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*In Pursuit of Liberty: The Levellers and the American Bill of Rights*

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## IN PURSUIT OF LIBERTY: THE LEVELLERS AND THE AMERICAN BILL OF RIGHTS

Michael Kent Curtis © Michael Kent Curtis \*  
8 Constitution Commentary 701 (1991) (slightly revised)

### INTRODUCTION

More than a century before the American Bill of Rights, an Englishman named John Lilburne embraced political ideals that would animate many eighteenth and nineteenth century Americans. Lilburne was a crusader for religious toleration, wider suffrage, and civil liberties in seventeenth century England. In 1657 Lilburne was a prisoner in Dover Castle, held there without trial by order of Oliver Cromwell's Council of State. Criminal prosecutions of Lilburne had failed twice: in a 1649 trial for treason and in a 1653 trial for violating a parliamentary order of banishment. Both of these politically charged prosecutions were frustrated by juries that refused to convict. After Lilburne's 1653 acquittal, the government simply kept him in prison, moving him first to the Isle of Jersey so he would be beyond the reach of a writ of habeas corpus and later to Dover Castle.<sup>1</sup> After Lilburne's jury trials Cromwell's Council tried political offenders in the High Court of Justice, which sat without a jury.<sup>2</sup>

Lilburne was an actor in major events of his times. He was in turn a Puritan rebel against the Bishops, a prisoner of the Star Chamber, a Puritan soldier in the Parliamentary army fighting against the King, an ally of Oliver Cromwell hoping for rebirth of liberty, and finally a prisoner of Cromwell's Government. In the end he became a Quaker. Starting in 1646, Lilburne helped to found a political faction that sought wider suffrage, religious toleration, and guarantees for individual rights. The faction was named the Levellers by its political opponents, who warned that democracy would lead to economic levelling. Though the name was misleading, it stuck.

The Levellers were the first mass-based pro-democracy protest movement in modern history.<sup>3</sup> After a short but eventful political life, the Levellers were suppressed.

To many, Lilburne was a popular hero. Following self-consciously in the steps of Christian martyrs, Lilburne became a political martyr.<sup>4</sup> He cast his confrontations with authority as a metaphor for the struggle for liberty, portraying his cause as the cause of "freeborn Englishmen."<sup>5</sup>

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<sup>1</sup>Pauline Gregg, *Free-Born John: A Biography of John Lilburne* 336-48 (George R. Harrap & Co. 1961) ("Free Born John").

<sup>2</sup>Shannon Stimson, *The American Revolution in the Law* 21 (Princeton U. Press 1990).

<sup>3</sup>G.E. Alymer, ed, *The Levellers In The English Revolution* 9 (Thames & Hudson, 1975). The Levellers, like any large political movement, had members with different ideas. They have attracted substantial scholarship. In the present essay, basic issues such as the Norman Yoke, Leveller views of the law, the relation of Leveller thought to that of Coke, their relations with Cromwell, and the historical events from 1642 to 1649, receive only the briefest mentions.

<sup>4</sup>John Lilburne, *The Legall Fundamentall Liberties Of The People Of England (1649)* ("Legal Fundamental Liberties"), excerpts in William Haller and Godfrey Davis, eds., *The Levellers Tracts 1647-1653*, 399, 449 (Peter Smith, 1964) ("Leveller Tracts").

<sup>5</sup>John Lilburne, *The Just Defense Of John Lilburne (1653)* ("The Just Defense") in Haller and Davis, *Leveller Tracts* at 455 (cited in note 1). For earlier examinations of the Levellers with a general historical focus see, e.g., Theodore C. Pease, *The Leveller Movement* (Peter Smith, 1915, 1965); Joseph Frank, *The Levellers* (Harv. U. Press, 1955); Henry Noel Brailsford, *The Levellers and the English Revolution* (Stanford U. Press, 1961) ("Levellers and the Eng. Rev.").

American courts cited Lilburne and the Levellers after their discovery by Justice Black. Edward G. Hudon, *John Lilburne the Levellers, and Mr. Justice Black*, 60 ADA Journal 686 (1974). While Lilburne and the Levellers have been cited in connection with specific issues like the privileges against self-incrimination, very little attention has been paid in law reviews to the larger story of the Levellers. For one of the rare exceptions see Diane Parkin-Speer, *John Lilburne: a Revolutionary Interprets Statutes and Common Law Due Process*, 1 Law and Hist. Rev. 276 (1983). For the Levellers and criminal jury trial see Thomas A. Green, *Verdict According to Conscience Perspectives on the English Criminal Trial Jury, 1200-1800*, 153-99 (U. Chi. Press, 1985) ("Verdict"). See also, e.g., Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (Temple Smith, 1972). Christopher Hill, *Puritanism and Revolution* (Secker & Warburg, 1958); David Underdown, *Revel, Riot and Rebellion* (Oxford U. Press, 1985). For one "revisionist" view see e.g., C.B. MacPherson, *The Political Theory of Possessive Individualism Hobbes to Locke* (Oxford U. Press, 1962). For a response, see Michael B. Levy, *Freedom, Property and the Levellers*, 36 W. Pol. Q. 116 (1983) and n.58.

The precise place of Lilburne and his Levellers in the genealogy of the American Bill of Rights is not clear. Still, Levellers developed specific guarantees and the very idea of a Bill of Rights. Levellers claimed a host of rights--against self incrimination, to receive a copy of the indictment, to counsel, to due process, to petition and to freedom of the press and of religion. In some cases--as in the privilege against self-incrimination--Lilburne was one of the main historical sources of the right. More generally, the Levellers contributed to seventeenth century ideas of natural and historic rights. These ideas, in turn, contributed significantly to developing ideas of liberty in the eighteenth and nineteenth centuries. In addition, the Levellers' experience teaches us something about how guarantees of civil liberties develop.

The Levellers agitated for religious and political liberty and for wider suffrage. In response to their efforts they found themselves targets of various ruling factions, and faced arrest, searches and seizures, seditious laws, censorship and imprisonment. In the face of attacks, Levellers appealed both to existing guarantees of liberty and to what were in fact new ones. They developed a view of history that supported their claims. Remarkably, some began to insist on procedural guarantees for their opponents as well as for themselves. Claiming individual rights in response to politically motivated attacks, as Levellers did, is at least one of the patterns that characterize the development of guarantees of liberty.

The rest of this paper will be divided into two parts. Part I will retell in very condensed form the story of Lilburne and the Levellers from their emergence to their suppression. The story is told largely from the Leveller perspective. Part II will look at the Levellers' contributions to the American Bill of Rights, and at the meaning of the Levellers' experience.

## I. THE LEVELLERS

### A. HISTORICAL BACKGROUND

The seventeenth century English kings, James I and Charles I, saw the rise of Puritanism and Puritan attacks on the established Church as a threat to the stability of the state. "[N]o bishop, no king," as James I put it.<sup>6</sup> At this point there were few, if any, advocates of religious toleration on any side of the dispute.

The English Crown tried to crush Puritanism. It hauled ministers and laymen before a special ecclesiastical court, the Court of the High Commission, and examined them about religious practices and beliefs. Ministers who were excessively Puritan were deprived of their jobs. Ministers and laymen were also subjected to other punishments. The Court of the High Commission punished the unorthodox for heresy or blasphemy.<sup>7</sup> People connected with unacceptable religious pamphlets were hauled before the Court of the Star Chamber and harshly punished: imprisoned, whipped, branded, their ears cropped, or worse.

Both courts were inquisitorial. A suspect was brought before the court, handed a Bible, and required to swear to answer all questions truthfully. The court would then proceed to examine the suspect on his views or his conduct in order to prove his guilt. This placed intensely religious Puritans in a difficult dilemma: they would either endanger their immortal souls or they would condemn themselves. To force recalcitrant witnesses to testify, the court relied on imprisonment or occasionally (in the case of the Star Chamber) torture. The courts also developed a simple rule which held that those who refused to testify had confessed.<sup>8</sup>

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<sup>6</sup>Goldwin Smith, *A History of England* 289 (Charles Scribner's Sons, 2d ed. 1957).

<sup>7</sup>Leonard W. Levy, *Origins of the Fifth Amendment* chs. 4 and 5 (Oxford U. Press, 1968) ("*Origins*").

<sup>8</sup>Levy, *Origins* at 250 (cited in note 7). Richard Harris, *Freedom Spent* 350-54 (Little Brown, 1974).

Hauling suspects in and forcing them to condemn themselves were powerful tools for a government determined to suppress political opponents, but these methods provoked intense hostility from a large part of the population. The victims of the courts raised a number of legal attacks against their inquisitors and had some success.<sup>9</sup> Finally, the courts themselves were swept away in the Civil War.

John Lilburne was one of the Star Chamber's Puritan victims. In 1638 Lilburne was twenty-two or twenty-three years old, an apprentice, and a devoted Puritan. Suspected--with some justification — of smuggling seditious religious books from Holland, Lilburne was brought before the Court of the Star Chamber for examination. He refused to take the oath. He was sentenced to imprisonment, to be tied to a cart and whipped through the streets of London, and to be placed in the pillory. As he was tied to the cart and prepared for whipping, Lilburne cried, "Wellcome be the Crosse of Christ." As the whipping began, he thanked God for finding him "worthy to suffer for thy glorious names sake."<sup>10</sup>

From the pillory, Lilburne delivered a lengthy speech attacking his prosecution. He told a sympathetic crowd that the oath he refused to take was contrary to the Petition of Right and was "absolutely against the Law of God, for that law required noe man to accuse himselfe."<sup>11</sup> To let his listeners judge his conduct for themselves, Lilburne reached under his shirt, produced copies of a Puritan pamphlet he was accused of smuggling into the country, and threw copies to the crowd. Before he completed his speech he was gagged, "being interrupted," he regretfully noted, "of much matter which by God's assistance I intended to have spoken"<sup>12</sup> From prison Lilburne produced a pamphlet about the events. It was to be the first of many.

By late 1640, Lilburne had been freed from prison to present his case to Parliament. In May of 1641, Parliament declared his imprisonment to be "illegal . . . bloody, wicked, cruel, barbarous and tyrannical."<sup>13</sup> Lilburne joined the parliamentary army in its battle against the King and rose to the rank of lieutenant colonel. By April 1645, he had resigned his commission because he was unwilling to subscribe to the Solemn League and Covenant, which required conformity to Presbyterianism in place of conformity to the Church of England.<sup>14</sup> By the mid-1640s, leading Levellers were in conflict with some Presbyterians over religious toleration.

In 1644, Parliament moved toward state-enforced religious orthodoxy — but on a Presbyterian rather than Church of England basis. Parliament ordered Roger Williams' plea for religious toleration burned, censored the press, and forbade laymen to preach. Officers imprisoned people for holding unorthodox religious meetings.<sup>15</sup>

As Parliamentary attempts to enforce religious conformity increased opposition mounted. Three future Levellers--William Walwyn, a London merchant, Richard Overton, and John Lilburne--were among those arguing for religious toleration

Writing in 1643, Walwyn's prescription for the problem of religious persecution was religious liberty and love:

Let truth have her free and perfect working, and the issue will bee increase of beleevers: let faith have her perfect working, and the issue will bee increase of love: and let love have her perfect working, and

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<sup>9</sup>Levy, *Origins* at ch. 8 (cited in note 7).

<sup>10</sup>John Lilburne, *A Worke Of The Beast* (1638), reprinted in William Haller, ed., *2 Tracts On Liberty In The Puritan Revolution* (1638-1647) 3, 7-8 (Columbia U. Press, 1934) ("*Tracts on Liberty*").

<sup>11</sup>Id. at 15.

<sup>12</sup>Id. at 25. Gregg, *Free-born John* at chs. 4 & 5 (cited in note 1); Harris, *Freedom Spent* at 350-51 (cited in note 8); Levy, *Origins* at ch. 9 (cited in note 7).

<sup>13</sup>Brailsford, *Levellers and the Eng. Rev.* at 85 (cited in note 5).

<sup>14</sup>Gregg, *Free-born John* at 11 (cited in note 1); Harris, *Freedom Spent* at 355- 57 (cited in note 5).

<sup>15</sup>Gregg, *Free-born John* at 113-14 (cited in note 1); Frank, *The Levellers* at chs. 5, 6 and 7 (cited in note 5). On the complexity of divisions, see David Underdown, *Pride's Purge* (George Allen & Uswin, 1985).

the whole world will be so refined, that God will be all in all; for hee that dwelleth in love dwelleth in God.<sup>16</sup>

Love required allowing one's brother "the peaceable enjoyment of his mind and judgement."<sup>17</sup> Walwyn suggested that the fortunate with "their silkes, their beavers, their rings" could turn their attention from suppressing religious dissent to assisting the poor unable to get food for a sickly wife or for starving children.<sup>18</sup>

In a 1644 pamphlet Walwyn suggested further arguments for toleration. There was the uncertainty of knowledge in this life, as shown by the facts that Church Fathers, councils, and national assemblies had been grossly mistaken. Walwyn warned that the mistaken might coerce the correct. Walwyn also made psychological arguments against coercion: "[C]onscience being subject only to reason (either that which is indeed, or seems to him which hears it to be so) can only be convinced . . . thereby, force makes it runne backe and strugle."<sup>19</sup> Finally, Walwyn said compelling a person against conscience was compelling him "to doe that which is sinfull: for though the thing may be in it selfe good, yet if it doe not appear to be so to my conscience, the practice thereof in me is sinfull."<sup>20</sup>

Walwyn suggested that economic self-interest was a powerful incentive leading established churches to persecution, because established clergy had "engrossed the trade to themselves."<sup>21</sup>

Following this metaphor of economic monopoly, Walwyn seemed to suggest free trade in religious ideas. Instead of suppressing heterodox religious ideas, the learned divines should "invite every man to give them their best light and information, that so they may heare all voyces."<sup>22</sup> He answered the suggestion that simple and untrained men should not preach by pointing out that Christ chose "poore and unlearned Fishermen and Tent-makers."<sup>23</sup>

Lilburne, like Walwyn, had an economic interpretation of demands for conformity. He also analyzed the problem of compelled orthodoxy in part as a problem of monopoly--"ingrossing the Preaching of the Word."<sup>24</sup> Lilburne opposed "tythes" because priests who were not one in a thousand received one-tenth or one-seventh "part of all things a man hath." Such an arrangement was "unequal and unjust."<sup>25</sup>

Closely related to the monopoly on preaching was "that insufferable, unjust and tyrannical Monopoly of Printing" which resulted in suppressing all "[d]eclaration[s] of the just Rights and Liberties of the free-borne people of this Nation." Worse yet, those in power upheld religious persecution and branded support for toleration as treasonous and seditious.<sup>26</sup>

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<sup>16</sup>William Walwyn, *The Power Of Love* (1643), in Haller, *2 Tracts on Liberty* at 273, 278 (cited in note 10).

<sup>17</sup>*Id.* at 277.

<sup>18</sup>*Id.* at 274.

<sup>19</sup>William Walwyn, *The Compassionate Samaritane* 10-11, 14 (1644) in Haller, *3 Tracts on Liberty* at 61, 70-71 (cited in note 10). Hereafter the pages of the original will be cited with the reference to *Tracts on Liberty* in brackets.

<sup>20</sup>*Id.* at 43 (86).

<sup>21</sup>*Id.* at 31 (80).

<sup>22</sup>*Id.* at 54 (91).

<sup>23</sup>*Id.* at 33 (81).

<sup>24</sup>John Lilburne, *England's Birth-Right Justified* 8-9 (1645) in Haller, *3 Tracts on Liberty* at 259, 266-67 (cited in note 10).

<sup>25</sup>*Id.* at 13 (271).

<sup>26</sup>*Id.* at 10 (268).

## B. IMPRISONMENT OF LILBURNE AND THE RISE OF THE LEVELLER PARTY

Lilburne was involved in repeated controversies. One contemporary suggested that if he were the last person on earth he would fall out with himself--Lilburne would quarrel with John and John with Lilburne.<sup>27</sup> In 1645 and 1646 Lilburne was arrested first by the Commons and then by the Lords, ostensibly for charging their speakers in one case with corruption and in the other case with treason to the Parliamentary cause. Lilburne responded to the arrests by demanding procedural guarantees, refusing to testify against himself, and finally questioning the Lords' jurisdiction over a commoner. On that point, Lilburne demanded a hearing by his peers.<sup>28</sup>

From prison Lilburne produced pamphlets defending himself and his struggle for the rights of freeborn Englishmen. From bright hopes for liberty things had come to a sad pass: "Neither petitions can be easily accepted, justice truly administered, the Presses equally opened, the cries of the poor heard, . . . [nor] the sighes of the Prisoners regarded "<sup>29</sup> Men who had fought and bled for the Parliamentary cause "must not sit in Parliament, though never so fit and able, unlesse they will take this . . . (persecuting, soul-destroying, *Englands* -dividing and undoing) *Covenant*."<sup>30</sup> "Oh *Englishmen*," Lilburne exclaimed, "Where is your freedoms? and what is become of your *Liberties* and *Priviledges* that you have been fighting for all this while?"<sup>31</sup>

In response to Lilburne's troubles this time, a group including Walwyn and Overton came to his defense. Petitions demanded his release or trial. John Lilburne's cause became mixed with broader causes: wider suffrage, religious toleration, protection of individual rights, an end to monopolies, and equality before the law. The Leveller party was being formed. The Levellers attracted much of their support from members of dissenting religious sects, from the army, and from artisans and apprentices.

In 1645, Walwyn published *Englands Lamentable Slaverie*, directed against Lilburne's imprisonment. In spite of their religious differences, Walwyn hailed Lilburne "for your undaunted resolution in defence of the common freedom of the People." Walwyn judged the prosecution of Lilburne and others by looking at the allegations and "the proceedings thereupon, whether legall or illegall just or unjust." "I doe not enquire," he wrote, "what his judgement is in Religion" nor consider "tales . . . of . . . personall imperfection."<sup>32</sup> Lilburne's imprisonment first without cause shown and then for refusing to answer interrogatories against himself, Walwyn said, violated both Magna Carta and the Petition of Right.

According to Walwyn, Lilburne had enraged the powerful because of "the freenesse of his tongue against all kinde of injustice."<sup>33</sup> Lilburne, he said, had been the first to assert that incriminating questions were not only a violation of his liberties as a free born Englishman, but were contrary to Magna Carta. Likewise, Walwyn said, Lilburne was the first to compare Parliament's incriminating questions to the practice of the Star Chamber that Parliament had

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<sup>27</sup>John Lilburne, *Just Defense*, in Haller and Davis *Leveller Tracts* at 451 (cited in note 4).

<sup>28</sup>Brailsford, *Levellers and the Eng. Rev.* at 91-95 (cited in note 5).

<sup>29</sup>Lilburne, *Englands Birth-Rights Justified* (Preamble), in Haller, *3 Tracts on Liberty* at 258 (cited in note 10).

<sup>30</sup>Id. at 29 [287].

<sup>31</sup>Id. at 11 [269].

<sup>32</sup>William Walwyn, *Englands Lamesable Slaverie* 2 (1645) in Haller, *3 Tracts on Liberty* at 311,312 (cited in note 10).

<sup>33</sup>William Walwyn, *A Pearle in a Dounghill* 3 (1646), reprinted in A.L. Morton, ed., *Freedom in Arms* 75, 81 (Seven Seas Pub., 1975).

condemned.<sup>34</sup> For Walwyn, Lilburne's case was of profound significance: it raised the question of whether Parliament was bound by the law or was "above MAGNA CHARTA and all Lawes whatsoever."<sup>35</sup>

Though he cited Magna Carta, Walwyn warned Lilburne against excessive reliance on it: "MAGNA CHARTA (you must observe) is but a part of the peoples rights and liberties, being no more but what with much striving and fighting, was by the blood of our Ancestors, wrestled out of the pawes of those Kings, who by force had conquered the Nation, changed the lawes and by strong hand held them in bondage."<sup>36</sup>

Richard Overton also came to Lilburne's defense. In 1646 he published *A Remonstrance of Many Thousand Citizens* "occasioned through the Illegall and Barbarous Imprisonment of that Famous and worthy Sufferer for his Countries Freedoms, Lieutenant Col. JOHN LILBURNE." As a result of publications criticizing the Lords, Overton, his wife, and his brother were imprisoned.

These imprisonments show that the authorities took the Levellers' challenge seriously. A look at Leveller ideology explains why they were viewed as a serious threat to the established order.

### C. LEVELLER IDEOLOGY

Leveller protests elaborated and developed ideas that threatened existing power, including their views of popular sovereignty, history, and the interrelationship of law, reason, and natural right.

#### 1. Popular Sovereignty

Popular sovereignty had earlier been invoked by Parliament in its struggle against the King. According to this Parliamentary analysis, the source of legitimate power was in the people in Parliament. Curiously, however, the same Parliamentary analysis dictated that the people could not limit or revoke Parliament's own power. Parliament and the people were identical, so the people had no rights against Parliament.<sup>37</sup>

The Levellers took up the revolutionary rhetoric Parliament had aimed at the King and redirected it. The sovereign was not the King or the People in Parliament, but the people of England. The Levellers' radical metaphor for the relation of Parliament to the people was that of agency. The people were the principal; Parliament was the agent. Parliament's authority as agent was to protect the liberty and property of the people. To the extent that the acts of Parliament violated the rights or interests of the people, they were void because they violated the trust that was the basis of the agency. As a Leveller Remonstrance noted "Wee are your Principalls, and you our Agents; . . . For if you . . . shall assume, or exercise any Power, that is not derived from our Trust and choice thereunto, that Power is no lesse then usurpation and an Oppression."<sup>38</sup>

An agent who ceased to serve the interests of his principal lost his authority. As one Leveller pamphlet put it:

*All authority is fundamentally seated in the office, and but ministerially in the persons; therefore, the persons in their Ministrations degenerating from safety to tyranny, their Authority ceaseth and is only to be found in the fundamentall originall, rise and situation thereof, which is the people, the body represented . . . [N]o sooner the Betrusted betray and forfeit their Trust but . . . it returneth from*

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<sup>34</sup>William Walwyn, *Englands Lamesable Slaverie* 3, in Haller, *Tracts on Liberty* at 313 (cited in note 10).

<sup>35</sup>Id.

<sup>36</sup>Id. at 3-4 [313-14].

<sup>37</sup>Edmund S. Morgan, *Inventing The People* 65 (W.W. Norton, 1988).

<sup>38</sup>Richard Overton, *A Remonstrance Of Many Thousand Citizens* 3 (1646) ("A Remonstrance"). in Haller, *3 Tracts on Liberty* at 351, 353 (cited in note 10).

whence it came, even to the hands of the *Trusters*: For all just *humaine powers* are but entrusted, confer'd and conveyed by joint and common consent, *for to every individuall in nature, is given an individuall propriety by nature, not to be invaded or usurped by any.* . . . and by naturall birth, all men *are equal and alike borne to like propriety and freedome.*<sup>39</sup>

As this excerpt shows, Levellers insisted that basic individual rights were beyond the power of government. At least some of these rights were reserved because they were beyond the power of the people to delegate to their government. The principal could not give his agent powers the principal did not possess. So as to the worship of God,

compell, yee cannot justly; for ye have no Power from Us so to doe, nor could you have; for we could not conferre a Power that was not in our selves, there being none of us, that can without wilfull sinne binde our selves to worship God after any other way, then what (to a tittle,) in our owne particular understandings wee approve to be just.<sup>40</sup>

Another assumption of the agency model, often made explicit, was that consent, of the governed was essential for legitimate governmental power. "Every person in England hath as clear a right to elect his representative as the greatest person in England," one Leveller declared. All legitimate government was based "in the free consent of the people."<sup>41</sup>

At first the Levellers had looked to Parliament for reform. In the end, the Levellers' proposed constitution was designed to come from an agreement of the people, not from Parliament. Only in that way could the structure of government and the reserved rights of the people be preserved from violation by future Parliaments.<sup>42</sup>

## 2. Leveller History

In a real sense, both individuals and social movements have their realities, their view of the world. The world view held by Leveller leaders Lilburne and Overton was closely connected with their view of the past. Basically they believed that before the Norman Conquest, England had been a free nation with a functioning representative government—one that was destroyed in 1066 by William the Conqueror. One writer, probably not a Leveller, called William "a Bastard, Thief, Robber & tirant."<sup>43</sup> So, the writer noted,

this thing called *prerogative* flows meerly from the wills and pleasures of *Robbers, Rogues, and Theaves*, by vertue of which they made *Dukes, Earles, Barrons, and Lords*, of their *fellow Robbers*,

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<sup>39</sup>Richard Overton, *An Appeal* (1647), reprinted in Don M. Wolfe, ed. *Leveller Manifestoes of the Puritan Revolution* 157, 162 (Thomas Nelson and Sons, 1944) ("*Leveller Manifestoes*").

<sup>40</sup>Richard Overton, *A Remonstrance Of Many Thousand Citizens*, (1646), in Wolfe, *Leveller Manifestoes* at 113, 122 (cited in note 39).

<sup>41</sup>John Wildman during the Putney Debates, (1647) in Aylmer, *The Levellers In The English Revolution* 97, 109 (cited in note 3).

<sup>42</sup>*An Agreement Of The People* (1647) in Wolfe, *Leveller Manifestoes* at 226, 230 (cited in note 39). Over forty years later John Locke, in his *Second Treatise On Government*, made a similar argument using words remarkably close to those used by the Levellers:

[T]here can be but one supreme power, which in the legislative . . . yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end being limited by that end, whenever that end is manifestly neglected or opposed, trust must necessarily be forfeited, and the power devolve into the hands of those that gave it.

John Locke, *An Essay Concerning The True Original, Extent And End Of Civil Government (Second Treatie On Civil Government)* (1690, 1694) in Ernest Barker, ed., *Social Contract* 87 (Oxford U. Press, 1960).

For an argument that Locke was much influenced by the Leveller tradition see Richard Ashcraft, *Revolutionary Publicks and Locke's Two Treatises Of Government* (Princeton U. 1986).

<sup>43</sup>*Regal Tyrannis Discovered* 92 (1647).



*Rogues*, and *Theaves*, the lineall issue, and progeny of which, the present House of *Peers* are, having no better right nor title, to their present pretended judicature, then meer and absolute usurpation .<sup>44</sup>

Gradually, according to this view, the Commons came to understand their rights and by much struggle "we in this age come to enjoy what we have, by *Magna Charta*, the *Petition of Right*, and the good and just Lawes . . . which is yet nothing nigh so much as by right we ought to enjoy."<sup>45</sup> Many effects of the Norman yoke nevertheless remained. These included the House of Lords, the lack of equality before the law, and the fact that the laws of the land were "lockt up from common capacities in the Latine or French tongues."<sup>46</sup>

### 3. Law, Reason, and Natural Right

Leveller leaders were often jailed and so paid close attention to the basic legal rights of "free-borne Englishmen." Nothing quickens appreciation of the rights of the accused more than being accused. To defend themselves Levellers like Lilburne and Overton cited *Magna Carta*, the *Petition of Right*, *Declarations of Parliament* on the Liberties of the subject, the common law, and natural law, and they also relied on new rights they in fact invented.

Part of their appeal was to existing law, at least to one seventeenth century view of it. Lilburne appeared at his 1649 treason trial armed with a copy of *Coke's Institutes*. In some cases, at least, he twisted Coke into a new shape. In Overton's account of his 1647 arrest, one of complaints was that his captors demanded that he surrender his copy of *Coke's Institutes on Magna Carta*.

Overton refused to comply: "I clapped it in my Armes, and I laid my selfe upon my belly" but his captors turned him over, and one hit Overton in the face to make him let go of Coke.

And thus by an assault they got the great Charter of *Englands Liberties and Freedoms* . . . and forthwith without any warrant poore *Magna Charta* was clap up close prisoner in *Newgate*, and my poore fellow prisoner de[p]rived of the comfortable visitation of friends.<sup>47</sup>

The Leveller mixture of traditional liberty with innovation is clear in Lilburne's demand for and view of due process of law. In 1649, Lilburne declared,

[T]he Law of *England* (which is my Birth-right and Inheritance) requires, that I shall not be deprived of my Liberty but by due processe of Law, according to the Laws of the Land; and that if any shall detain my body in prison without legall Authority, he is liable in Law to make me satisfaction.<sup>48</sup>

Lilburne, citing Coke and Parliamentary declarations against the King, insisted that due process comprised a cluster of legal rights of the accused including apprehension by a legal warrant, the right against self incrimination, confrontation by one's accuser, imprisonment only for a specific and previously forbidden crime, jury trial, and presentment by grand jury.<sup>49</sup>

In seventeenth century England there was a conflict between different views of the law. By one view, the law was to be shaped to fit the needs of the state and particularly of the king. So, in 1623, Justice Hobart announced a

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<sup>44</sup>Id. at 86.

<sup>45</sup>Id. at 96.

<sup>46</sup>Richard Overton, *An Appeal*, in Wolfe, *Leveller Manifestors* at 192 (cited in note 39).

<sup>47</sup>Richard Overton, *The Commoners Complaint* 14 (1647), in Haller, *3 Tracts on Liberty* , at 373, 386 (cited in note 10).

<sup>48</sup>John Lilburne, *Legal Fundamental Liberties* at 1 in Haller and Davis, *Leveller Tracts* (cited in note 4); see also John Lilburne, *The Outcries Of Oppressed Commons* 7 (1647).

<sup>49</sup>Lilburne, *Legal Fundamental Liberties* at 17 in Haller and Davis, *Leveller Tracts* (cited in note 4).

doctrine of strict construction. "[E]verything for the benefit of the king shall be taken largely, as everything against the king shall be taken strictly."<sup>50</sup> Another view, exemplified by Coke, saw the law as a force that arose from generations of custom and the application of legal reasoning. By this view, law limited royal power and protected the subject.<sup>51</sup> Lilburne's claims to expound the law and his insistence that law, properly conceived, was accessible to non-lawyers (a view very different from that of Coke) infuriated his lawyer critics. Claims that the law was accessible to non-lawyers had the potential to threaten the role of lawyers and judges, as similar claims about the Bible threatened the role of priests and Bishops.

While they appealed to established legal rights, the Levellers, Richard Overton and John Lilburne, consciously went beyond them. They appealed beyond precedent to equity and reason. For it was reason that gave

an equitable Authority, life and being to all just Lawes, pre[ce]dents and formes of Government whatsoever, for Reason is their very life and spirit, whereby they are all made lawful and warrantable . . . Nothing which is against reason is lawfull, *Reason* being the *very life* of the *Law of our Land*: So that should the Law be taken away from its *Originall reason* and end, it would be made a shell without a kernill, a shadow without substance, a carkasse without life. . . .<sup>52</sup>

The equity of the law was thus superior to the letter.<sup>53</sup>

Overton called on Parliament to "Estate us in naturall and just libertie agreeable to *Reason* and common *equitie*." The people were not to be denied because of precedent "for whatever our Fore-fathers were; or whatever they did or suffered, or were enforced to yeeld unto; we are the men of the present age, and ought to be absolutely free from all kindes of exorbitancies, molestations or *Arbitrary Power*."<sup>54</sup>

Related to their insistence on reason and equity, Levellers, like many Puritans and others, demanded law reform. Laws were to be "reduced to a smaller number" written in English, courts were to be moved back to the countries, and proceedings were to be short and speedy.<sup>55</sup>

#### **D. THE LEVELLER PLATFORM -- THE AGREEMENT OF THE FREE PEOPLE**

In espousing a basic political philosophy, Levellers were trying to institute concrete political reforms. Indeed, like their contemporaries, at various times some Levellers looked to Parliament, to the army, and even to alliance with Royalists to achieve their goals. To the goal of political and legal reform they held fast. In the end, the mechanism by which they hoped to bring about their reforms was their proposed written constitution: *The Agreement of the Free People*.

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<sup>50</sup>Derek Hirst, *Authority And Conflict, England 1603-1658*, 34 (Harv. U. Press, 1986).

<sup>51</sup>Id. at 120-21; Catherine Bowen, *The Lion And The Throne: The Life and Times of Sir Edward Coke* 291-306 (Little, Brown, 1956).

<sup>52</sup>Overton, *An Appeal*, in Wolfe, *Leveller Manifestoes* at 158-59 (cited in note 39). Here, as elsewhere, the Levellers followed Parliamentary rhetoric against the King. See Overton, *The Outcries of Oppressed Commons* 18 (1647) in id.

<sup>53</sup>Overton, *An Appeal*, in Wolfe, *Leveller Manifestoes* at 161 (cited in note 39).

<sup>54</sup>Overton, *A Remonstrance Of Many Thousand Citizens*, in Wolfe, *Leveller Manifestoes* at 114 (cited in note 39).

<sup>55</sup>Overton, *The Case Of The Armie Truly Stated* (1647) in Haller and Davis, *Leveller Tracts* (cited in note 4).

Two basic themes dominated the Agreement: far broader manhood suffrage, and the protection of individual liberties.<sup>56</sup> The April 1649 version of the Agreement provided that all men over twenty-one would vote except for servants and those accepting alms. Political reality forced the Levellers into both compromise and logical difficulties on suffrage. Supporters of the king would be excluded for ten years.<sup>57</sup> Servants and those accepting alms were excluded from the vote.

How much the Levellers would have expanded the franchise after their exclusion of servants and almsmen is disputed. One author, after reviewing the literature, suggested that in 1641 the electorate was forty percent of the male population.<sup>58</sup> The long term trend, assisted by inflation, had been to extend suffrage. In some places, franchise was already as broad as the Levellers demanded. The suffrage provided for in the Levellers' Agreement, this author suggests, would have enfranchised over eighty percent of the male population.<sup>59</sup>

The April 1649 Agreement not only listed the powers of government, it contained an extensive unalterable list of powers which would be denied to the government -- a bill of rights limiting the power of the legislature as well as the executive. The rights set out in The Agreement of the Free People included a number of rights later included in the American Constitution and Bill of Rights.

First the Agreement provided for free exercise of religion.<sup>60</sup> A pamphlet addressed to the Commons of England explained the Levellers' insistence on religious toleration. It argued that "[m]atters of Religion and God" should be exempted "from the compulsive or restrictive power of any authority on earth." It also opposed "appointing punishments concerning opinions or things super-natural" for the simple reason that "divine truths need no human helps to support them."<sup>61</sup>

The commitment to religious toleration had its limits, however. The Agreement provided that public office was to be open to all regardless of religious belief or practice, except for "such as maintain the Popes (or other forraign) Supremacy."<sup>62</sup>

In addition to freedom of religion, the Agreement contained a guarantee for equality before the law.<sup>63</sup> The call for equality before the law reflected a society where status had provided special privileges and exemptions from the commands of the law. King Charles I had granted nobles special privileges. In 1632 the Star Chamber had awarded massive damages to an earl who had experienced undeferential behavior. In 1633, Charles had declared that "when a

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<sup>56</sup>The Agreement also provided for a single House of Parliament with supreme legislative authority. There was to be no veto, and Parliament was to be reapportioned in accordance with population.

<sup>57</sup>The Agreement went through several versions. For the final, see *An Agreement Of The Free People Of England* (1649) ("Agreement"), in Haller and Davis, *Leveller Tracts* at 319 (cited in note 4). It is also reprinted in Wolfe, *Leveller Manifestoes* at 400-10 (cited note 39).

<sup>58</sup>Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* 152 (Princeton U. Press, 1986).

<sup>59</sup>Id.

<sup>60</sup>"[W]e do not impower or entrust our said representatives to continue in force, or to make any Lawes, Oaths or Covenants, whereby to compell by penalties or otherwise any person to any thing in or about matters of faith, Religion or Gods worship or to restrain any person from profession of his faith, or exercise of Religion according to his Conscience. . ." *Agreement* art. 10, in Haller and Davis, *Leveller Tracts* at 323 (cited in note 4).

<sup>61</sup>Overton, *To The Right Honorable. The Commons Of England*. . . (1646), in Wolfe, *Leveller Manifestoes* at 283, 289 (cited in note 39).

<sup>62</sup>Agreement art. 26, in Haller and Davis, *Leveller Tracts* at 326 (cited in note 4).

<sup>63</sup>"[A]ll privileges or exemptions of any persons from the Lawes, or from the ordinary course of Legall proceedings, by vertue of any Tenure, Grant, Charter, Patent, Degree, or Birth . . . or priviledge of Parliament, shall henceforth be void and null; and the like not to be not made nor revived again." *Agreement* art. 13, in Haller and Davis, *Leveller Tracts* at 324 (cited in note 4).

man of mean quality shall prosecute against a noble man for an offense of heat or passion" such a prosecution would not be allowed.<sup>64</sup>

The Agreement also included provisions against ex post facto laws and for a limited form of separation of powers.<sup>65</sup> It established a right against self-incrimination: "That it shall not be in the power of any Representative, to punish, or cause to be punished, any person or persons for refusing to answer questions against themselves in Criminal cases."<sup>66</sup>

The Agreement included an extensive list of guarantees dealing with the criminal justice system: the right to a speedy trial and to a jury trial by twelve men of the neighborhood in cases involving a person's life, liberty or estate; the right to counsel of a person's choice; the right to call witnesses or his behalf; and the rights set out in the English Petition of Right.<sup>67</sup>

Finally, the Agreement provided for some social reforms demanded by the Levellers -- an end to imprisonment for debt;<sup>68</sup> a requirement that laws be written in English; limitations on the use of capital punishment;<sup>69</sup> taxes in proportion to wealth;<sup>70</sup> an end to conscription;<sup>71</sup> freedom to all to trade beyond the seas;<sup>72</sup> the right to elect local officers;<sup>73</sup> and an end to tithes.<sup>74</sup> Some Levellers demanded free schools and hospitals and insisted that land that "anciently lay in Common for the poore" and that had been enclosed or appropriated be returned to the use of the poor.<sup>75</sup> Some Leveller pamphlets also emphasized freedom of the press and freedom from unreasonable searches and seizures.

### E. THE LEVELLERS AND THE PURITAN STATE 1648-1649

Throughout their short political life the Levellers' principles and agitation brought them into repeated conflict with the power of the State. The Government, reeling from years of Civil War and facing disaffection, revolt, and Royalist reaction, thought Leveller ideas threatened stability and property. From their "hidden presses" Levellers proselytized in favor of religious toleration, against the King and the Lords, and finally for their Agreement.<sup>76</sup> At best, the authorities were ambivalent. At worst, Leveller leaders were found in contempt, imprisoned for refusing to answer self-incriminating questions about their political activities, and imprisoned for printing seditious books. Often they were

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<sup>64</sup>Hirst, *Authority and Conflict* at 162 (cited in note 50).

<sup>65</sup>[W]e do not impower them to give judgement upon any ones person or estate, where no Law has been before provided, nor to give power to any other Court or Jurisdiction so to do. Because when there is no Law, there is no transgression, for men or Magistrates to take Cognisance of; neither doe we impower them to intermeddle with the execution of any Law whatsoever." *Agreement* art. 14, in Haller and Davis, *Leveller Tracts* at 324 (cited in 4).

<sup>66</sup>*Agreement* art. 16, in id. at 324.

<sup>67</sup>*Agreement* arts. 17 and 22, in id. at 325-26.

<sup>68</sup>*Agreement* art. 20, id. at 325.

<sup>69</sup>*Agreement* art. 21, in id. at 325.

<sup>70</sup>*Agreement* art. 19, in id. at 325.

<sup>71</sup>*Agreement* art. 11, in id. at 324.

<sup>72</sup>*Agreement* art. 18, in id. at 325.

<sup>73</sup>*Agreement* art. 27, in id. at 326.

<sup>74</sup>*Agreement* art. 23, in id. at 326.

<sup>75</sup>Overton, *An Appeal*, in Wolfe, *Leveller Manifestoes* at 194 (cited in note 39).

<sup>76</sup>Overton, To the . . . *Commons of England* . . . (1649), in id. at 322-23.

held without trial. From prison, Lilburne and Overton wrote more tracts defending the liberties of "free born Englishmen" and attacking their imprisonment as illegal and unjust. When they got out of prison they typically resumed the agitation which got them in trouble in the first place.<sup>77</sup>

Levellers used the device of mass petitioning as a vehicle for political organizing. In 1648, they planned a massive petition drive. They arranged for agents to take the petition to all parts of the country "to inform the people of their Liberties and Priviledges."<sup>78</sup> Opponents in Parliament saw the petition drive as revolutionary activity.

In spite of its ancient origin, the right to petition was not yet clearly established in 1648. Even in 1688 in the Trial of the Seven Bishops, one of the judges suggested that while petitions relating to private interest were permissible, petitions relating to government were not.<sup>79</sup> The right to petition the king without fear of arrest was recognized in the English Bill of Rights of 1689.<sup>80</sup> Forty-one years earlier, the Levellers like others before them insisted on legal protection for the right to petition.<sup>81</sup>

The Levellers sent petition after petition to Parliament. Parliament's responses varied, but it often ignored the petitions or branded them seditious and ordered them burned by the common hangman. Sometimes petitioners were arrested. Such behavior incensed the Levellers and led them to despair of reform from Parliament and ultimately to justify revolution: "[H]ee that *Oppreseth for complainning of oppression*," one pamphlet noted, "must needs be a *Tyrant* in the highest measure."<sup>82</sup>

[E]ven the *Rights and freedoms* of the people are *rendred* matters of *Sedition*, and to be *set on fire and burnt*, and that in the most contemptible manner, by *the hands of the Common hangman* . . . and really they burnt the *Great Charter of England*, for in those petitions were contained the cheifest heads of that Charter.<sup>83</sup>

To respond to Leveller petitions and pamphlets, a joint committee of Parliament commissioned a 1648 pamphlet, *A Declaration of Some Proceedings*. The Parliamentary effort shows unhappiness with the political uses to which the Leveller petitions were being put. "[I]f it be a Petition to the House," the Parliamentary pamphlet asked,

why is it Printed and Published to the people before the presenting of it to the House? . . . If what is asked be reasonable and just, and good for the publike, it needs no other qualification for its acceptance. . . . If it be not so, the Petitioners . . . ought not to be gratified . . . The whole Judgment of the Kingdom, is in the Judgment of the Houses.<sup>84</sup>

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<sup>77</sup>See Joseph Frank, *The Levellers* chs. 4-8 (Harv. U. Press, 1995); Gregg, *Free-born John* at chs. 10-28 (cited in note 1); Levy, *Origins of the Fifth Amendment* at chs. 9 and 10 (cited in note 7); Harris, *Freedom Spent* at 350-362 (cited in note 8).

<sup>78</sup>Frank, *The Levellers* at 148-49 (cited in note 77).

<sup>79</sup>Stephen B. Presser and Jamil S. Zainaldin, *Law And Jurisprudence In American History* 26-27 (West, 1989). For Lilburne's citation of Parliamentary support for the right in 1642, see, John Lilburne, *The Outcries Of Oppressed Commons* 8 (1647) in Wolfe, *Leveller Manifestoes* (cited in note 39). On ancient origins of the right, see Norman B. Smith, "Shall Make No Law Abridging. . . ." *An Analysis of the Neglected, But Nearly Absolute Right of Petition*, 54 U. Cinn. L Rev. 1153 (1986).

<sup>80</sup>Bernard Schwartz, 1 *The Roots of the Bill of Rights* 41, 43 (Chelsea House, 2d ed. 1980).

<sup>81</sup>Overton, *An Appeal*, in Wolfe, *Leveller Manifestoes* at 185 (cited in note 39).

<sup>82</sup>*Id.* at 172.

<sup>83</sup>*Id.* at 170-71.

<sup>84</sup>*A Declaration Of Some Proceedings* (1648) and Davis, *Leveller Tracts* at 105 (cited in note 4).

As to the Levellers' complaint that their petitions had been burned, the *Declaration* responded, "a Petition may well deserve to be burned and the Petitioners punished, if the matter be unjust, false, scandalous, seditious."<sup>85</sup> The *Declaration* also objected to Leveller rhetoric: "why many *Free-borne* people of this Nation? are there any Englishmen that are not Free-borne?"<sup>86</sup>

Though the Levellers complained of prosecutions where no law had been provided, the *Declaration* noted that some acts not prohibited by law may deserve punishment "in these unsettled times."<sup>87</sup> Finally, the *Declaration* condemned Leveller tactics as outrageous impudence. There was Libburne's scandalous behavior before the Lords "he did not only refuse to kneel [at the Barre (as is usuall in such cases)] . . . he said he would not hear, and upon reading thereof he stopped his cares with his finger."<sup>88</sup> Under such circumstances, the *Declaration* insisted, the meanest court in the Kingdom would have committed him for contempt.<sup>89</sup>

Levellers portrayed their conflict with government as a battle between liberty and tyranny. Still, their pamphlets did not discuss the complexity of the political dilemma faced by a government of weak legitimacy threatened by disaffection and Royalist reaction. Fear of the Levellers and of social and economic effects of democracy could drive government supporters into the Royalist camp. In the end, the Levellers were in conflict with their fellow (more moderate) revolutionaries. These included people like Cromwell who favored significant religious toleration (though short of the Leveller goal), and people who hoped for Parliamentary government -- but not with the greatly expanded suffrage favored by the Levellers. The question, the author of Parliament's *Declaration of Some Proceedings* insisted, was not what were the best laws, but what were the best laws that the people would accept. England, he argued, needed a practical, not a "Utopian" Commonwealth.<sup>90</sup> The basic tendency of Leveller reforms was to promote profound change: from parliamentary to popular sovereignty, from rights based on social status to rights based on citizenship, and from protection against the King to protection against all aspects of government.

In 1648, the army had purged Parliament, removing members thought too eager to reach terms for restoring the King. In January 1649, the King had been tried and executed. Confronted with broad unrest the Parliament sought to restore order and stability. Parliament gave a Council of State powers to arrest, interrogate, and imprison. A High Court of Justice could try political offenders without a jury. In early 1649, the Long Parliament ordered the military to enforce strictly laws against unlicensed publications. The law provided for the destruction of printing presses, whipping the peddler of unlicensed pamphlets, and forty days imprisonment or a forty shilling fine for the author.<sup>91</sup>

Levellers promptly complained in a petition, rather inaccurately called a "humble" petition. The petition noted that censorship

hath ever ushered in a tyrannie; mens mouths being to be kept from making noise, whilst they are robd of their liberties; So was it in the late Prerogative times before this Parliament, whilst upon pretense of care of the publicke, Licensers were set over the Press, Truth was suppressed, the people thereby kept ignorant, and fitted only to serve the unjust ends of Tyrants and Oppressers.<sup>92</sup>

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<sup>85</sup>Id. at 118.

<sup>86</sup>Id. at 116.

<sup>87</sup>Id. at 121.

<sup>88</sup>Id. at 96.

<sup>89</sup>Id. at 97, 124.

<sup>90</sup>Id. at 124.

<sup>91</sup>See Wolfe, *Leveller Manifestoes* at 323 (cited in note 39).

<sup>92</sup>Overton, *To . . . The Commons Of England* (1649), in Wolfe, *Leveller Manifestoes* at 326, 327 (cited in note 39).

In his early writing, William Walwyn, for example, called for full toleration of religious opinion but suggested that writing that was dangerous or scandalous to the state was justly prohibited by Parliament.<sup>93</sup> By 1649, after having their writing branded scandalous and seditious, some Levellers seemed to take a broader view of freedom of the press. The truth, apparently, was to emerge from free debate. To the claim that the government might be prejudiced they answered:

As for any prejudice to Government thereby, if Government be just in its Constitution, and equal in its distributions, it will be good, if not absolutely necessary for them, to hear all voices and judgments, which they can never do, but by giving freedom to the Press; and in case any abuse their authority by scandalous Pamphlets, they will never want able Advocates to vindicate their innocency. And therefore . . . to refer all Books and Pamphlets to the judgment, discretion, or affection of Licensers, or to put the least restraint upon the Press, seems altogether inconsistent with the good of the Commonwealth, and expressly opposite and dangerous to the liberties of the people.<sup>94</sup>

Opponents of the Levellers fought them with prison, with censorship, and with propaganda attacks against them. They were attacked as communists. More moderate critics suggested, whatever their intent, Leveller ideas would undermine property.

The charge of communism was false. The Levellers' Agreement specifically provided against "leveling estates" or "making all things Common."<sup>95</sup> But the Leveller view of history, their insistence on taxes in proportion to wealth, and their rhetoric suggest that their commitment to private property involved less favorable treatment for large accumulations of wealth than under existing law and custom. Under Leveller rule, the wealthy would pay a larger share of the cost of government. The excise tax that fell more heavily on the less wealthy would be repealed.<sup>96</sup> Many feared that these changes would be only the beginning.

The charges of communism went back at least to the debates the Parliamentary army held in 1647 on the future government of the nation. When the Leveller Colonel Rainsborough insisted on suffrage for "the poorest he that is in England," Henry Ireton, Cromwell's son-in-law, warned, "if you make this the rule, I think you must fly for refuge to an absolute natural right, and you must deny all civil right."<sup>97</sup>

Ireton proceeded to explain his view of the implications of universal male suffrage:

[I]f you admit [the vote for] any man that hath a breath and being, I show you how this will destroy property. It may come to destroy property thus: you may have a major part, you may have such men chosen, or at least the major part of them, why those men may not vote against all property.<sup>98</sup>

Rainsborough denied that the claim that every man having a vote was anti-property. By Ireton's logic, Rainsborough insisted, the poor could be pressed into military service and must suffer under laws they could not affect. Gentlemen with

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<sup>93</sup>William Walwyn, *The Compassionate Samaritan* 4,5-6 (1644), in Haller, *3 Tracts on Liberty* 61, 67 (cited in note 10).

<sup>94</sup>Wolfe, *Leveller Manifestoes* at 328-29. See also *id.* at 240 where the Levellers attack the crime of sedition.

<sup>95</sup>*Agreement* art. 30, in Haller and Davis, *Leveller Tracts* at 327 (cited in note 4). See Underdown, *Pride's Purge* at 16 (cited in note 15). Communism is used in its basic, pre-Marxist sense, of course.

<sup>96</sup>*Agreement* art 19, in Haller and Davis, *Leveller Tracts* at 325 (cited in note 4).

<sup>97</sup>Alymer, *The Levellers in the English Revolution* at 100 (cited in note 3).

<sup>98</sup>*Id.* at 107.

three or four lordships ("God knows how they got them," Rainsborough said) would be parliament men and could crush the poor.<sup>99</sup>

Two years later Lilburne would turn Ireton's argument on its head. Failure to secure individual liberty would threaten property:

[P]ropriety cannot be maintained, if Liberty be destroyed; for the Liberty of my Person is more neerer to me then my Propriety, or Goods; And he that contrary to Law and Justice, robs or deprives me of the Liberty of my Person, the nighest to me, may much more by the same reason, rob and deprive me at his will and pleasure of my Goods and Estate, the further of from me, and so Propriety is overthrowne and destroyed. . . .<sup>100</sup>

In addition to charges of communism, Levellers were also accused of favoring a community of wives and of all sorts of personal sins and transgressions.<sup>101</sup> Levellers responded to attacks on their principles. In response to personal attacks, Overton and Walwyn pointed out the unchristian nature of such behavior. As Richard Overton noted:

It is a certain badge of a Deceiver to take up whisperings and tales of mens personal failings to inflect them to the cause those persons maintain, by such means to gain advantages upon them.

Consider whether the things I hold forth and professe as in relation to the Common-wealth, be not for the good of mankinde, and the preservation of Gods people: and if they be, my personal failings are not to be reckoned as a counter-balance against them. . . . So that the businesse is, not how great a sinner I am, but how faithfull and reall to the Common-wealth; that's the matter concerneth my neighbour, . . . and for my personall sins that are not of Civill cognizance or wrong unto him, to leave them to God, whose judgment is righteous and just. And till persons professing Religion be brought to this sound temper, they fall far short of Christianity.<sup>102</sup>

One striking characteristic of Levellers is the audacity with which some of their leaders faced the state's attempts to crush them. Initially, Lilburne and Overton responded to these attacks with detailed and confident pronouncements about their legal and natural rights, by refusal to testify against themselves, and by pointing out that Parliament was replaying the tyrannies of the King.

By March of 1649, their Agreement had been rejected. Agitation and mutiny in the army had been suppressed by executions and martial law. Parliament had given the Council of State broad powers to arrest, imprison, and interrogate, and had passed other laws aimed at dissent. Leading Levellers responded with a new pamphlet with a self-explanatory title, *Englands New Chaines Discovered*.<sup>103</sup> *Englands New Chaines* attacked Parliament for "the stopping of our mouths from Printing" and for "dealing with us as the Bishops of old did with the honest Puritan."<sup>104</sup>

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<sup>99</sup>Id. at 104.

<sup>100</sup>Lilburne, *Legal Fundamental Liberties* in Haller and Davis, *Leveller Tracts* at 7 (cited in note 4).

<sup>101</sup>John Lilburne, Thomas Prince and Richard Overton, *The Picture of the Councel of State* (1649) ("Picture"), in Haller and Davis, *Leveller Tracts* at 191, 218 (cited in note 4) (Overton's account).

<sup>102</sup>Id. at 231.

<sup>103</sup>For a fuller account of the events, see Gregg, *Free-born John* at chs. 21 and 22 (cited in note 1).

<sup>104</sup>*England's New Chaines Discovered* (1648) in Haller and Davis, *Leveller Tracts* at 157, 162 (cited in note 55).



When the *Second Part of Englands New Chaines* was published, Parliament branded the pamphlet treasonous and ordered the suspected authors -- Lilburne, Overton, Walwyn, and Thomas Prince -- arrested.<sup>105</sup> From prison, the Leveller leaders produced a pamphlet about the events. Richard Overton described how he arrested at his home at six in the morning. He immediately demanded to see the warrant and was shown one for his arrest from the Council of State. He was taken back to his bedroom and told to open his trunks or they would be broken open. Overton continued:

I demanded his Warrant for that: He told me, he had a Warrant, I had seen it. I answered, That was for the apprehension of my person; and bid him shew his Warrant for searching my pockets, and the house: and according to my best remembrance, he replied, He should have a Warrant. So little respect had he to Law, Justice, and Reason.<sup>106</sup>

The soldier ransacked the house, found many "books in the beds" and took all Overton's writing, papers and books.<sup>107</sup> Overton and another man living in the house were taken into custody -- the second man because he had been found in bed with a woman. To the man's defense that the woman was his wife, the officers replied that he got a certificate from captain to that effect he would be released. Overton treated the incident with outrage and humor.

Friends and Country-men where are you now? What shall you do that have no Captains to give you Certificates? . . . [A]t least you must thence have a Congregationall License, . . . to lye with your wives, else how shall your wives be chast or the children Legitimate? They have now taken Cognizance over your wives and beds, whether will they next? Judgement is now come into the hand of the armed-fury Saints. My Masters have a care what you do, or how you look upon your wives, for the new-Saints Millitant are paramount [to] all Laws, King, Parliament, husbands, wives, beds, etc.<sup>108</sup>

Toward the end of the day Overton was called before the Council of State and told that the Council had determined to find out who wrote the *Second Part of Englands New Chaines Discovered*. Overton asked that the Council produce its authority to which the Council replied that it was "satisfied in [its] Authority."<sup>109</sup>

Then Overton demanded that he be delivered from military authority. Since he had "a naturall and legall title to the Rights of an Englishman " he asked to be sent before some ordinary civil court of justice to receive a "free and legall tryall."<sup>110</sup> Finally, he urged the Council to consider arbitration of their differences with the Levellers.<sup>111</sup>

To questions on whether he had any hand in publishing the book, the *Second Part of Englands New Chaines Discovered*, Overton responded:

Now, Gentlemen, it is well-known, . . . that in cases criminall, as you now pretend against me, it is against the fundamental Laws of the Common-wealth to proceed against any man by way of Interrogatories against himself, as you do against me: and I beleeve (Gentlemen) were you in our cases, you would not be willing to be so served your selves.<sup>112</sup>

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<sup>105</sup>Gregg, *Free-born John* at 269 (cited in note 1).

<sup>106</sup>Lilburne, Prince and Overton, *Picture*, in Haller and Davis, *Leveller Tracts* at 215-16 (cited in note 4). For seventeenth century search and seizure law, William Cuddibey and B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the Constitution*, 37 Wm. & Mary Q. 371 (1980).

<sup>107</sup>Lilburne, Prince, and Overton, *Picture*, in Haller and Davis, *Leveller Tracts* at 216 (cited in note 4).

<sup>108</sup>Id. at 219.

<sup>109</sup>Id. at 220-21.

<sup>110</sup>Id. at 121.

<sup>111</sup>Id.

<sup>112</sup>Id. at 223.

Sent off to prison, Overton immediately produced a pamphlet recounting his experience.

#### F. JOHN LILBURNE'S 1649 TRIAL FOR TREASON

Following the arrest in March 1649 of the four leading Levellers and a suppression of a pro-Leveller rebellion in the army in May, Lilburne was tried for treason in October. Denied counsel, in accordance with the law at the time for such cases, Lilburne represented himself and once again cast his case as a test case for English liberty. In the course of his trial, he demanded all sorts of rights, many of which were unprecedented, such as the right to be represented by a lawyer and to have a copy of the indictment against him. He refused to answer incriminating questions.<sup>113</sup> The trial was both remarkable and typical of Lilburne's methods.

As his 1649 trial began, Lilburne noted that the doors to his court room were "shut and guarded" and the public was excluded "which," Lilburne said, "is contrary to both law and justice."

[T]he first fundamental liberty of an Englishman . . . is [t]hat . . . all courts of justice always ought to be free and open for all sorts of peaceable people to see . . . and have free access unto; and no man whatsoever ought to be tried in holes or corners, or any place, where the gates are shut and barred, and guarded with armed men.<sup>114</sup>

In response to Lilburne's complaint, the doors were opened and the public was admitted.

Next he asked for his "birth-right and privilege, to consult with counsel." Counsel was necessary, Lilburne said, so he could understand and not be trapped by the formalities of the law. There were "niceties and formalities that are locked up in the French and Latin tongue, and cannot be read in English books." Lilburne's request for counsel was denied because, the court accurately announced, it was "not consistent to the law."<sup>115</sup> Lilburne kept coming back to the issue, much to the annoyance of his judges. The "law, in the equity and intention of it, would have all trials to be equal, and not prejudicial."<sup>116</sup> The prosecutor had time enough to consult counsel and in justice Lilburne should also.<sup>117</sup>

Next, without success Lilburne demanded a copy of the indictment.<sup>118</sup> He complained about *ex parte* conferences between the judges and the attorney general from which he was excluded. When the judges insisted on their right to confer with the attorney general, Lilburne responded, "Not . . . in hugger-mugger, or by private whisperings."<sup>119</sup>

When the court and attorney general called Lilburne a notorious traitor, he protested. "[I]n the eye of the law of England I am an innocent man, yea, as innocent as any of those who call me traitor, till such time as I be legally convicted."<sup>120</sup> Again he demanded a copy of his indictment and time to summon his witnesses.<sup>121</sup>

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<sup>113</sup>Levy, *Origins* at ch. 10 (cited in note 7); Gregg, *Free-born John* at ch. 25 (cited in note 1).

<sup>114</sup>Thomas Bayly Howell, ed. 4 *State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* 1270, 1273 (1 Charles II 1649) (London: T.C. Hansford 1816) ("*State Trials*").

<sup>115</sup>Id. at 1294.

<sup>116</sup>Id. at 1307.

<sup>117</sup>Id.

<sup>118</sup>Id. at 1296.

<sup>119</sup>Id. at 1301.

<sup>120</sup>Id. at 1310.

<sup>121</sup>Id. at 1312.

The gist of the treason act, which was read to the jury, was that it was treason to:

maliciously or advisedly publish, by writing, printing, or openly declaring, that the . . . government is tyrannical, usurped, or unlawful . . . or [to] plot, contrive, or endeavour to stir up or raise force against the present government, or for the subversion or alteration of the same.<sup>122</sup>

The prosecution attempted to prove the crime by showing that Lilburne had written a number of books that charged the government with being usurped, tyrannical, and unlawful and that urged altering it. Among other works the prosecution relied on the *Agreement of the People*.<sup>123</sup>

The prosecutor taunted Lilburne, on trial for his life, with refusing to admit his authorship: "But why will you put us to all this trouble to prove your Books, seeing your hand is to them? My lord, I had thought the great champion of England would not be ashamed to own his own hand."<sup>124</sup> In spite of repeated taunts, Lilburne stood on his right not to accuse himself.

To prove Lilburne's guilt the prosecution read to the jury at length from Lilburne's stirring and provocative writings. In the act of trying to prove his guilt, the prosecution found itself broadcasting the Levellers' revolutionary message. A contemporary wrote that reading passages from Lilburne's books, "pleased the people as well as if one of Ben Johnson's plays had been acted before them"<sup>125</sup>

After reading to the jury passages from Lilburne's books, the prosecutor noted that Lilburne had called the Parliament tyrants and trust breakers: "Oh insufferable, and the highest of treasons."<sup>126</sup> Lilburne responded by suggesting that words alone should not be sufficient for treason:

Sir, all the wit of all the lawyers in England could never bring it within the compass of High-Treason, by the old and just laws of this nation, that abhors to oppress men contrary to law; and then if they seem but to cry out of their oppressions, to make them traitors for words.<sup>127</sup>

Lilburne had first learned of the precise nature of the charge against him at his trial. His requests for delays had been denied. At the end of the prosecution's case Lilburne tried again. He sought a week to consider his answer to the indictment "and if not so long, then give me leave but till to-morrow morning to consider my answer. I am on my life." The court refused. Then Lilburne requested an hour to collect his thoughts. That request also was denied. "[T]hen I appeal," Lilburne responded in a "mighty voice," "to the righteous God of heaven and earth against you."

At that point, a scaffold fell in the court room causing much confusion.<sup>128</sup> Lilburne used the time to collect his books and papers. As Pauline Gregg notes, "The Lord had not always answered Lilburne so directly."<sup>129</sup>

Lilburne's appeal to his jury opened with another dramatic confrontation with the court. He asked,

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<sup>122</sup>Id. at 1348.

<sup>123</sup>Id. at 1353-72.

<sup>124</sup>Id. at 1342. This summary of the trial does not explore the issues it presents. For a fine discussion see Green, *Verdict* at 160-186 (cited in note 5).

<sup>125</sup>Brailsford, *Levellers and the English Rev.* at 596 (cited in note 5).

<sup>126</sup>Howell, 4 *State Trials* at 1367 (cited in note 114).

<sup>127</sup>Id.

<sup>128</sup>Id. at 1378.

<sup>129</sup>Gregg, *Free-born John* at 299 (cited in note 1).

that I may speak in my own behalf unto to the jury, my countrymen upon whose consciences, integrity and honesty, my life, and the lives and liberties of the honest men of this nation now lies; who are in law judges of law as well of fact, and you only the pronouncers of their sentence.<sup>130</sup>

Lilburne's almost unprecedented<sup>131</sup> claim that the jury could judge law as well as fact produced an immediate denial from the court, which in turn produced an immediate rejoinder from Lilburne:

The jury by law are not only judges of fact, but of law also: and you that call yourselves judges of the law, are no more but Norman intruders . . . are no more but cyphers to pronounce their verdict.<sup>132</sup>

Lilburne's defense showed careful attention to technical legal arguments. Treason, he insisted, required two witnesses to each act charged, but on specific charges of the indictment the prosecution had produced one or none.<sup>133</sup> Furthermore, Lilburne contended that many acts in the indictment had taken place in counties outside of London and as to them he was required to be tried in those places.<sup>134</sup>

Several witnesses had testified that Lilburne had admitted writing one of the books, "saving the printers errata," which he said were many. Perhaps, Lilburne suggested, the offending passages were errata. As to the *Agreement of the People*, it was published before the date of the Treason Act and "therefore not within the compass of it." For, Lilburne insisted, citing the apostle Paul, "Where there is no law, there can be no transgression."<sup>135</sup>

In his speech to the jury, Lilburne repeated his claims that his rights had been violated during and before his trial. The final issue he left "to the consciences of my jury."

I hope I have so clearly and fully answered all and every of your proofs, that not any one thing sticks. And to their consciences I cast it.... My conscience is free and clear as in the sight of God, and, I hope, of all unbiassed men.<sup>136</sup>

His life, he told his jury, had been a struggle "for the preservation of justice and just magistracy." Therefore, "having suffered much for the preservation of the common and just liberties of England," he left to the jury both judgement of "this matter, and the constant series of all my actions in this my pilgrimage and vale of tears here below."<sup>137</sup>

If "anything stick upon [the jury's] spirits," Lilburne said, "I shall intreat you to consider the intention of the law of England . . . It is not the act, but the intention of the mind, that declares the guilt."<sup>138</sup> And with this, and to show his intent had been to further the good of the land, Lilburne launched into the eventful story of his life.<sup>139</sup> He reminded

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<sup>130</sup>Howell, 4 *State Trials* at 1379 (cited in note 114).

<sup>131</sup>Green, *Verdict* at 1379 (cited in note 5).

<sup>132</sup>Howell, 4 *State Trials* at 1379 (cited in note 114).

<sup>133</sup>Id. at 1382.

<sup>134</sup>Id. at 1386.

<sup>135</sup>Id. at 1387-88.

<sup>136</sup>Id. at 1389.

<sup>137</sup>Id. at 1389-90.

<sup>138</sup>Id. at 1390.

<sup>139</sup>Id. at 1391-94.

the jury that his fellow citizens had come to his support. Ten thousand citizens, "old and young, males and females," he told his jury, had petitioned parliament on his behalf.<sup>140</sup>

Lilburne would face, as no doubt he knew, a hanging charge from the court.<sup>141</sup> So he ended his remarkable appeal to the jury as he had begun it, with his innovative assertion that the jury was the judge of law and fact:

[T]herefore as a free-born Englishman, and as a true Christian . . . with an upright heart and conscience, and with a cheerful countenance, [I] cast my life, and the lives of all the honest freemen of England, into the hands of God . . . and into the care and conscience of my honest jury and fellow-citizens; who I again declare by the law of England, are the conservators and sole judges of my life, having inherent in them alone the judicial power of the law, as well as fact: you judges that sit there being no more . . . but cyphers to pronounce the sentence, or their clerks to say Amen to them; being at the best in your original, but the Norman Conqueror's intruders.<sup>142</sup>

The crowd, with a loud voice, cried "Amen, Amen" and made a "great hum." The judges looked uncomfortable, and the major general in charge of troops at the trial sent for three more companies of foot soldiers.<sup>143</sup>

The jury found Lilburne not guilty. The Levellers struck a medal commemorating the event. It had the names of the jury members, a portrait of Lilburne, and the inscription: "John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact. Oct. 26, 1649."<sup>144</sup> Overton, Walwyn, and Prince were released; but Cromwell tightened his grip, and the Levellers and supporters of their Agreement ceased to be major actors on the political scene.

Soon Lilburne was back in difficulty and banished by the Rump Parliament. When Cromwell dissolved the Rump, Lilburne returned, only to be tried again in 1653 for his life for violating the order of banishment. He won again, this time achieving what Sir James Stephen tells us no one else had ever achieved, "extorting from the Court a copy of his indictment in order that he might put it before counsel and be instructed as to the objections which he might take against it."<sup>145</sup> This time the Barebones Parliament, Cromwell, and his council kept Lilburne a prisoner despite the acquittal, and he died a prisoner in 1657.

## II. THE LEVELLER LEGACY

The Levellers' political thought reflects their experience. As they saw it, Kings, Parliaments, and Councils came and went, but government after government used the power of police and courts in an attempt to crush political critics. Though the ruling faction changed, the tactics remained the same: arbitrary imprisonment, illegal searches, inquisitorial methods, sedition laws, and censorship.

The Leveller leaders came away from their experience expressing faith in "the people" but convinced that the natural tendency of rulers is to abuse power. The preface to the bill of rights in their *Agreement* summed up their view:

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<sup>140</sup>Id. at 1391-92.

<sup>141</sup>Id. at 1401-02.

<sup>142</sup>Id. at 1395.

<sup>143</sup>Id.

<sup>144</sup>Brailsford, *Levellers and the Eng. Rev.* at 603 (cited in note 5).

<sup>145</sup>James F. Stephen, 1 *A History of the Criminal Law of England* 367 (MacMillan 1883). In many ways, the 1653 trial presents even more interesting issues. For an excellent account, see Green, *Verdict* at 192-99 (cited in note 5).

they had learned, they said, from "wofull experience" that "most men once entrusted with authority . . . pervert the same to their own domination and to the prejudice of our Peace and Liberties."<sup>146</sup>

Finally, some Levellers began to say that civil liberty is indivisible and should be defended, not just for members of the same religious sect or political party, but for all alike. Lilburne insisted on adherence to due process for Royalists as well as for himself. The Levellers sought radical political change together with respect for individual rights. It was a difficult combination.

At times, no doubt, Levellers fell short of these ideals. Still, more than most contemporaries, Lilburne, Walwyn, and Overton were committed to the liberties of all people.<sup>147</sup> Their pamphlets pointed out the wider danger implicit in denial of their rights. As Walwyn, a leading Leveller, wrote

I wish you would be but as carefull to preserve intirely, the due and formall course of Law to every man, without exception, friend, or foe, as we have been: and though at present you may please your selves with the sufferings of your adversaries (as you fancy them) yet you do therein but trend down your own hedges, and pluck up that Bank that lets in the sea of will, and power, overwhelming your own liberties.<sup>148</sup>

Finally, the Levellers were suppressed. But they left for posterity their understanding of the conditions required for a free society -- a view they acquired through great suffering. As John Lilburne noted in one of his final pamphlets:

[F]or what is done to any one, may be done to every one besides, being all members of one body, that is, the English Commonwealth, one man should not suffer wrongfully, but all should be sensible, and endeavor his preservation; otherwise they give way to an inlet of the sea of will and power, upon all their laws and liberties, which are the boundaries to keep out tyranny and oppression; and who assists not in such cases, betrays his own rights, and is over-run, and of a free man made a slave when he thinks not of it, or regards it not, and so shunning the censure of turbulency, incurs the guilt of treachery to the present and future generations.<sup>149</sup>

Lilburne spent much of his adult life in prison. Other Leveller leaders were also imprisoned. They explained their efforts as a commitment to civic virtue and a sense of duty to their community. Indeed, to a very remarkable degree, the Levellers Lilburne, Overton, Walwyn, and others, subordinated their private interests to their concept of the public good. As they explained,

Since no man is born for himself only, but obliged by the Laws of Nature . . . of Christianity . . . and of Publick Societie and Government to employ our endeavours for the advancement of communitive Happinesse, of equal concernment to others as our selves: here have we . . . laboured . . . to produce out of the Common Calamities, such a proportion of Freedom and good to the Nation, as might somewhat compensate its many . . . sufferings.<sup>150</sup>

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<sup>146</sup>*An Agreement of the Free People of England* (1649), in Haller and Davis, *Leveller* at 319, 323 (cited in note 4). Initially the "people" would be limited to the well affected. But Levellers planned for growth and their ideas had the potential for growth.

<sup>147</sup>See, e.g., Gregg, *Free-born John* at 264 (cited in note 1) Lilburne, *Legall Fundamentall Liberties*, excerpts in Haller and Davis, *Leveller Tracts* at 400, 433 (cited in note 4).

<sup>148</sup>*Walwyn's Just Defense* (1649), in Haller and Davis, *Leveller Tracts* at 350, 368. (cited in note 4).

<sup>149</sup>Lilburne, *The Just Defense of John Lilburne*, in Haller and Davis, *Leveller Tracts* 450, 433 (cited in note 4).

<sup>150</sup>John Lilburne, et al. *A Manifestation* (1649), in Haller and Davis, *Leveller Treats* 276, 277 (cited in note 4).

In dark moments for the Leveller movement, Lilburne had encouraged his followers by an appeal to the good of future generations: "posterity we doubt not shall reap the benefit of our endeavors, what ever shall become of us."<sup>151</sup>

Professor Leonard Levy, in his book *The Origins of the Fifth Amendment*, credits Lilburne and the Levellers with establishing the principle against self-incrimination in English law.<sup>152</sup> Sir James Stephen credits Lilburne with helping to establish the right of the accused to a copy of the indictment in order to get the advice of counsel with respect to it.<sup>153</sup> Lilburne and his Levellers insisted that due process encompassed procedural protections for the criminally accused.<sup>154</sup> They claimed freedom of religion, the right to petition, and the right to free speech and free press.

As the Levellers were suppressed, many Levellers became Quakers. And as Quakers came under government attack and persecution, they had compelling reasons to focus on the ideas of individual rights developed by the Levellers.

In 1670, William Penn and William Mead were prosecuted for an unlawful assembly as a result of a Quaker religious meeting they held in the street. Significantly, Penn produced a pamphlet about the trial. It was, he indicated, an attack on the fundamental laws of England. In his pamphlet and trial, Penn reasserted a number of Leveller themes: he appealed to the liberties of "freeborn Englishmen"; he insisted the jury was the proper judge of law and fact; he demanded a copy of the indictment; he and his co-defendant invoked the right against self-incrimination; and Penn made the familiar assertion that there can be no prosecution for a law not in being at the time of the offense ("where there is no law, there is no transgression").<sup>155</sup>

The jury acquitted Penn and was punished for doing so. So Penn's case produced a second, *Bushel's Case*,<sup>156</sup> holding unlawful the punishment of Penn's jury for its verdict favorable to Penn. *Bushel's Case* was a crucial precedent protecting trial by jury.

According to Henry Noel Brailsford, the Quakers were one group that passed the Leveller torch to the New World. He points to Leveller influence on the Concessions of West Jersey.<sup>157</sup> In light of the breadth of Leveller support, transmission of their ideas to America is not surprising. Brailsford reports that one Leveller petition earned over 98,000 signatures. Many had about 10,000 signatures.<sup>158</sup>

Richard Ashcraft argues forcefully that John Locke and radical Whigs were influenced by Leveller ideas. The evidence is circumstantial. It includes Locke's involvement with Radical Whigs, including some former Levellers, his living in exile with a man whose library included a large number of Leveller tracts, and the similarity of some of Locke's

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<sup>151</sup>Gregg, *Free-born John* at 359 (cited in note 1).

<sup>152</sup>Levy, *Origins* at 313 (cited in note 7).

<sup>153</sup>Stephen, 1 *Hist of the Crim Law* at 367 (cited in note 145).

<sup>154</sup>See notes 48 and 49.

<sup>155</sup>Schwartz, *Bill of Rights* at 144, 147, 149, 150 (cited in note 80).

<sup>156</sup>1 Vaugh. 135, 124 Eng. Rep. 1006 (1671).

<sup>157</sup>Brailsford, *The Levellers and the English Rev.* at 640 (cited in note 5). The Concessions was a written constitution prohibiting unconstitutional legislation. It guaranteed freedom of conscience, jury trial, and public trial.

<sup>158</sup>*Id.* at 574.

ideas and rhetoric to that of the Levellers.<sup>159</sup> In some cases, as in the argument that Parliament is the agent of the people, limited by the nature of its fiduciary duties, Locke's rhetoric is strikingly similar to that of the Levellers.<sup>160</sup>

There are what seem to be echoes of Leveller doctrines in America. In the 1753 trial of John Peter Zenger for seditious libel, his counsel Mr. James Hamilton did not deny that Zenger published the paper critical of the Royal Governor of New York. Instead Hamilton insisted that it is the "right of every free-born subject to make" such complaints when they are true.<sup>161</sup> Hamilton further insisted that the jury was properly the judge of law and fact.<sup>162</sup>

The appeal to the jury as judges of law and fact surfaced again in the 1800 sedition trial of *United States v. Callender*.<sup>163</sup> There Callender was prosecuted and convicted of sedition for statements highly critical of President John Adams. Callender's counsel argued unsuccessfully that his statements were protected by the first amendment, that the jury could determine law as well as fact, that the Constitution was the supreme law, and that therefore the jury could judge the constitutionality of the Sedition Act.<sup>164</sup> In the eighteenth and early nineteenth centuries, a number of American states recognized the jury as judges of law as well as fact.<sup>165</sup>

The Pennsylvania Constitution of 1776, one of the most democratic of the time, parallels some Leveller ideas. Like the Declaration of Independence, much Leveller writing, and the ideas of John Locke, it recognized natural inherent, and unalienable rights. It recognized popular sovereignty in words that would have been familiar to both the Levellers and Locke:

All power being originally inherent in, and consequently derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.<sup>166</sup>

The Pennsylvania Constitution had a full panoply of procedural rights for those accused of crime. It provided freedom of assembly and petition. It had two guarantees of freedom of speech and press one directed specifically to the examination of the "proceedings of the legislature or any part of government."<sup>167</sup> It prohibited interference with or control of the right to conscience in religious worship.<sup>168</sup> It did, however, require members of the legislature to acknowledge divine inspiration of the Old and New Testaments.<sup>169</sup> Like the Levellers' agreement, Pennsylvania provided for a single

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<sup>159</sup>Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* at 149, 165, 208, and 209 (cited is note 58). The influence of Locke in America is controversial. See Carl Becker, *The Declaration Of Independence* 79 (Harcourt, Bruce, 1922); J.G.A. Pocock, *The Machiavellian Moment* (Princeton U. Press, 1975); Gary Wills, *Inventing America: Jefferson's Declaration Of Independence* (Doubleday, 1978); Isaac Kramnick, *Republicanism And Bourgeois Radicalism* ch.6 (Cornell U. Press, 1990).

<sup>160</sup>See note 42.

<sup>161</sup>*The Trial Of John Peter Zenger* in Presser and Zainaldin, *Law And Jurisprudence In American History* at 31, 34 (cited in note 79).

<sup>162</sup>*Id.* at 42. For a likely direct source of the claim, see the similar claim in *The Trial of the Seven Bishops*, 12 *State Trials* 183 (4 James II 1688).

<sup>163</sup>25 Fed. Cas. 239 (1800). For a discussion of the role of the jury today, see J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 *BU. L. Rev.* 483 (1985).

<sup>164</sup>*Callendar*, 24 Fed. Cas. at 252-53.

<sup>165</sup>Note, *The Changing Role the Jury in the Nineteenth Century*, 74 *Yale L.J.* 170 (1964). Today that position seems archaic and dangerous. The problem that led to its invention was the use of the criminal justice system to crush political enemies and the periodic willingness of judges to assist the protection in such endeavors.

<sup>166</sup>The Pennsylvania Constitution of 1776, in Presser and Zainaldian, *Law and Jurisprudence*, at 106, 107 (cited in note 79).

<sup>167</sup>*Id.* at 114.

<sup>168</sup>Schwartz, 1 *Bill of Rights* at 263, 264 (cited in note 80).

<sup>169</sup>*Id.* at 267.



house of representatives and no veto. Ironically, experience with such legislative supremacy led many American political leaders to conclude that it provided insufficient protection against economic levelling.<sup>170</sup>

The new federal Constitution increased national power and at first lacked a Bill of Rights. Proposals for a Bill of Rights surfaced late in the Constitutional Convention and were defeated. In the face of mounting criticism, Federalists provided a host of arguments to explain the lack of a Bill of Rights. Alexander Hamilton, in *Federalist Paper 84*, argued that bills of rights were stipulations between king and subject, reservations of rights not surrendered to the prince. Here the people surrendered nothing, for it was "we the people" who ordained the Constitution.<sup>171</sup> According to historian Edmund Morgan, "[w]ith the advent of popular sovereignty, as the Federalists argued the case, neither concession nor contract was possible because people and government were one in the same."<sup>172</sup> It was a mistake that the Levellers with their experience with Parliament did not make. Instead they sharply distinguished between the people and those who temporarily (and potentially oppressively) exercised power in their name. With the ratification of the Bill of Rights in 1791, Americans ultimately rejected Hamilton's arguments.

The course of Leveller influence has not been traced. According to one historian, Leveller writings were cited in American revolutionary pamphlets.<sup>173</sup> Information about Lilburne was available in British sources familiar to at least some revolutionary colonial leaders.<sup>174</sup> In the case of the fifth amendment privilege against self incrimination and the sixth amendment right to be informed of the nature of the accusation, Lilburne's influence is strong. Protection for religious freedom and the right to public trial in the Concessions and Agreements of West Jersey is a case of Leveller influence in America. In other cases, evidence of connection is circumstantial and the case is yet to be proved. Probably the ideas of the Levellers, ideas that grew out of and merged with other seventeenth century ideas of liberty and law, contributed significantly, if not always directly, to the mixture of historic liberties and natural rights that became one American tradition.

Of course the American experience transmuted Leveller and seventeenth century English ideas, just as the Levellers had transmuted the ideas of their time. The ideas of popular sovereignty, a written constitution emanating from the people as distinct from the legislature, and of a bill of rights limiting governmental power are all American ideas which the Levellers anticipated.

In many ways, the modern world looks far different from the world of the Levellers. Ours is a secular age. Most Leveller leaders were the product of a religious tradition. While natural rights and natural law seemed self evident to the Levellers, they are not at all self evident to many modern judges and thinkers.<sup>175</sup>

One Leveller legacy is their concern for protection of individuals from injury or coercion from concentrations of power. In a real sense, the abolition of slavery, the recognition of the constitutional rights of African-Americans, and the legal steps taken toward granting women equal rights were all an unfolding of the implicit promises of the Declaration of Independence.<sup>176</sup> (Of course, the implications escaped many Americans in the eighteenth and nineteenth

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<sup>170</sup>Kramnick, *Republicanism and Bourgeois Radicalism* at 264 (cited in note 159).

<sup>171</sup>*The Federalist No. 84* at 577-79 (A. Hamilton) (J. Cooke ed. 1961).

<sup>172</sup>Edmund S. Morgan, *Inventing The People* 283 (W.W. Norton, 1989).

<sup>173</sup>Charles F. Mullett, *Fundamental Law and the American Revolution 1760-1776* 54 (Columbia U. Press, 1933). Unfortunately the assertion is not supported by a footnote. See Edward Dumbauld, *Thomas Jefferson and the Law* 145-56 (U. Okl. Press 1978).

<sup>174</sup>F.K. Donnelly, *The Levellers and Early Nineteenth Century Radicalism*, 49 Bull. of the Soc'y for the Study of Lab. Hist. 24 (1984).

<sup>175</sup>For example, William H. Rehnquist, *The Nation of a Living Constitution*, 54 Tex. L Rev. 693 (1976).

<sup>176</sup>See Patrick Henry, *Those Words Will Go Forth When Our Bones Are Dust*, reprinted in *Liberty*, vol. 83, no. 4, July/August, 1988 (no source given):

Those words (of the Declaration of Independence) will go forth to the world when our bones are dust. To the slave in bondage they will speak hope; to the mechanic in his workshop, freedom.

centuries.) The "self evident" truths of the Declaration in turn grew out of an intellectual world that the Levellers did their part to shape.

Thomas Jefferson wrote his last letter in response to an invitation to attend a ceremony in Washington to celebrate the 50th anniversary of the signing of the Declaration of Independence. "[T]he mass of mankind," Jefferson wrote, "has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."<sup>177</sup> It was an aphorism delivered from the scaffold by a Radical Whig and former Leveller.<sup>178</sup>

The aphorism and the Declaration contain ideas painfully violated in Jefferson's world, and in our own. By expressing ideals, the Declaration raised the issue of realization. By making their turbulent stand for human rights, the Levellers stated their ideal, confident of its unfolding in the future if not in their time. But history is not simply a story of progress. The essence of The Leveller program, expanded participation, decentralized political power, and protection of fundamental rights, is, to put it mildly, far from realization. In the face of despair and defeat, Lilburne counseled faith and hope. "And posterity," Lilburne wrote, "we doubt not shall reap the benefit of our endeavours, what ever shall become of us."<sup>179</sup>

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That parchment will speak to kings in language sad and terrible, as the trumpet of the Archangel. You have trampled on the rights of mankind long enough.

See also the *Seneca Falls Declaration Of Sentiments And Resolutions* (1848) in Presser and Zainaldin, *Law and Jurisprudence* at 553 (cited in note 79); Roy Basler, ed. *The Collected Works Of Abraham Lincoln*, 405-06 (Rutgers U. Press, 1953).

<sup>177</sup>Adrienne Koch & William Peden, eds., *The Life And Selected Writings Of Thomas Jefferson* 729-30 (Random House, 1994).

<sup>178</sup>Brailsford, *Levellers and the English Rev.* at 624 (cited in note 5). For likely transmission to Jefferson, see Douglas Adair, *Fame and the Founding Fathers* 192-201 (W.W. Norton, 1974).

<sup>179</sup>Gregg, *Free-born John* at 359 (cited in note 1).