

Jefferson, Natural Law, and the Problem of Slavery during the Revolutionary Period

William G. Merkel*

ABSTRACT

Thomas Jefferson's one-time image as a principled opponent of slavery has been heavily criticized for more than forty years. This article reassesses Jefferson's early writings on legal and constitutional questions concerning slavery, and makes the case that the revisionists' proslavery image is oversimplified and problematic. The article focuses on the first period of Jefferson's professional and political life, when he practiced law in Virginia's colonial capital Williamsburg, represented Albemarle County in the Burgesses, authored the *Summary View of the Rights of British America* (1774), and served as principal draftsman of the *Declaration of Independence*. After exploring Jefferson's commitment to Whig readings of the common law, English history, and English constitutionalism, the article surveys Jefferson's seven-year career as a property lawyer. It analyzes in detail Jefferson's argument in *Howell v. Netherland*, a freedom suit appealed to the General Court of Virginia in 1770, and then considers his rhetoric respecting African slavery and alleged plans for political enslavement of British North America in his classic state papers the *Summary View* and the *Declaration of Independence*. The natural rights arguments Jefferson employed in *Howell v. Netherland*, the *Summary View*, and the *Declaration of Independence* reflected a philosophy essentially inimical to chattel slavery. At the same time, the nuanced understanding of estates in land that Jefferson developed as a student and practitioner caused him to think in terms of conflicting and multivalent interests in property instead of Romanesque conceptions of *dominium* or absolute and unconditional ownership. This historically conditioned understanding of property equipped Jefferson to question the propriety and defensibility of objectification of human beings. Later in life, when he took a leading role in forming the policies of the new American nation, Jefferson de-prioritized claims for African American liberty. But in the early 1770s, Jefferson, provincial slaveholder and common lawyer that he was, embraced progressive anti-slavery tenants as yet little different from those animating the nascent anti-slavery vanguard in England and the North.

* Associate Professor of Law, Washburn Law School; J.D. Columbia; D. Phil. (history) Oxford. Thanks to Colin Bonwick (Keele), Richard Carwardine (Oxford), Sarah Barringer Gordon (U. Penn), Thomas Grey (Stanford), Daniel Howe (Oxford, UCLA), David Thomas Konig (Washington University St. Louis), Larry Kramer (Stanford), and Peter Onuf (Virginia) for their helpful comments and advice. Special thanks to Larry Crow, my research assistant at Washburn.

PART I: THE JEFFERSON IMAGE

Thomas Jefferson, once the object of wide veneration, is no longer universally beloved among academics and intellectuals. Indeed, one could state this proposition more boldly: More than a few contemporary historians, cultural theorists, and belles-lettrists appear to dislike Jefferson more intensely than most of us dislike anyone actually living, with whom we are personally familiar, for better or for worse. To be sure, most (but not all) of these highly critical voices disavow any personal malice towards Jefferson, yet in a great many cases, the disavowals have the air of mere polite forms of words, while the animosity lingers palpably on the printed pages of recent books and journals.¹

Perhaps legal academics are more forgiving in their assessments of Jefferson than the humanists.² Scholars and advocates of religious liberty in particular continue to celebrate Jefferson as a pioneer, or at least a committed

¹ See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2001); Connor Cruise O'Brien, *Thomas Jefferson: Radical and Racist*, A. MTHLY. (Oct. 1996); Michael Zuckerman, *The Power of Blackness: Thomas Jefferson and the Revolution in St. Domingue*, in *ALMOST CHOSEN PEOPLE: OBLIQUE BIOGRAPHIES IN THE AMERICAN GRAIN 175* (Michael Zuckerman ed. 1993); Paul Finkelman, *Jefferson and Slavery: Treason Against the Hopes of the World*, in *JEFFERSONIAN LEGACIES 181* (Peter S. Onuf ed. 1993). Pauline Maier's denial of animosity towards Jefferson has about it a gleam of truth, but her form of words is closely replicated by others who might be suspected of harboring less charitable opinions. See PAULINE MAIER, *AMERICAN SCRIPTURE: HOW AMERICA DECLARED ITS INDEPENDENCE FROM BRITAIN xvii* (1999) (1997) ("Perhaps I should also explain I bear no animus towards Jefferson. True, I once nominated him the most overrated person in American history . . ."). For a balanced assessment of Jefferson and many of his recent detractors, see Benjamin Schwartz, *What Jefferson Helps to Explain*, A. MTHLY. (Mar. 1997).

² See, e.g., THOMAS JEFFERSON AND *BOLLING V. BOLLING: LAW AND THE LEGAL PROFESSION IN PRE-REVOLUTIONARY AMERICA 24-26, 58-60* (Bernard Schwartz et al. eds., 1997) (glowing account of Jefferson's lawyerly talent); Jack N. Rakove, *Our Jefferson*, in *SALLY HEMINGS & THOMAS JEFFERSON: HISTORY, MEMORY, AND CIVIC CULTURE 210-235* (Jane Ellen Lewis and Peter S. Onuf eds. 1999) (on Jefferson's constitutionalism), LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW, 45-49* (2004) (on Jefferson's constitutional principles, with particular reference to separation of powers and democratic legitimacy), BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY, 55-76* (2005) (on Jefferson's sage and public spirited political judgment during the electoral crisis of 1800).

progressive.³ Still, in the law schools as in other fora, Jefferson has come under closer invigilation in recent years, and lost much of his former luster in the process.⁴ But if truth be told, Jefferson—while often widely revered—has never been universally beloved. Enormously controversial in his own life time, the third president was simultaneously an apostle of liberty to his supporters, a wild eyed zealot to his critics, and a scheming hypocrite to his staunchest opponents. His public image was contested while he lived and has ebbed and flowed since his death, frequently being co-opted or disowned by one side or another in national political struggles focused on order and liberty, localism and federal authority, individualism and the collective good, the utility and meaning of history, and even the meaning of (moral) meaning.⁵

For all the rancor associated with the Jeffersonian image through the course of American history, no aspect of Jefferson’s life, thought, and work has attracted more critical attention and hostile reaction over the last forty some years

³ See, e.g., PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE, 3(2002) (saying scholars of the Virginia Statute for Religious Freedom are much more likely to accept a central role for John Locke in Jefferson’s thought than are scholars of the Declaration of Independence). See FRANCIS D. COGLIANO, THOMAS JEFFERSON: REPUTATION AND LEGACY, 165 n. 44 (2006). Interestingly, even Leonard Levy, who perhaps did as much as anyone to usher in the modern phase of post-hagiographic Jefferson studies, acknowledges Jefferson’s bona fides respecting religious liberty. LEONARD LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE, 4-8(1963).

⁴ See Finkelman, *supra* note 1, at 211-212. “Yes, there had been ‘treason against the hopes of the world.’ The treason was by that generation which failed to place the nation on the road to liberty for all. No one bore a greater responsibility for that failure than the author of the Declaration of Independence—the Master of Monticello.” The phrase “treason against the hopes of the world” is Jefferson’s, who used it in 1820 to describe the guilt that would attend the break up of the Union (and hence betrayal of the spirit of 1776 and failure of the one shining example of republican governance in the world) if the Missouri Crisis was not abated and resolved. See Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in JEFFERSON: WRITINGS, Merrill D. Petersen, ed. 1434 (1984).

⁵ MERRILL D. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND (1960) is the classic study of Jefferson’s multifaceted and highly politicized image from his death to the mid-twentieth century; Cogliano, *supra* note 3, provides an updated and contemporized perspective on various aspects of Jefferson’s reputation and legacy. The express linkage of Jefferson to the problem of discovering the meaning of (moral) meaning goes back at least as far as nineteenth century biographer James Parton, who in 1874 mused, “if Jefferson was wrong, America is wrong. If America is right, Jefferson was right,” quoted in Gordon S. Wood, *The Trials and Tribulations of Thomas Jefferson*, in Onuf, *supra* note 1, at 395.

than his involvement with—and stance towards—African American slavery.⁶ The heightened scrutiny of recent decades has served a useful corrective purpose regarding Jefferson’s connection to slavery, which some earlier more hagiographic writers had frequently been quick to gloss over and explain away. Few would now deny that Jefferson’s complex and troubled (or simply troubling?) relationship with slavery was animated by attitudes towards African Americans that were at times more malign than munificent. And today, the stark contrast between the avowal of liberty in the *Declaration of Independence* and the practice of slavery in Jeffersonian America angers and intrigues scholars as it once angered and intrigued some of Jefferson’s contemporaries.⁷ Why indeed, one might ask with Dr. Johnson, were the loudest yelps for liberty heard from the drivers of Negroes?⁸ The question cannot lightly be dismissed, but neither, I suggest, are the contradictions between Jeffersonian practice and principle as simple and straightforward as some scholars now assume.

When Jefferson died on July 4th, 1826—50 years exactly since the first public reading of his celebrated proclamation in favor of universal liberty—most of his remaining slaves passed with his bankrupt estate into the hands of receivers and thence to the auction block. Jefferson freed only five slaves in his will, all members of the Hemings family, and so very probably blood relatives of his long deceased wife, Martha.⁹ In two cases, the manumitted were probably, or at least

⁶ See Finkleman, *supra* note 1; CONNOR CRUISE O’BRIEN, *supra* note 1, Zuckerman, *supra* note 1 ; GARRY WILLS, “NEGRO PRESIDENT:” JEFFERSON AND THE SLAVE POWER (2003).

⁷ See e.g. PAUL FINKLEMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* ix (2d ed. 2001) (“[D]espite Jefferson’s fine words and our belief in this credo, it is clear that liberty was not available to most African-Americans at the time of the founding. . . . I argue that Jefferson himself, who owned over 150 slaves when he wrote the Declaration, did not in fact believe that blacks were entitled to the same rights as other Americans.”).

⁸ Johnson’s famous query “How is it that we hear the loudest yelps for liberty among the drivers of negroes?” appeared originally in the pamphlet *Taxation No Tyranny: An Answer to the Resolution and Address of the American Congress* (1775) reprinted in JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 876 (World’s Classics Ed. 1980) (1791).

⁹ It has long been widely assumed that Jefferson’s father-in-law John Wayles lived in more or less open concubinage with his slave Betty Hemings, and thus became the father of Sally Hemings, who relocated to Monticello along with her mother and other family members after Wayles’ death in 1774. The question whether any members of the next generation of Hemings were the children of Thomas Jefferson and Sally Hemings (presumably Mrs. Martha Wayles Skelton Jefferson’s half-sister) has famously provoked heated debate, impassioned denial, and painstaking genetic analysis. See, e.g., Eugene A. Foster et al., *Jefferson Fathered Slave’s Last Child*, *NATURE* (Nov. 5, 1998); Eric S. Lander & Joseph J. Ellis, *Founding Father*, *NATURE* (Nov. 5, 1998). The Jefferson Foundation’s official position is that Thomas Jefferson’s paternity of some of Sally Hemings’

possibly, his own children.¹⁰ But Jefferson's anti-slavery legacy is hardly as hollow as many recent commentators—Joseph Ellis, Paul Finkelman, and Connor Cruise O'Brien among them—insist.¹¹ For all his racism, which these writers rightly emphasize, Jefferson never accepted the legitimacy of slavery. The man who played a leading role in ushering America towards independence could also see himself as the target of a justifiable revolution by his own slaves. In 1800, when a major uprising of Virginia slaves under the leadership of Gabriel (or Gabriel Prosser) was narrowly averted, Jefferson urged deportation rather than execution of the slave conspirators, on the grounds that their actions were legally justified.¹²

Jefferson's letter to Governor James Monroe three weeks after the failed uprising, urging the Governor to “stay the hand of the executioner,”¹³ was not the only action of Jefferson's long life that could plausibly be labeled “anti-slavery.” His proposed Constitution for Virginia of 1783, composed while constitutional revision appeared likely in the Old Dominion, included a gradual emancipation clause that would have freed all persons born to enslaved mothers in the state after 1800.¹⁴ His draft of the Territorial Governance Act (or Ordinance) of 1784,

children is highly probable, *see* REPORT OF THE MONTICELLO RESEARCH COMMITTEE ON THOMAS JEFFERSON AND SALLY HEMINGS, http://www.monticello.org/plantation/hemingscontro/jefferson-hemings_report.pdf, but prominent voices may still be heard in defense of the old scholarly consensus that a relationship between Sally Hemings and Thomas Jefferson was unlikely, *see, e.g.*, Robert F. Turner et al., *Report of April 12, 2001* (Paul Rahe dissenting) (Turner reported in conversation with the author in fall 2006 that the report was finally nearing publication). To my knowledge, neither historians nor Jefferson's descendants have ever expressed reservations about the assumptions that John Wayles cohabited with Betty Hemings, and that he was Sally Hemings' father.

¹⁰ The persons freed in the will were Burwell (no surname), John Hemings, Joe Fosset, Madison Hemings, and Easton Hemings. Sally Hemings, fifty-three years old in 1826, was not emancipated. Madison Hemings, aged twenty-one, and Easton Hemings, aged eighteen, were her sons; her other light-skinned children had already “run-away” or passed into the white community. *See* FAWN M. BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 466 (1974).

¹¹ ELLIS, *supra* note 1, at __; Finkelman, *supra* note 1, at __; Connor Cruise O'Brien, *supra* note 1, at __.

¹² *See* William G. Merkel, *To See Oneself as a Target of Justified Revolution: Thomas Jefferson and Gabriel's Uprising*, 4 AM. 19TH CENT. HIST. 1 (2003).

¹³ Letter from Thomas Jefferson to James Monroe (Sept. 20, 1800), in 7 THE WRITINGS OF THOMAS JEFFERSON 457 (Paul Leicester Ford ed. 1892-99) [hereinafter Ford].

¹⁴ In the end, Virginia summoned no constitutional convention in 1783, and the Constitution of 1776 remained in force until 1830, but Jefferson's proposal was reprinted in early editions of the NOTES ON THE STATE OF VIRGINIA. *See Draught of a Fundamental Constitution* (first English edition 1787, first French edition (in

contained a clause that would have barred slavery from all of the new American nation's western territories after 1800 had it not failed to pass by the narrowest possible margin.¹⁵ And in December, 1806, with the federal constitutional prohibition against slave trade abolition soon scheduled to lapse, President Jefferson successfully pressed Congress to abolish the slave trade at the earliest possible juncture.¹⁶ Jefferson made still other anti-slavery overtures during the Revolutionary period,¹⁷ but the focus in this paper is on three papers Jefferson authored during the years immediately preceding independence. The first, described in Part III, is Jefferson's opinion (or argument) in *Howell v. Netherland*, an appeal of provincial freedom suit in 1770¹⁸ that anticipated the *Somerset* decision of 1772 in which Lord Chief Justice Mansfield held that slavery was

English) 1785), in THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 215 (William Peden ed. 1972) (1954) [hereinafter NOTES ON VIRGINIA].

¹⁵ See Report of a Plan of Government for the Western Territory (and accompanying editorial notes) in 6 THE PAPERS OF THOMAS JEFFERSON 581-618 (Julian P. Boyd et al. eds. 1950-) [hereinafter Boyd].

¹⁶ *6th Annual Message* (1806) in 3 Lipscomb, *supra* note 4, at 421.

¹⁷ In NOTES ON VIRGINIA, Jefferson reported that the Committee of Revisors (Jefferson, Edmund Pendleton, & George Wythe) who were charged shortly after independence with undertaking a revision of Virginia's laws for submission as individual bills to the state legislature, drafted a proposed statute to provide for comprehensive gradual emancipation linked to colonization of the freed persons to locations outside the commonwealth. This plan was to be presented as an amendment to Bill No. 51 on slavery once that bill was brought forward, but was not included in the report the Revisors made to the Assembly, lest its publication prior to actual legislative deliberation provoke a fatal conservative backlash. See NOTES ON VIRGINIA, *supra* note 14, at 137-38. The amendment was never moved, and no transcript of it survives. See 2 Boyd, *supra* note 15. Jefferson's explanation that the emancipation scheme was kept out of the public light for reasons of legislative strategy appears credible given the extreme reaction to other emancipation proposals of the era. Cf. 29 Boyd, *supra* note 15, at 489 (on the fate of St. George Tucker's emancipation proposal submitted to the Virginia General Assembly in 1797).

¹⁸ *Howell v. Netherland* (1770). There is no official report of the case, but Jefferson's argument for the claimant is found in REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730 TO 1740 AND FROM 1768 TO 1772 (Thomas Jefferson ed. 1832) [hereinafter REPORTS OF CASES], *reprinted in* 1 Ford, *supra* note 13, at 373-74. David Thomas Konig of Washington University in St. Louis, who is completing a comprehensive study of Jefferson's legal thought and career, reports that Jefferson argued six freedom suits (all of them pro bono) between 1767 and 1776, see Konig, Antislavery in Jefferson's Virginia: The Incremental Attack on an Entrenched Institution (18 June 2006) (unpublished conference paper for "Too Pure an Air: Law and the Quest for Freedom, Justice, and Equality," University of Gloucestershire, UK) (on file with author).

incompatible with the common law.¹⁹ The second, discussed in Part IV, is the *Summary View of the Rights of British America*, an important revolutionary pamphlet secretly authored by Jefferson in 1774 to steel Virginians' resolve in resisting British colonial policies that Jefferson likened to slavery. The third paper analyzed here is the *Declaration of Independence*—more specifically the purged sections of the Declaration condemning slavery and the slave trade—the subject of Part V of the Article. One of the central claims of this Article is that Jefferson's common law and Whig constitutionalist mentalities shaped his early anti-slavery beliefs. Jefferson's legal education and seven-year career as a practicing lawyer form the subjects of the next Part of this Article.

PART II: JEFFERSON THE LAWYER

After two years reading arts and sciences at the College of William and Mary, Jefferson commenced his legal studies in late 1762 under the supervision of George Wythe in Williamsburg. Wythe practiced at the General Court, the highest tribunal in the colonial capital, and also held an appointment at the College, where he had taught Jefferson classics. William and Mary did not yet offer law as a degree course, but in 1779 the College appointed Wythe to the first law professorship in the United States. Wythe, one of the great legal educators in American history, went on to train up generations of lawyers including John Marshall, James Monroe, and Henry Clay; taken together, Wythe and his pupils numbered among the leading lights of the American Bar for over a century. Prior to the establishment of the professorship and institution of lecture courses at the College, Wythe took on pupils in his chambers. His standard mode of instruction during the 1760s, followed by Jefferson and his contemporaries, included directed reading, supervised drafting of pleadings and instruments, moot courts (said to be a Wythe invention), and attendance at the General Court and Williamsburg Hustings.²⁰

There is no doubt that Jefferson's preparation for a legal career was uncommonly thorough by the standards of his or any other age, but the familiar claim that he studied law for five years is probably somewhat misleading. Frank

¹⁹ *Somerset v. Stewart*, Loft 1, (1772), 98 Eng. Rep. 499 (K.B.). The official report is more readily available in T.B. HOWELL, 20 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER MISDEMEANOURS FROM THE EARLIEST PERIOD TO THE YEAR 1783 1 (1816) [*hereinafter* STATE TRIALS]. The most complete and accurate transcript of the case, including the argument of counsel and supporting briefs, is housed at the New York Historical Society on Central Park West, where it can be found in the folder labeled "Granville Sharp Papers (miscellaneous manuscripts in his hand)." On the significance of *Somerset*, see also the recent symposium "*Somerset's* Case Revisited," 24 L. & Hist. Rev. 601 (2006) (featuring a major article by George Van Cleve and comments by Daniel Hulsebosch and Ruth Paley).

²⁰ There are two biographies of Wythe: WILLIAM CLARKIN, *SERENE PATRIOT: A LIFE OF GEORGE WYTHE* (1970); IMOGENE E. BROWN, *AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE* (1981).

Dewey, who laboriously reconstructed Jefferson's legal education and career by consulting relevant post-1769 correspondence, public records, newspaper articles, and Jefferson's *Case Book*, *Fee Books*, and *Docket Books*, concludes that Jefferson began his work with Wythe in November, 1762, went home to Shadwell shortly thereafter to read Coke's *Institutes* and other foundational texts in law and the humanities, and returned to Williamsburg in October, 1763 for two years of closely supervised instruction. In October, 1765, Jefferson passed his first bar examination, allowing him to practice in the county court of any Virginia county where he took the oath. But Jefferson never practiced before county magistrates. A year after admission on the county level, Jefferson became eligible to present himself for a second examination and consideration for admission to the General Court in Williamsburg. He was admitted, and immediately opened his practice, embarking upon a seven year career as an attorney.²¹

A. G. Roeber's careful study of lawyers and courts in eighteenth century Virginia has elucidated tensions and conflicts between two models of justice that persisted in the colony (and indeed in the English speaking world) throughout the colonial and revolutionary eras.²² The dominant pattern throughout the period was one of local justice, administered by amateur squires sitting as county magistrates, supervising more or less deferential but at times independent juries, before which professional and law-trained advocates enjoyed no advantages (and indeed encountered considerable resentment), and in which metropolitan law (reduced to statute by legislatures, memorialized by learned treatise writers, or committed to print in the opinions of appellate judges) was often less important than local norms and expectations. At the opposite pole was professional law, practiced by full-time specialists, adjudicated before learned courts, and governed by the law known to scholars and established by authorities. In the mother country, this was the law of King's Bench and Common Pleas, the law of the Inns of Courts and of Chancery, the law of London, not of the justices of the peace and the country squires. In Virginia, to the extent that metropolitan law was enforceable, it was the law practiced before the General Court. As Roeber explains, through the course of the century, local magistrates turned away enumerable reform efforts in the Burgesses designed to shift power to trained judges and practitioners, but by Jefferson's day, the General Court, for the first time, was exercising substantial authority as a court of appeals with jurisdiction as to both law and equity, reviewing decisions by the

²¹ FRANK L. DEWEY, *THOMAS JEFFERSON, LAWYER 1762-1770* (1986). Jefferson's *Case Book*, *Fee Books*, and *Docket Books*, containing minimalist entries respecting the names of clients, costs advanced and fees charged, pleas entered, disposition, and money collected or written off, were accessible only in manuscript form in the dispersed collections of the Library of Congress, the Massachusetts Historical Society, and the Huntington Library when Dewey completed his book, but are now published in *JEFFERSON'S MEMORANDUM BOOKS, ACCOUNTS, WITH LEGAL RECORDS AND MISCELLANY, 1767-1826* (James A. Bear, Jr. & Lucia C. Stanton eds. 1997) as part of Boyd, *supra* note 15.

²² A. G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810* (1981).

county magistrates, and as a court of first instance for felonies, pleas of the crown (private prosecutions of less serious felonies and misdemeanors not brought by the Attorney General in the name of the King), and important commercial matters over which the magistrates had lost jurisdiction.²³ The General Court, including the Royal Governor, comprised the same twelve individuals who sat as the Governor's Privy Council (in which capacity they heard what we would today call government law and administrative law matters). In an arrangement that surely would have troubled Montesquieu but was typical of colonial British America, the Council also exercised legislative functions (as the upper house), and executive duties (as advisers to the Governor).²⁴

The bar was bifurcated in colonial Virginia, but the division of function was not between barristers and solicitors as it was in England. Rather, county court practitioners and General Court practitioners were precluded from appearing in the others' courts, except that barristers (trained in England at the Inns of Court) who were admitted to the General Court were not excluded from the county courts. Attorneys admitted to county practice were far more numerous, serving each of the fifty-nine counties and the borough of Norfolk during the late colonial period, with various lawyers active in most counties, and county lawyers typically appearing in several adjoining jurisdictions. General Court lawyers were far less numerous (approximately ten during Jefferson's tenure), and more highly esteemed.²⁵ But their practice was less lucrative, with fees set by the legislature lower than those set for similar service in the county courts. There was seldom a majority in the Burgesses in favor of attracting trained lawyers to the colony, and setting low statutory rates was one way the "country" majority could keep power from migrating from magistrates to the "court."²⁶ While attorneys admitted to the General Court were expected to be more learned in the law, the practical reality is that they were also required to be men of independent means. Jefferson ultimately gave up the practice in part because it was not financially sensible to keep it open, his large client base and high reputation notwithstanding. But his time as a member of the colonial capital's elite bar solidified his reputation in the province, allowed him to enhance his connections among leading and influential men who shortly became principal figures in the Revolution, and cultivate a broader political base than he already enjoyed as a member of the Burgesses for Albermarle.²⁷

Jefferson was a thoroughly professional lawyer, and his academic, cosmopolitan temperament was better suited to a legal career in the colonial "metropolis" than to lawyering at the county assizes, where oratory and showmanship (not among Jefferson's great gifts) rated highly, and where there was far less time for research, analysis, and reference to published authority. And yet he

²³ *Id.* at 231-261.

²⁴ Dewey, *supra* note 21, at 18-25.

²⁵ *Id.* at 1-8.

²⁶ Roeber, *supra* note 22, at 73-159, *passim*.

²⁷ Dewey, *supra* note 21, at 83-93. The desire to spend more time with his new wife and supervise work on his newly begun home at Monticello also figured into the decision.

was a Westerner, attuned to western interests, and his clientele included settlers in recently established counties of the Shenandoah Valley and the forward slopes of the Alleghenies. While Jefferson never argued at the county hustings or assizes, he attended regularly in Albermarle and Augusta, trawling for clients who wished to appeal, bring other matters to the General Court, or, most especially, have titles to land registered in the capital. Apart from perfecting land claims and representing parties to title disputes (a ubiquitous concern owing to conflicting grants, multiple surveys, and numerous subsequent sales and devises), Jefferson's business focused on contested inheritances. These involved interests in land, and, in a great many cases, interests in slaves.²⁸

In a forthcoming study, David Konig argues that Jefferson developed a reputation as the leading authority on using the writ of detinue to assist heirs who wished to keep slave families intact when dispersal loomed likely to satisfy all creditors and legatees. Indeed, as late as 1808, practitioners were still seeking (and receiving) the President's advice on this use of the writ. Careful parsing of Jefferson's *Case Book*, *Fee Books*, and *Docket Books* will also allow Professor Konig to make an important and fascinating revelation: While it is widely known among scholars that Jefferson took an appeal of a freedom suit on behalf of a bound servant (this is the case of *Howell v. Netherland*, discussed in great detail in Part III), Konig has now established that Jefferson argued appeals in six freedom suits during his seven year career at the bar. He took all of the cases *pro bono*, and advanced filing fees and court costs on account of the clients. Jefferson did argue once on behalf of a master in a freedom suit, but the fact that he took six *pro bono* cases on behalf of claimants for freedom is significant.²⁹ *Howell v. Netherland* is the only one of these in which Jefferson's argument survives, so some speculation is required to form a generalized opinion. It appears that the claimants were all of mixed descent, typically (although not in Howell's case) seeking freedom on account of Indian ancestry. This suggests that Jefferson was more receptive to demands for liberty on behalf of persons not wholly African in heritage, but it is also true that non-African descent was by far the strongest and most likely argument to establish wrongful detention in servitude. The number of cases, and the fact that Jefferson financed them, also implies that Jefferson was emotionally invested in the cause, and that his reasoning in *Howell v. Netherland* cannot be explained away as a merely dutiful or mercenary exercise in advocacy on behalf of a suitor who presented himself at the law office.

Slavery and Property Law in Eighteenth Century Virginia

Jefferson's law practice focused on property, but what were the form and substance of the law of property that he applied in his work, and how did these

²⁸ *Id.* at 26-34.

²⁹ Konig, *supra* note 18. I deeply appreciate Professor Konig sharing his preliminary findings and allowing me to rely on his manuscript. The paper he gave me is un-paginated; pin-point citations are not yet possible.

doctrines bear on slavery?³⁰ The first point worth emphasizing is that when Jefferson plied his trade in Virginia, the common law was still very much the law of the writ system. Dating back to the Middle Ages, this highly elaborate and formalistic corpus of law (coextensive with the common law itself) did not elevate form over substance, but rather blended form and substance into one. In the classic words of Frederic William Maitland, under the writs, “each procedural pigeon-hole contains its own substantive law.”³¹ It is a familiar aphorism that causes were routinely lost because the wrong form of action was chosen. Jefferson’s *Legal Commonplace Book* reveals that he was meticulous, even obsessive about pleading; it is likely that he read and summarized every English case illustrating the form, nature, and function of the various writs available in Virginia in either treatises or reporters. Konig relates in his unpublished manuscript that Jefferson was reputed to be a master of pleading, not just in the sense of correctly reproducing the required form of words to allow a cause to be heard and remedied, but also in creatively tailoring ancient and complex devices to serve novel and contemporary purposes.³²

Jefferson’s use of detinue, a charge of unjust detainer (i.e. retention) but not unlawful taking of property, as a tool to address contested dispensation of a decedent’s slaves has been mentioned above. The unsuccessful defendant in a detinue suit had the option of surrendering the property to the claimant or paying money damages, that is, converting the property and acquiring ownership by means of a forced sale.³³ By the eighteenth century the writ was seldom used in England, but it became a mainstay in Virginia and other Southern courts to fill gaps in the common law created by the absence of English precedent on slavery and property in slaves. During his Williamsburg days, Jefferson copied reports of Virginia cases

³⁰ Anglo-American legal history is an enormous subject that has generated an abundance of first rate scholarly analysis, going back many generations. For England, J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* (4th ed. 2002), is an excellent modern introduction with a thorough bibliography. For the United States, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2nd ed. 1985), is still good but dated; it can be usefully supplemented by STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (6th ed., 2006).

³¹ FREDERIC WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 4 (1963). The writs relevant to slave-related adjudication in Virginia were detinue, trespass, debt, case, trover and assumpsit. Detinue is discussed in the main text. Trover differed from detinue in function in that the former required wrongful taking of the contested property prior to the suit. Trespass has been called (rightly or wrongly) the ancestor of actions in intentional tort, while case has been labeled (again, rightly or wrongly) the forbear of negligence. These actions were relevant with respect to wrongs committed by another’s slaves (the disputes centered on whether either master or slave could be held accountable). Assumpsit was an action for non-performance of a contract. See generally Baker, *supra* note 30, at 53-96.

³² Konig, *supra* note 18.

³³ THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* 6 (1996).

argued and determined in the General Court, including a number in which he participated, and others dating back to the 1730s.³⁴ These reports were published posthumously and now comprise the earliest run of entries in the official reporter for the Commonwealth's high court. Half of the cases in Jefferson's *Reports* concern slave property, and most of these involve highly complex arguments respecting actions in detinue. According to Konig, Jefferson was often retained by other counsel to handle the aspects of their cases covered within that writ, and Jefferson never represented parties seeking to remove slaves from their present situation. This is revealing, for it means that in practice, notwithstanding his well known commitment to equal inheritances, Jefferson used his expertise in pleading to thwart efforts by claimants unhappy with their inheritance to take newborn children from their enslaved mothers and to break up existing families by removing individuals from the decedent's family seat to the plantations of disappointed heirs and legatees. Konig concludes that defence of these actions, along with Jefferson's arguing freedom suits as discussed above, contributed to his now forgotten reputation as a vexatious "negro lawyer," one of a handful in Williamsburg during the late colonial period who provoked the ire of champions of unbridled rights in human beings.³⁵

The second issue about Jefferson's world view as an eighteenth century property lawyer that should be elucidated at the outset is that Jefferson's understanding of property was not by nature absolute and individualistic. When he thought of property, he did not think first and foremost of a thing (or a human chattel) that a possessor could control completely, against which the outside world had no countervailing claims. Instead, like his professional colleagues and fellow country squires throughout the English speaking world, his core conceptions of property focused on the English system of estates in land—bundles of conflicting, circumscribed, limited, multivalent interests, still rooted in corporate feudalism, and not necessarily attuned to the dictates of liberal capitalism that were then quickly permeating the law of contract.³⁶ The interests in real property that formed the dominant trope of aristocratic, genteel, and yeomanly self-image in Jane Austen's England and in Rhys Isaac's Virginia were legally defined by a complex maelstrom of doctrines extending to fee tail, joint tenancies, estates *pur autre vie*, non-possessory rights and limitations of others' rights such as easements and servitudes (each with its negative counterpart, each enforceable by instrument or operation of law), and covenants that ran with the land.³⁷ Alienation was conditioned by a host

³⁴ REPORTS ON CASES, *supra* note 18.

³⁵ Konig, *supra* note 18.

³⁶ See generally MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1979).

³⁷ Conflicted interests in landed estates and the status attendant thereto inspired a whole genre of "inheritance novels," including Samuel Richardson's CLARISSA (1747-49), Fanny Burney's EVELINA (1778), and Austen's PRIDE AND PREJUDICE (1813, original manuscript rejected 1797). One particularly poignant literary perspective on the vicissitudes engendered by complex interests in estates in land is William Makepeace Thackeray's THE LUCK OF BARRY LYNDON, published in 1844 but set in the mid 18th century. Redmond Barry takes the name Barry

of abstruse doctrines such as the Rule Against Perpetuities, the Rule in Shelley's Case, and the Doctrine of Worthier Title.³⁸ These gave rise to varied contingent current and future interests subject to eventual claims and conditions embodied in such forms as the fee on condition, and the fee subject to condition subsequent, and fee subject to reversion.³⁹ For every owner or tenant the law recognized multiple possible future replacements. The current possessor had duties to these persons (many not yet in existence or even ascertainable) that restricted what the "owner" could do with lands and buildings currently in his or her custody.

The land law has changed in England, yielding to statutory reform and simplified modern conventions, and the notions just described seem exotic now to all but the passing generation of American property lawyers and law professors. For Jefferson, however, they were fundamental to a seemingly timeless way of life and to his livelihood. That legally cognizable interests in real property were not absolute but conditional for Jefferson matters profoundly, because for most of the eighteenth century in Virginia, slaves were legally defined as real property, not personal

Lyndon when he marries the wealthy widow of Lord Bullingdon. But he holds only a life estate *pur autre vie* in the estate, which will devolve to his step-son, Viscount Bullingdon, who holds a future interest in the form of a fee simple subject to condition precedent and will take upon the death of his mother provided he has reached maturity. Rhys Isaac's *TRANSFORMATION OF VIRGINIA, 1740-1790* (1982), is a brilliant study of role playing in genteel Virginia, laying great emphasis on the land as setting.

³⁸ The Rule Against Perpetuities holds that "No [contingent future] interest [in land] shall vest [in interest, not in possession], unless it must vest, if vest at all, within twenty-one years plus the period of gestation of a life in being at the time of its creation." *Duke of Norfolk's Case*, (1683) 22 Eng. Rep. 931. The Rule in Shelley's Case holds, "When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or fee tail, 'the heirs' are words of limitation of the estate, and not words of purchase." 1 Coke's Reports 93b (1581). The Doctrine of Worthier Titles holds that at common law, where a testator undertakes to devise to an heir exactly the same interest in land as such heir would take by descent, descent was regarded as the worthier title and the heir took by descent not by devise. *See generally* the entry in *BLACK'S LAW DICTIONARY* 1607 (6th ed. 1990). The point to introducing these restraints against alienation is that notions along the lines of "it (or he or she) is mine, and therefore I can do with it as I please" do not so readily resonate in Jefferson's culture as we might assume.

³⁹ *See generally* A. W. B. SIMPSON, *A HISTORY OF THE LAND LAW* 208-241 (1986); Baker, *supra* note 30, at 248-297.

property.⁴⁰ The difference between real property and personal property was significant. In the words of Virginia Attorney General John Randolph in 1768:

The natural property of land is, that it is fixed and permanent: its legal properties, that it shall descend to heir in various manners; shall be subject to widows' dowers, shall not be liable to execution; cannot be aliened but by writing; shall give its proprietor a right of voting at elections: cannot be demanded but by action real, &c. Again the natural properties of personal estate are, that it is moveable and perishable: its legal properties that is shall be distributed among the next of kin equally; shall be liable to execution; may be aliened without writing; shall not give a right to vote; must be demanded by action personal, &c.⁴¹

In practice, the Virginia courts of the eighteenth century treated slave property as real property for some purposes and personal property for others, while affording slaves more protection than chattels but less than land against claims of creditors. An owners' legal interest in a slave might therefore be limited—not in favor of the slave, but in favor of other white persons who might claim a countervailing interest, or a different stick in the bundle of ownership rights attached to the enslaved person. The fact that slaves were, within limitations, real rather than personal property, restricted the ability of creditors to seize them to satisfy debts of a decedent. It had important consequences respecting the dower's third when husbands died intestate. And it meant that slaves could be—and sometimes were, especially on great plantations—entailed, to preserve the grandeur of an estate passing to the eldest son or favored heir.⁴² In part because they were classified as real property in eighteenth century Virginia, slaves were not objects over which a master could as a matter of course assert absolute legal authority. This was one important reason that Jefferson's conceptions of the rights of slaveholders against the world were not in harmony with the Lockean revolutionary claims of popular pro-slavery petitioners who threatened rebellion if their rights were circumscribed.⁴³

⁴⁰ Morris, *supra* note 33, at 66-71. A statute of 1705 defined slaves as real property, except in cases of ownership by merchants, factors, and agents. A 1727 statute allowed slaves to be entailed with estates. The Burgesses attempted to change the law in 1748, but the proposed reversion was disallowed by the Crown in 1751. Slaves were not reclassified as chattels personal until a statute of 1792.

⁴¹ *Blackwell v. Wilkinson* (October, 1768) in REPORTS OF CASES, *supra* note 18, at 73-74 (quoted in Morris, *supra* note 33, at 63).

⁴² Morris, *supra* note 33, at 70-71.

⁴³ See William G. Merkel, *Jefferson's Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism*, 38 SETON HALL LAW REVIEW ____ (2008).

Slavery, Status, and the Statutory Law

As a property lawyer, Jefferson litigated cases involving claims to human beings as objects. The notion that human beings were things that could be owned was counter-intuitive to eighteenth century enlightened sensibilities. It was already anomalous in the early modern common law of the seventeenth century, especially as that law came down to Jefferson enveloped in Whiggish, freedom favoring mythology by his favorite commentator, Lord Coke. True, the law of England had once tolerated a level of subjugation approaching that of slavery, but villeinage was defunct by the time the English came to North America, and even a statute of Edward VI that had allowed two years enslavement as punishment for vagrancy was a distant memory.⁴⁴ Given the assumption that holding people as property was, by the time Virginia was established, an un-English practice, much probing, path-breaking, and insightful scholarship has focused on the seventeenth century decision (or haphazard sequence of events?) that established a different rule for black persons, teaching that even if England was too pure an air for a Russian slave to breathe without immediately becoming free, the air of Virginia was sufficiently sullied to allow holding an African in perpetual bondage.⁴⁵

Many points are debated respecting the legitimization of slavery, and the process by which blackness became equated with slave status. Winthrop Jordan is doubtless correct that the cultural history of English and European perceptions of the color black fostered attitudes of hostility long before Virginians came into contact with Africans.⁴⁶ David Brion Davis is certainly right that the long history of antagonism and Manichean struggle between the Islamic and Christian worlds made the European mind receptive to dehumanized portrayals of the other, the exotic, and the alien.⁴⁷ The Handlins are probably not wrong that when blacks were first

⁴⁴ The 1547 law providing that vagrants would be sold as slaves (to serve two years) was repealed in 1549. See Morris, *supra* note 33, at 41-41. See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 33-40 (1966) (discussing the demise of villeinage).

⁴⁵ Cartwright's Case, not reprinted directly in any contemporaneous reporter, but discussed at length in *Somerset*, reputedly held that "In the eleventh of Elizabeth, one Cartwright brought a slave from Russia and would scourge him; for which he was questioned; and it was resolved that England was too pure an air for a slave to breathe in." See discussion in DAVID BRION DAVIS, *SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* 487 (1975); and in George Van Cleve, *Somerset's Case and Its Antecedents in Imperial Perspective*, 24 L. & HIST. REV. 601, 614 (pointing out that the decision was read to limit punishment rather than slavery by some authorities). A frequently cited un-attributed hearsay report of *Cartwright's Case* in HISTORICAL COLLECTIONS, at 468-69 (J. Rushworth ed. 1686) (published over a hundred years after the case was decided).

⁴⁶ WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* 3-43 (1968).

⁴⁷ David Brion Davis, *Slavery – White, Black, Muslim, Christian*, N.Y. REVIEW OF BOOKS, July 5, 2001 (reviewing PETER LINEBAUGH & MARCUS REDIKER, *THE*

landed—and sold—in Virginia in 1619, there was yet no intuitive consensus among white Virginians that Africans must be slaves.⁴⁸ Whether they are also right that no such consensus emerged until 1660, or T. H. Breen and Stephen Innes are correct that equation of blackness and slave status did not take root until 1690 or 1700 is harder to say.⁴⁹ Questions of chronology and provenance (Caribbean examples? Roman law?) respecting the crystallization of assumptions under-girding the North American colonial slave law are perhaps irresolvable owing to paucity and ambiguity of evidence. There are documents (but not that many of them) on either side of any contentious historiographic issue regarding the non-statutory seventeenth century law of slavery. Customary law, of course, mirrors social practice and expectations, and common law doctrines in Virginia (both “country” and “court”) by necessity adopted and changed as the colony evolved between 1660 and 1730 from a plantation economy whose principal labor force consisted of white servants for terms of years to one whose estates were worked almost wholly by African slaves for life.⁵⁰

By Jefferson’s day, this much was certain, and long reduced to statute:⁵¹ A Virginia Act of 1662 declared that “all children born in this country shall be held bond or free only according to the condition of the mother,” thus establishing the rule of *partus sequitur ventrem*, eventually the rule in all the slaveholding British

MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HISTORY OF THE REVOLUTIONARY ATLANTIC (2000); LAMIN SANNEH, ABOLITIONISTS ABROAD: AMERICAN BLACKS AND THE MAKING OF MODERN WEST AFRICA (2000)).

⁴⁸ Oscar & Mary Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q.3D 199 (1950).

⁴⁹ T.H. BREEN & STEPHEN INNES, “MYNE OWNE GROUND”: RACE AND FREEDOM ON VIRGINIA’S EASTERN SHORE, 1640-1676 5 & 11-17 (1980).

⁵⁰ Some thirty years after its initial publication, Edmund S. Morgan’s AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA remains balanced, powerful and convincing in its analysis of Virginia’s transition from indentured servitude to African slavery. Morgan stresses the increasing life expectancy of Virginians (slave and free), which made slaves for life more attractive investments than servants for a term of years, the rising profitability of Chesapeake tobacco compared to West Indian sugar, which made Virginia slave prices more attractive to importers, and the lifting of the Royal Africa Company’s monopoly in 1698, which augmented the supply of slaves, as factors contributing to the switch to African slavery. Morgan suggests the transition accelerated in the 1670s and was largely complete by 1710. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 295-315, (1975).

⁵¹ The detailed analysis of the statutory history of slavery in Morris, *supra* note 14, *passim*, supplants William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q.3D 258 (1977).

North American colonies, but unknown in English law.⁵² Thereafter, children born to enslaved women in Virginia would be slaves for life, and in 1677 the Burgesses decreed that baptism and conversion would not alter the status of a slave, whether born in Virginia or outside the colony.⁵³ A 1670 statute addressed the status of persons imported into the colony as laborers, and pronounced that non-Christians who came by sea (i.e. from Africa or the West Indies) would be slaves, but that those who came by land (i.e. American Indians) would serve for a term of years.⁵⁴ This distinction was blurred when the colonial legislature declared in 1679 that Indians taken prisoner in war could be held as slaves, and three years later that Indians sold into the colony from other jurisdictions were to be classified as slaves, not servants.⁵⁵ But the Burgesses performed another about face in 1691, reversing the policies of 1679 and 1683, and settling on the rule that all American Indians brought into the colony thereafter would be free persons.⁵⁶

In 1705, with slavery well on its way to supplanting indentured servitude as the colony's principal labor system, Virginia enacted a comprehensive law on slaves and servants. The statute recited many of the prior acts, codified a police regime, penalized servants and slaves who absented themselves from plantations, and made clear that Christians of Christian parentage newly brought into the colony could not be held as slaves but only as servants for five years.⁵⁷ Finally, in 1723, the colony stiffened already daunting obstacles to manumission, requiring special permission from the Governor and Council, and mandating seizure of any person a master attempted to free without authorization.⁵⁸ Thus, when Jefferson entered onto the public stage in the 1760s, it was taken as social fact buttressed by long settled written law that whites could not be slaves unless descended from African slaves in the maternal line, that no one with Indian lineage (on the maternal side) more recent than 1691 could be held in slavery, that Indians could only be held in slavery if it were proved that they descended of Indians enslaved in Virginia or brought as slaves into Virginia during the period from 1679-1691, and that blacks would be slaves (excepting the small segment of the population descended from Africans who attained freedom before the color line solidified in the later decades of the seventeenth century).⁵⁹ The equation of African and slave status (absent other

⁵² Collection of all the Laws of Virginia from the first session of the legislature in the year 1619 (Feb. 5, 1808), 2 STATUTES AT LARGE, at 170 (William Walter Hening ed. 1819-23) (discussed in Morris, *supra* note 33, at 43-44). The commonplace that the rule was unknown in English law requires clarification: While the principle was unknown respecting human status, it reflected long established and accepted practice regarding live stock.

⁵³ Hening, *supra* note 52, at 260.

⁵⁴ *Id.* at 283.

⁵⁵ *Id.* at 490; *Hudgins v. Wrights*, 11 Va. 134, 137-38 (1806).

⁵⁶ *Id.*

⁵⁷ 3 Hening, *supra* note 52, at 447.

⁵⁸ *Id.* at 250.

⁵⁹ The best summary of these race-based presumptions respecting slavery and freedom is contained in the opinions of Virginia Court of Appeals Judges St.

descent), unclear as it had been in the early and middle seventeenth century, was now nearly absolute. Prior to the Manumission Act of 1782, special permission to emancipate particularly named individuals or classes was rarely granted, and in the pre-Revolutionary period, the free black population numbered less than 0.3 percent.⁶⁰

Slaves then were property, and Africans and African Americans—with few exceptions—were slaves. That slaves were real and not personal property may have, for the reasons discussed above, mitigated the conceptualization of African Americans as objects of complete dominion by their masters. So too did the fact that slaves could undeniably have agency, and the criminal law, the law of private wrongs, and the law of contract had to confront the issues of when and to what degree the fiction of objectification would trump the reality of willed (or negligent) consequential action.⁶¹ In the eighteenth century (but not in the nineteenth) slaves seldom had counsel in judicial proceedings, and issues of individual black agency were largely beyond the scope of Jefferson’s property practice, focused as it was on things, the right to possession of things, and (in the context of freedom suits) eligibility *vel non* of humans to be fictive things or escape objectification. In one important context, Jefferson did confront squarely legal ramifications of purposeful African American action and planned action, but this occurred long after he closed his practice, when Gabriel’s Uprising forced him to consider whether slave rebellion was justified (it was, at least as a matter of legal theory; however violent white reaction, and refusal to allow the rebels to plead justification, was excusable necessity).⁶²

A final preliminary point about Jefferson’s legal knowledge and lawyerly disposition merits noting here, before moving on to consideration of his principal early writings involving slavery. This concerns his ability, felicity, and profundity in legal argumentation. Bernard Schwartz, the eminent constitutionalist and editor of *Bolling v. Bolling*, remarked that the rigor and insight characterizing Jefferson’s and Wythe’s opposed “opinions” (as arguments were then called) in *Bolling* is striking, indeed humbling. Schwartz’s assessment is well merited. Jefferson’s brief to the court, written without aid of on-line search engines and data-bases, largely without access to compiled reporters of decisions, and without assistance of a clerk, surpasses in thoroughness, logic, and depth of understanding any memorandum from a large modern law office that I have seen. Perhaps, like the art of building

George Tucker and Spencer Roane in *Hudgins v. Wrights*, 11 Va. 134, at 137-143 (1806). The case is discussed in ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS*, 51-55 (1975).

⁶⁰ IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 46-47 (1974); JOHN H. RUSSELL, *THE FREE NEGRO IN VIRGINIA, 1619-1865* (1913).

⁶¹ See Morris, *supra* note 33, at 132-59 (on slaves and legal responsibility for contractual obligations), *id.* at 249 – 321 (on prosecution of slaves as criminals capable of acting with wrongful intent), *id.* at 354-68 (on slaves and tortuous intent or negligence).

⁶² See Merkel, *supra* note 12 (for a detailed analysis).

cathedrals and tall ships, the skills of the elite common lawyers of old have been lost to the ages.

In recent decades, many historians have depicted Jefferson as impulsive and emotive, as a superficial glosser and sheener, rather than a serious political thinker. But those familiar with Jefferson's lawyerly method and legal scholarship—including his colleagues, both friend and foe, with direct experience of his work, and subsequent commentators who have familiarized themselves with his legal endeavors—have been nearly uniformly impressed with the erudition and skill of his lawyering. As Schwartz concludes;

[Jefferson] received what was probably the best legal education in the colonies under the tutelage of George Wythe He built up a successful practice and, as John W. Davis once put it, "if he had not been called away to public life . . . , he would still have won his place in the history of Virginia as one of the brightest ornaments of an illustrious bar." In 1790, John Marshall could list Jefferson as among the 'ablest men and soundest lawyers' of the day. As [Willard Sterne Randall reports] . . . "By the time he decided to abandon his legal practice . . . , he represented many of the colony's wealthiest and most prominent citizens, including many of its leading lawyers." Jefferson's legal knowledge was summarized after his death by James Madison: "The Law itself he studied to the bottom, and in its greatest breadth, of which proofs were given at the Bar which he attended for a number of years, and occasionally throughout his career." . . . Edmund Pendleton thought [Jefferson] qualified to be a judge; according to Justice Lewis F. Powell, "Jefferson certainly could have had a judgeship if he wanted it." Long after Jefferson had given up his practice, Aaron Burr (certainly no admirer) was heard to say of him, "Our president is a lawyer, and a great one too."⁶³

In his dealings with slavery, Jefferson was sometimes on the right side of history and morality, and sometimes on the wrong. Over the course of his long life, his various values and ideals ebbed and flowed. His faith in the law, and in the ultimate triumph of justice, however was—like his involvement with slavery—a constant. As an advocate, statesman, citizen, and philosopher, his thoroughly legal mindset shaped the formulation and expression of his thoughts and actions respecting slavery throughout his adult life.

PART TWO: *HOWELL v. NETHERLAND*

Jefferson's earliest fully-documented systematic and philosophical examination of slavery comprises his written argument in the April, 1770 case of

⁶³ *Id.* at 25-26.

Howell v. Netherland,⁶⁴ in which he presented an intricate appeal to the General Court seeking to overturn dismissal of a freedom suit on behalf of a male bond-servant whose great-grandmother had been white. The case comes down to us in Jefferson's compilation of mid-eighteenth century Virginia cases assembled shortly before his death and not published until 1829. Over fifty years had passed before Jefferson noted down his recollections of the Court's summary judgment against his client, delivered directly after he made his oral argument, and before opposing counsel—Jefferson's mentor and law teacher George Wythe—had spoken. The vividness of these impressions, preserved so long after the fact in the margin notes of Jefferson's *Collection of Cases*, attests to the importance of the incident in the mind of an idealistic young attorney. These recollections suggest also that the elderly Jefferson found it worthwhile to illustrate just how unripe for anti-slavery the Old Dominion had been when he himself was of a zealous age, possessed of weapons more than fervent prayers.⁶⁵

After giving birth to a mixed-race child, Howell's white great-grandmother was bound over to labor for a five-year term. Her child, Howell's mulatto grandmother, was bound over for thirty-one years, during which time she in turn gave birth to Howell's mother, who also was made to serve an appointed master for thirty-one years. Because Howell was born during his mother's term of service, his mother's master felt entitled to hold him to a thirty-one year term as well. But when that master died, Howell sought his freedom, retaining Jefferson to argue that he should not be bound over to a new master for the balance of his thirty-one years.

Paul Finkelman has suggested that Howell was only one eighth African, and hence very nearly white in appearance. Jefferson's attempts to win his client's liberty, Finkelman implies, had less to do with opposition to African-American slavery than with the principle that white persons should be immune from the species of bondage that was commonly the lot of black Virginians.⁶⁶ But Finkelman's supposition about Howell's appearance is a guess, and Jefferson did not argue that Howell was entitled to freedom because he was legally white. Moreover,

⁶⁴ Available in REPORTS OF CASES, *supra* note 18 (reprinted in 1 Ford, *supra* note 13, at 373-74).

⁶⁵ In a letter of 1814 to Edward Coles, declining an invitation to head a revived anti-slavery movement, Jefferson wrote, "I am sensible of the partialities with which you have looked towards me as the person who should undertake this salutary but arduous work. But this, my dear sir, is like bidding old Priam to buckle the armour of Hector 'trementibus aequo humeris et inutile ferruncingi.' No, I have overlived the generation with which mutual labors and perils begat mutual confidence and influence. This enterprise is for the young; for those who can follow it up, and bear it through to its consummation. It shall have all my prayers, & these are the only weapons of an old man." Letter from TJ to Edward Coles (August 25, 1814) (reprinted in 9 Ford, *supra* note 13, at 477-79). Fervent prayers became a favorite expression of Jefferson's old age, particularly as a means of expressing his assumption that matters (often related to slavery) were beyond his direct control.

⁶⁶ Finkelman, *supra* note 1, at 190.

the magistrate court had not freed Howell on inspection, as courts generally did with white-looking (or Indian-looking) plaintiffs in freedom suits.⁶⁷ In fact, the lower court did not grant Howell his liberty at all, and the General Court did not call that decision into a question.

There are at least two possible explanations for the failure to free Howell on grounds of racial exemption from slavery. First, *if* the case hinged on the question of slavery or freedom, then Howell almost certainly must have been less than 7/8 white, and descended from other African-American forebearers in addition to the man who “illegally” fathered his grandmother. Had Howell been a white looking *slave*, one would expect him to have been freed on those grounds alone. A second explanation for the decision not to set Howell free emphasizes that his was not really a freedom suit in the conventional sense. Jefferson’s argument stressed Howell’s status as a bound-servant, and to the extent that Jefferson was seeking to end his client’s obligation to serve as a bound laborer rather than win his freedom from slavery, whiteness would not have been a dispositive, or even a relevant, issue. But whether the issue before the court was understood in terms of slavery and freedom or of bound servitude and liberty, Jefferson’s analysis built on premises inimical to human bondage.

Jefferson’s argument was methodical and meticulous. The version preserved in the *Collection of Cases* appears to be Jefferson’s written summary of his own oral “opinion” (as lawyers’ arguments were then called), taken down immediately after the case was heard, but annotated with margin and footnotes half a century later in preparation for publication in the *Collection*. No other record of the case (either written submissions by counsel or formal opinion by the court) seems to have been preserved. In his opinion, Jefferson argued in the first place that even if Howell was legally detained by his first master, he could not be alienated (i.e. sold or devised), and in the second place, that Howell could not legally be detained in slavery at all. Both arguments rely on the plaintiff’s white ancestry, but proceed to build on that fact in a manner that calls into question the moral legitimacy of slaveholding irrespective of the color of the bondmen.

The argument Jefferson put to the General Court reflected a precocious sense of legal realism and a visionary devotion to rights theory far removed from the narrow statutory substance of the case. Jefferson’s opinion ranged beyond his core

⁶⁷ See DUNCAN MACLEOD, *SLAVERY, RACE, AND THE AMERICAN REVOLUTION* 109-126 (1974) (discussing freedom suits in the Revolutionary period); amplified by personal conversation with Dr. MacLeod stressing the frequency of decisions for freedom based on inspection; *see also* *Hudgins v. Wrights*, discussed below, and analyzed in ROBERT M. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* 51-55 (1975). In the Court of Chancery, George Wythe held that Wright and his family were presumptively free because of Indian appearance and because the Virginia Declaration of Rights of 1776 created the presumption—not overcome in this case—that all persons were free. St. George Tucker, for the Court of Appeals, upheld the decision on the grounds of appearance but disowned the Court of Chancery’s alternative basis for the decision founded in the Declaration of Rights.

claim that there was no legislative authority for holding his client to bound labor, and developed at length into a full-fledged indictment of slavery on grounds of natural law and natural rights. Since the arguments of opposing counsel have not been preserved, we simply do not know whether George Wythe intended to press a claim that Howell was his client's chattel slave, and not merely bound to labor for a term of years. We have only Jefferson's opinion to go on, and Jefferson's analysis assumes that there was no legal basis—and no case at bar—for holding Howell as a *de jure* slave for life. And yet, as the unfortunate offspring three generations removed of an illegal union, Howell was being held in *de facto* slavery by a putative master who intended to enforce an uncompensated obligation to serve the balance of a term amounting to well over half a productive life-time in eighteenth century Virginia. Thus, even if Jefferson's antislavery rhetoric did not apply directly to his client's formal legal status, it was all too relevant to Howell's actual station in life. And Jefferson's natural-rights-based indictment of slavery carried potentially far wider implications, for it called into question all claims to property rights in persons not reducible to particular acts of the legislature sanctioning enslavement of clearly defined classes of individuals.

The first plank of Jefferson's argument develops an equal rights reading of the law governing covenants of apprenticeship, while the second expounds a radical interpretation of Virginia's statutes on offspring of mixed union. In both planks, Jefferson places great weight on the natural law's abhorrence of all forms of slavery. Perhaps not surprisingly, the Court dismissed these sentiments out of hand. According to Jefferson, after he presented his oral argument, "Wythe, for the defendant, was about to answer, but the Court interrupted him, and gave judgement in favour of his client."⁶⁸ The youthful Jefferson was thus rebuked dismissively by an arm of the Virginia government for an attempt to put broad anti-slavery principles into practice. This was doubtless a memorable, and very probably a humiliating experience. The members of the General Court in 1770 included a peer, the heir to a peerage, Jefferson's closest friend, and several of his other mentors. The Court comprised John Blair, William Nelson, Thomas Nelson, Richard Corbin, William Byrd III, Philip Ludwell Lee, John Tayloe, Robert Carter, Robert Burwell, John Page, George William Fairfax, and James Harrocks, all leading men of the colony or scions of its most eminent families. Before his Lordship's sudden death in October, the popular and respected Norborne Berkeley, Baron Botetourt, held the Governor's chair, and led the Court's sessions.⁶⁹ Around the same time that Jefferson was rebuffed in the General Court, Jefferson prevailed on fellow Burgess Richard Bland to propose a measure facilitating private manumission in the colonial legislature, only to see the man and the measure chastised before the galleries. The cumulative effects were chastening, and in due course Jefferson learned to avoid discussion of race and slavery in Virginia's public fora. But the argument in *Howell v. Netherland* possesses a measure of brashness the twenty-seven year old Jefferson had not yet

⁶⁸ *Howell v. Netherland* (hereinafter *Howell*), (reprinted in 1 Ford, *supra* note 13, at 373-74).

⁶⁹ Dewey, *supra* note 21, at 18 (citing 6 *The Exec. J. of the Council of Colonial Va.* (1925-1966), at 34, 113, 228-29).

learned to eschew regarding Virginia's most delicate issues, and it therefore makes a particularly interesting study.

In the first plank of his argument, Jefferson reasoned that punishing the offspring of mixed union ran counter to the Legislature's intent when it acted to curtail miscegenation. In Jefferson's words, "the purpose of the act (of 1705) was to punish and deter women from that confusion of species, which the legislature seems to have considered as an evil, and not to oppress their innocent offspring."⁷⁰ However, an earlier statute suggests Jefferson was likely wrong about the legislative intent of 1705; the Burgesses, Council, and Governor probably did desire to stigmatize, shackle, and shame the children of mixed unions. As Edmund S. Morgan explains, the 1705 act revised an act of 1691—Jefferson's chronology of miscegenation statutes stopped off one short of the original. The preamble to the 1691 act decried "that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their accompanying with one another."⁷¹ So while Jefferson is right that the Burgesses intended "to punish and deter women from that confusion of species . . . (they) seemed to consider as an evil," his notion that the Burgesses did not intend "to oppress (the women's) innocent offspring" is hard to square with the preamble to the predecessor statute that the Burgesses did not disown; its emphasis on abominable mixture and spurious issue suggests strongly the children as much as parents were the targets of the Burgesses' ire. In any case, the fact that the scholarly Jefferson was historically mistaken is less important for present purposes than his argumentative method and the assumptions his technique reveals.⁷²

⁷⁰ Howell, *supra* note 13, at 374.

⁷¹ Morgan, *supra* note 50, at 335.

⁷² For Jefferson, living in an age that saw itself as benevolent, sentimental, and enlightened, the late seventeenth century legislature's intent to punish children for the sins of their forbears was now so alien as to be unimaginable—or at least incapable of intuition without benefit of access to the statutory language articulating this now other-worldly purpose. According to Edmund Morgan, the Burgesses' underlying design in both 1691 and 1705 was to divide white laborers from black, instill among lesser whites a sense of racial solidarity transcending class antagonisms, and to forestall another Bacon's Rebellion. See Morgan, *supra* note 50, at 335. If Morgan is right, Jefferson's own prejudices and those of his time become testimonials to the completeness of the Burgesses' success. By Jefferson's day, white solidarity was so firmly rooted in Virginia that common cause among rebellious blacks and whites had in fact become inconceivable. (*But see* DOUGLAS R. EGERTON GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 & 1802 (1993), advancing a revisionist argument that leaders of the foiled insurrection of 1800 envisioned establishment of a bi-racial artisan republic; Egerton's evidentiary basis for his conclusions is questioned sharply in JAMES SIDBURY, PLOUGHSARES INTO SWORDS: RACE, REBELLION AND IDENTITY IN GABRIEL'S VIRGINIA, 60, 74-75, 81, 83, 88, 131 (1997)); and consider the charged response to Lord Dunmore's Proclamation in 1775 as evidence that

Based on his misreading of the legislature's intent sixty-five and eighty years earlier, Jefferson maintained that far from wishing to punish the children of mixed union, the Burgesses had "made cautious [that is meticulous, as opposed to timid] provision for the welfare of the child, by leaving it to the church wardens to choose out a proper master."⁷³ This master, having been selected by the wardens, entered into a covenant to provide sufficient food, clothing, and lodging for the child, in consideration of which the child was to labor for the master until the age of thirty-one. To sell the ward, Jefferson reasoned, would break the covenant, which in turn would release the ward from his obligation to labor. Jefferson's analysis, then, relied on a rights-based understanding of master-servant relations. He built his argument on his interpretation of the "covenant" between Howell and his master—a covenant that the Court clearly did not recognize, a covenant, in fact, that the Court would not even consider.

Jefferson's notion of covenant implied an equality of the mulatto bond servant and his master before the law. When arguing that a master could never withdraw his obligation to provide his ward with the necessities of life, Jefferson instructed the Court that "the servant may as well set up a right of withdrawing from his master those personal services which he, in return, is bound to yield him."⁷⁴ The suggestion that non-white servants, bound to an extended term of labor by operation of the state's anti-miscegenation laws, had rights analogous to those of workers who had freely contracted to labor in return for valuable consideration, was a non-starter for law-finders in Virginia's race-based slave plantation society. But Jefferson did not stop here. "These servants bear greater resemblance to apprentices than to slaves," he continued. "On the death of the first master, they go to his executor as an apprentice would, and not to his heir as a slave . . . Now it is well known that an apprentice can not be aliened."⁷⁵ Thus, according to Jefferson, Howell's apprenticeship ceased with the death of his master, and he could not be passed on to a new owner. Not so, however, in the Court's eyes. It may have been well known that apprentices could not be aliened, but the claim that mixed-race servants bound by operation of statute were really apprentices was unacceptable. Virginia's legal system would not countenance a series of gradations from black slavery to white freedom. That these were

white Virginians saw cooperation among white soldiers and armed former slaves as per se illegitimate). While Jefferson eventually expressed fears of black uprisings -- and these expressions grew more frequent after the Haitian Revolution and the Gabriel plot -- he remained generally unconcerned or indeed enthusiastic about uprisings by white farmers and workers. The feelings of racial solidarity engendered by the early legislators in Virginia had grown to operate from top to bottom as well as bottom to top of the social scale. Perhaps, in the long run, the Burgesses were more successful than they would have wished to be.

⁷³ 1 *Howell*, *supra* note 13, at 374.

⁷⁴ *Id.*

⁷⁵ *Id.* at 375.

absolutely irreconcilable and distinct social conditions remained beyond debate in a court of law.⁷⁶

In the second plank of his argument, Jefferson moved to an exercise in statutory construction. Notwithstanding the illegality of transferring Howell to a second owner, Jefferson now argued that Howell was entitled to absolute freedom as a matter of law. He attempted to show that Virginia law governing children of mixed slave and free or black and white descent required the Court to confer freedom on Howell. The law in question was set forth in statutes of 1705, 1723, 1748, and 1753. Only the meaning of the first two statutes was really at issue, the last two acts were merely restatements and codifications.

Jefferson argued that “the plaintiff, being a mulatto of the third generation, would not be detained in servitude under any law whatever.”⁷⁷ His “grand proposition” was that one law reduced to servitude the immediate offspring of a white woman by a Negro or mulatto man, and a second extended it to that person’s children, but that no statute had yet extended servitude beyond the grandchildren of the white woman who originally gave birth to a mixed-race child.⁷⁸ Jefferson backed up this argument with some painstaking statutory history (stopping off one short of the original act) that need not detain us here. What is much more interesting than his thorough history of provincial law-making is the philosophical and natural law foundation upon which his argument is based.

Jefferson's fundamental premise was that freedom is mankind's natural condition, and that absent any positive law to the contrary, an individual is absolutely entitled to personal liberty. To this end, Jefferson strictured the Court in no uncertain language:

I suppose it will not be pretended that the mother being a servant, the child would be a servant also under the law of nature, without any particular provision in the act. Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and it is

⁷⁶ An absolute legal barrier between white freedom and black slavery was firmly in place long before 1770. These legal categories developed markedly from the 1660s onwards, and were first codified at the close of the seventeenth century. The best accounts of this process remain Edmund S. Morgan’s *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA*, *supra* note 50; and Handlin, *supra* note 48, at 199-222.

⁷⁷ *Howell*, *supra* note 13, at 375. The ambiguous phrase “mulatto of the third generation” refers to Howell’s white great-grandmother’s union with a slave, which was punished by statute. Howell’s unfree status is traceable through his maternal line to that “transgression” three generations past, but the phrase mulatto of the third generation does not tell us conclusively whether any of Howell’s other progenitors, particularly those on his father’s side, were of African heritage.

⁷⁸ These statutes are, respectively, Act of 1705, c. 49 s. 18, and Act of 1723, c. 4 s. 22 (cited by TJ in *Howell*, *supra* note 13, at 375-76).

given him by the author of nature, because necessary for his own sustenance. The reducing the mother to servitude was a violation of the law of nature: surely then the same law cannot prescribe a continuance of the violation to her issue, and that too without end.⁷⁹

Jefferson then cites the German jurist Pufendorf to support this natural law doctrine. His reliance on the noted natural law theorist is instructive. In contradistinction to positivists like Grotius, Hobbes, and Bentham, Pufendorf assumed that fundamental, universal principles of justice informed both municipal law and the law of nations, and suggested that laws violative of these principles were presumptively invalid, and in some circumstances, should not be enforced.⁸⁰ Here, Jefferson's invocation of Pufendorf anticipated the higher law constitutionalism Salmon Chase brought to bear against slavery before the Civil War.⁸¹ More immediately, Jefferson's argument prefigures the noted *Somerset* case of 1772, which led eventually to the termination of slavery within England (but not, of course, the Empire).⁸² In that case, Lord Chief Justice Mansfield, for the Court of King's Bench, held that slavery was indeed in violation of the law of nature, and that took positive man-made law to impose slavery upon society and upon individuals. Lord Mansfield found no such positive law existing in England in 1772.⁸³ His decision ultimately resulted in recognition of freedom for some 15,000 former slaves living in England and Wales.

A detailed comparison of Jefferson's argument in *Howell* with Granville Sharp's advisory brief, Francis Hargrave's argument, and Lord Mansfield's opinion in *Somerset* requires a long excursion into eighteenth century legal theory respecting contract and liberty (and the nineteenth century developments that explain the ultimate doctrinal significance of the eighteenth century disputes), and this must wait until another day. In the mean time, it will be useful to note the long term implications of the view that slavery contradicted natural law for common law cultures like England or Virginia, where law, evolving through precedent, is as likely

⁷⁹ *Id.* at 376.

⁸⁰ For a short insightful discussion of the divergence of natural law theory from positivism in the 17th and 18th centuries, see Harold H. Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599, 2604-11 (1997).

⁸¹ See my discussion of Chase.

⁸² 1 STATE TRIALS, *supra* note 19. In this case, Hargrave, arguing on behalf of the alleged slave Somerset, refers to *Cartwright's Case* of 11th Elizabeth, where it was held that England was too pure an air for a slave to breathe. This, however, applied presumably only to whites.

⁸³ Mansfield's holding endorsed, if somewhat reluctantly, Hargrave's contention that without any countervailing positive law, the English constitution and common law held no place for slavery. Generally, however, Mansfield was no abolitionist. This emerges clearly in the correspondence of Sharp and Hargrave during the preparation and consideration of *Somerset*. In fact, Sharp's indictment of Mansfield's proslavery tendency is quite damning.

to be proclaimed by judges as made by legislatures. As Hargrave pointed out in *Somerset*, Pufendorf was not actually opposed to slavery in all circumstances. What the German had argued was that only positive law could support human bondage, and that without specific statutes or decisions slavery was legally insupportable. Once conceded, Pufendorf's and Jefferson's view that slavery violated natural law renders the institution's legality dependent on the willingness of the judiciary or the legislature to rediscover, re-invent, and re-assert positive proslavery law over the years. In 1770, the General Court in Virginia would not even consider the Pufendorf doctrine, and so open up a Pandora's box of anti-slavery eventualities. But if a higher and more distinguished Court in the metropolis could come around to Pufendorf's position two years later, it becomes clear that Jefferson stood on the threshold of an age where slavery would no longer be taken for granted. Over time, the Southern need to assert positively the legality of slavery became more and more clear to politically conscious slaveholders. At length, a stacked Supreme Court and a solid Southern phalanx in the Democratic Party maneuvered openly in *Dred Scott* and in the territorial controversies of the 1850s to impose just such positive law (in the form of tortured interpretation of constitutional text) on an increasingly unwilling nation.

From the empiricist's perspective, it is a unfortunate that the *Howell* Court dismissed this freedom suit out of hand, rather than providing us with a written opinion. The case joined broader issues than an individual's claim for freedom on account of white ancestry. With a written opinion, we would know the precise points at which Jefferson's philosophical exposition jarred Virginia's institutional rationale for bond service, and know also specifically how the court rebuffed Jefferson's radical tenets. We could then form clearer notions of his acculturation into the ideology of the late colonial aristocracy, and arrive at a better understanding of his need to temper youthful exuberance for liberty where it conflicted with Virginia's most fundamental interest in slavery. The Court's swift dispensation of the appeal also relieved Wythe of the responsibility to respond to Jefferson's claims on Howell's behalf.⁸⁴ One can safely assume Jefferson's law tutor intended to offer more of an answer than a blunt demurrer, or a motion for summary judgement based on the plaintiff's failure to state a claim for which relief could be granted. If Jefferson had not stated a claim cognizable to the General Court, he had doubtless rejoined deeper issues about the nature and purpose of justice which had engaged both mentor and apprentice during Jefferson's long pupilage in Wythe's chambers, and perhaps occupied Jefferson and members of the Court in private conversations pursued in the decade since he first came up to the capital in 1760.⁸⁵

Many years later, in 1806, the eighty-year-old George Wythe established himself as the South's leading anti-slavery jurist, when, in a freedom suit brought by a Native American family in the Richmond District Court of Chancery, he ruled that

⁸⁴ *Howel*, *supra* note 13, at 373.

⁸⁵ See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 4-11 (1994) (discussing the searching character of Jefferson's study under Wythe).

slavery constituted an illegal violation of the Virginia Bill of Rights.⁸⁶ There is no little irony then, that it should have been Wythe who opposed Jefferson's anti-slavery argument in 1770. Wythe and Jefferson remained close friends, occasional collaborators (they worked together on the Committee of Revisors charged with systematizing Virginia's statutory law after independence), and frequent correspondents throughout their lives, and it is worth considering whether Jefferson's youthful antislavery beliefs inspired Wythe to reconsider the legal posture of slavery over the years. Shortly after announcing his precocious anti-slavery opinion in *Hudgins v. Wrights*, Wythe and his African American ward Michael Brown were fatally poisoned by Wythe's jealous nephew, who hoped to inherit Brown's share of Wythe's estate as well as his own. Brown, it might be remarked, may have been Wythe's son as well as his ward.⁸⁷

After Wythe's death, Virginia's Supreme Court of Appeals, per Justice St. George Tucker, quickly overturned the late Chancellor's radical anti-slavery pronouncement in the *Hudgins* case, while upholding the plaintiffs' freedom on the alternative grounds that they did not appear to be African, and hence enjoyed presumptive liberty absent proof that they were legitimately enslaved. In essence, the high court in *Hudgins* rejected the second plank of the argument Jefferson had made in *Howell*, and embraced a narrower claim that the plaintiffs should be freed on inspection. Interestingly, Wythe's will appointed President Jefferson to serve as guardian to Michael Brown, and take responsibility for his continuing education. Wythe, evidently, felt that the President would be a solicitous mentor to the teenage Brown, who had demonstrated remarkable intellect and ability.

William Freehling and Duncan MacLeod have pointed to Jefferson's influence on Edward Coles, a Jefferson disciple in Virginia, who as governor of Illinois successfully resisted efforts to constitutionalize slavery in the new state.⁸⁸ Freehling and MacLeod have both suggested that, in the Midwest, Coles was able to put into practice Jeffersonian anti-slavery goals that remained unattainable—and at length became unspeakable—in Virginia. Jefferson's anti-slavery principles of 1770 may have had a similar impact in goading Wythe down the long road that led to his bold decision of 1806 divorcing the Commonwealth from slavery, a radical separation that the state's highest court quickly annulled and disowned. At the very least, Wythe's selection of Jefferson to serve as Brown's guardian implies a continued perception of Jefferson as open to manumission, and to the elevation of individual persons of color above the debased plane of slavery.

Duncan MacLeod has also suggested that additional institutional and policy reasons informed the *Howell* Court's unwillingness to consider expansive natural law arguments against slavery in 1770. Considerable evidence in Virginia

⁸⁶ For a cogent reconstruction and analysis of Wythe's reasoning, based on St. George Tucker's appellate opinion and contemporary newspaper reports, see Cover, *supra* note 67, at 50-55.

⁸⁷ See Cover, *supra* note 67, at 52; Julian P. Boyd, *The Murder of George Wythe*, 12 WM. & MARY Q.3D 513 (Oct. 1955).

⁸⁸ WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854* 140-41 (1990); MacLeod, *supra* note 67, at 145.

newspapers and reported court decisions points to a non-reported ruling of 1768 or 1769 shifting the burden of proving rightful enslavement in cases of individuals descended of Indians to the alleged masters. This decision gave rise to substantial confusion and dislocation concerning Virginians' property in slaves.⁸⁹ If a similar path to freedom were opened for descendants of white mothers and African slaves, a further segment of Virginia's slave population would acquire legally enforceable claims to freedom. A court mindful of the policy implications of its decisions would want to forestall this eventuality, and steer clear of a situation in which the clear line between white freedom and black slavery began to blur. Indeed, in neighboring Maryland, MacLeod has shown, judicial presumptions in favor of freedom, and the admissibility of hearsay testimony to establish white or Indian ancestry on the maternal side, helped liberate thousands of claimants during the revolutionary years. In that state, hundreds of freedom suits alone were premised on descent from one remarkable individual, "Irish Nell" (or Nell Butler), a prodigious child rearer of the early eighteenth century.⁹⁰ Judicial procedures favoring freedom, coupled with laws easing private manumission, helped create a free black class little smaller than Maryland's slave population by the middle of the nineteenth century.⁹¹ With the evisceration of the traditional assumption that all African Americans were slaves, came much social unrest and economic uncertainty. David Konig has suggested a smaller scale crisis in the Virginia of the late 1760s, brought on by the establishment of the presumption that plaintiffs seeking freedom on grounds of Indian descent were entitled to liberty absent proof of lack of Indian ancestry.⁹² If MacLeod and Konig are right about the complaints concerning confusion and destabilization that followed in that ruling's wake, the Howell court's hostility to Jefferson's proffered presumption in favor of freedom becomes that much easier to fathom.

But there is more to interest us about Jefferson's argument in *Howell v. Netherland* than its failure to find favor with the Court. As well as being a useful signal of social and institutional beliefs, it is an instructive biographical source. The language reveals much about young Jefferson's conceptions of Africans, slavery, and miscegenation in 1770, two years before his marriage and four years before the arrival of the Hemings, and some ten years prior to his systematic, racist exposition of theories of biological difference in the *Notes on Virginia*.

One of the most fascinating aspects of *Howell* is that it occasions Jefferson's advocacy of extreme positions, or, at least, positions that seem out of kilter by the standards of his later life. There are several plausible explanations. In the first place, *Howell* involves our earliest sustained encounter with Jefferson's views on slavery. Clearly, these views moderated over time, and in response to political and

⁸⁹ *Id.* at 110-111; and personal conversations with Dr. MacLeod.

⁹⁰ *Id.* at 116-123.

⁹¹ According to the Bureau of the Census, 7.2 % of Maryland's black population was free in 1790, 15.6 % free in 1800, 23.3 % free in 1810, 27.0% free in 1820, 33.9% free in 1830, 40.9% free in 1840, 45.3% free in 1850, and 49.1% free in 1860. See www.census.gov/population/documentation/twps0056/tab35.xls (March, 2005).

⁹² Konig, *supra* note 18.

social pressures. Secondly, as a young attorney, Jefferson tends to engage in a high degree of logical abstraction and transcendent contemplation. Thus, his argument is in part a philosophical exercise somewhat divorced from prosaic legal and political reality. Finally, the adversarial system of justice demanded of Jefferson unabashed advocacy on behalf of his client, and it became his duty to pursue arguments he may not have supported in other situations.⁹³

The clearest illustration of this tendency is his implication of mulatto women's equality to whites before the law. Jefferson wrote:

since the temporary service of a white woman does not take from her the appellation of a freewoman, in the sense of this act, and her children under this very clause are free, as being the children of a free woman, *neither does the temporary servitude of a mulatto exclude her from the same appellation, and her children also shall be free under this clause, as the children of a free woman.*⁹⁴

Upon closer inspection, this position implies truly “un-Southern” suppositions and corollaries.

To begin with, Jefferson defines a class of non-white persons' rights by direct analogy to white entitlement. In Virginia, this was anything but conventional. The analogy denies any privilege based on white skin with reference to free or bond status. White women fare no better than mulattos under Jefferson's version of the law. Moreover, Jefferson suggests a legal gradation in racial status. Mulattos and whites are equal before the law, but what about blacks? The implication is that to be legally mulatto is not to be legally black. Both the denial of white privileges *vis a vis* persons of color in the case of condition of servitude, and the suggestion of color gradations rather than absolute whiteness and blackness, were anathema in the eyes of Virginia legal orthodoxy.⁹⁵ They fly in the face of the logic of race-based slavery

⁹³ Additionally, there is the issue of Howell's color, which may have been nearly white. This suggests—at least to Paul Finkelman—that Jefferson might have advanced natural rights arguments in Howell's favor that he would not have raised on behalf of a full-blooded African, *see* Finkelman, *supra* note 1, at 190. However, it should be emphasized that Jefferson's natural rights opinion was not developed on racial lines. It simply stated that all persons were entitled to their natural freedom, unless wrongly deprived thereof by statute.

⁹⁴ *Howell, supra* note 13, at 378 (italics added).

⁹⁵ On the mainland Anglo-American practice of refusing to acknowledge racial gradations, and recognizing only “pure” white and black archetypes, *see* CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* (1971) (comparing the very different practices of the United States and Brazil); MARVIN F. HARRIS, *PATTERNS OF RACE IN THE AMERICAS* (1964) (analyzing conceptions of race throughout the hemisphere). In the twentieth century, Virginia adopted an even more extreme variant of dichotomous thinking on race, deciding that all persons were either white or

in an increasingly republican society. Given Jefferson's later commentary in *The Notes on Virginia* concerning the undesirability of racial mixing, one cannot help but ask, could Jefferson really believe what he wrote here about mulatto entitlement?

In fact, the Jefferson who argued for freedom in *Howell* is in important respects of a different mind altogether than the author of the *Notes*. This is especially true regarding racial mixture. "It was observed," Jefferson writes in *Howell*, "that the purpose of the act (of 1705) was to punish and deter women from that confusion of species, which the legislature seems to have considered as an evil, and not to oppress their innocent offspring."⁹⁶ That the legislature "seemed" to have considered miscegenation an evil, suggests that in 1770 Jefferson may not have considered it an evil, or that he may not have formed a definite opinion on the matter, or that he may not have taken its evil nature for granted. The Jefferson of 1770 certainly appears less adamant in his abhorrence of racial mixture than the Jefferson of the *Notes on Virginia*.

With the *Notes* in mind, Winthrop Jordan has stressed Jefferson's antipathy towards "mixture of species."⁹⁷ In the light of Jordan's cogent analysis, the Jefferson of *Howell* does seem hard to decipher. However, in 1770, Jefferson had just met his future wife Martha Wayles (they were not married until New Year's day, 1772), and he had not yet come into ownership of the Hemings family, which included his father-in-law's concubine as well his wife's half brothers and sisters, among them the infant Sally Hemings. After Mr. Wayles' died in 1773, the Hemings family moved to Monticello,⁹⁸ and from then on, Jefferson had to live with polite society's perception of his family's racial and sexual debasement. Writing the *Notes on Virginia* under the shadow of his wife's decline and death in the winter of 1781-82, his feelings about miscegenation were far removed from those of the zealous natural rights advocate of the *Howell* days.⁹⁹ After the death of his beloved wife, her half-African siblings remained with Jefferson at Monticello, and perhaps their images haunted him in his loneliness and solitude. The genetic research published in 1998 that established that Jefferson or another descendant of his paternal grandfather fathered at least one of Sally Hemings' children strongly suggests that Jefferson did not cross over into the taboo world of interracial union with his late wife's younger half-sister until several years after they returned from Paris in 1789. Whether Jefferson's relationship with Sally Hemings mollified the scientific objections to

black, and redefining Indians as blacks by statute in the infamous Racial Integrity Law of 1924.

⁹⁶ *Howell*, *supra* note 13, at 374. As mentioned above, Jefferson was factually mistaken on this point.

⁹⁷ Jordan, *supra* note 46, at 464-487.

⁹⁸ FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 84 (1974); DUMAS MALONE, JEFFERSON THE VIRGINIAN 161-63 (1948).

⁹⁹ We can safely assume that by the time he wrote the *Notes*, Jefferson would not have taken on a case like *Howell*. Even beyond his changing social attitudes and awkward domestic situation, it would have shocked too many sensibilities for a man of a former governor's standing to start arguing freedom suits in Virginia's county court houses.

interracial union he voiced in the *Notes on Virginia* is a hotly debated question.¹⁰⁰ But in 1770, before the Hemings family became entwined with his own, Jefferson was able to view interracial relations dispassionately, and treat of the rights of persons of mixed descent as questions of justice, rather than as the charged issues of cultural anthropology and personal character they would later become.

Jefferson wound up his case for Howell's freedom with an elegant, concise, and technical summation. Rather than focusing on natural law, this summation dealt almost entirely with statutory interpretation. By playing down the philosophical in his summation, Jefferson evidently conceded that natural law considerations would not sway the Court. It is revealing, therefore, that he bothered to make such an exhaustive natural law argument, which took up some three fourths of his written opinion. Strategically speaking, he did Howell no favors by raising his claim to the rarefied, impractical, yet frightening niveau of a frontal attack on slavery. Over the course of his long career in law and government, Jefferson would gradually realize that the injustice of holding another in slavery gave rise to one understanding from an abstract and theoretical perspective, and to an altogether different one from the concrete perspective of existing and practicable relations in slaveholding Virginia. As a young attorney, he could not resist philosophical expostulation in the grandest forum in the colony. Even at the age of twenty-seven, however, he sensed that when it came to a single slave's claim to freedom, appeals to the universal were out of place. If he had formulated a powerful academic argument for natural rights, it was not relevant in the case of a real living slave like Howell, seeking freedom in the here and now of an appeal from a suit dismissed in county court.

Still, Jefferson did not conceive of his client as a mere cipher, as an excuse to philosophize before the Court. He was intellectually, morally, and professionally committed to gaining Howell's freedom. Jefferson would not abandon Howell simply because the General Court refused to be swayed by the natural rights arguments so dear to Jefferson himself. For these reasons, the statutory interpretation plank of his argument is also a carefully planned and persuasive construction. But even when it came to statutory meaning, Jefferson remained too intellectual to stoop to confine himself to rehearsing the law and beseeching the Court to apply it. He developed the law's legislative history to understand its true meaning, before appealing to the Court for judgement in Howell's favor.

I have already pointed to the chief flaw in the statutory construction plank of Jefferson's argument, arising from a misreading of the Legislature's intent in 1705, when the Burgesses revised an earlier statute of which Jefferson had not been aware. But it was not this error regarding legislative intent that cost Howell his chance for freedom. Members of the court, after all, may not have been aware of the 1691 statute either; and if they had been interested in rebutting Jefferson's argument, they would certainly have condescended to hear Wythe in opposition. It was not Jefferson's interpretation of old statutes that the Court refuted. They rejected his elevation of an individual's freedom suit to a broadly based and potentially far reaching appeal. To hear an argument that a mixed-race claimant's grandmother was a freewoman was one thing; to entertain a "class-action" suit was another—and

¹⁰⁰ See, e.g., Lewis & Onuf, *supra* note 1.

far more threatening—issue altogether; all the more so in the light of David Konig and Duncan MacLeod’s point that a similar argument concerning slaves of Indian descent had just carried the day.

As mentioned above, another formative episode from this period involves Jefferson's early mentor in the House of Burgesses, Richard Bland, and an attempt to move anti-slavery legislation during the 1769-70 session of the legislature. This incident requires careful deciphering because it is not recorded in any contemporaneous sources; the only two surviving accounts to mention it were written by Jefferson himself in old age. The first of these accounts is given in Jefferson's noted 1814 letter to Edward Coles, in which he declined to become even the figure-head of a revived anti-slavery movement.¹⁰¹ In apologizing for being too old to head the cause, Jefferson recalls the ideals of his youth, and his first public anti-slavery effort, during that early hour when the “quiet and monotonous course of colonial life ha(d) been disturbed by no alarm, and little reflection on the value of liberty.” He remembers urging Richard Bland “to move for certain moderate extensions of the protection of the laws to these people,”¹⁰² a motion which Jefferson then seconded. For his efforts, Bland “was denounced as an enemy of his country and was treated with the grossest indecorum.” Being a “younger member,” Jefferson was “more spared in the debate;” but this painful censure of his mentor endured in Jefferson's mind for some 45 years, and stifled his anti-slavery instincts even as a seventy-one year old ex-President. These recollections reveal something important about Jefferson's self-image in retirement: He saw himself as having undertaken meaningful steps during his early career to relieve the injustices suffered by African Americans in Virginia, but social and political forces more powerful than he was had thwarted these designs in every instance, eventually convincing him of the unfeasibility and finally the counter-productivity of anti-slavery efforts while Virginia remained unripe for emancipation.

Jefferson’s reference to “certain moderate extensions of the protections of the laws to these people” is open to broad construction. That iteration might encompass a variety of proposed reforms, perhaps including measures to provide greater security against excessive violence or “correction,” or even expansion of civil rights for Virginia’s free black population, still a very small segment of the community in 1770, but one about to undergo rapid increase.¹⁰³ Jefferson’s second

¹⁰¹ Letter from TJ to Edward Coles (Aug 25, 1814) (reprinted in 9 Ford, *supra* note 13, at 477-79).

¹⁰² *Id.* Whether “these people” refers to slaves, freedmen, or all Africans is unclear.

¹⁰³ Some commentators assert that Virginia enacted a free black civil rights bill in 1783. The statute in question merely sets out the requirements for acquiring Virginia citizenship in race neutral, inclusive terms, *see* 11 Hening, *supra* note 52, at 322-24. While the statute says nothing about restricting the civil rights of free blacks, its focus was doubtless on white immigration and on privileges and immunities of (former) citizens of other states, Britain, and European countries. But its race neutral language raises interesting ambiguities similar to those

after-the-fact account of Bland's failed motion, however, spells out more clearly the reforms Bland and Jefferson had in mind. This account appears in Jefferson's *Autobiography* of 1821. There, Jefferson relates that, after election to the legislature in 1769, he "made one effort in that body for permission of the emancipation of slaves, which was rejected." The reference to *emancipation* in this context has misled some interpreters who have wished to portray Jefferson as an early abolitionist. That Jefferson meant what twentieth century historians have called manumission, that is grants of freedom to individual slaves, rather than a general program to end bondage, follows directly from his use of the term permission.¹⁰⁴ As Paul Leicester Ford points out with reference to this passage, Virginia law did not then permit slaves to be set "free upon any pretence whatsoever, except for some meritorious services, to be adjudged and allowed by the Governor and Council."¹⁰⁵ Jefferson's *Autobiography*, then, recalls an attempt as a young Burgess to do away with legal obstacles to manumission.

Such an attempt, while not amounting to a frontal assault against slavery, retains considerable significance. In 1769 or '70, it placed Jefferson in the vanguard of progressive thinking on slavery-related issues in Virginia. It attests also to a willingness to conceive of individual African Americans in human terms, and to contemplate particular candidates for manumission. Duncan MacLeod has suggested to me an alternative explanation, in that freedom to manumit would have enhanced the slave-owners' liberty of dispensing with his property as he saw fit. There is no doubt that liberty in this sense of freedom to do what one pleased with one's own property resonated with Enlightenment political values. But MacLeod's freedom of alienation-based explanation for the manumission law is perhaps premised on an overly Roman and insufficiently Anglo-American conception of

implied by Jefferson's later race neutral discussions of citizenship in the new western states analyzed below.

¹⁰⁴ The famous Virginia statute of 1782 permitting manumission without special application to and license from the legislature likewise used the term emancipation to refer to individual grants of freedom as opposed to a comprehensive scheme abolishing domestic slavery, *see id.* at 39. Though commonly called the Manumission Act by writers in our own time, the General Assembly uses the terms manumission and emancipation interchangeably in the 1782 statute.

¹⁰⁵ 1 Ford, *supra* note 13, at 5 (citing *Acts of the Assembly, 1769*). I am not clear as to which compilation Ford's citation refers. Ford evidently desires to clarify for readers that Jefferson intended no motion for a general emancipation. He goes on to add that "no trace of (Jefferson's) effort is recorded in the *Journal of the House of Burgesses*." Dumas Malone has commented that Ford's edition is "well annotated, though with a slight bias against Jefferson." Malone, *supra* note 98, at 460. Ford is correct that no record of Jefferson's latent motion survives. But Ford is sloppy in other respects. He refers to the Act of 2 Geo. II preventing manumission except in cases of meritorious service, but while Henning reports a great many statutes for 1 Geo II and 3-4 Geo II, he lists no acts at all for 1728-29, when the Burgesses apparently were not in session.

property. Eighteenth century property owners in the English speaking world understood and accepted estates other than absolute dominion as central features of their society. The Roman notion of *dominium*, referring to an individual's unbounded possessory interest in a parcel of real or personal property, was hardly unknown to English speakers. Indeed, it was approximated by their own claims to many types of personal property, provided those claims were free of restraints and other forms of encumbrance. But a Virginian's principal image of property focused squarely on real property, in the form of estates in land. And ownership of land was anything but absolute or unbounded. As illustrated poignantly in the novels of Richardson and Smollett (and later Thackeray) a gentleman's landed estate was a complex and worrying thing, burdened by a diverse array of claims and obligations, in the form of future interests, mortgages, non-possessory interests, fees, conditions, time-bound tenures, and the daunting duo of the Rule in Shelly's Case and the Rule Against Perpetuities.¹⁰⁶ MacLeod is certainly not wrong that Virginians might have wished to be able to dispense freely with property in slaves, but based on their complex real life experiences with their estates in land, the "Lockean" vision of absolute liberty over one's possessions must have seemed more like a philosopher's parable than a reflection of reality.¹⁰⁷

Liberal manumission laws, such as the one Jefferson and Bland proposed in 1769 or '70, were not without consequence in terms of institutional slavery's long term future. When permissive attitudes towards manumission became current just after the Revolution, they fostered ideals of conditional termination, helped carve out the first popular images of a free Virginia, and placed slavery on a course towards ultimate extinction north of Maryland. Virginia's influential manumission statute of 1782 led to freedom for nearly 30,000 before its repeal in 1806.¹⁰⁸ During the 24 years it was on the books, Virginia's free black community increased from 0.3% to 3% of the state's total population.¹⁰⁹ The Act was passed during Jefferson's first retirement, following the British raid on Richmond, his flight from the governor's residence to the mountains, and the death of his wife in the ensuing winter, so he had no hand in the legislation. Notwithstanding his unpleasant memories of the failure of his own bill twelve years before, it is a safe assumption that Jefferson supported the Act of 1782. His draft constitution for Virginia of the same year, prepared in the expectation of a new constitutional convention in 1783, features a clause requiring emancipation of all slaves born after 1800.¹¹⁰

¹⁰⁶ These doctrines are explained succinctly in footnote 38.

¹⁰⁷ I use "Lockean" in the libertarian sense popular with many scholars of our own day. Locke himself was quite clear that the state had legitimate claims against private property, once the formation of a social compact brought government into existence.

¹⁰⁸ See 11 Hening, *supra* note 52, at 39; and detailed discussion at _____.

¹⁰⁹ See Berlin, *supra* note 60, at 46-47; and census cited figures above at _____.

¹¹⁰ The *Draught of a Fundamental Constitution* is reprinted in the first English edition of Jefferson's NOTES ON VIRGINIA, *supra* note 14, Appendix 2, at 215. For a discussion of Jefferson's emancipation proposal, see Merkel, *Jefferson's Failed Anti-Slavery Ordinance*, *supra* note ___ at ___.

Jefferson's explanation for the failure of his effort to pass a manumission bill in the Burgesses in the 1769-70 session reveals a good deal about his attribution of blame for Virginia's slave society, and about his conflation of chattel and political slavery into a single rhetorical issue. "Indeed," Jefferson wrote, "during the regal government nothing liberal could expect success. Our minds were circumscribed within narrow limits by an habitual belief that it was our duty to be subordinate to the mother country in all matters of government." Thus, in Jefferson's mind, the colonial doldrums became accountable for legislative inaction. Jefferson blamed the "difficulties with our representatives" on "habit and despair," not on "reflection and conviction." Not merely the colonial mindset, but the various levels of imperial governance thwarted progress, until "last of all the Royal negative closed the last door to every hope of amelioration."¹¹¹ By this point, amelioration referred not so much to the condition of resident slaves, as to imperiled efforts to curtail importation of new slaves and other Anglo-American liberties at stake in Virginia's contest with the British administration.

In recent decades, several critical commentators have pointed to the self-interest involved in Virginia's anti-slave trade policies and to the seeming hypocrisy of blaming Britain for injustice that Virginia was unwilling to end herself.¹¹² There is some logic to this. After all, when Jefferson died in 1826, Virginia's slave-owners were more solidly committed to the permanence of slavery than ever, while his immediate presidential successors Madison and Monroe lived on to see emancipation come to the British Empire a mere seven years later in 1833. And yet, not having lived through the thought process involved in colonial dependency ourselves, it is perhaps too easy to belittle the breadth of its debilitating tendencies. Many other participants in the momentous political debates leading up to independence voiced similar frustrations respecting the conservative colonial mentality concerning issues ranging far beyond slave trade legislation.¹¹³ Nor were the Virginians' protests about metropolitan interference with colonial efforts at slave trade abolition wholly disingenuous. After all, the royal veto *had* undone repeated attempts to prohibit slave importations.¹¹⁴ Doubtless, many provincials supported slave-trade curtailment or abolition for reasons of interest as well as

¹¹¹ Letter from TJ to Coles (reprinted in 9 Ford, *supra* note 13, at 477).

¹¹² ROBERT MCCOLLEY, *SLAVERY & JEFFERSONIAN VIRGINIA* 116-120 (2d ed. 1973); Finkelman, *supra* note 1, at 190-192.

¹¹³ See generally GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION: HOW A REVOLUTION TRANSFORMED A MONARCHICAL SOCIETY INTO A DEMOCRATIC ONE UNLIKE ANY THAT HAD EVER EXISTED* (1992) (discussing the transition from the monarchical to republican and then democratic mindsets).

¹¹⁴ See Isaac, *supra* note 37, at 247-248 (discusses the Burgesses' failed attempt to obtain the royal assent to legislation ending the slave trade to Virginia in 1772). McColley acknowledges the Burgesses had been trying to curtail, suspend, or abolish the trade for twenty years, but had failed for want of the royal assent, *supra* note 112, at 116-117. Indeed, an effort to lay imposts on slave importations had been vetoed as early as 1727, see 4 Hening, *supra* note 52, vol. IV, at 182.

morality, but public policy choices rarely, if ever, flow from principles of ethics alone. And though we can say with hindsight that abolition of the slave trade did not lead directly to emancipation, for decades after the American Revolution, the most progressive anti-slavery activists—including the members of Britain's Clapham Sect—continued to advocate slave trade abolition as the surest and most immediate step towards ending slavery itself.¹¹⁵

Ultimately, Jefferson's view that the colonial mind-frame stifled the development of anti-slavery principles and politics in Virginia is not a complete answer to implicit charges that his generation failed to realize their noblest ideals, but it is also more than an escapist, self-serving delusion. When read in context, it emerges as internally consistent, perceptive, and self-critical. In the same 1814 letter to Edward Coles, Jefferson explained the failure of anti-slavery among the Revolutionary generation in the following terms:

From those of the former generation who were in the fullness of age when I came into public life, which was while our controversy with England was on paper only, I soon saw that nothing was to be hoped. Nursed and educated in the daily habit of seeing the degraded condition, both bodily and mental, of those unfortunate beings, not reflecting that that degradation was very much the work of themselves and their fathers, few minds have yet doubted but that they were as legitimate subjects of property as their horses and cattle. The quiet and monotonous course of colonial life had been disturbed by no alarm, and little reflection on the value of liberty. And when alarm was taken at an enterprize on their own, it was not easy to carry them to the whole length of the principles which they invoked for themselves.¹¹⁶

This remarkable passage anticipates much of the hostile criticism revisionist scholars aimed at Jefferson in the 1960-70s and again in the 1990s. Jefferson realizes fully that even after Virginia threw off its colonial mentality, and even after an environmentalist view on the origins of apparent African inferiority gained acceptance, his own generation of political leaders continued to behave hypocritically in not applying their avowed principles towards African Americans. Tragically, having understood the injustice of his inaction, he did not feel able to act positively to undo the injustice for which he was in part responsible.

Twin refrains—one charging Britain with stifling Virginia's anti-slavery, and another confusing political enslavement to a despot with physical enslavement of one people by another—echo through the aging Jefferson's memories of failed anti-slavery efforts as a young Burgess. The same themes animate Jefferson's writing of the Revolutionary period itself, in his early political masterpieces, the *Summary View* and the *Declaration of Independence*.

¹¹⁵ See Davis, *supra* note 45, at 218-221.

¹¹⁶ 9 Ford, *supra* note 13, at 477.

PART IV: POLITICAL SLAVERY AND THE SUMMARY VIEW

Jefferson first approached the issue of American rights and liberties against Britain not so much from the universal perspective of natural rights that famously generated the tensions between liberty and slavery in the *Declaration of Independence*, but from the narrower perspective of Whig republicanism. Indeed, a ready way for Whiggish slaveholders to assert colonial grievances against British policy and still avoid a head-on confrontation between slavery and natural rights ideology was to fuse the issues of chattel slavery and arbitrary political dependence. This mode of discourse came naturally to a generation of thinkers reared in republican and commonwealth traditions, but to engage in such conflation did not necessarily amount to conscious deception. In the 1770s, this species of confusion was so wide spread even in the metropolis to suggest that many people perceived no real dichotomy between political and chattel slavery. As Francis Hargrave, councillor for the alleged slave Somerset, commented at the start of his famous argument before Chief Justice Mansfield:

I mean however always to keep in view slavery, not as it is in the relation of a subject to an absolute prince, but only as it is in the relation of the lowest species of servant to his master, in any state, whether free or otherwise in the form of government. Great confusion has ensued from discoursing on slavery, without due attention to the difference between the despotism of a sovereign over a whole people and that of one subject over another I desire to be understood as confining myself to the latter [type of despotism]; though from the connection between the two subjects, some of my observations may perhaps be applicable to both.¹¹⁷

When Jefferson began his analysis of issues of royal and parliamentary incursions against American liberty, he was not so clearheaded as Hargrave about the distinction between actual chattel slavery and metaphoric political slavery. The problem was compounded further by a second strain of dualism, because Jefferson's inquiries based on the rights of Englishmen led down different paths from those premised on natural rights. Both methodologies figure prominently in Jefferson's *Summary View* of July, 1774, his first great public paper and his first systematic exposition of broad political principles.

The first fundamental premise for the rights of British North Americans that Jefferson asserts is racial identity. In keeping with the Whig view of history, Jefferson maintained that English liberties were passed down intact from Saxons who "left their native wilds and woods in the North of Europe, possessed themselves of the island of Britain then less charged with inhabitants, and established there that

¹¹⁷ 1 STATE TRIALS, *supra* note 19, at 25.

system of laws which has so long been the glory and protection of that country.”¹¹⁸ By the same process, all the liberties protected in the common law and the ancient Constitution accompanied the emigrants who settled America. As Jefferson reasons, “it is thought that no circumstance has occurred to distinguish materially the British from the Saxon emigration.” Thus, in demanding that Crown and Parliament respect their liberties and privileges, Americans asserted the birth rights of their English race.

Such racial justifications for American rights involve a powerful sense of shared history as an additional well spring of entitlement. In Jefferson's eyes, the half century spanning the English Civil Wars and the Glorious Revolution culminated with the “establishment of the British constitution on its free and antient principles.”¹¹⁹ Thus, Whig heroes had secured rights that Jefferson construed both as Saxon legacies and products of valiant British reassertion. Moreover, Americans had participated in these seventeenth century struggles themselves, by resisting royal usurpations against colonial freedoms.¹²⁰ When Jefferson laid an ethnic and historical claim to the rights of Englishmen, he stated a claim which by its very nature excluded African Americans, who had no part in either the Saxon or Commonwealth heritage. It was not necessary to consciously exclude blacks, because they simply did not figure in the dialectic of Whig history. The liberties secured in the common law and British Constitution reflected centuries of struggle which had taken no notice of Africans. In the minds of white Americans drifting towards revolution, the republican ideology that shaped and guaranteed the liberties of the Anglo-American race had never extended to or impacted upon African slaves.

Barbara Jeanne Fields has suggested a similar explanation of English liberty's indifference to African slaves in early colonial Virginia. According to Fields:

Africans and Afro-West Indians had not taken part in the long history of negotiation and contest in which the English lower classes had worked out the relationship between themselves and their superiors. Therefore, the custom and law that embodied that history did not apply to them. To put it another way: when English servants entered the ring in Virginia, they did not enter alone. Instead, they entered in company with the generations who had proceeded them in the struggle; and the outcome of those earlier struggles established the terms and conditions of the latest one. But Africans and Afro-West Indians did enter the ring

¹¹⁸ Draft of Instructions to the Virginia Delegates in the Continental Congress. 1 A SUMMARY VIEW OF THE RIGHTS OF BRITISH NORTH AMERICA 121 (July, 1774) (Julian P. Boyd ed.); verb tense changed (hereinafter A SUMMARY VIEW).

¹¹⁹ *Id.* at 131.

¹²⁰ See generally RICHARD MIDDLETON, COLONIAL AMERICA: A HISTORY, 1565-1776 151-170, 502-503 (3d ed. 2002) (on the Glorious Revolution in America).

alone. Their forebears had struggled in a different arena, which had no bearing on this one.¹²¹

So when Jefferson invoked English liberties on behalf of Virginians in 1774, he did not bother to mention that they did not extend to African Americans. This linkage between entitlement to the full benefits of republican principles and the racial identity of Americans contending for liberty pervades the *Summary View*. When the English Commonwealth and Virginia agreed by solemn treaty in 1651 that Virginia should have free trade with the world, they did so without regard to the rights of Africans. When Charles II rescinded this treaty, he did so without even thinking of the Africans living in Virginia. To Jefferson, there was no reason to consider that these seventeenth century transactions might have any bearing on anyone not identified as British Americans.

Thus, Jefferson moved from the arena of political rights to the question of economic liberty. If African Americans were not here excluded by definition, as they were in the case of the rights of Englishmen, their economic interests were not likely to engender a sense of common identity with the white, slaveholding, political leadership of Virginia. With economic liberties, then, as with the English political heritage, there was no incentive for Jefferson or any one similarly situated to argue the case for black freedom. Recalling Jack P. Greene's argument about political manhood, we might now put things slightly differently.¹²² Neither with regard to claims based on the rights of Englishmen nor respecting those centred on economic liberty was there any impetus of logic or interest for politically animated white Virginians to make common cause with African slaves, or to include them within the orbit of the appeal against Parliamentary tyranny.

Having set out his case that the rights of British North Americans were intolerably offended by the Coercive Acts, Jefferson was ready to assert independence from Parliament. "The true ground on which we declare these acts void," he argued, "is that the British parliament has no right to exercise authority over us." This assertion of independence follows a pattern of logic very similar to the argument in the *Declaration of Independence*; an introduction details the paper's purpose to its intended audience, then a philosophical premise is stated, an American perspective of proper relations within the British Empire laid down, a list of infractions developed, and finally a forthright proclamation of independence— from Parliament in the first case, and from King in the second—brings the paper to a

¹²¹ Barbara Jeanne Fields, *Slavery, Race, and Ideology in the United States of America*, THE NEW LEFT REV., May-June 1990, no. 181, at 107. Fields' point here is a cogent one; and indeed, Fields typically describes ideologies with piercing acumen. On the whole, however, her analysis is undermined by a quixotic commitment to denying the importance of race as a historical factor. This fixation obscures valuable insights that, among other things, might shed much light on Jefferson's thinking in the 1770's.

¹²² See JACK P. GREENE, ALL MEN ARE CREATED EQUAL, SOME REFLECTIONS ON THE CHARACTER OF THE AMERICAN REVOLUTION, AN INAUGURAL LECTURE (1976).

solemn and deliberate close. The structure of Jefferson's state papers makes familiar historiography,¹²³ but it is worth keeping in view because it highlights starkly the principles upon which independence is asserted. Independence in the *Summary View* is not yet an abstract universal entitlement, but rather a right asserted on very specific grounds of British history. Under the terms of debate in the *Summary View*, American liberty is not something to which African-Americans had any claim. When debate shifted away from English liberties to natural rights in *The Declaration of Independence*, an argument with the very same structure and purpose created contradictions that by necessity loomed more prominently and complexly in Jefferson's mind. With the perspective of historical hindsight, we can make out the origins of these complexities in the *Summary View's* Lockean depiction of a conspiracy against liberty.

With independence from Parliament already asserted, Jefferson returned to the Intolerable Acts not to detail grievances, but to unmask the government's usurpatory design. "Single acts of tyranny may be ascribed to the accidental opinion of the day; but a series of oppressions, begun at a distinguished period, and pursued unalterably thro' every change of ministers, too plainly prove a deliberate, systematical plan of reducing us to slavery." This is of course very nearly the language of the *Declaration*; it is also very nearly the language of Locke's *Second Treatise*.¹²⁴ Jefferson's first mention of "slavery" in the *Summary View* marks

¹²³ See e.g. THE DECLARATION OF INDEPENDENCE: THE EVOLUTION OF THE TEXT AS SHOWN IN FACSIMILES OF VARIOUS DRAFTS BY ITS AUTHOR, THOMAS JEFFERSON (Julian P. Boyd ed. 1945), 1 Boyd, *supra* note 15, at 415-454; A DECENT RESPECT TO THE OPINIONS OF MANKIND: CONGRESSIONAL STATE PAPERS, 1774-76 (J.H. Hutson ed. 1975); PAULINE MAIER, AMERICAN SCRIPTURE: HOW AMERICA DECLARED ITS INDEPENDENCE FROM BRITAIN (1999).

¹²⁴ In Section 225, Locke wrote "*revolutions happen* not upon every little mismanagement in public affairs. *Great mistakes* in the ruling part, many wrong and inconvenient laws, and all the *slips* of human frailty, will be *born by the people* without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected..." SECOND TREATISE OF GOVERNMENT 113 (C. B. Macpherson ed. 1980) (originally published 1690). The *Declaration* as Adopted by Congress reads "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." 1 Boyd, *supra* note 123, at 429-30. Thus, neither Locke nor Congress chooses the term

(respecting his surviving papers, at least) his first public, written use of the term before an audience larger than the General Court that heard *Howell v. Netherland*. Here, the reference is to political, not chattel, slavery; it is all the more revealing therefore that the usage occurs in a so expressly Lockean context.

Locke can be seen quite properly as a bridge between common law and natural law, between civic humanism and the Enlightenment, and between the rights of Englishmen and natural rights. Jefferson was of course all of these things as well. Moreover, by Jefferson's day, progress had altered the balance between ancient and modern liberty, so that common law, civic humanism, and the rights of Englishmen were imbued more with a flavor of heritage, while natural law, enlightened reason, and natural rights acquired more the feel of practicability. But Jefferson became one thing more than Locke. His discourse spanned republicanism and egalitarian democracy, and in so doing engendered a way of thinking about and governing society that could not forever co-exist with chattel slavery. Even in the *Summary View*, Jefferson flirts with belief systems that would no longer accommodate discussion of slavery in exclusively metaphorical and political terms, and no longer take for granted that chattel slavery existed outside the ambit of political relevance.

With reference to the late seventeenth century, and to Locke in particular, D. B. Davis has written of the "curious capacity of slavery for generating or accommodating itself to dualism in thought."¹²⁵ Without a doubt, this curious capacity lived on to touch Jefferson and other Southern champions of liberty who lived after him; in fact, dualism on slavery became a Jeffersonian characteristic. But Davis can also write of Locke that his "unquestioning acceptance of colonial slavery shows how remote abolitionism was from even the more liberal minds of the late seventeenth century."¹²⁶ This was no longer true of Jefferson or of his age. When

slavery to refer to impending political despotism. Congress, in fact, pointedly altered Jefferson's choice of that phrase in earlier drafts.

¹²⁵ Davis, *supra* note 44, at 119. According to Davis, Locke was able to dismiss the conflict between slavery and natural rights ideology by assuming that slavery existed exclusively outside the social contract. "For in Locke's view," says Davis, "the origin of slavery, like the origin of liberty and property, was entirely outside the social contract. When any man, by fault or act, forfeited his life to another, he could not complain of injustice if his punishment was postponed by his being enslaved." *Id.* All of Locke's politics derived from the social contract, so slaves, justly captured in war, existed outside Locke's political realm. But if anyone had convinced Locke of Jefferson's position that slaves were captured not in just wars, but by piracy, then, by force of logic, these slaves would have become relevant to Locke's politics. After all, Locke could scarcely go on maintaining that enslaved persons had forfeited their lives through fault or intentional act if they came to slavery because they or their ancestors had been unjustly seized. If Locke had abandoned the fiction that slavery originated in just war, he must surely have come round to the view that the slaves had had the social contract imposed upon them. In so doing, he would have approached Malcolm X's formulation that blacks and Indians did not land at Plymouth Rock, but rather, that Plymouth Rock landed on them.

¹²⁶ *Id.* at 121.

Jefferson moved beyond Whig-republican to equal rights-based denunciations of impending political slavery, he would have to confront his society's involvement with human bondage if his rhetoric was to remain credible. Before yielding to this necessity, he devoted four full pages to strident denunciations of political enslavement. Before confronting a situation which threatened to saddle Jefferson, his own legislature, and his own constituents with blame, he heaped as much blame on King and Parliament as he could muster.

If there is something of hypocrisy or self-service about this argumentative technique, it surfaces most clearly in Jefferson's lambasting of virtual representation. Virtual representation was a concept hatched in the 1760s by champions of Parliamentary authority in the American colonies. It maintained that although colonials returned no members to Westminster, they were still represented in Parliament, because every MP had the interests of all the Empire at heart.¹²⁷ Jefferson saw this doctrine as a poor apology for Parliament's proclaimed right to levy internal taxes in America, as indeed it was. But his rhetoric reveals a good deal more than this. "Can any one reason be assigned," Jefferson argues:

why 160,000 electors in the island of Great Britain should give law to four millions in the states of America, every individual of whom is equal to every individual of them in understanding, and in bodily strength? Were this to be admitted, instead of being a free people, as we have hitherto supposed, and mean to continue, ourselves, we should suddenly be found the slaves, not of one, but of 160,000 tyrants, distinguished too from all others by this singular circumstance that they are removed from the reach of fear, the only restraining motive which may hold the hand of a tyrant.¹²⁸

Thus Jefferson returns to the symbol of slavery, to argue that Americans will not submit to virtual representation.¹²⁹ But America and Virginia were very much practitioners of virtual representation in their own right. Jefferson refers to "four

¹²⁷ See e.g. Soame Jenyns, *Objections Considered* (reprinted in SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION (Samuel Eliot Morison ed., 1962) (first published 1929); George Grenville, *Speech in the Debate on the Address* (reprinted in THE DEBATE ON THE AMERICAN REVOLUTION, 1761-1783 97-99 (Max Beloff ed. 1972).

¹²⁸ 1 Boyd, *supra* note 118, at 126.

¹²⁹ Slavery was of course the ultimate symbol of complete submission to absolute power. Here the metaphor is especially poignant, because Jefferson refers to the slavery of a whole class of people, Americans, to another class of people, English. Notwithstanding the many ways that slaves did resist, described by writers like Blassingame and Genovese, for the abstracted purposes of theories of political liberty, Jefferson here represents the submission of African slaves in Virginia as total and absolute, like the inmates in Elkins' prison camps. Cf. STANELY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1987).

millions in the states of America.” He cannot mean four million electors, because there were no where near that many, and he knew as much. There were by his reckoning perhaps four million people, including women, slaves, minors, and others disenfranchised.¹³⁰ Even an assumption of universal white manhood suffrage—and Virginia, for instance, had nothing of the sort until the 1850s—leaves women, slaves, and minors virtually represented, subsumed within the vote of their *pater familias*, on the grounds that they had no political will of their own, or, more accurately, that their interests were encompassed within those of the master of their household. Simply indicting Jefferson for not anticipating current political sensibilities, or condemning the past for being less inclusive than the present, might not be historically instructive. But Jefferson's approach to virtual representation is interesting for the additional reason that it suggests what he viewed as the stakes in his debate with the King. Among America's alleged four millions, Jefferson insists, those who possessed political manhood would not be bludgeoned into submission. Collectively, this group spoke for the whole society. In this passage about political entitlement wrongly assailed, Jefferson takes for granted that the rest of the nation is subsumed within his and the politically competent citizens' voices. When he uses the metaphor of slavery, Jefferson does not question that he actually does speak for this other part of North America—the part that includes three quarters of a million chattel slaves. In so doing, Jefferson ascended to the outer limits of credible audacity for republican denunciations of political slavery.

This type of audacity became a standard feature of Virginia's Revolutionary self-assertion, and a similar style resurfaced as a principal bulwark in the South's rhetoric of liberty during the antebellum years. The author of the *Summary View*, like the fire-eaters of the nineteenth century, felt compelled to an ongoing, repetitive re-assertion of his liberties. In both instances, the key issue was to avoid backsliding into political slavery. What differentiated the politics of Virginia in 1774 from those of, say, South Carolina in 1850, were the specific elements of liberty emphasised by the respective votaries. Fire-Eaters were jealous of liberties that touched the security, mobility, and moral sanctity of their property in human beings, and equated threats to self-determination in this sphere with enslavement. Spurred on by Parliament's partial suspension of local governance and jury trial in Massachusetts, Jefferson championed liberties that touched more closely on personal sovereignty, and which appeal more closely to our own morality. To Jefferson, the counterpoint of liberty and slavery was, if anything, more convincing and compelling than to the Fire-eaters. His rhetoric equated evisceration of legal right and status to enslavement. In this regard, the slave with no right to due process, no standing at law, and no recourse to the courts painted a far more poignant picture than the fire eaters' image of a slave who had no right to take other slaves into Kansas. Jefferson's metaphor was the same as Ruffin's or Rhett's, and, as a slaveholder, his

¹³⁰ A modern day academic estimates the total population in 1774 at nearer to two-and-a-half million. See J. Potter, *The Growth of Population in America, 1700-1860* in *POPULATION IN HIST.* 638 (David Glass & D.E. Eversley eds. 1965).

audacity was of a similar vein; but his zeal was for liberties, that, to use what later became a jurisprudential term of art, are far more fundamental.¹³¹

Due process rights were fundamental to Jefferson, and their possession was incompatible with chattel or political slavery. Of equal status as a core liberty, and as a counterpoint to slavery, was government by representative legislature. Not only Parliament, however, but King as well, stood accused of waging war on American legal and political liberty. To Jefferson, a royal veto over the various legislatures within the Empire was a necessary check against jurisdictional expansion by aggressive and interested legislatures, such as the Parliament at Westminster. But in the “wanton exercise of the [royal veto] power which we have seen his majesty practice on the laws of the American legislatures,”¹³² Jefferson perceived a direct attempt to reduce America to political slavery. And reaching the King’s misuse of this power to block Virginia’s efforts to ban slave importations, Jefferson moved at long last, and with some deftness, to the issue of genuine chattel slavery, an issue which had loomed inescapably larger with each of his rhetorical thrusts against figurative bondage.

“For the most trifling reasons, and sometimes for no conceivable reason at all,” Jefferson complained, “his majesty has rejected laws of the most salutary tendency. The abolition of domestic slavery,” he continued, “is the great object of desire in these colonies where it was unhappily introduced in their infant state.”¹³³ From a factual standpoint, this last statement was most certainly wrong.

It is true, that in 1774 many Virginians wished for a suspension—if not abolition—of the slave trade. It is also true that in 1774, Jefferson favored an eventual end to slavery in Virginia. But it is by no means true that Virginians, Southerners, or even Americans generally shared this view.¹³⁴ It would be next to impossible to quantify attitudes towards slavery on the eve of independence, but it is probably quite safe to say a majority of Virginians supported the institution. In the newspaper reels I have examined, there are many more notices for runaways, slave sales, and hiring-out than there are letters or editorials condemning chattel slavery. One must ask whether Jefferson here engaged in naivete, in wishful thinking, or in false advertisement. Whatever the case, with this statement Jefferson went firmly on record as morally opposed to slavery. Its introduction, after all, was labelled an unhappy occurrence. But he also managed to avoid direct culpability. Slavery was introduced in Virginia’s infancy, and came down to Jefferson’s generation as an unwanted legacy.

The next link in Jefferson’s argument is not quite logical. He contends that “previous to the enfranchisement of the slaves we have, it is necessary to exclude all

¹³¹ See generally WILLIAM J. COOPER, JR., *LIBERTY AND SLAVERY: SOUTHERN POLITICS TO 1860* (2000) (discussing the rhetoric of liberty in the pro-slavery politics of the antebellum South); Freehling, *supra* note 88.

¹³² 1 Boyd, *supra* note 118, at 129.

¹³³ *Id.* at 130.

¹³⁴ See generally MacLeod, *supra* note 67; LARRY TISE, *PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701-1840* (1987); McColley, *supra* note 112.

further importations from Africa.”¹³⁵ If not epistemologically impregnable, this contention was nevertheless genuine. Jefferson was hardly alone in viewing slave trade abolition as a prerequisite for emancipation; all but the most radical Quakers held this view then, and for decades after.¹³⁶ Indeed, in 1775, in one of his early contributions to the *Pennsylvania Journal*, even that most committed of radicals, Thomas Paine, argued that independence might be necessary in order for Americans to put an end to the slave trade.¹³⁷ Still, it is worth while to pause and consider the implications of Jefferson’s sequential logic. Charging the King for failure of slave trade abolition removed the onus of blame, and allowed Jefferson to maintain the moral high ground while he belabored the metaphor of political enslavement. No action was possible on chattel slavery, because the necessary first step of excluding further African importations “by prohibitions, and by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty’s negative.”¹³⁸ Thus, Britain was responsible not only for the imposition of slavery in the first place, but also for its continuation into the enlightened 1770s. In his condemnation, Jefferson now waxed righteous and indignant. His Majesty had “preferred immediate advantages of a few British corsairs to the lasting interests of the American states, and to the rights of human nature deeply wounded by the infamous practice.”¹³⁹ To Jefferson’s critics from Dr. Johnson onwards, these passages have seemed hypocritical in the extreme. Rather than extricating himself or his society from slavery, Jefferson blamed spatially and temporarily distant actors for his involvement in crimes against humanity. But while one may find fault with Jefferson’s allocation of blame, his condemnation of slavery is in itself irreproachable, as he labels the slave trade piracy, and enslavement of Africans an

¹³⁵ Boyd, *supra* note 118, at 130. Here, enfranchisement has nothing to do with voting, but merely liberation from slavery. In the OED, Dr. Murray informs that today’s more familiar usage comes down from Johnson’s derivation of En + Franchise, which, though not quite accurate, became generally influential. Johnson’s Dictionary was published in 1755, but Jefferson was no fan of his (or any Tory writers), even before the quip about the loudest yelps for liberty. It is quite inconceivable that Jefferson had in mind an early 15th Amendment or Voting Rights Act when he referred to “infranchisement,” although the term’s two meanings are logically related, as the authors and interpreters of both the 14th and 15th amendments would discover.

¹³⁶ See Davis, *supra* note 45, at 408-468; *Id.* at 116-118; Freehling, *supra* note 88, at 136-138.

¹³⁷ See letter from “Humanus,” PENNSYLVANIA JOURNAL (October 18, 1775) (quoted in FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 260 YEARS: 1690 TO 1950 91 (revised ed. 1950). Whether Paine, who had only arrived in America in 1774, formed this opinion independently, or whether he based his assertion on Jefferson’s *Summary View*, is an interesting question.

¹³⁸ Boyd, *supra* note 118, at 130.

¹³⁹ *Id.*

injury to human nature. Who, one may well ask, among the world's politicians, had said more in 1774?¹⁴⁰

Jefferson's temerity in pursuing the political slavery analogy even while he championed rights of slaveholders—never, however, their pretended rights to hold slaves—made confrontation with the issue of Virginia's involvement with slavery inevitable. By finally grappling the problem he deflated a sense of tension in his reading audience.¹⁴¹ A skillful framing of the issue within the royal veto question allowed Jefferson to play down slavery's obvious centrality to readers, who, while attuned to republican rhetoric, were also sensitive to natural rights doctrines, and even to ascending sentimentalism. Still, there remained something awkward about saddling England with all the blame for oppression in Virginia. Jefferson would encounter this awkwardness in far greater measure when he drafted the *Declaration*, which appealed to a much wider audience and involved so much more self-justification. In 1774, however, in what was still an intra-Empire argument about English liberties, Jefferson was happy to dispense with the issue by merely broaching it. This allowed him to get back to his driving purpose with renewed vigor and emphasis, and rejoin his attack on political enslavement.

Back on the offensive, Jefferson's writing is at its best, both in its rhetorical power and in its richness to an historian. “Does his majesty seriously wish, and publish it to the world,” demanded Jefferson, “that his subjects should give up the glorious right of representation, with all the benefits derived from that, and submit themselves absolute slaves of his will?”¹⁴² Perfidious Albion was selling out the very core of America's birth-right English liberties, the right to government by a representative legislature, and in so doing denying even America's Englishness. Americans might as well be African slaves.

Jefferson's indictment of His Majesty moves onwards, employing uncommonly forceful and revealing invective:

One of the articles of impeachment against Tresilian and the other judges of Westminster Hall in the reign of Richard the second, for which they suffered death as traitors to their country, was that they had advised the king that he might dissolve his parliament at any time: and succeeding kings have adopted the opinion of these unjust judges. Since the establishment however of the British

¹⁴⁰ Not until 1820 did the U.S. pass a law equating maritime slave trading with piracy. 3 Stat. 600 (1819). This act imposed the death penalty; the slave trade abolition statute that Jefferson signed in 1807 imposed fines between \$1,000 and \$20,000 and prison terms of two to ten years. 2 Stat. 426-30 (1806).

¹⁴¹ That is, his British and Northern audiences. Virginians, one might suppose, would have relished his relentless and shameless audacity. See generally ROBERT A. FERGUSON, *READING THE EARLY REPUBLIC* (2004); JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE* (1993); ANDREW BURSTEIN, *THE INNER JEFFERSON: PORTRAIT OF A GRIEVING OPTIMIST* (1995) (on the sensibilities of the reading audience).

¹⁴² Boyd, *supra* note 118, at 131.

Constitution at the glorious Revolution on its free and ancient principles, neither his majesty nor his ancestors have exercised such a power in the island of Great Britain; and when his majesty was petitioned by the united voice of his people there to dissolve the present parliament, who had become obnoxious to them, his ministers were heard to declare in open parliament that his majesty possessed no such power by the constitution. But how different their language and his practice here! . . . When the legislative body have lost the confidence of their constituents, when they have notoriously made sale of their most valuable rights, when they have assumed to themselves powers which the people never put into their hands, then indeed their continuing in office becomes dangerous to the state, and calls for an exercise of the power of dissolution. Such being the causes for which the representative body should and should not be dissolved, will it not appear strange to an unbiased observer that that of Great Britain was not dissolved, while those of the colonies have repeatedly incurred that sentence?¹⁴³

This last phrase is most telling of all. Why, indeed, were the loudest yelps for liberty heard from the drivers of Negroes? Without any doubt, the double standard developing regarding the British government's respect for English liberty on the one hand, and disregard for American liberty on the other, seemed most alarming to someone living day in and day out in a society defined by the double standard between black slavery and white freedom.¹⁴⁴ In the *Summary View*, Jefferson was obsessed by the rights of Englishmen, and their foundation in British history. The British Constitution embodied the struggle, culmination, distillation, and permanent fixation of liberty's triumph over British history. Not only did African American slaves have no role or stake in these trials and triumphs, but, in Jefferson's mind, their very exclusion from this legacy became an instructive exhortation for him to carry on the fight.¹⁴⁵

¹⁴³ *Id.*

¹⁴⁴ Edmund Burke commented early and insightfully on the Southern slaveholders' propensity towards jealous guardianship of their own liberty. See Edmund Burke, *Speech on Conciliation with America* (reprinted in *ON EMPIRE, LIBERTY AND REFORM: SPEECHES AND LETTERS OF EDMUND BURKE*, 62-134 (David Bromwich ed. 2000)).

¹⁴⁵ This notion of black exclusion was not the only logical interpretation of real commonwealth ideology. In regions where slavery was neither fundamental nor pervasive, the opposite decision could be reached. Hargrave and the councillors for Somerset maintained that, at least in England, African people did inherit the common law, the Constitution, and their respective abhorrence of slavery. The framers of the Massachusetts Constitution thought much the same. In this expansive view of the rights inherited from British whiggery they discovered the genius of America's future democratic society.

PART V: LIBERTY, SLAVERY & THE DECLARATION OF INDEPENDENCE

When Jefferson rejoined his struggle for America's fundamental liberties in the *Declaration of Independence*, he entered a far larger arena and played for far higher stakes. He now spoke officially for a much wider constituency—thirteen states instead of one—and addressed a much wider audience—the enlightened world as opposed to the Virginia delegation and the Westminster government. The game, however, remained substantially the same. Speaking on behalf of a slaveholding people, Jefferson asserted the right to avoid political enslavement. The complexities engendered by the new wider parameters led to revisions, adjustments, and one fundamental deletion respecting slavery, as the *Declaration* made its way through four drafts, bringing it from Jefferson's hand to committee, and to the floor, and to ratification and publication before the world.

In Congress, on June 7, 1776 Richard Henry Lee proposed Virginia's motion for American independence. After two days of debate, Congress postponed further action on the motion until July 1, so that delegations still bound by instructions not to sever ties with Britain could refer back to their states for new instructions. To forestall any additional delay, Congress on June 11, appointed a Committee of Five to place a declaration in readiness, assuming that independence was inevitable following the King's withdrawal of protection from his American subjects. This Committee consisted of Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston. They, in turn, elected Jefferson to draft the fateful document.¹⁴⁶

By the time the Committee asked Jefferson to draft a Declaration, tensions inherent in Virginia's simultaneous denunciations of political slavery and practice of chattel slavery had intensified markedly even from his first broaching the issue in the *Summary View*. In November, 1775 Lord Dunmore, Virginia's last Royal Governor, issued a ship-board proclamation as he fled the rebellious Old Dominion, guaranteeing freedom to all slaves who would enlist for the Crown.¹⁴⁷ There is strong textual evidence in drafts of the *Declaration* that Dunmore's proclamation weighed heavily on Jefferson's sense of security, on his conscience, and on his self-image. Much of the beauty of the *Declaration* in its final form lies in its universality, and its transcendence of the contradictions particular to Revolutionary Virginia. However, in their revelation of the tensions with which Jefferson wrestled as he strove toward the universal, the drafts make fascinating reading.

Jefferson's ethno-cultural basis for rights assertion emerges clearly in his earliest attempt at what would become the *Declaration*, a section of a first draft for his proposed Constitution for Virginia.¹⁴⁸ Jefferson drafted this in Philadelphia,

¹⁴⁶ See Maier, *supra* note 1, at 97-143 (discussing the Committee's role, arguing that its contributions are generally underappreciated).

¹⁴⁷ LORD DUNMORE, Proclamation of Nov. 7, 1775, (April 2005)

<http://collections.ic.gc.ca/blackloyalists/documents/official/dunmore.htm>.

¹⁴⁸ THOMAS JEFFERSON, THIRD DRAFT OF THE CONSTITUTION FOR VIRGINIA, 1 Boyd, *supra* note 15, at 356-65.

even as Lee's motion was pending in Congress. He sent it home with George Wythe, when his friend and law teacher (and opposing counsel in *Howell*) quit the Congress to participate in the creation of Virginia's new Constitution. Jefferson's attentions remained divided as he wrote America's *Declaration*; frequently his mind turned anxiously to Virginia, where a new republican constitution was in creation, and where his wife was experiencing another difficult and precarious pregnancy. When Virginia was on his mind in the early stages of his drafting, a local perspective sometimes colored his Continental discourse.

The section of the proposed Virginia Constitution corresponds to the section of the *Declaration* containing charges against the King; it lists the “black Catalogue of unprovoked injuries” that drove Virginia to seek independence. Jefferson enumerates sixteen charges, divided into three groups. The first relates to the King's “waging war” against American political liberty, the last to what Locke called the act of “unkinging” a century before. For present purposes, the middle group is the most interesting. This relates to George III's war against the American people. Here, Jefferson identifies the people as a distinct and definable race. In Jefferson's eyes, the King waged war by “prompting our negroes to rise in arms among us; those very negroes whom by an inhuman use of his negative he hath refused us permission to exclude by law.”¹⁴⁹ This obvious reference to Lord Dunmore's proclamation affords clear textual evidence that at the time of the *Declaration*, Jefferson's “us” did not encompass African Americans as Virginians, but rather excluded them as a separate and potentially threatening presence “among us,” a presence Virginia would have liked to legally debar.¹⁵⁰

Two further charges in the proposed Virginia Constitution suggest Jefferson's heightening sense of American racial identity. He indicted the King for “endeavouring to bring on the inhabitants of our frontiers the merciless Indian savages whose known rule of warfare is an undistinguished destruction of all ages, sexes, & conditions of existence.”¹⁵¹ Thus, one force defining the American race is

¹⁴⁹ *Id.* at 418.

¹⁵⁰ Peter Onuf has argued that Jefferson saw white and black Virginians locked in a permanent state of war, caused by slavery. Even in times of external peace, Onuf argues, low intensity hostilities between white and black continued in Jefferson's eyes. Dunmore's Proclamation merely allowed these hostilities to come out into the open. See PETER S. ONUF, *JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* (2000). Merkel, *Race, Liberty and Law: Thomas Jefferson and the Problem of Slavery: 1770-1800* (unpublished doctoral thesis, on file with author), makes the case that Onuf accurately captures Jefferson's sensibilities during wartime, but that between the American and Haitian Revolutions, Jefferson was able to contemplate some measure of peaceful post-emancipation co-existence between whites and blacks in Virginia. Only with the expulsion and extermination of the white colonial population in the former St. Dominique did Jefferson's mind harden permanently against the continued presence of a large African American population in a post-slavery United States.

¹⁵¹ 1 Boyd, *supra* note 15, at 418.

its distinctness from the aboriginals; and simultaneously, the threat of violence inherent in that distinctness. That threat of violence spoke directly to Jefferson as a deeply protective husband and father. Distinctions defining white and Indian parallel closely those distinctions separating white from black. The overlap is particularly interesting, in the light of the greater esteem and higher desire for integration Jefferson generally harbored towards Indians. There were many times when the mere presence of natives in the new country did not seem threatening or disturbing to Jefferson, but this bloody civil war to define national destiny could not be one of them.¹⁵²

A further charge against the King, revealing much about Jefferson's conception of American racial identity, relates to foreign mercenaries. The mercenaries came, Jefferson charges, to “compleat the works of death, desolation, & tyranny already begun with circumstances of cruelty & perfidy so unworthy the head of a civilized nation.”¹⁵³ This language resounds in ethno-cultural images. If the Hessians were foreign, then the English were not. To be American would no longer entail subjection to English government, but, at the same time, to be un-English was to be foreign to America, and to be foreign to America was to be un-English. Moreover, the English nation was a civilized nation (even if ruled by an unworthy King), which suggests strongly a counterpoint in this political dynamic of peoples who were not civilized, namely blacks and Indians. Again, it seems Lord Dunmore's proclamation weighed heavily on the draftsman of independence. So in this short preliminary fragment, Jefferson, writing still in a Virginia frame of mind, effects a fairly exclusionary definition of his people: They can be neither un-English, uncivilized, Indian, African, nor enslaved.

The next precursor to Jefferson's *Declaration* is called the composition draft by the late Julian Boyd, the longest serving editor-in-chief of Jefferson's papers. It reflects the state of the developing text in mid June, 1776, after the Committee had delegated the drafting to Jefferson, but before he submitted the original rough draft to them. Re-assembled from several fragments, the composition draft expresses Jefferson's first consciously American—and not merely Virginian—perspective. Perhaps surprisingly, its vision of the American people is in some respects even narrower than that of the draft constitution for Virginia. Here the King is charged with “send[ing] over not only soldiers of our (own) common blood but Scotch and foreign mercenaries to (destroy us) invade and deluge us in blood.”¹⁵⁴ When

¹⁵² Much more is said regarding Jefferson's attitudes towards Indians, and the light these cast on his opinions of African Americans, in my discussion of *The Notes on the State of Virginia*. But see also ANTHONY F. C. WALLACE, *JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS* (1999) (for another and more damning account).

¹⁵³ 1 Boyd, *supra* note 15, at 419.

¹⁵⁴ *Id.* at 420 (Jefferson's own deletions appear here in parenthesis). Note also the now seldom heard Verse 6 of God Save the King, highly topical when the future anthem was first performed in 1745: “Lord grant that Marshal Wade / May by thy mighty aid / Victory bring. / May he sedition hush, / And like a torrent rush, / Rebellious Scots to crush. / God Save the King!”

political dispute waxes into blood feud, what part could alien Africans hope to play? And how pure the American blood becomes here, excluding in Jefferson's eyes even the Scots!¹⁵⁵ Truly, this is the American Revolution as a family quarrel among equals, in which blacks play no part.

However, even as Jefferson ascends his greatest heights of ethnocentricity, his logic begins to shift towards a potentially more universal perspective. Following immediately on the heels of the remonstrance against the blood feud, Jefferson wrote, and then himself deleted, that British policy was “too much to be borne even by relations. Enough then be it to say, we are now done with them.”¹⁵⁶ When the parties to a family quarrel no longer acknowledge their familiarity, they are left not to struggle over systems of relations, but over principles. Unlike a quarrel over Anglo-American family matters, a struggle over principles might become broad enough to touch more pointedly on African American status and interest. In time, it might even become necessary for slaveholding Revolutionaries to develop and articulate a rationale justifying the inapplicability of Revolutionary principles to the slaves. By the time Jefferson's text had evolved into what is called the original rough draft, this very problem was beginning to bubble beneath the smooth surface of Revolutionary rhetoric.

The original rough draft is the version Jefferson submitted to the Committee of Five. The Committee made few changes, none of which related directly to slavery.¹⁵⁷ Nevertheless, three of those changes raised interesting philosophical implications concerning slavery's increasingly contradictory place in the new Republic.

Jefferson's original of the Declaration's famous preamble read:

When in the course of human events it becomes necessary for a people to advance from that subordination in which they have hitherto remained, & to assume among the powers of the earth the equal & independent station to which the laws of nature & of nature's god entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the change.¹⁵⁸

Here, the Committee made two changes. Jefferson's “advance from that subordination in which they have hitherto remained” gives way to “dissolve the political bonds which have connected them with another.” The Committee, more

¹⁵⁵ See T.H. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTER ON THE EVE OF REVOLUTION* (1985) (stressing anti-Scottish sensibilities in Virginia as a reflection of hostility towards the frequently Scottish factors of British banks and merchant houses who represented their firms in Virginia).

¹⁵⁶ 1 Boyd, *supra* note 15, at 420.

¹⁵⁷ *But see* Maier, *supra* note 1, at 97-143 (arguing that the Committee's contributions to the final product have been undervalued and Jefferson's overestimated).

¹⁵⁸ 1 Boyd, *supra* note 15, at 423.

Whiggish here than even Jefferson, denied that the colonials were ever in theory or in legitimate practice subordinate to England. Hence, they were never, nor could they ever be, political slaves. Not perhaps to the Committee, but to most readers, this free station would reaffirm a seemingly unbridgeable gap between the political rights of white and black Americans.

Secondly, the Committee substituted “separate and equal” station for Jefferson's “equal and independant [sic].” The implications of this change are subtle and debatable, but the replacement of independant by separate may imply a shift away from notions of preserving America's perfect Englishness towards visions of creating a new and novel commonwealth. This too would suggest the Committee's pushing Jefferson away from his older notion of Englishness as a title to rights and towards the vision of natural entitlement to rights that won the *Declaration* everlasting fame. In any case, it is perhaps not the subtle qualifiers of equality, but the introduction of equality itself into the *Declaration* that became most important to the future of slavery.

It is in the very next sentence that Jefferson writes his most famous words “all men are created equal.” In this Original Draft, the phrasing is actually “independant and equal,” echoing the couplet concerning America's political station as it stood prior to the Committee's alteration. The Original Rough Draft continues “that from that equal creation they derive rights inherent & inalienable,” which the Committee alters to “they are endowed by their creator with inherent and inalienable rights.” The Committee's more visible and active creator imbues all men with an arguably still firmer claim to equality, and renders future claims of separate white and black creation more dubious under America's fundamental charter of liberty. Perhaps because some Committee members felt a closer relation to God than did Jefferson, African Americans' latent and future claims to the triad of life, liberty, and happiness became more surely enshrined in the language of the *Declaration*.¹⁵⁹

As the earliest complete version of the *Declaration*, the original rough draft is more important for what it reveals about Jefferson's vision and language that carried over into the final form, than for its evidence of Jefferson's phrases that did not survive editing by the Committee. If the Committee made equality more firmly universal by invoking the Creator, Jefferson is due the greater credit for casting the national charter as an appeal to universal rights and to equality rather than merely as an appeal to the rights of Englishmen and to liberty. In the history of constitutionalism, this represented a truly revolutionary break from the past, and pointed to a potentially limitless expansion of natural rights into law and governance. The original rough draft corresponds very nearly to the *Declaration's* final published form. Here, for the first time, Jefferson moves beyond cataloging offenses of the British Administration to an exposition of philosophical justifications for independence. Here, also for the first time, appears the famous passage denouncing the King's complicity in the slave trade. That passage, however, would not survive debate on the Floor of the Continental Congress.

¹⁵⁹ See Paul K. Conkin, *Thomas Jefferson's Religious Pilgrimage*, in Onuf, *supra* note 2, at 19-49 (on the evolution of Jefferson's religious beliefs during this period).

The Committee of Five reported on June 28. Congress, sitting as the Committee of the Whole, debated Lee's Resolution for independence on July 1st and 2nd. On the 2nd, Congress voted in favor of independence and took up the Declaration reported by the Committee of Five.¹⁶⁰ Jefferson's own *Notes of Proceedings in the Continental Congress*—proven by Boyd to be a contemporaneous or nearly contemporaneous account¹⁶¹—reveal the author's sensitivity to changes made on the Floor. As Jefferson writes, “the pusillanimous idea that we had friends in England worth keeping terms with, still haunted the minds of many. for this reason those passages which conveyed censures on the people of England were struck out, lest they should give them offence.”¹⁶²

As Jefferson moves to an explanation of the deletion of the slave trade passage, his sensitivity waxes still more acute:

[T]he clause too, reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina & Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it. our Northern brethren also I believe felt a little tender under those censures; for tho' their people have very few slaves themselves yet they have been pretty considerable carriers of them to others.¹⁶³

Jefferson's characterization of the deleted passage is thoroughly revealing. It is the enslaving of inhabitants of Africa, and not the keeping of African-American slaves, that he censures. The blame resides in the kidnapping, and not in the maintenance of the institution. In this light, Virginia, in desiring to arrest the trade, appears more virtuous than England, South Carolina, Georgia, or New England. With no countervailing security interest in the African trade, Jefferson's moral sense gave him free reign to combat the trade with a zeal he could never bring to bear on the institution itself.

The indictment that Congress debated and deleted struck at the King with especial adamancy. Jefferson's semi-famous words charged that the King had:

waged cruel war against human nature itself, violating it's most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. this piratical warfare, the opprobrium of *infidel* powers, is the warfare of the *Christian* king of Great Britain. determined to keep open a market where *Men* should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. and that this assemblage of

¹⁶⁰ 1 Boyd, editorial notes, *supra* note 15, at 414.

¹⁶¹ Boyd argues that Jefferson's *Notes* were written in August, 1776. He proves they could not possibly have been set down later than 1783. *Id.* at 307-308.

¹⁶² Thomas Jefferson, *Notes of Proceedings in the Continental Congress* (June 7-August 1, 1776) (quoted in 1 Boyd, *supra* note 15, at 314).

¹⁶³ *Id.* at 314-15.

horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he has also obtruded them: thus paying off [faded print looks like 'paving off' in Boyd] former crimes committed against the *Liberties* of on people, with the crimes which he urges them to commit against the *lives* of another.¹⁶⁴

Dumas Malone, who usually lauds Jefferson's anti-slavery efforts, argues that this “was one of those rare Jeffersonian passages which are consciously rhetorical and betray a striving for effect.”¹⁶⁵ The biographer is quite right that “[f]rom the literary point of view this omission was no loss,”¹⁶⁶ but he is too quick to dismiss its ideological consistency. The purged language forms part of a coherent whole, explaining Jefferson's justification to himself of a natural rights basis for American independence, notwithstanding his beloved Virginia's deep involvement with human bondage.

It seems odd perhaps that so sympathetic a Jeffersonian as Malone—a son of New South Mississippi, who devoted more than fifty years to recreating Jefferson's life and times—should view the Virginian's blaming the King for slavery as a self-conscious endeavor. That but for the withholding of the royal assent, slave importations into Virginia would have ceased in 1772, is a belief Jefferson held sincerely and accurately.¹⁶⁷ That this belief also buttressed his sense of virtue is true, but that does not necessarily mean that it was illegitimate. All modern scholars of slave trade abolition, from Williams, to Anstey, to Davis, to Haskell¹⁶⁸ agree that a concordance of interest and morality was necessary to the overthrow of the nefarious traffic. What scholars and the general public alike have lost sight of in the last four decades is Jefferson's typicality among reformers in this regard. Polemical as it may have been, Jefferson's attempt to enshrine the strictures against the trade in the *Declaration* attests to the centrality of slave trade abolition to his vision in 1776, and to the strength of his abhorrence of the practice. Moreover, when it came to slave trade abolition, in 1776 Jefferson was actually in the vanguard of moral reform. In Britain, Clarkson and Wilberforce had not yet commenced their public careers, and legislation to outlaw the African trade was not yet a serious prospect.¹⁶⁹

¹⁶⁴ *Id.* at 317-318.

¹⁶⁵ Malone, *supra* note 98, at 222.

¹⁶⁶ *Id.*

¹⁶⁷ See Isaac, *supra* note 37, at 247-48 (discussing the failure of the Burgesses to obtain the royal assent for a bill ending the slave trade into Virginia).

¹⁶⁸ ERIC WILLIAMS, *CAPITALISM AND SLAVERY* (1944); ROGER T. ANSTEY, *THE ATLANTIC SLAVE TRADE AND BRITISH ABOLITION, 1760-1810* (1975); Davis, *supra* note 45; Thomas Haskell, *Capitalism and the Origins of Humanitarian Sensibility*, *AM. HIST. REV.* (1985), 90, at 339-61, 547-66.

¹⁶⁹ Davis, *supra* note 45, at 421-448 (tracing the Parliamentary struggle to abolish the trade from its beginnings in the 1780s to fruition in 1807).

And Jefferson labeled the trade piracy, something the United States Congress was not willing to do until 1820.¹⁷⁰

The deleted passage, however, deals not just with the African trade, but with slavery itself, and here Jefferson's rhetorical situation was much more awkward. To de-legitimize Lord Dunmore's proclamation urging slaves to enlist against the Continentals, Jefferson was forced to establish a hierarchy of values, placing white life above black liberty.¹⁷¹ But the Colonials were themselves taking up arms against the Loyalists, and they were doing so in the name of liberty. Given that the *Declaration* was premised on the triad of life, liberty, and happiness, these inconsistencies were better left unstated; and the document became more logical, more universal, and ultimately more promotive of liberty after the purge. Jefferson's invocation of universally applicable natural rights in a fundamental charter of national generation, rather than his endeavor to justify the contradictions particular to Virginia in 1776, rendered the *Declaration* immortal.

The Committee of the Whole made one more principal alteration before publishing the *Declaration* to the world. This involved the question of Scottishness. As Jefferson recalled in 1818:

when the Declaration of Independence was under the consideration of Congress, there were two or three unlucky expressions in it which gave offence to some members. The words "Scotch and foreign auxiliaries" excited the ire of a gentleman or two of that country... altho' the offensive expressions were immediately yielded, these gentlemen continued their depredations on other parts of the instrument.¹⁷²

As Boyd commented, there were no Scotsmen among the Committee, but several in Congress, the most prominent of whom were Wilson, Witherspoon, and Mckean.¹⁷³ This colorful episode marks the first appearance of that quintessentially American penchant of ethnic minorities to resent any questioning of their Americanness in the political arena. In this sense, expunging calumnies against the Scotsmen rendered Jefferson's *Declaration* more universal. It helped the document transcend British ethnic politics, and erect a broader foundation for liberty than the one inherent in the rights of Englishmen. The birth rights that defined Englishmen, like the keen sense of liberty fostered by life in a slave society, were fundamental building blocks of Jefferson's natural rights philosophy. Eventually, that philosophy overcame its particular cultural context, and embraced all humanity in its compass. It would not be until long after Jefferson's death that the natural rights enshrined in the

¹⁷⁰ See 3 Stat. 600 (1820).

¹⁷¹ It is interesting to note that he adopted the reverse position in the context of the Haitian Revolution and Gabriel's Uprising, allowing the slave rebellion was justified, while white self-defense was merely excusable on grounds of necessity. This point is developed in more detail in Merkel, *To See Oneself as a Target of a Justified Revolution*, *supra* note ___ at 15-16.

¹⁷² Letter from TJ to Robert Walsh (Dec 4, 1818), *in* Boyd, *supra* note 123, at 36.

¹⁷³ *Id.*

Declaration were vouchsafed to African Americans. If Jefferson had not come around to insisting on those rights on behalf of Revolutionary America in universal terms by July, 1776, it might have been very much longer still.

CONCLUSION

Jefferson's personal involvement with African American slavery constituted one of the central defining features of his life. As explored in this article, anti-slavery played also an important—though not life-defining role—in Jefferson's early public career. As a practicing lawyer, Jefferson argued six freedom suits prior to closing his law office in 1774. The *Summary View* develops an argument against political enslavement of British America, and at length wrestles with the wrongfulness of African American slavery, a problem joined head on in Jefferson's drafts of the *Declaration of Independence*. This article concludes its exposition by exploring Jefferson's role in ushering America to independence in 1776, but Jefferson made further anti-slavery efforts over the course of the revolutionary years. As a leading member of Virginia's Committee of Revision, Jefferson claims to have drafted a gradual emancipation bill for the Commonwealth, a claim buttressed by Jefferson's inclusion of a comprehensive gradual emancipation provision in his draft Virginia Constitution of 1783. A year later, the Confederation Congress failed by a single vote to include Jefferson's clause barring slavery from the entirety of the United States' western territories after 1800 in the Territorial Governance Act.¹⁷⁴ In the decades after the Revolution, however, the first window of opportunity for the anti-slavery cause was closing rapidly.

Jefferson himself was acutely aware of what David Brion Davis calls the "perishability of revolutionary time," that is, of the urgency of implementing reform in the afterglow of independence, before popular disinclination to change and sacrifice had extinguished the nation's revolutionary virtue.¹⁷⁵ During of the 1790s, perceived excesses of the French Revolution chastened lingering radical impulses of northern Federalists, while extirpation of white planters in revolutionary Haiti spurred Southerners to seek an end to social reforms deemed destabilizing. Gabriel's Plot of 1800, which prompted one of Jefferson's most principled (if clandestine) anti-slavery acts (his letter to Governor Monroe urging commutation of the rebels' sentences on the grounds that their uprising was justified), helped fuel the hostile backlash against the manumission movement—heretofore the upper South's most tangible anti-slavery achievement.¹⁷⁶ Other than signing the Slave Trade Abolition Act into law in 1807 (the importance of which should not be underestimated), Jefferson did not make any direct attempts to counter the spread of slavery in the nineteenth century. In fact, it is entirely fair to say that he generally acquiesced and to some degree collaborated in its expansion. But the anti-slavery image that Jefferson established during the revolutionary period resurfaced after his

¹⁷⁴ See Merkel, *Jefferson's Failed Anti-Slavery Proviso*, *supra* note ____.

¹⁷⁵ Davis, *supra* note 45, at 306-326.

¹⁷⁶ See Merkel, *To See Oneself as a Target of a Justified Revolution*, *supra* note ____.

death to become a powerful weapon in the anti-slavery movement of the antebellum years.

Before the triumph of the ideology of economic liberalism in the nineteenth century, Americans who argued politics from first principles argued from the standpoint of natural rights. No one did so more eloquently than Jefferson. Eighteenth century lawyers looked to natural law to discover the first principles of jurisprudence.¹⁷⁷ But they also realized that natural law must generally give way to positive law wherever it conflicted with legitimate expressions of legislative will or accepted judicial determination. Natural law, encompassing also theories of natural right, would, it was to be hoped, generally be in harmony with positive law in just society. Perhaps still more importantly, natural law, and argument from first principle, should and would be determinative wherever the legislature or the courts had not spoken. Natural law was, to use an idiom of our own day, the default rule of the legal culture, and the preferred gap filler of legal lacunae. It was in this intellectual and professional environment that Jefferson sought freedom for Mr. Howell. What is most remarkable about his unsuccessful argument is the very wide swath he carved out for the authority of natural law, and his most contentious suggestion that unjust law should give way to natural right in a case touching the core of African slavery in Virginia.

One reason the onus of proof respecting the defensibility of slavery was shifting to the slaveholding interest in the 1850s is that the natural rights vision of *Howell* found enduring expression in the universal language of the *Declaration of Independence* in 1776. While *Howell* addressed the overarching conflict of natural right and slavery, it did so in the particular and limited context of a mixed-race bound servant's quest for liberty after the death of his master. The *Declaration* spoke of liberty without contextual limits, transcending the arguments for liberty that the *Summary View* rooted in English political and constitutional history. The particular genius of the *Declaration* as drafted by Jefferson and edited by Committee and by Congress was that it avoided efforts to excuse slavery's presence in America and justified American independence on unabashedly universalist principles of liberty. The logical applicability of these principles to African Americans emerges from the plain meaning of the document; indeed, in the context of America's appeal to a candid, philosophical, and logical world, it is clear that abstractly and in terms of principle the right to liberty necessarily reached black people as well as white. No coherent universal philosophy could deny this and retain the general applicability that gave it scientific legitimacy. It is only in the context of the South's particular social and economic situation that African Americans would clearly be excluded from the *Declaration's* immediate appeal. But to Southerners black exclusion did not require expression, and to the rest of the world black exclusion from the *Declaration* went unstated. This left the world a manifesto for universal liberty from which African Americans were not excluded, and from which there was no principled reason to exclude them.

¹⁷⁷ See Cover, *supra* note 67, at 8-30.

In the period between Jefferson's death in 1826 and the coming of the Civil War, the *Declaration* acquired virtually oracular authority for Americans, particularly those increasingly committed to anti-slavery.¹⁷⁸ As its authority augmented over the years, the *Declaration* retained no internal evidence for principled devotees without a stake in slavery to assume that it did anything other than de-legitimize slavery, or provide an irrefutable justification for its abolition. This is the spirit in which the anti-slavery Republicans of the 1850s received their Jefferson, and—to borrow Lincoln's idiom about Jefferson and the *Declaration*—"all honor" to them for applying Jefferson's theories to ultimate purposes Jefferson himself was politically, sociologically and psychologically unable to achieve. At a Jefferson day dinner organized by the Republican Party of Boston in 1859, Lincoln said that Jefferson was "the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, and so to embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling block to the very harbingers of re-appearing tyranny and oppression."¹⁷⁹ Inspired by Jefferson's words, Lincoln's generation of Republicans took momentous steps down the road to putting Jefferson's ideals more completely into practice.

¹⁷⁸ See Peterson, *supra* note 5, at 164-208.

¹⁷⁹ Lincoln to H.L. Pierce and others (April 6, 1859) (quoted in Peterson, *supra* note, 5 at 162).