Jefferson's "Laws of Nature": Newtonian Influence and the Dual Valence of Jurisprudence and Science

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Jefferson [...] democratized the scientific revolution. [...] If pretended access to
the mysteries of nature or human life had given priests and kings a divine right or
claim to rule, why should not access to the truth of nature and human life give sci-
entists like Newton a claim to rule?

—Benjamin Tucker

Imagine, if you will, a warm June night in Philadelphia, 1776, and Thomas
Jefferson, having spent the day politicking, studying, and in meetings, now dons
something more comfortable. He sits at a desk, a glass of French wine at his side,
dashing off line after line at the top of his papers, leaving space for notes under-
neath. Various street sounds—a hastening carriage, a strolling couple, inebriated
passersby—fill the room with their echo. "We hold these truths to be sacred and
undeniable," he writes in what will become a very different line in the final draft
of this, the Declaration of Independence, a text at once plain and revolutionary.

He pens a few more words, leans back in his chair, and dots the line emphatically,
sighing with relief. "Alas," he thinks, "I've done it." This setting, envisioned in some
way or another by countless historians, may or may not bear any fact. It is in one
respect a moment of triviality: a man at a desk cobbled together lofty words and
phrases. But in another respect it is a profound, groundbreaking moment: the seem-
ingly inevitable culmination of centuries of natural law theorizing.

Jefferson appears to have conceived of natural law rather differently from his
predecessors—namely, Saint Thomas Aquinas,2 Richard Hooker,3 Hugo Grotius,4
Samuel von Pufendorf,5 John Locke,6 and, among others, William Blackstone.7
This particular pedigree looked to divine decree or moral order to anchor natural law
philosophy. But Jefferson’s various writings, most notably Notes on the State of
Virginia, champion the thinking of a natural historian, a man who celebrated reason
and scientific method, who extolled fact over fancy, material over the immaterial,
observation over superstition, and experiment over divine revelation. That is why,
in the first paragraph of the Declaration, Jefferson situates “Laws of Nature” beside
“Nature’s God” as if the terms were coextensive, interchangeable, connected, or
otherwise related. Where, as here, Jefferson treats natural law as comparable to
divine law, he nevertheless tries to distinguish himself as an Enlightenment thinker,
a homme du monde, a veritable encyclopedia of knowledge that can discourse on
any number of topics and confront, as it were, such overseas counterparts as George
Louis Leclerc and Comte de Buffon.8 Small wonder Timothy Sweet declares,
phrase “Laws of Nature and Nature’s God” (from the first paragraph of the Declaration) to the tradition of natural law: Hugo Grotius, Samuel von Pufendorf, and so on through Locke. However, Jefferson’s particular choice of phrasing, “laws of nature” rather than “natural law,” may indicate a specifically Newtonian conceptualization; and the postulation of certain “truths” as being “self-evident” may attribute to these truths the status of scientific axiom, something that is simply stated and cannot be made more plain through demonstration. The question of influence here opens onto the dual valence of “law” in jurisprudence (prescriptive) and in science (descriptive—predictive): in the latter context, a “law” is inviolable.  

Sweet points to a compelling synergy between seemingly disparate fields: law and science. He also calls attention to the influence of Isaac Newton on Jefferson’s thought.  

Jurisprudents have mostly ignored the sometime symbiotic relationship of law and science, just as they have downplayed or altogether ignored Jefferson’s unique contributions to legal philosophy.  

For many, Jefferson is the quintessential natural philosopher. As a case-in-point, R.B. Bernstein proclaims, “Amid the tumult of politics and the clanger of war, Jefferson always claimed to yearn for a life of tranquil contemplation, spent with his books, his architectural drawings, and his researches in science—known, in his era, as ‘natural philosophy.’”  

If Jefferson was a natural philosopher, as Bernstein suggests, he was no armchair pontificator. He put his intellectual versatility to work, so to speak, by improving almanacs, calculating an eclipse, collecting bones and fossils, and designing buildings and then overseeing their construction. Informing all of these scientific (or quasi-scientific) forays was a keen interest in Newton and “the natural.” “To read widely in the papers of Thomas Jefferson,” states Charles A. Miller, “is to be struck by a remarkable fact: the words ‘nature’ and ‘natural’ appear with great frequency, in countless contexts, and with many meanings.”  

Perhaps the most widely known references to nature appear in the Declaration, but similar references permeate most of Jefferson’s writings. “It is not only Jefferson’s vast papers that are filled with nature,” Miller explains, “[H]is library of sixty-five hundred volumes, the best map to the man’s intellect, is filled with nature, too.”  

Jefferson’s fascination with nature was bound up with nationalism, Miller explains, and so it is fitting—one might say natural—that Jefferson should couch the Declaration in terms of natural philosophy.  

But how does Jefferson’s natural philosophy conceptualize law? Science is all about studying objects and predicting their behaviors. If law is more than bills or statutes or glorified pieces of paper—if it is intangible but somehow immanent—how does one collect or observe it in nature? What is its ontology? Its epistemology? How do we discover it? How do we experiment with it? In what way is it, as Jefferson apparently believed, innate to humankind? This article will consider all of these questions while arguing for the inclusion of Jefferson into what I call the “natural law canon” of jurisprudence. I submit that Jefferson’s ideas about nature are tied to his ideas about reason and that his scientific approach to jurisprudence was not only innovative but nearly unprecedented. I have divided the article into two sections, the first unpacking Jefferson’s theories of natural law, and the second dealing with Jefferson as a counteractive force to the positivist jurisprudence of
Jeremy Bentham and John Austin. I am less concerned with tracing snippets of Jefferson’s writing back to Newton’s precise works or quotes than I am with demonstrating how Jefferson’s jurisprudence appropriates science, what makes that appropriation unique, and why that appropriation matters to a 21st century audience. These concerns alone merit Jefferson’s inclusion in jurisprudence textbooks. In the end, Jefferson’s laws of nature may be more metaphorical than literal. They may be reflective of, rather than tantamount to, Newton’s various laws in that they can be violated whereas Newton’s law of gravity (and other like laws) cannot. In other words, Jefferson’s laws of nature may be more figurative than concrete—candidates for truth but not truths per se. For the purpose of this essay, however, that issue is beside the point. More to the point is the luxury of Jefferson’s “hybrid” theoretical-scientific approach, which allows him to dismiss unverifiable data as merely metaphorical at the same time he tries to rationalize something real, novel, and exact.

Jefferson’s jurisprudence stands on its own and marks a significant departure from, more than an adoption of, earlier legal theory—especially as it derives its lexicon of intelligibility from science. Jurisprudence textbooks traditionally have venerated the philosophy of Jefferson’s natural law predecessors (mentioned above) as well as of later figures like Lon Fuller, John Finnis, and, to a certain extent, Ronald Dworkin. Jefferson, however, remains strangely missing. This inattention to Jefferson’s jurisprudence is surprising. After all, jurists frequently have tried to situate legal theory within the (sometimes) broad parameters of science. In the late 19th century, under the leadership of then-dean Christopher Columbus Langdell, Harvard Law School began to teach law in a scientific way. Early in the twentieth-century, Hannis Taylor titled his widely read textbook *The Science of Jurisprudence*, thereby underscoring the importance of scientific methodology to legal analysis. In 1938, moreover, Jerome Hall incorporated several passages about science and the scientific method in his textbook *Readings in Jurisprudence*. Some of these writings deal with Isaac Newton directly. As recently as 1990, Michael Foley wrote an entire book on Newton’s indispensable influence on American government and American constitutionalism, but Foley pays scant attention to Jefferson’s writings and thought (he cites Jefferson a total of six times, in passing only). Science continues to mark American legal education in subtle ways. The terminal research degree in law, for example, is a Doctor of Juridical Science or a Scientiae Juridicae Doctor (Doctor of the Science of Law). And the related discipline of political science—as its name suggests—marries politics and science in many of its formative taxonomies and methodologies. Despite these procedural topoi, classificatory protocols, and scientific nomenclatures, jurists have snubbed the role of science in shaping the American legal landscape, and, in so doing, have missed the continued import of Jefferson’s Newtonian attitudes.

This essay cannot possibly bring to light all of the scientific foundations of Jefferson’s thought, so it will focus principally on what Sweet calls the “dual valence” of law and science as it pertains to natural law philosophy. This dual valence parts from the Christian tradition of natural law (although not from Deism) and embraces the physical sciences as a quantifying and calculating measure of
rights and duties. We live in an era that constantly contradicts itself. On the one hand, postmodernism assails the critical soundness of essentialist, universalized prescriptions such as natural law. On the other hand, natural law, as manifested in the rhetoric of human rights, urgently figures the trajectory of international rules and regulations. Both hands endeavor towards “liberalism,” that vague, amorphous, catch-all network of multiplicities that in the putative aggregate means many different things to many different people. With this ambiguity in mind, a rethinking of Jefferson’s legacy seems timely and imperative.

Part One: Unpacking Jefferson’s Natural Law

“Man [is] a rational animal,” Jefferson writes to William Johnson in 1823, “endowed by nature with rights and with an innate sense of justice.” This line represents the major premise of Jefferson’s natural law logic: that human behavior is subject to superintendent and universal principles, which are reducible in theory to “rights” and an innate “sense of justice.” It follows that any behavior offending these rights, or this fixed sense of justice, must be a violation of natural law. Such an articulation of natural law does not always account for the processes by which humans internalize notions of rights or justice. In this line to Johnson, Jefferson implies that humans are born with a sense of law. Elsewhere, though, he implies that either the human absorbs natural laws, or, instead, that natural laws impose themselves onto (or perchance inject themselves into) the human form, perhaps by divinity, perhaps some other way. Referring to the right of expatriation, for instance, Jefferson scribbles the following in a letter to John Manners: “The evidence of natural right, like that of our right to life, liberty, the use of our faculties, the pursuit of happiness, is not left to the feeble and sophistical investigations of reason, but is impressed on the sense of every man. We do not claim these under the charters of kings or legislators, but under the King of Kings.” Here Jefferson disclaims the capacity of human reason to divine law from nature and fails to supply chronology regarding when human sense is “impressed” with law. At birth? During life by some other means than reason? He also tackles positive law by attributing rights to a deity, not to kings or legislators. Compare these conjectures with one expressed by Jefferson some 47 years earlier: “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 is given him by the Author of nature, because necessary for his own sustenance.” In this passage, Jefferson more clearly treats law as innate, not learned, and furthermore anticipates his famous line in the Declaration that we are “endowed by our creator with certain unalienable rights.”

Notwithstanding how law obtains to human perception, the fact of the matter is that law and humanity ultimately converge and thereby integrate the physical and natural world as one association within the mind of humans. Law is uniform and universal if it is innate to all humans; and rational thought—not faith in God or morality—translates this law into a system whereby only the irrational violate rules. One can examine these rules in the same way one collects and analyzes fossil
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sea shells and hypothesizes, at length, that the deluges beyond the extent of Virginia “seem out of the laws of Nature,” although they “may have taken place to a greater or less degree, in proportion to the combination of natural causes which may be supposed to have produced them.” Human reason can also test internalized rules of nature. As Benjamin Tucker explains in the most definitive and comprehensive study of Notes to date, “The method of cautious hypothesizing and testing through the careful comparison of facts worked because nature was constant, the same cause producing the same effect everywhere and always.” Tucker adds that if “nature changed and acted arbitrarily it would not be possible to test claims made about nature by comparing facts, because the facts could change and causes and effects produce different results at different times and places.” Fortunately, nature is constant: “The constancy of nature allowed it to be a standard by which humans could judge claims made about the world and how it worked. By observation and comparison, one might find the constantly recurring patterns in things and thus uncover the hidden workings of nature.” Accordingly, nature is testable and humans internalize nature as thought or reason; therefore, thought and reason are also testable—but only by the externalities they supposedly display or produce. Here we may differentiate between epistemology and ontology, the former referring to the fundamental elements of reality or nature (what they are), and the latter to the ways in which we understand those fundamental elements (how we know what they are).

Regarding externalities, Jefferson proposes that Natives’ reason is evident in the objects and ideas they produce and that blacks’ lack of reason is evident in their behavior and failure to produce anything worthwhile. Jefferson thus deduces that reason corresponds with skin color, which might, he speculates, be material as or within thought: “The first difference which strikes us is that of color. Whether the black of the negro resides in the reticular membrane between the skin and scarf skin, or in the scarf skin itself; whether it proceeds from the color of the blood, the color of the bile, or from that of some other secretion, the difference is fixed in Nature, and is as real as if its seat and cause were known to us.” It would require a long and entirely separate essay to interrogate the racist assumptions underlying these putatively objective “observations.” Suffice it to say that Jefferson’s racially premised methodology of testing and observing reason problematizes his “science” and undermines any contemporary call for the canonization of his jurisprudence. Be that as it may, an out-of-hand dismissal of his jurisprudence, on the grounds of this mistake alone, would risk missing other valid and well-reasoned analyses.

According to Jefferson’s formulation, natural law is not only testable and ultimately confirmable but also corporeal—built into our very essence. Such a theory abstracts from the material world at the very moment it embraces materiality. The body hosts law, so to speak, once the mind recognizes legality. In this way, law and body share an identical, self-actualized form. Humans therefore sense right and wrong the way they sense “tasting and feeling.” They are like the embodiment of law—except that they exist as rational, autonomous, free-willed agents for whom law is not causally deterministic. The simultaneous unity and distinction of law
and body might seem paradoxical and hence troubling to Jefferson's line of reasoning, which itself seems paradoxical (inasmuch as science and abstract metaphysics are seemingly contradictory enterprises). Really, though, the unity and distinction complement and participate with each other and never require reconciliation insofar as they never actually contrast. The mind and body contain nature, and nature is matter. For Jefferson, "[a]ll that is not nature is void, empty nonexistent. Nature itself consists of matter, and only matter. Nothing else—soul, spirit, or thought—has primary existence or a reality independent of the stuff of nature. [...] Everything has a natural material explanation." As proof-positive of Jefferson's faith in the materiality of thought (and hence of law), consider the following lines to George Cabanis, which express both doubt and hope about the provability of a connection between mind and matter: "That thought may be a faculty of our material organization, has been believed in the gross; and though the modus operandi of nature in this, as in most other cases, can never be developed and demonstrated to beings limited as we are, yet I feel confident you will have conducted us as far on the road as we can go, and have lodged us within reconnoitering distance of the citadel itself." Jefferson maintains his conviction that thought—which supposedly contains law—consists of materiality or substance despite the lack of tangible evidence or logical proof. He adheres to blind belief in the matter of the mind and expresses wishful thinking about that matter's verifiability. This does not make him less of a scientist—it makes him more of a scientific-theorist with an abiding trust in the authority and results of his speculations. Jefferson is not contradictory when theorizing about unconfirmed evidence; in other words, science and philosophy are not mutually exclusive. As G. W. F. Hegel explains, "The science of natural law, like other sciences such as mechanics and physics, has long been recognized as an essentially philosophical science and, since philosophy must have parts, as an essential part of philosophy." In any case, without teasing out distinctions between body and mind, the articulation of law as embodied in human form, or at least as contained by human form, serves to demystify the fantasy of natural law—to grant it a tangible essence. "Law is that consciousness within us," Jefferson seems to say, "It is not some airy, ethereal non-matter that changes with the blowing of the wind." Although law manifests itself in individual, autonomous bodies, it nevertheless remains uniform and universal and thus collapses all differences between people. "What is true of every member of the society individually, is true of them all collectively," Jefferson writes to James Madison, "since the rights of the whole can be no more than the sum of the rights of individuals." That all humans possess a sense of law would seem to multiply law's taxonomic possibilities: rather than there being fewer variations in law, there would be more. Each human would have a personal sense of law that does not necessarily comport with the sense of another. Jefferson appears to reject this notion by celebrating the inherent and universal legality of nature. He intimates in query 6 of Notes that humans derive their sense of law from nature, which is, in essence, uniform, ordered, and constant. For example, he mentions "the uniform effect of one and the same cause, whether acting on this or that side of the globe," and adds that "rule of philosophy [...] teaches us to
ascribe like effects to like causes." Likewise, his entire refutation of Buffon reads like an attempt to render the sameness of nature on a planetary scale. "Human nature is the same on every side of the Atlantic," Jefferson opines, "and will be alike influenced by the same causes." Tucker points out that Jefferson describes nature as "consistent," "constant" (albeit not perfectly constant, since black slaves can give birth to albino children), "orderly and lawful," "not capricious or arbitrary," "regular and dependable," "economical," "orderly," and "lawful." For Tucker, Jefferson's nature is "well-designed." "Nothing," he submits, "exists without a reason or a purpose or a function in the overall design, including those changes that occur naturally to the design." The natural world is so organized and regular as to be ordered and regulated. As Tucker expounds, "Nature or its Creator had a design and everything fit into that design; nothing was extraneous or pointless." Accordingly, law is uniform and constant—it is part and parcel of nature itself. This view in many ways recalls the Great Chain of Being, or scala naturae, which regards nature and the universe as hierarchical, composed of a linking of various elements in a chain extending from small, foundational particles all the way up to God (i.e., to perfection). The general order of query 6 lends credence to the idea that Jefferson had the Great Chain of Being in mind. The chapter begins with small, inanimate objects (minerals, shells); moves to larger, animate objects (trees, animals); and finally undertakes such large and living "objects" as animals, Natives, birds, blacks, and so on. Moreover, Jefferson employs the word "link" to describe the "great work" of the "economy of Nature." "By using the term 'link,'" Tucker explains, "Jefferson suggested that he understood the species in nature to be organized in a chain of being that reached from the lowest to the highest." That is to say, nature "organized itself into a hierarchy of beings."

To reiterate, Jefferson considered law innate to all humans and also universal (insofar as it was ordered or designed by nature). How, then, does he deal with aberrations of nature or, put another way, infractions of natural law? His passage about animal races provides a clarifying focus for this inquiry. "Every race of animals," Jefferson submits, most probably including humans within this category, "seems to have received from their Maker certain laws of extension at the time of their formation. Their elaborative organs were formed to produce this, while proper obstacles were opposed to further progress. Below these limits they cannot fall, nor rise above them. What intermediate station they shall take may depend on soil, on climate, on food, on a careful choice of breeders." An individual is therefore free to break law but not to decide what law is or is not. Law exceeds the control of any one human. Whether an individual violates law depends on his or her cultural and social conditioning. In terms of the nature/nurture binary, it depends on nurture. Although nature prescribes universal, absolute laws, humans control their actions and choices. They have free will. External stimuli, including systems of ideas, values, and shared vocabularies, influence human choice. An individual's tendency to violate law has to do with the various exchanges of interpersonal forces that shaped that individual's life. Thus, Jefferson can describe the Powhatan, Manna-hoac, and Monacan Indian tribes as more law-abiding than Europeans despite their lack of codified or formalized rules.
For Jefferson, these Natives live a more “natural” life than Europeans. Being more in tune with nature, they are plugged into “true” law. Unlike Europeans, they have not corrupted society with too many rules and too much government. They never have “submitted themselves to any laws, any coercive power, any shadow of government,” and their “only controls are their manners, and that moral sense of right and wrong which [...] in every man makes a part of his nature.” If William Bartram’s Travels is any indication, other notable thinkers of the day shared Jefferson’s views about Natives, nature, and law. Natives, according to Bartram, “stand in no need of European civilization” because they appear “to have made greater advances towards the refinements of true civilization, which cannot, in the least degree, be attributed to the good examples of the white people.” Moreover, the natives’ “constitution or system of their police is simply natural, and as little complicated as that which is supposed to direct or rule the approved economy of the ant and the bee; and seems to be nothing more than the simple dictates of natural reason, plain to every one.” If nature is ordered, regulated, and just, then abiding by nature, as the Natives allegedly did, is complying with law in its purest expression. Because of its more natural composition, Bartram explains, Native society respects “the golden rule” and “produces a society of peace and love, which in effect better maintains human happiness, than the most complicated system of modern politics, or sumptuary laws, enforced by coercive means: for here the people are all on an equality, as to the possession and enjoyments of the common necessaries and conveniences of life, for luxuries and superfluities they have none.” Implicit in Bartram’s statement is a critique of the analytical positivism of Jeremy Bentham and John Austin, whose jurisprudence holds that the only laws are those promulgated by humans. Bartram’s emphasis on “coercion” also seems to signal Austin’s “command theory” of law, which is always about hierarchy and superior/inferior relationships whereas the Native government (or lack thereof) supposedly enacts perfect egalitarianism. The message behind Jefferson’s and Bartram’s glorifications of the noble savage, at any rate, is that pure law is most intelligible in its natural form—unsullied by European intervention.

Jefferson suggests that humans can test whether their laws comport with nature or natural order—whether, that is, their human-made laws are actually laws or merely erroneous constructs. Nature sets the content of “true” laws, which are always and everywhere valid. Jefferson proposes that “[q]uestions of natural right are triable by their conformity with the moral sense and reason of man.” A perfectly reasonable law must measure up to the logic of an innate sense of law and justice, which are themselves natural. Bad reasoning is not congruent with natural law or the laws of nature. It usually cannot arrive at true law—only at counterfeit,
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misguided, or manufactured formulae. “Reason and free enquiry are the only effectual agents against error,” Jefferson declares.69 “They are the natural enemies of error, and of error only.” In keeping with his belief that government corrupts natural law, Jefferson references the persecution of Galileo during the inquisition.69 Despite his discovery of true or natural laws of the universe (that the world was spherical and not flat), Galileo was persecuted under human laws. In this example, human laws are not laws at all because they do not correspond with reason. Jefferson uses this allusion to advocate for a Newtonian conception of natural law: “the vortices have been exploded, and the Newtonian principle of gravitation is now more firmly established on the basis of reason, than it would be were the government to step in and to make it an article of necessary faith.” Newton’s law of gravity is a law regardless of whether an intrusive or meddling government says so. It exists independent of, and prior to, human administration. Or perhaps it is the ultimate government—its rules cannot be violated. The laws of gravity might represent an edict of the perfect State—the state of nature, which maintains universal order according to divine design. Fallible human government is post factum: true government—nature itself—is pre factum and registered by the human intellect with a capacity for right reason. By toying with the interchangeability of religion and the State70—apparently both coercive institutions—Jefferson is able to take on Blackstone, Bentham, and Austin in one fell swoop. On this score, it is worth quoting Jefferson at length:

[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty Gods, or no God. It neither picks my pocket nor breaks my leg. If it be said his testimony in a court of justice cannot be relied on, reject it then, and be the stigma on him. Constraint may make him worse by making him a hypocrite, but it will never make him a truer man. It may fix him obstinately in his errors, but will not cure them. Reason and free enquiry are the only effectual agents against error. Give a loose to them, they will support the true religion, by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only.88

By suggesting that law antecedes human authority, Jefferson rejects Bentham’s and Austin’s outline of a linguistic system reducing law to command sequences. By referencing “rights of conscience,” he promotes the idea that humans internalize law, but he does not go so far as to investigate why or how a positivist, having internalized law, would nevertheless put forth a jurisprudence counter to his or her internalized law as manifest in sense or intuition. He does suggest that wrong reasoning arrives at wrong law—but he does not fully explain the illusory representation of reality (of true law) in psychological or sensory terms. Instead, he leapfrogs over these points and proposes that government regulation is inferior to divine (read: natural) regulation. Accordingly, human regulation impedes progress and blocks access to truth—it falsifies “law” into an artificial and flawed modality. Here again Jefferson seems to espouse the classical liberal view that “government
is best which governs least.” The less humans restrict, interfere with, distort, mask, constrain, or appropriate nature, the more accessible truth becomes. *Irrational* humans reverse the course of nature and retard real law. Reason, however, channels human energies toward nature and truth and secures those rights which belong to us by nature. Expounding on one such right—freedom of correspondence between citizens—Jefferson submits to James Monroe that “natural rights [are] the objects for the protection of which society is formed and municipal laws established.” By Jefferson’s logic, American government was “reasonable” or otherwise agreeable to nature inasmuch as it jettisoned all monarchical aspirations: “Every species of government has its specific principles. Ours perhaps are more peculiar than those of any other in the universe. It is a composition of the freest principles of the English constitution, with others derived from natural right and natural reason. To these nothing can be more opposed than the maxims of absolute monarchies.” Americans did not, so to speak, throw the baby out with the bathwater—they borrowed what was reasonable from English constitutionalism (i.e., common law et. al.) and deduced the remainder of their government from nature. In Jefferson’s own words, “The principles on which we engaged, of which the charter of our independence is the record, were sanctioned by the laws of our being, and we but obeyed them in pursuing undeviatingly the course they called for. It issued finally in that inestimable state of freedom which alone can ensure to man the enjoyment of his equal rights.”

In a nutshell, then, reason is the means by which one realizes law, which is evident in nature and embedded in human body and mind. Science demonstrates that law is a feature of nature, which provides abundant evidence that the world is ordered, structured, and policed without the help of humankind. Nature is self-regulating, God having left it to its own devices just as a clockmaker leaves a watch to its own devices. Thus, as I have suggested, Deism plays a role in Jefferson’s jurisprudence. Jefferson does not reject God’s function wholesale but credits God with the creation of nature: “[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?” God is the designer, but nature operates on its own—without divine intervention. In the history of jurisprudence, not all theological or ethical claims situate law in contradistinction to science. St. Thomas Aquinas, in fact, employs science as a pivotal reference point for his ontological dissertations about law. “The precepts of the natural law are related to practical reason,” he analogizes, “as the first principles of scientific demonstrations are related to theoretical reason.” This line seems oddly similar to some of Jefferson’s lines, except that Aquinas establishes a parallel between law and reason and their counterparts, science and reason; but law and science remain, in the end, mutually exclusive. Jefferson’s “self-evident” truths of the Declaration recall Aquinas’s belief that “both the precepts of the natural law and the first principles of scientific demonstrations are self-evident principles,” but Jefferson seems to collapse Aquinas’s analogy and to fuse law and science into one cohesive unit. Theory and science are not, for Jefferson, autonomous receptacles of knowledge but mutually illuminating and inextricably tied enterprises. Science involves theory, and vice versa.
Part Two: Jefferson’s Natural Law versus Analytical Positivism

The Declaration—rooted in “moral realism” and “its relation to moral truths” according to one prominent federal judge—abounds in significations of natural law that actually go beyond morality or religion or virtue ethics. In part, scholarly inattention to Jefferson’s jurisprudence (most notably the aforementioned dual valence) has to do with the glaring disjuncture between a popular understanding of natural law—parroted by this federal judge—and what Jefferson imagined as the “laws of nature.” For Jefferson, the idea that natural law always amounts to morality or divinity simply will not do. Jefferson proudly employs the scientific method to prove human continuity with the natural world. His technical labels, Latin diction, and Newtonian rhetoric not only supplement his physical (and to some extent teleological) descriptions, but also carry a certain political freight; for with the possible exception of Latin phraseology, they represent tacit rejections of Blackstonian natural law theory without resort to Benthamite paradigms. In other words, they looze law from its theistic moorings without treating it as a catalogue of human-made implementations. Dressed up in scientific idiom, Jefferson’s natural law empiricism also raises questions about materiality: if law is constant, immutable, and understood by all rational beings, then is it tangible as well? Can humanity ever perceive intangible phenomena?

That the federal judge would base the Declaration in terms of morality is not surprising. Natural law, in its most clichéd construction, is tantamount to morality or virtue ethics. But Jefferson’s take on natural law is more nuanced. “In the wake of the scientific triumph of Newtonian physics,” explains Andrew J. Reck, “the universe was pictured as a well-ordered system of natural laws, designed demonstrably by an omnipotent, intelligent, and beneficent deity. Hence divine laws came to be secularized as natural laws, and natural laws were believed to hold for morality and politics as well as for physics.” Jefferson’s jurisprudence signals this secular shift. I have little to add to what other, more prominent critics have said about natural law in the abstract or as ontologically derived from God or some other supreme moral order. To the extent that concepts are best understood by what they are not, however, a detailed comparison with positive law—that antithesis of natural law—is in order. Understanding Jefferson’s jurisprudence requires historical contextualization, which itself requires a familiarity with the etymology of positive law. The Declaration and Notes are products of a particular historical moment—what Reck deems the wake of the scientific triumph of Newtonian physics—and they exhibit a strategic yoking of science and politics that countermands the prevailing tenor of Anglo-American jurisprudence in the late 18th century.

Jefferson penned the Declaration and Notes while the natural law/positive law divide could not have been more politically charged or controversial. After all, in their most essentialized manifestations, debates over the French and American Revolutions pivoted on distinctions between natural and positive law. Positive law, in Anglo-American jurisprudence at least, emanates from the utilitarianism of two British thinkers: Jeremy Bentham and John Austin. Like Jefferson, Bentham and Austin emphasized reason and a scientific approach to law. Unlike Jefferson, they
avoided empirical observation and turned, instead, to “objective” systems of classification and legislation. Just as Jefferson developed a totally new form of natural law, these figures developed a totally new jurisprudence altogether—one that pooh-poohed natural law and its celebration of rights. Both antithetical jurisdictions, natural and positive law, originated in science and emerged at roughly the same moment. Underpinning their scientific theories were clear political aims—on the one hand, reforming judicial systems first in London and then worldwide; on the other, validating patriotism and natural identity and stabilizing a fledgling government.

Born in Spitalfields, London, in 1748, the flippant and doctrinaire Jeremy Bentham was some 42 years older than John Austin, Bentham’s diffident protégé, and some five years younger than Jefferson, Bentham’s American inverse. Austin first delivered his sweeping, empirical theories through lecture media, and in 1832—the year of Bentham’s death—these lectures appeared in monograph form in *The Providence of Jurisprudence Determined* and were later reprinted in a two-volume work, *On Jurisprudence*. Because Austin’s lectures reached print before Bentham’s—which surfaced posthumously (in 1945) as *The Limits of Jurisprudence Defined*—many scholars mistakenly glorify Austin as the creator of legal positivism when actually he was its popularizer. Some even erroneously declare that Bentham lived *after* Austin, presumably because popular wisdom holds that Austin originated positivist jurisprudence. Austin’s various theories, however, owe much to Bentham’s pioneering influence, especially to Bentham’s stubborn pragmatism and stark rejection of moral sense as a basis for ethical theory. One of Austin’s ideas in particular smacks of Benthamite origin: the “command theory” of law. Simply put, this theory maintains that laws are commands of the sovereign backed with the power to “sanction,” a double-edged term that can mean “penalize” or “approve.”

Using William Blackstone’s natural-law theories as an occasion to spell out his own compelling jurisprudence, Bentham anticipates Austin’s command theory by maintaining that laws are little more than expressions of human will and not, as Blackstone suggests, divine or moral phenomena immanent in nature. “A law is a discourse,” Bentham submits, all but relegating Blackstone’s divine and moral phenomena to the rank of mere chimera. This so-called discourse is “expressive of the will of some person or persons, to whom, on the occasion, and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed or disposed to pay obedience.” Bentham’s inventive and arguably postmodern take on law forms the basic backbone of Austinian command theory. Not surprisingly, then, hints of Bentham fill the pages of *On Jurisprudence*.

Writing roughly five years after Jefferson penned the Declaration and roughly six years before Jefferson published *Notes*, Bentham declares that law corroborates power by prohibition or command: “by prohibition of such acts (on the part of other persons) as are judged incompatible with the exercise of it; and upon occasion, by command of such acts as are judged to be necessary for the removal of such or such obstacles of the number of those which may occur to impede or exercise of it.”
For Bentham, every “law is either a command, or a revocation of one” (the latter itself being a command to disregard a previous command). As linguistic constructs, commands can take almost any form. “The Metamorphoses of Ovid, if thus given,” Bentham jests, “would be law.” Treating law as a product of discursive formation (as a command) is also essential to Austin’s formative speculations in the early chapters of On Jurisprudence. Compare, for instance, the following statement by Austin with the previous statements by Bentham: “If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command.” Austin’s use of the word “command” seems deliberate, especially since his remark—like Bentham’s remarks—turns on the assumption that law is simply discourse constituting or producing relationships between subject and object, superior and inferior. To oversimplify, law is an expression of Party A’s desire about Party B’s actions, by which desire and expression Party B is willing to abide. Of course, the term “willing” is highly contingent. It entails not simply a ready desire to act (or to refrain from acting) according to another’s wish, but also to avoid the harmful consequences occasioned by disobedience. As Austin rather vulgarly puts it, “laws emanate from superiors.” Harmful consequences obtain to the actor individually and also affect the happiness of the community writ large. Bentham’s and Austin’s claims here may seem merely descriptive and therefore neither unique nor innovative; but the implications of their claims—that laws amount to human language and human will and not to some divine or transcendent order—call into question the dominant suppositions of Blackstonian common-law theory.

If Bentham and Austin are correct and law is essentially discourse, then “rights” and “powers” and other such concepts celebrated by Jefferson are but empty rhetorical flourishes, albeit with very definite social consequences. The meaning of “rights” and “duties” is imposed or supplied, but not, as Blackstone or Jefferson would argue, inherent. Building on this supposition, Bentham actually refers to “rights” and “powers” as fictitious entities and announces that “[p]ower and right, and the whole tribe of fictitious entities of this stamp, are all of them, in the sense which belongs to them in a book of jurisprudence, the results of some manifestation or other of the legislator’s will with respect to such or such an act.” By inference, therefore, rights and powers are not concrete “things” but rather rhetorical signifiers. Humans posit, enact, and adopt them because there are no material “rights” and “powers” out there in the world that inherently belong to people—only ideas of rights and ideas of powers that legislators grant to subjects and citizens. For this reason, Bentham maintains that “rights” and “powers” are constituted rather than discovered. It is possible, in the Benthamite formulation, that commands do not constitute powers so much as they presuppose them. The connection between wish and command might assume another (perhaps legal) authority to enforce the resulting power structure.

That Jefferson claimed to be a scientist and a believer in natural law might have seemed strange to Bentham and Austin, who also attributed their positivism to science or realism. Especially after his work on the Declaration, Jefferson secured
a reputation as one with an uncommon knack for writing. It is conceivable that Bentham and Austin considered Jefferson an overseas counterpart to Blackstone, the major natural law figure who also wrote prettily but whose ideas were, according to Bentham and Austin, retrograde and unsound. As Jefferson sought out the natural world to substantiate his “laws of nature,” Austin and Bentham sought out language itself. Austin’s command theory, for instance, hinges on the notion of discursive formation. Austin contends that when laws confer a right (because rights never predate promulgation) they impose a duty correlative to that right. His point is that an individual’s “right”—more properly understood as a freedom protected by law—is nothing more than a codified duty or obligation for someone else not to do something (i.e., not to infringe on that supposed “right”). Properly conceived, rights participate with duties: they cannot exist independent of duties; nor can they have meaning without some corresponding imperative (“thou shalt not”). Austin’s perception of rights derives from Bentham’s conviction that to know “how to expound a right, [you must] carry your eye to the act which, in the circumstances in question, would be a violation of that right: the law creates the right by prohibiting that act.” Thus read, rights depend on laws. For his part, Austin eschews lengthy ontological discussions of rights in the abstract, thereby deviating from Bentham’s bold and hostile declaration that rights are fictitious entities (and also sparing himself the abortive efforts that Bentham undertakes to qualify his position). The take-home point from Bentham and Austin is, in this regard, that rights do not preexist the promulgation of laws because, in effect, rights are purely notional and discursive constructs; and rights are purely notional and discursive constructs because laws—themselves purely notional and discursive constructs—create an idea of rights, which, in turn, a community invests with meaning. This complicated perception of rights frustrates Jefferson’s natural law theory, which maintains that rights are preexistent, natural, and inalienable truths.

Science provided an enabling vocabulary with which Jefferson could anticipate the criticisms of analytical positivism without seeming like an aloof dreamer, as it were, with his head in the clouds (or in nature). It is even possible that Jefferson put the finishing touches on Notes while having Bentham or Bentham-like thinkers in mind. Although most of Bentham’s and all of Austin’s theories were unpublished at the writing of the Declaration and Notes, comparable theories already had generated considerable attention among the British public. Bentham, at any rate, was well aware of Jefferson’s writings and, in a letter to John Lind, says the following about the Declaration: “If the right of pursuit of happiness is a right unalienable (why [how] are thieves restrained from pursuing it by theft, murderers by murder, and rebels by rebellion)?” Elsewhere, Bentham ridicules the Declaration as “a hodge-podge of confusion and absurdity in which the theory to be proved is all along taken for granted.” Jefferson most likely would have been familiar with analytical positivism, which caused an enormous fuss due to its noisy rejection of Blackstonian theories of natural and common law—on which America based its entire legal architecture. “A free people [claim] their rights as derived from the laws of nature,” says Jefferson in a stark refutation of positivism, “not as the gift of their chief magistrate.” Jefferson’s turn to science legitimates and authorizes
his lofty legal abstractions while padding the *pathos* of the Declaration (and like documents) with sound "evidence" based on collection, observation, and experimentation (he did not supply the evidence in the Declaration but in later documents like *Notes*). Given the political backdrop of Jefferson's jurisprudence (the American Revolution and so forth), a Newtonian conception of natural law became increasingly important for the colonists. If Jefferson could show that the American cause signified the triumph of natural law—which traditionally signified God's will—and that the British cause signified analytical positivism—which signified pyramidal classificatory schemes privileging human command over God's will—then he could imply that Americans were more in tune with nature or God than the British. He could invalidate British polity as unnatural. By supposedly verifying the absolute truths of the Declaration by means of science, he could embolden the colonists to view themselves as instruments of natural design or divine providence. The importance of these perceptions did not go away after the American Revolution ended.

**Conclusion**

Jefferson did not write legal theory or a judicial opinion *per se*. His draft of the Constitution of Virginia, which was never adopted, remains obscure. This might explain Jefferson's absence from the natural law canon. Nevertheless, natural law theory is but one aspect of a much larger movement to derive politics from nature. This movement dates back at least to Aristotle, if not further. Legal scholars often have appropriated and later canonized seminal works from this longstanding project. Thomas Hobbes's *Leviathan*, for instance, is more a general tract about social contract theory, government, human nature, and civil society—in short, about political economy—than it is about specific legal doctrines. Yet Hobbes's name frequently appears in jurisprudence textbooks. Jefferson's status as jurist depends above all on his authoring of the Declaration and *Notes on the State of Virginia*. Neither text is original; both derive their vocabulary and significance from previous theory. That does not diminish their import, however. It simply means that Jefferson's jurisprudence is a fresh revision and a logical extension of earlier conjectures. We can divine Jefferson's jurisprudence from these texts much as we divine Ayn Rand's objectivism from her novels or Edmund Burke's conservatism from his epistolary exchanges. That is to say, genre is not dispositive as to whether a certain tract constitutes "philosophy" in a particular classificatory scheme.

Woodrow Wilson once posited that the "government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe." Jefferson played a determinative role in this Newtonianization of America. For many, just hearing the name "Thomas Jefferson" will likely conjure up associations with the Enlightenment, natural philosophy, science, nature, and reason. Jefferson has come to stand for the ethos of the entire Enlightenment era. His jurisprudence represents a large-scale movement away from previous modes of thought. Studying his jurisprudence is therefore important not simply because Jefferson creatively and imaginatively
employed science, but also because he marks both priority and authority in the history of legal thought. He is, in short, a milestone. He appropriates Blackstone for his own ends and neutralizes the global impact of Bentham's and Austin's analytical positivism. In his many works, science almost always appears bound up with politics. Even his answer to Buffon has political subtext. His scientific tropes are singular and, at that point in history, rare. One could, I suspect, argue that Jefferson's jurisprudence is belated and irrelevant, an application of prior theory but not theory in its own right. But that would be to ignore the most illuminative expression of the "laws of nature"--the Declaration of Independence—in an intercontinental political context. Jefferson's numerous writings, including his letters but most importantly his conjectures in Notes, supplement our understanding of "laws of nature." That is why a holistic understanding of Jefferson's jurisprudence requires some piecing together of fragments. The full perception, however, is well worth the effort.

Endnotes

The author thanks Timothy Sweet for inspiring this article and for reviewing its early drafts.

9. John W. Oliver, in 1943, declares that "Jefferson was the most scientifically minded president this nation has ever known." John W. Oliver, "Thomas Jefferson—Scientist" (1943) 56 The Scientific Monthly 460.


12. Jefferson is not mentioned at all in the following landmark jurisprudence textbooks: Sir John Salmond, Jurisprudence, 7th ed. (London: Stevens and Haynes, 1929); Roscoe Pound,
Jefferson’s “Laws of Nature”


Ibid. at 3.

“I Jefferso's use of the word 'nature' is not only extensive in itself but, in an important way, different from 'nature' as used by Europeans of the Enlightenment. Jefferson came to 'know' nature in America in the way that Thoreau said he came to 'know' beans at Walden Pond, by working with it day after day. Further, insofar as nature symbolized America in its entirety, nature was America for Jefferson. His interest in nature and his use of the word are therefore a form of nationalism. In Europe national sentiment was expressed through a common history, a royal family, a culture, or a literature. In America and for Jefferson it was expressed through, and as, nature." Ibid. at 3.


Lawrence M. Friedman, American Law in the 20th Century (New Haven, CT: Yale University Press, 2002) at 34. (“Langdell considered law a science, which had to be taught in a scientific way. The students were supposed to extract the principles of law from reading appellate cases. The most startling of his innovations was in fact the case method—teaching law not by lecture but by Socratic questions and answers. The students would study appellate cases, selected and collected in “case books”; the questions and answers would be based on these cases. Langdell also invented (one might say) the law professor. The Harvard faculty had always consisted of distinguished lawyers and judges—men who had made their mark in the legal world. Joseph Story, for example, a justice of the United States Supreme Court, once taught law at Harvard on the side. Langdell rejected this notion, and began to hire young, bright men—men who had done nothing much at the bar, but who were good (he thought) at the Langdell method of teaching.”


Jerome Hall, Readings in Jurisprudence (Indianapolis, IN: The Bobbs-Merrill Company, 1938) at 675-714.


The degrees are abbreviated either S.J.D. or J.S.D.

Thomas Jefferson, Memoir, Correspondence, and Miscellanies: From the Papers of Thomas Jefferson (Boston, MA: Gray and Bowen, 1830) at 369.

30. See Tucker, supra note 1 at 24.
33. After speaking derogatively of blacks, Jefferson immediately states, “The Indians, with no advantages of this kind, will often carve figures on their pipes not destitute of design and merit. They will crayon out an animal, a plant, or a country, so as to prove the existence of a germ in their minds which only wants cultivation. They astonish you with strokes of the most sublime oracy; such as prove their reason and sentiment strong, their imagination glowing and elevated. But never yet could I find that a black had uttered a thought above the level of plain narration; never seen even an elementary trait of painting or sculpture.” Jefferson, *supra* note 29 at 151 [emphasis added].
34. “Comparing [blacks] by their faculties of memory, reason, and imagination, it appears to me that in memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and in imagination they are dull, tasteless and anomalous.” *Ibid.*
36. See Thomas Jefferson & Nicholas E. Magris, “Thomas Jefferson and Slavery: An Analysis of His Racist Thinking as Revealed by His Writings and Political Behavior” (1999) 29 J. Black Studies 491 at 491-92 (“[... ] a review of Jefferson’s major published work, *Notes on the State of Virginia* (1787/1954), indicates that Jefferson was not rational and scientific when he wrote of the African-descended slaves in Virginia. His conclusion, developed in his book, that the slaves were inferior in body and mind resulted from thinking that was extremely emotional and illogical. His bias is especially obvious when compared to his own standards expressed in this same work. Jefferson, who considered himself among the enlightened persons of his time, broke with the prevailing Enlightenment thought when he speculated on the causes for what he believed was the innate inferiority of the Black race [... ]”).
37. “Jefferson held that reason is implanted in both physical nature and human nature. The reason of physical nature is its order. The reason of human nature is our ability to understand a fair portion of that order. Because of that, Jefferson’s ‘nature’ is sometimes identified with reason.” Miller, *supra* note 14 at 4.
41. Even in *Notes*, Jefferson seems to disclaim the possibility that science can “prove” everything; he notes, for instance, that anatomical knife, magnifying lenses, and “analysis by fire” or “by solvents” cannot access human internalities like thought and law, which elude “the research of all the senses” and possibly “bid defiance to calculation.” Jefferson, *supra* note 29 at 155.
47. One could argue that Jefferson might have wanted to reduce this anomaly to regularity.
48. Tucker, *supra* note 1 at 20, 21. Tucker points to several passages in query 6 to back up his claims here: Jefferson’s various arguments against Buffon, his examination of races of animals, his letter to a nephew, etc.
Jefferson's "Laws of Nature"

53. Jefferson, supra note 29 at 55.
54. Tucker, supra note 1 at 22.
55. Ibid.
57. Ibid. at 100.
58. Ibid.
60. Ibid. at 388.
61. Ibid.
63. Jefferson, supra note 29 at 170.
64. Ibid.
65. Ibid.
66. Ibid.
67. "At the common law, heresy was a capital offence, punishable by burning. Its definition was left to the ecclesiastical judges, before whom the conviction was, till the statute of the 1 El., c. 1, circumscribed it, by declaring that nothing should be deemed heresy, but what had been so determined by authority of the canonical Scriptures, or by one of the four first general councils, or by some other council having for the grounds of their declaration the express and plain works of the Scriptures. Heresy, thus circumscribed, being an offence at the common law, our act of assembly of October, 1777, c. 17, gives cognizance of it to the General Court, by declaring that the jurisdiction of that court shall be general in all matters at the common law. The execution is by the writ De haereticis comburendo. By our own act of assembly of 1705, c. 30, if a person brought up in the Christian religion denies the being of a God, or the Trinity, or asserts there are more Gods than one, or denies the Christian religion to be true, or the Scriptures to be of divine authority, he is punishable on the first offence by incapacity to hold any office or employment ecclesiastical, civil or military; on the second by disability to sue, to take any gift or legacy, to be guardian, executor, or administrator, and by three years imprisonment, without bail. A father's right to the custody of his own children being founded in law on his right of guardianship, this being taken away, they may of course be severed from him, and put, by the authority of a court, into more orthodox hands. This is a summary view of that religious slavery, under which a people have been willing to remain, who have lavished their lives and fortunes for the establishment of their civil freedom. The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the law." Ibid.
68. Ibid. at 170-71.
70. Jefferson, supra note 29 at 93.
73. See Tucker, supra note 1 at 25-29.
75. Ibid.
77. "Drawing together Jefferson's characterizations of nature in Nous, we can say that he understood nature to be constant, orderly and lawful, not capricious or arbitrary; efficient and purposeful, not wasteful and pointless; and hierarchical, not unordered or randomly distributed. Unique among natural beings in their incompleteness, humans formed one link in the chain, one rank in the scale of beings but the human being was endowed with a need to complete himself which perfected nature's order. Taken together, the natural world was an order, which, as Mussenbroek claimed, lacked nothing. It was in this sense, at least, perfect." Tucker, supra note 1 at 23. Jefferson apparently believed that science informed all intellectual disciplines: "I am for encouraging the progress of science in all its branches; and not for raising a hue and cry against the sacred name of philosophy; for awing the human mind by stories of raw head and bloody bones to a distrust of its own vision, and to repose implicitly on that of others; to go backward instead of forward, to look for improvement; to believe that government, religion, morality, and every other science were in the highest perfection in the ages of darkest ignorance and that nothing can ever be devised more perfect than what was established by our forefathers." Jefferson, supra note 26 at 51.
78. Bentham's jurisprudence—analytical positivism—is in a way a reaction to Blackstone's natural law theories. Supposedly, when Bentham was 16, he attended Blackstone's lectures for the price


80. Statistician Charles Murray describes this historical transition as follows: "By the 1750s the Enlightenment had become the continent's child as well, but it had been Britain's baby. Isaac Newton's revelation in Principia Mathematica (1687) that the universe is rational, obeying fixed and predictable laws, had changed the way that people perceived the universe. God was no longer the interfering, jealous God of the Old Testament nor the loving personal God of the New, but God the Clockmaker, setting the universe on a course governed forever after by mathematically perfect immutable laws. If only mortals had enough data, they could predict everything that happened, and the tool whereby they could do this in a clocklike universe was reason. Reason, sweet and infallible, should be brought to bear on hoary traditions that governed the pursuit of knowledge, relationships between the sexes and the social classes, standards of art and music, and the exercise of political power." Charles Murray, Human Accomplishment (New York: HarperCollins, 2003) at 49.

81. "Thomas Jefferson lived in a world boiling with political and social ferment. He stood on the thresholds of the great revolutions of the 18th and 19th Centuries, and at the ideological core of one of them.

"He also stood on the brink of scientific developments every bit as precedent-shattering as the political upheavals of his time. Electricity was just beginning to yield some of its secrets. The discovery of oxygen and oxidation provided the first hints of the ecological complementarity of respiration and photosynthesis. The harnessing of steam power was revolutionizing transportation and manufacturing. Jefferson was a Founding Father keenly attuned to science's potential for improving the human condition, and adding to man's understanding of himself. Furthermore, he envisaged the newly independent America as a nation where the natural sciences could expand freely, nourished by that intellectual liberty which strikes the brightest creative sparks from active minds." C. Edward Quinn, "Thomas Jefferson and the Fossil Record" (1976) 47 BioS 159 at 159.

82. Thirteen years after drafting the Declaration, Jefferson, traveling through Paris, likely helped his friend, marquis de Lafayette, draft the sweeping language of the French Declaration of the Rights of Man and Citizen, which cast rights in terms of abstract universalities. According to Lynn Hunt, "the publication of the [French] declaration immediately galvanized worldwide opinion on the subject of rights, both for and against. In a sermon given in London on November 4, 1789, Richard Price, friend of Benjamin Franklin and frequent critic of the English government, waxed lyrical on the new rights of man. 'I have lived to see the rights of men better understood than ever, and nations panting for liberty, which seemed to have lost the idea of it'. Outraged by Price's naïve enthusiasm for the 'metaphysical abstractions' of the French, the well-known essayist and member of Parliament Edmund Burke dashed off a furious response. His pamphlet, Reflections on the Revolution in France (1790), gained instant recognition as the founding text of conservatism. 'We are not the converts of Rousseau,' Burke thundered. 'We know that we have made no discoveries, and we think that no discoveries are to be made, in morality. ... We have not been drawn and trussed, in order that we may be filled, like stuffed birds in a museum, with chaff and rags and paltry blurred shreds of paper about the rights of man.' Price and Burke had agreed about the American Revolution; they both supported it. But the French Revolution upped the ante enormously, and battle lines soon formed: was it the dawn of a new era of freedom based on reason or the beginning of a relentless descent into anarchy and violence?" Lynn Hunt, Inventing Human Rights (New York: W.W. Norton, 2007) at 17. Thomas Paine's publication of Rights of Man in 1791 would explode Burke's assertions and further intensify the natural law/positive law debates.

83. That Bentham, Austin, and Jefferson espoused a scientific or mathematical angle on law might explain how at least one scholar has lumped Austin and Jefferson in the same camp: "The Declaration of Independence and the Constitution are the culmination of centuries of legal thought and support our thesis that American law is founded on the form and spirit of mathematics. The legal developments of the nineteenth century continued this tradition in the work of John Austin (1790-1859), the founder of analytical jurisprudence. This is the notion of law as established fact subject to scientific treatment and orderly classification, as a science built upon the mathematical model. It attempted to reduce a large number of legal concepts to a basic few that were not themselves further analyzable. It is a study of what law is as opposed to what an individual or group thinks it ought to be." Stephen A. Kenton, "Mathematical Foundations of Constitutional Law" (1979) 52 Mathematics Mag. 223 at 224. Stephens corroborates two of my claims—first, that many scholars do in fact attribute analytical positivism to Austin and not Bentham; and second, that Austin was in conversation with Jefferson, the author of the Declaration. Because
Bentham preceded Austin, and because theories like Bentham's and Austin's were in discursive circulation at the time of Jefferson's writings, it is possible that Jefferson was likewise responding to analytical positivism, even if he was not directly responding to Bentham and Austin (who came later).

84. "For Bentham, natural law was mere rhetoric, clothed in subjective value judgments. In its place Bentham argued for a new science of law based on legislation. Bentham's idea of legal science was not so much based on 'empirical observation' but rather on careful analysis of law according to 'objective' categories and subcategories. He insisted on the development of a technical vocabulary which would allow politics and law to be analyzed 'neutrally.' For Bentham, and other utilitarian philosophers of the 19th century, there was seemingly no end to the power of reason and the possibilities of science to achieve social change." [Kathy Laster, *Law as Culture* (Sydney, AU: Federation Press, 2001)] at 203.

85. It bears noting some chronological comparisons. Bentham passed the bar exam in 1769, seven years before Jefferson's writing of the Declaration. Ross Harrison, *Bentham* (London: Routledge, 1983) at 15. By 1780, Bentham had authored much of the introduction to the penal code. *Ibid.* Bentham's widespread fame did not come about until the 1780s. *Ibid.* at 17-18. Bentham published his Universal Declaration of Human Rights in 1763, the same year that Jefferson authored the Declaration. Charles Milner Adkinson, *Jeremy Bentham: His Life and Work* (London: Methuen, 1905) at 35. During his lifetime, Bentham lectured to an extraordinary number of prominent individuals. According to Charles Noble Gregory, "Bentham, or 'the Hermit,' as he loved to call himself, did not hesitate to address, by post or the public press, potentates or powers, wherever circumstances seemed to make it probable that a change of law was contemplated or possible, and to offer his services to advise on any measure in discussion or to furnish a complete code. So he addressed Alexander I., the Emperor of all the Russias, the people of Spain, Simon Snyder, Governor of Pennsylvania, his fellow-citizens of France, James Madison, then President of the Congress of the American United States; Mehemet Ali, Albert Gallatin, Prince Adam Czartoriski of Poland, and in a circular communication, 'the respective governors of the American United States,' and in a series of letters, 'The Citizens of the several American United States.' He even proposed that, as we were not the only United States of America, and as the name 'The Anglo-American United States' was a circumlocution, we should rename our country 'Washingtonia,' and advised us to 'shut our ports against the common law as we 'would against the plague.'" Charles Noble Gregory, "Bentham and the Codifiers" (1900) 13 Harv. L. Rev. 344 at 346.

86. See, e.g., Ian Duncanson, "Cultural Studies Encounters Legal Pluralism: Certain Objects of Order, Law and Culture" (1997) 12 Can. J.I. & Policy 115 at 139 ("Unlike the later Bentham, Austin was never a democrat.").

87. Austin is not indifferent to moral questions; nor does he deny the existence of universal, transcendental laws immanent in nature. In fact, he lists "divine laws" or "the laws of God" as examples of "laws proper" or "commands." John Austin, *On Jurisprudence* (London: John Murray, 1879) at 81. He also points out that these universal rules "cannot be styled the jus omnium gentium, or the commune omniium hominum jus" because they "cannot be purely or simply of human position or invention." *Ibid.* at 84. Instead, they are "made by men on laws coming from God, or from the intelligent and rational Nature which is the soul and the guide of the universe." *Ibid.* at 84-85. Accordingly, they are not "so properly laws of human device and institution, as divine or natural laws clothed with human sanctions." *Ibid.* That universal rules are made, according to Austin, on God's laws suggests that they are additions, supplements, revisions, or complements to God's laws but that they never actually constitute God's laws.

88. Blackstone may be disingenuous on this score because he conceives under the guise of the natural what is in fact gleaned from already existing English common law.


90. Bentham, *supra* note 89 at 94.


95. Austin, *supra* note 87 at 91.

96. *Ibid.* at 100. This point is true in a different way for Jefferson, who believes that law emanates from the creater through nature.
97. The idea that discourse constitutes relationships or power structures is resonant in the poststructuralist works of, most notably, Michel Foucault, and it begs further explanation, especially since Foucault attributes his working paradigms to Bentham, not Austin, unlike the various legal theorists who treat Austin as analytical positivism's intellectual forerunner. Bentham explains in *Principles* that "[p]ower, whether over a man's own person, or over other persons, or over things, is constituted in the first instance by permission," thus lending critical substance to Austin's belief that a "superior" legitimately commands laws to an "inferior" only so long as that inferior consents. Bentham, *supra* note 92 at 224. An "inferior," in turn, consents only so far as he or she perceives that those commands are good. This process recalls Locke's idea of social contract (appropriated by Adam Smith, Bentham, et al.), which holds that citizens surrender a certain amount of individual liberty to gain collective liberty. In light of this apparent mutual dependence, Austin refers to the relationship between superiors and inferiors as reciprocal ("in all or most cases of human superiority, the relation of the superior and inferior, and the relation of inferior and superior, are reciprocal"). Austin, *supra* note 87 at 99. He substantiates this logic with the following concrete example: "To an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude." *Ibid.* That is to say, the monarch has power over subjects only so long as subjects allow that power; and subjects allow that power only so long as the monarch serves their interests (if only minimally). The fatal flaw of this reasoning is that subjects probably do not have the luxury of dismantling previously established power structures. If subjects decide no longer to channel power to the commanding monarch, will the monarch simply concede without resort to coercion? More than just signifying a desire, Bentham and Austin seem to suggest, laws entail mutual consent, which subsequently gives rise to duties and obligations and therefore to power (imb)balances. One can see here the foundations of Foucault's power/knowledge and power/pleasure principles. These binary oppositions, rather than compete with or exclude each other, actually participate with each other to produce or activate and then perpetuate power. For Austin, laws are relational and reciprocal but not totally unilateral. Yet, over a century after Austin and Bentham, Foucault would extend these principles to suggest that power itself is active, productive, and participatory rather than passive or one-sided. This is not to say that power cannot be unidirectional—for instance, if the consent is, as Noam Chomsky puts it, "manufactured"—only that power requires the energies of both controller and controlled. See generally Edward S. Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988).

98. In *Notes*, Jefferson actually footnotes the compiler of Blackstone's letters, Philip Furneaux (1726-1783). The footnote appears after the following line: "The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws." *Ibid.* supra note 28 at 170.


100. The following quote substantiates this point while illuminating Bentham's influence on Jefferson: "The greatest happiness of the greatest number is Beccaria's phrase, plagiarized by Bentham; and the pursuit of happiness might well be the turn given it by one with as fine a feeling for language as had Jefferson." Herbert Lawrence Ganson, "Jefferson's Pursuit of Happiness” and Some Forgotten Men” (1936) 16 Wm. & Mary Q. 558 at 559.

101. One may deduce this conclusion from Albert W. Alschuler's comment about Jefferson and Blackstone: "In 1812, while describing Blackstone's *Commentaries* as 'the most elegant and best digested of our law catalogue,' Jefferson quoted 'canonization' of the book: 'A student finds there a smattering of everything, and his indolence easily persuades him if he understands that book, he is the master of the whole body of law’" Albert W. Alschuler, "Rediscovering Blackstone" (1996) 145 U. Pa. L. Rev. 1 at 10 (quoting Jefferson in *supra* note 27 at 65-66). Alschuler goes on to suggest, however, that Jefferson's views about Blackstone were complicated. Sometimes Jefferson praised Blackstone; sometimes he criticized Blackstone.

102. Blackstone, who wrote with "graceful prose," was also a poet and the author of critical notes on Shakespeare. Alschuler, *supra* note 101 at 8.

in other words, but discourse assigns them such categories, which people then accept and perpetuate. It is not enough that one party merely declares an action unlawful; other parties must approve that declaration and then abide by it. On a communal level, such compliance is more likely if disobedience occasions formal punishment. "A command," Bentham explains in an earlier passage, constitutes a legal obligation when "punishment [is] appointed for the breach of it." *Ibid.* at 226. After all, a declaration by itself, being nothing more than discourse, carries no weight unless respected by its subjects; and punishment, or rather the power to punish, brings about this respect.

Nevertheless, Bentham says that "all punishment in itself is evil" because it subtracts from happiness, the ultimate objective of utilitarianism. *Ibid.* at 170. But punishment seems a central ingredient to command theory. Rather than reject punishment altogether, Bentham proposes it as a last resort that "ought only to be admitted in as far as it promises to exclude some greater evil." *Ibid.* Accordingly, society may punish a serial killer if doing so prevents the random deaths of other victims—if, that is, it prevents greater evils. The utilitarian implication here is that law should never aspire to retributivism. It is enough that law simply remove or prevent further mischief, but putatively moral punishments—"just deserts"—are unnecessary. Worse, they are against happiness and therefore not moral at all. Bentham is adamant that punishment is inappropriate if it is groundless (i.e., not a reaction to some corresponding mischief), ineffectual, unprofitable, or needless. *Ibid.* at 171-72, 175, 177. He spends a great deal of energy classifying and arranging punishment precisely because punishment is inherently at odds with happiness, which is rooted in pleasure, not pain. Although his ideas generally inspired Austin's command theory, a central tenet of positivism, they do not maintain that laws necessarily entail punishment but, instead, that the measure of law be utility. Whatever principle differs from this principle of utility, in fact, "must necessarily be a wrong one." *Ibid.* at 8. Incidentally, punishment emanating from the sovereign almost never conforms to the principle of utility. "If the sovereign must needs take a part in the controversy," Bentham explains, "the pen is the proper weapon to combat error with, not the sword." *Ibid.* at 177. Suspicious of institutions and, of course, pain, Bentham seems to imply that the collective benefit is enhanced when law involves personal interactions and not grand political programs, especially those prone to violence.

104. Specifically, he says, "The meanings of the term right, are various and perplexed; taken with its proper meaning, it comprises ideas which are numerous and complicated; and the searching and extensive analysis, which the term, therefore, requires, would occupy more room than could be given to it in the present lecture. It is not, however, necessary, that the analysis should be performed here." Austin, *supra* note 87 at 103.

105. Jefferson manages to have 200 copies of *Notes* printed in 1785, having more or less completed the manuscript by 1784. Frank Shuffelton, "Introduction" in *Notes on the State of Virginia* (New York: Penguin Classics, 1999) at xiv-xx. By this time, Bentham has achieved some level of fame and has met with many notables like William Pitt. See generally Atkinson, *supra* note 85 at 50-75. By the 1787 printing of *Notes*, Bentham has secured for himself an even more prominent reputation.

106. "Bentham's creed of utility had long been the accepted creed of many thinkers of many different political parties." William Holdsworth, "Bentham's Place in English Legal History" (1940) 28 Cal. L. Rev. 568 at 572. Moreover, as Albert Venn Dicey elucidates: "Dr. Johnson, the moralist of the preceding generation, had admitted, and Paley, still the accepted English theologian of the day, had advocated, the fundamental dogma of Benthamism, that the aim of existence was the attainment of happiness. The religious teachers who touched the conscience of Englishmen tacitly accepted this doctrine. The true strength of Evangelicism did not, indeed, lie in the fervour with which its preachers appealed, as they often did, to the terrors of hell as a sanction for the practice of virtue on earth, but the appeal was in fact a recognition of the principle of utility. When Bentham applied this principle to the amendment of the law he was in thorough harmony with the sentiment of the time; he gave an appeal to moderate reformers by applying to the appropriate sphere of legislation that greatest happiness principle which the public had long accepted as something like a dictate of common sense." Albert Venn Dicey, *Lectures on the Relation Between Law & Public Opinion in England During the Nineteenth Century* (London: Macmillan, 1905) at 173-74.


Bentham's prominence, his American contacts, and his outspokenness about Jefferson, it seems highly likely Jefferson was aware of Bentham's reputation if not Bentham's ideas.


111. As Sweet indicates, "Perhaps the political context—the war to substantiate a document [the Declaration] grounding a government in the 'Laws of Nature'—made generalizations a matter of greater urgency than in the case of moose or mammoth." Sweet, supra note 10 at 108. Likewise, Quinn writes, "The unimpeded pursuit of anthropology, genetics, paleontology, archeology, and psychology has unquestionably helped establish a clear scientific rationale for justice, the logical consequence of that human equality proclaimed in the Declaration of Independence. Jefferson would have been deeply gratified that this key passage [quoted by Quinn] from his very last letter should have been confirmed by the conclusions of those biological sciences in which he had so deeply involved himself. His constant vigilance over the right of free inquiry and unconstrained by responsible expression helped make the United States a country in which biological science took deep root and enjoyed unprecedented growth." Quinn, supra note 81 at 166-67.

112. Douglass Anderson says the following of Jefferson's use of science, in *Noies*, to counter British culture and institutions: "Jefferson indicted the state of English culture by treating its conduct of the American war as a monstrous birth, an inhuman 'issue' that signals an 'awful dissolution.' The scientific context over the fertility of American nature, in vegetables, quadrupeds, and men, may be conducted in reasonably civil, scientific fashion. The political and military contest with Great Britain, on the other hand, takes a bitter, inward turn to which the gestational metaphors of Query VI seem inevitably to turn." Douglas Anderson, "Subterranean Virginia: The Ethical Poetics of Thomas Jefferson" (2000) 33 Eighteenth-Century Studies 233 at 240.

113. See generally John Meyer, *Political Nature* (Cambridge, MA: MIT Press, 2001). Meyer opens his book with this provocative passage: "How should human communities be ordered? Those who engage in politics—in its broadest sense—seek to address this question. What is and what should be the relationship between the order of human communities and the order of nature? This is one of the fundamental questions confronted—sometimes explicitly, always implicitly—by political thinkers over the millennia. It is also a question that contemporary environmentalists regularly seek to address. Thus the question is not only a perennial one, it is timely." Ibid. at 1.


