers in England who sought “perfection of policy and law,” he shared Adam Smith’s awareness that it was futile to hope for “establishing all at once ... every thing which that idea may seem to require.”¹³ In the meantime, it fell to committed lawyers – especially those practicing within a common law system -- to work incrementally, identifying individual examples of misgovernment and defending victims of arbitrary power. It is indeed ironic that the cause for which he left the law in 1774 – independence and revolution – has obscured the manner in which he pursued the same basic ends that had guided him when he entered the law. To that period in his life we must turn.

¹² Jefferson, “Autobiography,” in *Writings*, 37.

¹³ Smith assailed the “Tory” principle of “sovereign princes” who “consider the state as made for themselves, not themselves for the state,” against which “whig” principles stood, in his *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie ([1759], reprint, Indianapolis, 1982), 319. For the broader contours of this effort, see David Thomas Konig, “Jurisprudence and Social Policy in the New Republic,” in *Devising Liberty. Preserving and Creating Freedom in the New American Republic* (Stanford, 1995), 178-216.

Studying English history at the College of William and Mary, Jefferson no doubt imbibed the widespread whig belief, expressed by an anonymous Briton in 1769, that "... we may learn, that we shall not be secure against danger, merely by keeping up the antient form of our Government, as we received it from our Ancestors. We must retain its virtue and essence. Let us therefore *contend earnestly for the constitution once delivered to us*; and with its outward form, study to preserve its inward vigour, and not suffer ay of our Rights to been [sic] croached upon or invaded."¹⁴ Once he shook off his initial infatuation with Hume, history for Jefferson was whig history, both in England and Virginia. The short period of the history of Virginia that Jefferson read in the work of William Stith (which concluded in 1624) conveyed an unmistakably antimonarchical message. "I take it to be the main Part of the Duty and Office of an Historian," wrote Stith, "to paint Men and Things in their true and lively Colours; and to do Justice to the Vices and Follies of Princes and Great men, after their Death, which it is not safe or proper to do, whilst they are alive."¹⁵ His portrait of James I left a lasting impression on the young lawyer-to-be: "He was, at best, only very simple and injudicious, without any steady Principle of Justice and Honour; which was rendered the more odious and ridiculous, by his large and constant pretensions to Wisdom and Virtue." But Stith was making more than an appraisal of the person, for it was "in his Dealings with the [Virginia] Company" that James's political significance came through: he "had acted

¹⁴ Cited by John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (Madison, 1986), 185.

¹⁵ William Stith, *the History of the First Discovery and Settlement of Virginia* ([1747] London, 1753), vii.

with such mean Arts and Fraud, and such little Tricking, as highly misbecome Majesty.”¹⁶

Preparation for the bar, Jefferson wrote to a cousin, required a breadth of knowledge, but “especially history,”¹⁷ as it provided the whig lessons of liberty entrusted to protection under the rule of law. From Paris he wrote to his future son-in-law, Thomas Mann Randolph, Jr.,

I have proposed to you to carry on the study of the law, with that of Politics and History. 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.¹⁸

It was important, however, that proper *whig* history be provided to those seeking the lessons of the past, because his first exposure to English history had been through David Hume, whose tory-slanted *History of England*,¹⁹ he later confessed, had dazzled him in youth. Hume’s “elegant” history, he warned,

seems intended to disguise & discredit the good principles of the government, and is so plausible & pleasing in it’s style and manner, as to instill it’s errors & heresies insensibly into the minds of unwary readers.²⁰

Ruefully, he recalled “the enthusiasm with which I devoured it when young, and the length of time, the research & reflection which were necessary to eradicate the poison it had instilled into my mind.”²¹

¹⁶ Ibid.

¹⁷ Jefferson to John Garland Jefferson, 11 June 1790, in *The Papers of Thomas Jefferson* (32 vols. to date, Princeton, 1950-), 16: 480 [Hereinafter, *PTJ*].

¹⁸ Jefferson to Thomas Mann Randolph, Jr., 6 July 1787, *ibid.*, 11: 557-58.

¹⁹ David Hume *History of England* (6 vols., London, 1754).

²⁰ Jefferson to John Norvell, 11 June 1807, cited by Millicent E. Sowerby, *Catalogue of the Library of Thomas Jefferson* (5 vols., Charlottesville, 1983), 1: 157.

²¹ Jefferson to William Duane, 12 August 1810, cited *ibid.*

Along with Blackstone's *Commentaries*²², Hume's *History* was an insidious agent whose influence had to be resisted:

In truth, Blackstone and Hume have made Tories, of all England, and are making Tories of those young Americans whose native feelings of independence have not placed them above the wily sophistries of a Hume or a Blackstone. These two books, but especially the former have done more towards the suppression of the liberties of man, than all the million of men in arms of Bonaparte....²³

The appearance in 1796 of John Baxter's *History of England*, which Jefferson called "an editio purgata of Hume,"²⁴ provided him with a properly Whig work to undo the damage done to the American legal profession, as did St. George Tucker's republicanized version of Blackstone that appeared in 1803.²⁵

But Jefferson did not have to wait until 1796 or 1803, because his preparation for the law had been guided by George Wythe, whose impact on him was so great as to lead Jefferson to call him his "second father." Wythe was the ideal of the Whig attorney whose efforts were antithetical to the pettifoggers who so distressed the elderly Jefferson. When asked to contribute notes for a biography of his mentor in 1820, Jefferson wrote,

No man ever left behind him a character more venerated than George Wythe. His virtue was of the purest tint; his integrity inflexible, and his justice exact; of warm patriotism, and, devoted as he was to liberty and the natural and equal rights of man, he might truly be called the Cato of his country, without the avarice of the Roman; for a more disinterested person never lived. Temperance and regularity in all his habits gave him general good health, and his unaffected modesty and suavity of manners endeared him to everyone. He was of easy elocution, his language chaste, methodical in the arrangement of his matter, learned and logical in the use of it, and of great urbanity in debate; not quick of apprehension, but, with a little time, profound in penetration and sound in conclusion. In philosophy he was firm, and neither troubling nor perhaps trusting anyone with his religious creed, he left the world to the conclusion that that religion must be good which

²² William Blackstone, *Commentaries on the Laws of England* (4 vols., Oxford, 1765-69).

²³ Jefferson to Horatio G. Spafford, 17 March 1814, *WTJ*, 14: 120..

²⁴ Jefferson to George Washington Lewis, 25 October 1825, cited by Sowerby, *Catalogue*, 1: 175.

²⁵ St. George Tucker, *Blackstone's Commentaries; With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States* (Philadelphia, 1803).

could produce a life of such exemplary virtue.... Such was George Wythe, the honor of his own, and the model of future times.²⁶

The depth of Jefferson's studious engagement with legal authorities stands in marked contrast to that of other law students of the day, even with that of John Marshall, who also studied under Wythe. A year before Marshall began his legal studies in 1780, Wythe had assumed the chair of "Law and Police" at the College, a position created by Jefferson while governor. Similar to the Vinerian chair at Oxford occupied by Sir William Blackstone, the position was intended to provide a whig counterblast to the tory doctrine taught in England. Marshall attended Wythe's lectures at the College during a three-month period in the summer of 1780 while on leave from his duties in the Continental Army, where he had been introduced to military justice during a brief stint as a deputy judge advocate general at Valley Forge.²⁷ Jefferson, by comparison, had studied with Wythe while an undergraduate, and after completing those studies in 1762 spent slightly more than three years under Wythe's tutelage, either directly with him in Williamsburg or at a distance while reading at Shadwell.²⁸ Both Jefferson and Marshall benefited from Wythe's aversion to having his law students perform the drudgery of an apprenticeship. That common form of legal training, which he had endured himself as an apprenticeship to his uncle,²⁹ "may have shown him 'how not' to train lawyers."³⁰

²⁶ "Notes for Biography of George Wythe," 1 L&B 169.

²⁷ David Robarge, *A Chief Justice's progress. John Marshall from Revolutionary Virginia to the Supreme Court* (Westport, 200), 52-53. Even so, Marshall's three-month course of study exceeded that of Patrick Henry, whose presumption "to practice law after having read a borrowed copy of Coke for a few weeks" is said to have "disgusted" Wythe. Imogene F. Brown, *American Aristides. A Life of George Wythe* (Rutherford, NJ, 1981), 51. Despite Jefferson's later claim that Wythe, one of Henry's examiners for the bar, refused to sign his license, Brown (ibid., 64) concludes that Wythe did so,

²⁸ Dewey, *Lawyer*, 11.

²⁹ Dewey, *Lawyer*, 3.

³⁰ Brown, *American Aristides*, 22.

Marshall's education under Wythe differed in more than the length of time devoted to it. By the time Marshall began his studies, Wythe as professor was lecturing to a large group of students, a demand that limited his teaching to drilling them on the content of assigned reading, and conducting moot court exercises.³¹ From what can be inferred from the notes commonplaced by Marshall, the future chief justice approached the law conventionally, and with an eye to undertaking a large practice.. His notes are organized in the conventional alphabetical manner, and show little engagement with the material from Bacon's *Abridgment*,³² and a compilation of Virginia statutes,³³ in addition to the by-now popular edition of Blackstone's *Commentaries*.³⁴ Although the editors of Marshall's papers observe that "[t]he pedestrian character of Marshall's work in compiling the law notes tends to obscure some useful information that can be gained from a close study of his transcription,"³⁵ their overwhelming focus on practical pleadings is undeniable. Kent Newmyer's biography of Marshall understates the matter in noting, "One thing was clear: he did not succeed by emulating his mentor, George Wythe, who loved legal learning for its own sake, Latin quotations as well..." By contrast, "Marshall was a working lawyer, whose knowledge of the law was working

³¹ Charles Cullen, "New Light on John Marshall's Legal Education and Admission to the Bar," *American Journal of Legal History*, 16 (1972), 348. Wythe's lecture notes have, unfortunately, been lost, depriving us of any insight into their content. For the most comprehensive inquiry into the question, see Robert B. Kirtland, *George Wythe. Lawyer, Revolutionary, Judge* (New York, 1986), Appendix A, "What has Become of George Wythe's Papers?"

³² Matthew Bacon, *A New Abridgement of the Law* (3 vols., London, 1768).

³³ *The Acts of Assembly Now in Force in the Colony of Virginia* (Williamsburg, 1769)

³⁴ Marshall's commonplacing of sources is described by William F. Swindler, "John Marshall's Preparation for the Bar – Some Observations on His Law Notes," *American Journal of Legal History*, 11 (1967), 208-09.

³⁵ "Editorial Note," in *The Papers of John Marshall*, ed. Herbert A. Johnson, et al. (12 vols., Chapel Hill, 1974-2006), 1: 39.

knowledge at the ready.”³⁶ After his brief study at the College, he gained the bulk of legal knowledge working as an apprentice to Edmund Randolph for nearly four years.³⁷

Marshall was, to be sure, a luminary of the bar, and, for that matter, Jefferson was also a working lawyer. But there the comparison ends. Marshall’s practice was heavily devoted to debt cases, while Jefferson’s case load included numerous *pro bono* actions for the freedom of persons of color.³⁸ Jefferson’s more intimate and closely directed study under Wythe led him to take volumes of the law back home to Shadwell and study them during the long hours of isolation on the then-frontier of the colony. When he began his Legal Commonplace Book in 1765,³⁹ he was able to follow Wythe’s guidance and closer attention. “All that is necessary for a student is access to a library, and directions in what order the books are to be read.”⁴⁰ But that advice does not do justice to the closeness with which he engaged the material, much less the breadth of authorities that he had read under Wythe. Jefferson as a student, and even as practitioner, “was in the habit of abridging and commonplacing what I read meriting it, and sometimes mixing my own reflections on the subject.”⁴¹ Marshall, by contrast, more usually made a verbatim transcription of what he was reading.⁴² His notes show little attention to more philosophical or historical sources, “because,” note the editors of his legal papers, “they did not apply to American conditions.”⁴³ Although he cited other English authorities,

³⁶ R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, 2001), 80.

³⁷ On Marshall’s working relationship with Randolph, see *Papers of John Marshall*, 5: liii.

³⁸ Newmyer, *John Marshall*, 76. Jefferson’s *pro bono* work can be seen in his case book, numbers

³⁹ For this dating I rely on Douglas L. Wilson, “Thomas Jefferson’s Early Notebooks,” *William and Mary Quarterly*, 3rd ser., 42 (1985), 444. Marie Kimball, *Road to Glory*, 87, dates this at 1766.

⁴⁰ Jefferson to John Garland Jefferson, 11 June 1790, *PTJ*, 16: 480.

⁴¹ Jefferson to Thomas Cooper, 10 February 1814, *WTJ*, 14: 85.

⁴² “Editorial Note,” *Papers*, 1: 38.

⁴³ *Marshall Papers*, 1: 40. They speculate that “this was the result of advice from Wythe or some other experienced Virginia practitioner.” *Ibid.* Wythe’s influence here would seem unlikely, in view of Jefferson’s directed readings.

“Marshall’s law notes give no indication that the cited reports or treatises were consulted,” being kept perhaps for future reference.⁴⁴ Jefferson’s acquisition of law books for his library included numerous practical volumes purchased through the *Virginia Gazette* in 1764, but, as Frank Dewey, they are conspicuous by their absence in his commonplace books.⁴⁵

Wythe’s impact, whether through his own direction, or by way of the authorities he recommended to Jefferson is clear. One Wythe biographer notes, for example, that he “had an eagle eye for misprints, and seems to have passed this on to Jefferson, who remained an indefatigable proofreader to the end of his life.”⁴⁶ In his religious beliefs Wythe was also a deist; in studying religion sought to read ancient texts in their original language and even had a local rabbi teach him Hebrew⁴⁷ for that purpose. In Jefferson’s practice and application of the law we can also see the influence of Wythe’s knowledge of equity, which led to Wythe’s appointment as Chancellor after Independence, and his reliance on strict statutory construction. His appointment by Jefferson to the chair of law and police at the College, then, was natural.⁴⁸

As Wythe’s student, Jefferson drank deeply from the whig history and law that he read in his early years. Jefferson took careful notes of English cases concerning civil liberties dating back to the great struggles of the seventeenth century, even those of little use to any lawyer practicing in Virginia. This interest is especially apparent in the cases he commonplaced for his own Legal Commonplace Book⁴⁹ while he studied and

⁴⁴ Ibid.

⁴⁵ Dewey, *Lawyer*, 16.

⁴⁶ Kirtland, *Wythe*, 8.

⁴⁷ Ibid., 26, 29.

⁴⁸ Jefferson, “Autobiography,” 1 L&B 74.

⁴⁹ Now in the process of being edited for inclusion in *The Papers of Thomas Jefferson* (ed. David Thomas Konig and Michael Zuckert).

practiced law. As he wrote of his notes in 1814, with no little sense of regret as to how his career changed in a half century, “They were written at a time when I was bold in the pursuit of knowledge, never fearing to follow truth and reason to whatever results they led, and bearding every authority which stood in their way.”⁵⁰

Jefferson’s legal study followed what was surely Wythe’s direction, beginning with Sir Edward Coke’s four volumes of *Institutes*. Although the first volume, *Coke on Littleton*, led him quickly to denounce its author as “an old dull scoundrel,”⁵¹ he never forgot the political lessons of whiggery conveyed by Coke. Praise of Coke appears repeatedly in Jefferson’s advice for the study of law, and he insisted that Coke be required reading at the University of Virginia. Writing to Madison in 1826, he emphasized the importance of whig principles:

In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke Littleton was the universal elementary book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember also that our lawyers were then all Whigs.⁵²

Coke, of course, was such a standard requirement that even Patrick Henry understood the need to demonstrate some familiarity with him before the colony’s bar examiners. But Jefferson’s course of study embraced a far wider field. His *Commonplace Book* demonstrates not only a breadth of reading, but engagement and reflection. A systematic analysis of Jefferson’s jurisprudence and its influence on his

⁵⁰ Jefferson to Thomas Cooper, 10 February 1814, *WTJ*, 14: 85.

⁵¹ Jefferson to John Page, 25 December 1762, cited by Sowerby, *Catalogue*, 2: 217, item # 1781. Sowerby teats the other volumes *ibid.*, 218-219, items #1782-1784.

⁵² Jefferson to James Madison, 17 February 1826, *Writings*, 1513.

practice awaits fuller examination,⁵³ but the present essay can present aspects of his study and practice that demonstrate how powerful an influence the principles of whiggery and the example of whig judges held on him.

Jefferson would have read of the whigs in Bishop Gilbert Burnet's *History of His own Time*,⁵⁴ which he owned, and which chronicled the tumultuous political events of the Restoration era, when those who opposed the Stuarts embraced the pejorative term "whig" once applied to Scots Presbyterians in the Civil War era. Burnet carried his *History* through 1713, but at the center of its (often verbose and rambling) narrative was the Glorious Revolution and what would be celebrated as "first and foremost the rule of law. It was the triumph of the Common Law and lawyers over the king, who had tried to put prerogative above the law."⁵⁵ But as a law student Jefferson also was introduced to whig lawyers in the common law reports given him to read by Wythe,⁵⁶ and which he painstakingly commonplaced from 1765 through 1770, with sporadic additions through the rest of his life. His common law notes include extensive reliance on the second, third, and fourth volumes of Coke's *Institutes*,⁵⁷ and reports by George Andrews,⁵⁸ William

⁵³ In addition to an edited edition of the Legal Commonplace Book (manuscript at Library of Congress), this question is examined at length in David Thomas Konig, *Nature's Advocate: Thomas Jefferson and the Discovery of American Law* (in progress).

⁵⁴ 2 vols., London, 1724, 1734. For its inclusion in Jefferson's library, see Sowerby, *Catalogue*, 2: 161 (item #379), which notes, "This book is on Jefferson's list of recommended historical reading."

⁵⁵ G. M. Trevelyan, in *The English Revolution, 1688-1689* (New York, 1939), cited by Michael Landon, *The Triumph of the Lawyers. Their Role in English Politics, 1678-1689* (University, AL, 1970), 9.

⁵⁶ Jefferson also commonplaced cases in the English chancery courts, whose equitable jurisdiction embraced so much of his practice in trusts, estates, and inheritance. But it was in the common law courts – especially the crown side of King's Bench -- that cases of a political nature were tried.

⁵⁷ Sowerby, *Catalogue*, 2: 218-219, #1782-1784.

⁵⁸ George Andrews, *Reports of Cases argued and Adjudged in the Court of King's Bench, in the eleventh and twelfth years of the reign of his present Majesty King George the Second* (London, 1754).

Salkeld,⁵⁹ and Robert, Lord Raymond,⁶⁰ as well as common law cases included by William Peere Williams.⁶¹

The present essay can not examine all of the numerous areas of law and politics that engaged Jefferson's attention in his legal note taking, but the whig impulse to restrain the misdeeds of government officials stands out among them. His attention to the crown side of the Court of King's Bench reflects that court's jurisdiction over such acts. Its issuance of writs of *scire facias*, *mandamus*, *quo warranto*, *certiorari*, and – especially -- *habeas corpus* provide ample examples of the judicial protection of individual liberties. Those efforts rose to prominence in the period covered by these reports, but it was one judge whose role dominates the legal materials that attracted Jefferson's thinking: Sir John Holt, chief justice of King's Bench from 1689 to 1710, whom Jefferson called "the greatest lawyer England ever had, except Coke."⁶² Although Holt's legal practice shows both whig and tory activity,⁶³ his judicial career is emphatically whig. Under Holt's leadership, King's Bench made greater use of *habeas corpus* in criminal trials than ever before. In little more than the year after his appointment, it bailed or discharged eighty percent of persons jailed for treason, treasonable practices, or sedition.⁶⁴ Four of these cases appear in Jefferson's Legal

⁵⁹ William Salkeld, *Reports of Cases Adjudged in the Court of King's Bench, with some special cases in the Courts of Chancery, Common Pleas, and Exchequer ... from the first year of K. William and Q. Mary to the tenth year of Q. Anne* (London, 1742).

⁶⁰ Robert, Lord Raymond, *Reports of Cases argued and adjudged in the Courts of King's bench and Common pleas, in the Reigns of the late King William, Queen Anne, King George the First, and King George the Second* (London, 1765).

⁶¹ William Peere Williams, *Reports of Cases argued and adjudged in the High Court of Chancery, and of some special cases adjudged in the Court of King's Bench* (Dublin, 1741).

⁶² Jefferson to Peter Carr, 8 May 1791, 20 *PTJ* 378.

⁶³ Such is the point made by Paul D. Halliday in his biographical entry on Holt in the *Oxford Dictionary of National Biography* (2004), 27: 830.

⁶⁴ Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," *Virginia Law Review*, 94 (2008), 626.

Commonplace Book,⁶⁵ an unusual fact given the relative rarity with which the writ was used in colonial Virginia.

Holt stood for judicial independence at a time when colonial judges served at the pleasure of royal governors, and even English judges were subject to removal by Parliament.⁶⁶ Both Wythe and Jefferson knew and noted this fact. Wythe made explicit reference to Holt's being summoned before the Lords to give the reasons for a judgment they disapproved of, and to Holt's reply.⁶⁷ Holt would appear if the case were judicially removed to the Lords by writ of error, but he would not do so in this extrajudicial manner. Lord Raymond notes in his report of the case that "some lords were so offended, that they would have committed the chief justice to the Tower. But notwithstanding, all their endeavours vanished in smoak."⁶⁸ Jefferson referred to the case twice in his notes.⁶⁹ Chancellor James Kent shared Jefferson's admiration for Holt's judicial independence, citing the judge's "generous and distinguished zeal for the liberties of the people." Kent cited a case that

arose long after the passing of the *Habeas Corpus* Act, and the unanimous opinion of the Court of K. B. was given by Sir John Holt, whose name has always been held in reverence by English freemen; for he was a sound judge and an inflexible patriot, who manifested, on every occasion, a generous and distinguished zeal for the liberties of the people. He went at large into the cases in support of the doctrine and showed, to every one's entire satisfaction, that judges were not liable to an action by the party for what they did as judges; that no averment was admissible that a judge of record had acted against his duty; that if even a justice of the peace should record that, upon his view as a force which was no force, he could not be drawn in question, for it is a judicial act; that, in like manner, jurors were not responsible for their verdicts because they were judges of fact; and he added, in this emphatical language, "that it would expose the justice

⁶⁵ Entries # 82, 108, 194, and 410.

⁶⁶ Dennis Rubini, "The Precarious Independence of Judges," *Law Quarterly Review*, 83 (1967), 343-45.

⁶⁷ The English case, *Philips v. Berry* (1694), is reported in 1 Raymond 5, and is cited in George Wythe, *A report of the case between Field and Harrison, determined by the High Court of Chancery, in which the decree was reversed by the Court of Appeals* (Richmond, 1796), 19-20.

⁶⁸ 1 Lord Raymond 18.

⁶⁹ Legal Commonplace Book, # 244, 245.

of the nation, and no man would execute the office of judge, upon peril of being arraigned, by action or indictment, for every judgment he pronounces.”⁷⁰

Jefferson cited this case and noted of its holding, “a judge is not answerable for errors of judgment in a matter of which he has jurisdiction.”⁷¹ Of the 555 common law entries in the Legal Common Place Book, Jefferson cited Holt by name for majority opinions in 54, and in another 106 without naming him. What is more significant, however, is that he cited Holt by name twelve times in dissent – that is, for opinions that were not settled law in England, but which Jefferson regarded as noteworthy. Where Salkeld had omitted some matter by Holt that Jefferson later encountered in a report by Lord Raymond, Jefferson interlined the latter citation.⁷²

Holt was the ideal source for the transmission of those earlier ideas into the eighteenth century and across the Atlantic. While the great whig battles of the seventeenth century had been fought to establish parliament’s supremacy over the crown, Holt saw how Parliamentary supremacy was equally dangerous and in need of limitation. Writes Philip Hamburger,

Even more revolutionary than the political philosophy Holt had assimilated was the use to which he put it. He had participated in the Revolution of 1688 as a legal advisor to the Lords, as a member of the Convention of 1689, and, indeed, as a manager on behalf of the Commons in their conference with the Lords about James II’s “abdication.” In 1702, still having an attachment to the principles of the Revolution, Holt recognized that these principles could have general application - that many of the objections to unlimited monarchical power could, if stated generally, also apply to unlimited parliamentary power.⁷³

Jefferson admired the whig tradition in law, especially as it had now been

⁷⁰ *Yates v. Lansing*, 5 Johns. 282, 294-95 (1810). Kent was citing *Groenvelt v. Burwell* (12 Mod. 386; 1 Ld. Raym. 454) (1700).

⁷¹ Legal Commonplace Book, #170.

⁷² *Ibid.*, #141.

⁷³ Philip A. Hamburger, “Revolution and Judicial Review: Chief Justice Holt’s Opinion in *City of London v. Wood*,” 94 *Columbia Law Review.*, 94 (1994), 2136-2137.

translated into terms resonant with the growing contest between colonial interests and those in England, whether royal or Parliamentary. He never abandoned that vision, and in retirement lamented the fact in the United States as well as in England it no longer motivated lawyers. Writing in 1814, he expressed his “reprobation of our merchants, priests, and lawyers, for their adherence to England and monarchy, in preference to their own country and its Constitution.... Lawyers have, in the mother country, been generally the firmest supporters of the free principles of their constitution. But there, too, they have changed. I ascribe much of this to the substitution of Blackstone for my Lord Coke, as an elementary work.”⁷⁴

Refusing to yield his republican adherence to the rule of law, he urged faithfulness to its core values of civic engagement and advocacy, providing a Jeffersonian tradition of lawyerly activism that would, in fact, endure into the next century.⁷⁵ For Jefferson, victories did not constitute the sum of the project. His careful accumulation of legal records, to be used in future cases, resonates with the efforts of many of today’s advocates who, writes one scholar of our contemporary situation,

see themselves as bearing witness to injustices of the present, and they see litigation as a way of memorializing those injustices. They seek to ‘make a record’ as a way of appealing to the future. Litigation for them thus has two audiences, the audience of the present and an audience of the future, an audience whose attention the cause of abolition will be galvanized, these lawyers believe, by the cumulation of individual stories of injustice.⁷⁶

⁷⁴ Jefferson to Horatio G. Spafford, 17 March 1814, *WTJ*, 14: 119-20.

⁷⁵ For a brief description of the republican tradition of the independent advocate capable of undertaking causes, see Robert W. Gordon, “The Independence of Lawyers,” *Boston University Law Review*, 68 (1988), 14-16.

⁷⁶ Richard Abel, “Speaking Law to Power: Occasions for Cause Lawyering,” in *Cause Lawyering. Political Commitments and Professional Responsibilities*, ed. Austin Sarat and Stuart Scheingold, New York, 1998), 19. See also Edward Dumbauld, “A Manuscript from Monticello. Jefferson’s Library in Legal History,” *American Bar Association Journal*, 38 (1952), 389-92, 446-47.

Jefferson's legacy of whig lawyering also includes, therefore, his posthumously published reports of cases involving, among other subjects, his own failed efforts to repudiate the recognition of Christianity within the common law, or to free a person of color wrongfully held in servitude.⁷⁷

To see beyond the blinders of our presentism toward cause lawyering, we must sharpen our understanding of what that concept actually involves in practice. It is, first and foremost, a much humbler process, undertaken on a daily basis by countless attorneys using the legal system for the achievement of modest goals limited to the protection of individuals – not the spectacular landmark cases so beloved by the media and popular culture.⁷⁸ Second, as the two of the most eminent scholars of the subject remind us, “almost everywhere cause lawyering is more powerful as a shield against abuse than as a sword to achieve substantive goals.”⁷⁹ This Jefferson understood. “The ground of liberty is to be gained by inches,” he wrote in 1790, “and we must be contented to secure what we can get, from time to time, and eternally press forward for what is yet to get. It takes time to persuade men to do even what is for their own good.”⁸⁰

Jefferson's attention to Holt (and what he stood for) bespeaks an interest beyond that of a young practitioner. Where other aspiring members of the Virginia bar concentrated on the practical aspects of pleading, marching alphabetically through

⁷⁷ Thomas Jefferson, *Reports of Cases Determined in the General Court of Virginia. From 1730, to 1740, and from 1768, to 1772*, comp. Thomas Jefferson Randolph (Charlottesville, 1829). The two items are a “Disquisition of my own on the most remarkable instance of Judicial legislation, that has ever occurred in English jurisprudence, or perhaps any other,” entitled “Whether Christianity is a part of the Common Law?” (v-vi, 137-42) and his report of *Howell v. Netherland* (1770), 90-96.

⁷⁸ For the distortions about law created by such major cases, see Robert Ferguson, *The Trial in American Life* (New York, 2008).

⁷⁹ Editors’ “Introduction,” in *Cause Lawyering. Political Commitments and Professional Responsibilities*, ed. Austin Sarat and Stuart Scheingold (NY, 1998), 14.

⁸⁰ Jefferson to Rev. Charles Clay, 27 January 1790, *WTJ*, 8: 4.

Bacon's *Abridgement*, starting with "Abatement" and proceeding to compile a useful reference to carry with them on circuit through Virginia's counties, or for their appellate practice in Williamsburg, Jefferson followed his whig interests. His idiosyncratic method of study reveals, under careful scrutiny and through the application of sleuthing usually not applied to a man whose copious and blunt writings seem to make it unnecessary, the influences shaping his mind and, ultimately, his actions. Tracing the influence of ideas is a difficult challenge to the historian, made all the more difficult by the extraordinary breadth of reading that Jefferson did and the vastness of his library. But his preparation for the bar, and his early activities in that practice, can be teased out to cast light on a dimension of the man more commonly left in the shadows.

To illustrate this process we should turn to the way in which he learned the law and the context of lawyering as he studied it. Our perspective in the twenty-first century makes it very difficult to identify – much less to appreciate – these efforts, for what we now refer to as "cause lawyering" -- has taken on a much different nature. The firm foundation of civil rights and civil liberties on express constitutional guarantees leads us to seek grand statements of principle based on the Bill of Rights or the equal protection clause of the Fourteenth Amendment. As John Phillip Reid reminds us, however, constitutional rights in the eighteenth century were not what they became in the twentieth century; many "existed in quite different guises" and those that resemble our own they were secured in a much different manner.⁸¹ Most notably, they were not enforced through the striking down of laws as "unconstitutional" through judicial review. That principle, though incipient and partially formed, did not yet exist. Instead, it might be accomplished through civil litigation. In checking the power of British troops occupying

⁸¹ Reid, *Authority of Rights*, 4-5.

Boston, for example, a civil action of trespass “was as much justification for military timidity as was constitutional law.”⁸² The clash over law – of whig versus tory – in England was transferred to North America as a struggle over what was deemed legitimate authority under the constitution. As Reid explains, “the imperial government premised its claims on the eighteenth-century British constitution of parliamentary supremacy, while American whigs defended colonial rights by appealing to the seventeenth-century English constitution of customary restraints on arbitrary power.”⁸³

Jefferson’s commonplacing of Holt reveals his attention to the principles and practices of the whig lawyering tradition, for Holt as chief justice of King’s Bench presided at many clashes of law and power. One such case will, it is hoped, sum up the issues and methods. It is a case, we can state confidently, that attracted Jefferson’s attention and piqued his interest. Usually a report provided him with a single point (what he called “the pith of the case”) to commonplace, but this case he cited in two separate entries and gave it special attention by inserting it as a marginal note to amplify a point he had noted many years earlier in an earlier entry. His practice was, as once explained, to include “what I read meriting it”⁸⁴; this case certainly merited his attention.

The case was that of *Lane v. Cotton and Frankland*,⁸⁵ a simple action on the case brought when a letter mailed by the plaintiff, “to be sent by the post from London to Worcester, by the negligence of the defendants in the execution of their office, was opened in the office, and divers Exchequer bills therein inclosed were taken away.”

⁸² John Phillip Reid, *In Defiance of Law. The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (Chapel Hill, 1981), 207-208.

⁸³ Reid, *Defiance*, 3.

⁸⁴ Jefferson to Dr. Thomas Cooper, 10 February 1814, *WTJ*, 14: 85.

⁸⁵ 1 *Ld. Raym* 646, 91 ER 1332 (KB 1701).

The defendants, Sir Robert Cotton and Sir Thomas Frankland, pleaded that they were not liable; rather, their deputy in the London office where the loss occurred, one Underhill Breese, was receiver of all post deposited there and was thus by law chargeable with the damages.⁸⁶ With this plea the court agreed and held for the defendants.

Jefferson did not encounter this case until well into his commonplacing – he cited in his entries #407 and #408, which he might have made as late as 1770. When he did so, however, he returned to an entry, #59, which he had made perhaps as much as five years earlier, in 1765, when he made his first entries.⁸⁷ In 1765 he had been studying Coke’s *Institutes*, and was summarizing items in the third volume when he extracted from Coke’s discussion “Of Simony and Corrupt Presentments,” which concerned ecclesiastical matters, a point noteworthy for its broader, secular import. The matter was the king’s ability, by an order known as *non obstante*, to dispense with a penalty in a particular case. Coke supported this authority when the penalty went to the king alone or to him and the informer. By contrast, Coke made it clear that the king had no such power when the act was “tortuous for the good of the Church, or Common-wealth,” because “in this law all the Kings subjects have an interest, and therefore the King cannot dispence therewith no more than with the Common law.”⁸⁸ The gravamen of this case to Jefferson (who notably omitted the Church’s interest) concerned “acts of parliament which are for the good of the commonwealth and in which all the king’s subjects have an interest.”⁸⁹

The point would take on greater import several years later when Jefferson read Holt’s report of *Lane*. On reading the report he went back to #59 and marked Coke’s

⁸⁶ Ibid.

⁸⁷ Wilson, “Jefferson’s Early Notebooks,” 444.

⁸⁸ 3 Inst. 154, ch. 71.

⁸⁹ Legal Commonplace Book, #59.

comment about the interests of “all the king’s subjects” with an asterisk, referring himself to *Lane*, which he then commonplacated twice, in # 407 and #408. In the former, his comment was brief, simply to note that one of the justices had held that the postmasters were not liable because they “had no premium from the pl[aintiff] for carrying [the bills].” Jefferson cited Holt’s answer that a postmaster “has a salary paid out of the profits of the office.”⁹⁰ This seemingly minor point led Jefferson to a much longer citation in #408, for it is there that we see Holt’s – and Jefferson’s -- spotting of issues that made this civil action for damages a whig action of a constitutional nature. The three other justices hearing the case had shielded the postmasters from liability by shifting it to Breese, their servant, who was chargeable for damages for several reasons. Any contractual relationship, said Sir Henry Gould, was between the plaintiff and Breese, not the defendants. In fact, “Breese had a charge and trust of himself, and was not a deputy of the defendants” because he was paid by the receiver-general (ultimately, by the king), not the defendants.

The dispute brought into conflict two sharply differing notions of law and government – tory and whig. The three-judge majority based its decision on their belief that “[t]his office is founded in Government, and reposed in the King.”⁹¹ The only remedy, said Gould, would be to sue Breese, or to request that the king remove him. Invoking the fellow-servant rule to negate the historic common law principle of *respondeat superior*,⁹² they held that the postmasters had no liability because they had no direct supervision over Breese, who was one of perhaps hundreds of individuals working for the post.

⁹⁰ *Ibid.*, #407.

⁹¹ *Ibid.*, at 648.

⁹² “Let the master answer.”

Holt's dissent announced whig law: repeatedly he used the term "trust" to describe the duty of anyone holding government office: "the postmaster is by this act intrusted with the interest and property of the subject," Holt argued. A postmaster could not give direct supervision of his servants, but he had the power to hire and fire them, and thus assumed responsibility, because "by the nature of the trust he ought safely to keep all letters there at his peril in his custody."⁹³ To Gould's holding that "this office is founded in Government" Holt made a robustly whig reply: if Gould meant that the office and its duties were founded on law, it was "a different sort of law," on a statute that did not overrule the common law. "And he [Holt] did not see in what sort of Government it was otherwise founded, but only that a trust is given for the benefit of the subject."⁹⁴ When the majority objected that if Holt's reasoning prevailed, "This will ruin the office," Holt was blunter still: "It will make them more careful."⁹⁵

Holt was a minority of one, but his arguments were such that the plaintiff's threat to bring a writ of error led the defendants to repay the lost value. What Jefferson took away from this case – at least what he recorded in his notes – was not the talk of public trust and governmental responsibility. These were axiomatic for him. Rather, he identified what any good whig lawyer would: namely, the legal points that Holt had made (and which quoted verbatim) concerning whether "for misfeasance of a deputy an action will lie against him, not qua officer, but qua tort-feasor." The point was important, because it removed the defendants from behind the shield of royal service to that of ordinary citizens, subject to the same obligations as a gaoler or innkeeper, by which "the

⁹³ Ibid., at 651. The act was 12 Car. 2, c. 35.

⁹⁴ Ibid.

⁹⁵ Ibid., at 657.

act of the deputy is the act of the principal.”⁹⁶ Holdsworth, the great historian of English law, locates in Holt’s opinion in *Lane* exactly what Jefferson also saw and absorbed: “an instance of a strain of legal conservatism which characterizes some of his other decisions and dicta.”⁹⁷ Like any good whig lawyer, he found the law in the customary privileges of the past, and he would make good use of them just a few years later in the Declaration of Independence.

⁹⁶ Legal Commonplace Book, # 408.

⁹⁷ William S. Holdsworth, *Some Makers of English Law. The Tagore Lectures* (Cambridge, Eng., 1938), 156.