The government that tried and condemned Charles I in January, 1649, found later the same year that it was unable to have its way with John Lilburne. As leader of the Levellers, the most imposing of the groups that clashed with the Cromwellian regime, Lilburne appealed to his jurors, in a celebrated phrase, “as judges of law as well as fact.”

When the jury acquitted him of treason, this claim to a “jury right”—a right of the jury to decide the law—brought the criminal trial jury for the first time into the forefront of English constitutional and political debate.

The emergence of a theory of the jury’s right to decide the law was not in any simple way a reaction to the transformation of criminal process in early modern England. On the one hand, much of what the radical reformers attacked predated the Tudor period; on the other, much of their program was inspired by the political crisis that accompanied the struggle against the Stuart monarchy. Nevertheless, the Leveller attack on the judiciary in criminal cases was a response to the power and behavior of the bench, and that power and behavior were largely owing to new forms of criminal procedure.


2. This obviously has relevance to debate in published works. The issue appears not to have been formulated as one regarding a right to “find law” until the late 1640s either in published writings or in discourse generally. If it was formulated earlier, it appears not to have attained widespread currency.

3. In one sense, the Leveller program was aimed at the Westminster bench as it had developed since the twelfth century. I suggest below (text at nn. 36–37) that the Levellers overstated the actual powers of the bench (and understated those of the jury) in the medieval period. In their minds, they were attacking usages that long predated the Tudor period. Not only were they attacking what they took to be ancient practices, but they were also contending with particularly virulent symptoms of what they believed to be the Norman disease that had manifested themselves in the Parliamentary struggle against Charles I.
At the same time, the radicals' insistence on a community-based system of criminal justice was not a claim to an entirely novel approach to the criminal law. For, as we have seen, even as the power of the bench increased, some substantial degree of reliance on the trial jury's discretion continued. And if the bench viewed such discretion as appropriate within fairly narrow limits, others might have inferred from actual practice that the jury was supposed to have considerable leeway in rendering verdicts according to its sense of justice. Of course, what the radicals most insisted upon the actual administration of justice did clearly deny them: truly local trials before a lay bench or before a weak official bench. For the government, jury discretion was tolerable only within the context of a centrally administered, closely overseen, and highly managed system of criminal law. For at least some of the government's opponents the purpose of jury discretion—the essence of the historic right to trial by peers—was being frustrated by what had become the official approach to the administration of the criminal law.

What did Lilburne mean by the jury's right to decide "law as well as fact"? What was the source of his theory of trial by jury? How did that theory evolve during the Commonwealth? In the discussion that follows, I shall attempt to answer these questions through an analysis of Leveller political theory and the conception of English history on which it was based. The "jury right" was more than just another Leveller reform item: the supposed right lay at the very heart of Leveller political and social theory, and at least in its theoretical implications the right involved the gravest threat that the Levellers posed to the governments of the Interregnum. For Lilburne and for some of his followers, the coercion of jurors meant more than the deprivation of the defendant's right to trial by jury. Coercion of jurors also meant the loss by Englishmen of control over the law. Finality of the verdict of the country had long implied the sanctity of the community's judgment concerning the accused. Now it also came to stand for the sanctity of the community's judgment regarding the substance of the "true law."

The Levellers were only one of many groups that comprised the mid-seventeenth-century movement for reform of the law. There were many sides to that movement, nearly all of which, save for the debate over the criminal trial jury, have received significant scholarly attention. It may be useful to sketch the outlines of the entire movement and the Levellers' distinctive place within it against the background of the Civil War and its immediate aftermath, the Interregnum governments. 4

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4. See below, text at nn. 85 et seq., for discussion of such writers as John Jones and James Frese.

5. The most recent and comprehensive account of the movement for law reform is Donald
Even before the outbreak of the Civil War, the Long Parliament forced upon Charles I the abolition of the Courts of Star Chamber and High Commission. Reform of the common-law judiciary included dismissal and punishment of those judges who, in Parliament’s eyes, had rendered unconstitutional decisions; after the Civil War began in 1642, it also included attempts to subject the bench to parliamentary (as opposed to executive) control. The legal reformers in Parliament moved against feudal tenures and the Courts of Wards and Liberties, and reflected broad agreement among the propertied as a whole on the need to undertake reform of some of the procedures that resulted in excessive costs and delays both in the common-law courts and in Chancery.

Divisions among groups demanding law reform were soon mirrored by divisions within the revolutionary movement. The Levellers were among the first to challenge the moderate goals of the parliamentary leadership during the Civil War. They were a mixture of soldiers from the ranks of the New Model Army that had been formed under the leadership of Oliver Cromwell in 1645, and civilians, who by the mid-1640s experienced disenchantment with the limited goals espoused by the leaders of the parliamentary cause. The surrender of Charles I in 1646 and the commencement of negotiations between the king and Parliament for a reformed constitutional monarchy alienated the burgeoning Leveller movement and gave it a basis for opposition. In a profusion of tracts and broadsides, this embryonic opposition proclaimed its demands for reform of suffrage and for social and legal reform. The last entailed a trenchant attack on the common law, both private and public, and particularly on


For the abolition of Star Chamber (and the conciliar courts of the Council of the Marches of Wales and the Council of the North) see Stat. 16 Chas. 1, c. 10 (1641); for the abolition of High Commission see Stat. 16 Chas. 1, c. II (1641).


the control over the common law manifested by the centralized bench at Westminster and the elitist legal profession.

Negotiations with the king were paralleled in late 1647 by discussions between Cromwell and the Army representatives of the radicals, many of whom were now openly known by the epithet of "Levellers." The stalemate in the latter negotiations was followed by an outright conflict between the Army's establishment leadership and some radicals, but the escape of Charles and commencement of the second phase of the Civil War (1648) brought all opponents of the king closer together. Lilburne (who had been held in the Tower for his attacks on Parliament, then released in 1647 only to be sequestered once again the following year), Richard Overton, and William Walwyn were by now widely recognized as the leading Leveller publicists. Rapprochement with Cromwell in 1648 halted neither Leveller diatribes against the Presbyterian-dominated Parliament (including demands for religious toleration) nor their proposals for "universal" male suffrage and a system of law accessible to the common man.

Purged by the Army, the rump of the Long Parliament proceeded to bring the captured king to trial and public execution. In February, 1649, a Commonwealth was established to bring order to the strife-torn country. Although the Levellers had taken part in the discussions that led to the purge and to the execution of Charles, they remained suspicious (to put it mildly) of the Rump's membership, especially after the readmission of the Conformists, and hostile to its reforms. These reforms included appointment of a High Court of Justice, which did not provide for trial by jury, and the passage of a series of Treason Acts. Leveller disenchantment and published criticism of the new regime resulted in the arrest of Lilburne, Overton, Walwyn, and Thomas Prince. In May, the Army put down a small Leveller rising at Burton with force. By the autumn of 1649, when Lilburne was brought to trial, the movement had been largely destroyed.

Political and religious radicalism, though no longer perceived as a threat to the very existence of the regime, both pushed the Rump forward and intensified its determination to embrace only a very moderate reform program. It led, also, to the Rump's decision to afforce the activities of its own parliamentary law committee by the creation of an extraparliamentary law reform commission under the leadership of the respected barrister


Sir Matthew Hale. Although the Hale Commission functioned during the early 1650s to draw the steam out of the radical reform movement, it promoted a number of substantial, moderate reform measures. Its failure to effect many of these, despite the dissolution in 1653 of the Rump, reflected the power of the prevailing legal establishment and the deep suspicion, prevalent even among moderates, of those groups, largely, by this time, religious radicals, most insistent upon purifying the common law and its institutions. The demonstrations surrounding Lilburne's trial in 1653 for returning to England without permission while under decree of banishment cannot have helped matters.

From late 1653, Cromwell was Lord Protector by virtue of a new, written constitution. For the next five years, until his death and brief succession by his son Richard, the movement for far-reaching law reform slipped into the background. Some changes in the legal system were effected by the essentially moderate government, changes that did not meet the demands of either the remnant of the Leveller movement or the religious radicals (The Fifth Monarchy Men). These reforms, as well as other moderate proposals for reforms that were debated but not enacted, touched private common law, the Court of Chancery, the system of land registration, and some aspects of the law of sanctions. The record, by the end of the Protectorate and the Restoration in 1660 of Charles II, was one of intense and widespread interest in eliminating that part of the legal quagmire that inconvenienced the propertied classes, but little more. As we shall see, there were proposals regarding the jury. These, however, were in the direction of securing more trustworthy jurors, not of democratizing the institution or of shifting power to it and away from the bench. The jury reforms that the radical Levellers demanded were never seriously considered.

12. The definitive study of the Hale Commission is Cotterell, "Interregnum Law Reform." Many members of the committee that selected the Hale Commission members sat on the Parliamentary Law Committee. A majority of those selected either had been called to the bar or had at least studied at one of the Inns of Court. Cotterell (ibid., p. 692) found that thirteen members of the Commission were not radicals but were "men of power, wealth and position, devoted to the pursuit of power and status, whose interest lay with a strong establishment. . . . They sought, not an overturning, but the reform continuity for which Cromwell stood." Five "radicals" sat on the Commission. Three of the twenty-one members cannot be assigned to either group (ibid., p. 693).


14. For Lilburne's 1653 trial see below, section VI.


The term "Leveller"—it should be stressed at the outset—is employed largely as a term of convenience. The Levellers were not a unified group; those who called themselves Levellers, took part in Leveller demonstrations, or signed Leveller petitions stood for different positions on a variety of issues. Even those usually referred to as leaders of the Levellers were by no means in agreement on all matters. Lilburne and Walwyn differed in their religious views. Overton and Walwyn have been considered "true Levellers," being more radical on social and economic issues than Lilburne, Prince, and John Wildman, the "constitutional Levellers." As I shall indicate, there was no one Leveller theory regarding the criminal trial jury. Nonetheless, there may have been more agreement regarding that institution than any other. Political and social disagreements were probably more pronounced with regard to the civil jury, especially as it dealt with property issues, just as disagreements over the institution of property itself loomed large among Leveller leaders and their followers.

The account I shall give of Leveller political and historical theory is generalized and obscures some differences among the leading Leveller writers, but, again, these differences did not necessarily affect Leveller views of the criminal trial jury. Most Levellers—indeed most Leveller leaders—did not think deeply about the history of the jury. Although their views about the jury were probably influenced by Lilburne's 1649 trial, they did not develop a systematic theory that explained why the jury ought to have the powers Lilburne claimed for it.

In what follows, I shall delineate the framework of ideas—political, legal, social, and religious—into which contemporary radical claims concerning the criminal trial jury seem to have fit. Though we cannot know how many caught up in the Leveller movement viewed the institution in any one way, we can attain a collective impression of the range of views they held. I shall also identify the strain of Interregnum radical (or law-finding) jury theory that was passed on to posterity. Here disagreement between Lilburne and other more radical Leveller leaders proved important. From the perspective of this book, it is the Leveller legacy that is of greatest interest. In this essay, however, it is the more radical, stillborn jury theory that receives greatest attention. In its light we may understand the distance between many of the Levellers and the Cromwellian regime; we may see how central the institution of the

17. For an excellent summary of the recent scholarship on Leveller factions and disagreements among Leveller leaders see Aylmer, ed., Levellers in the English Revolution, pp. 9-55.
19. Ibid., pp. 91-99.
criminal trial jury was to a truly revolutionary conception of society; and we may marvel both at the manipulation of contemporary historical learning and at how far that learning was from the actual history of the criminal trial jury.

There were three phases in the mid-seventeenth-century criminal trial jury debate. In the first phase, up to Lilburne's 1649 trial, "radical" law reformers combined an insistence on the right to indictment and trial by peers with specific demands for frequent, convenient, and local trials. Jurors were to be "of the neighborhood," for such persons were best informed regarding the circumstances of the felony and the credibility of the witnesses and principals. There was in this first period little, if any, public discussion of the jurors' knowledge of law; indeed, the early tracts assume the correctness of the "old decantatum": judges are to determine the law; jurors are to determine the fact.20

What Lilburne meant when he claimed in 1649 that his jurors were "judges of law as well as of fact" is not entirely clear. The writings occasioned by his 1649 trial, as the debate over the jury deepened, represent the second phase of the jury argument. John Jones, who seems to have shared many of the Levellers' ideas, gave meaning to Lilburne's aphorism in the course of his elaboration upon traditional Leveller historiography. His works set forth a far-reaching argument for total jury control over the law, an argument that may have been no more than a posthumous statement of Leveller theory a year after the Cromwellian regime had largely destroyed the Leveller movement.21 Jones provided a rationale for taking nearly all power out of the hands of the bench. His defense of the jury right combined his own version of Leveller historical views with a radical Puritan argument concerning the right of the people to interpret the law as they would interpret Scripture, which he conceived to be the law's principal basis.

The final phase of the debate over the jury right began with the regime's second prosecution of Lilburne in 1653. Lilburne now enunciated a more precise theory of the jury right, one that appears to have taken its form from the specific circumstances of his prosecution. He claimed that the statute of banishment under which he was tried was not valid under English law. The jury had the right and duty, he argued, to judge a statute or an indictment in the light of English fundamental law, and to acquit the defendant if, despite a judicial charge to the contrary, the jury found that the statute was void. Moreover, Lilburne now asserted that the jury ought to acquit the defendant if it believed that the prescribed punishment was

20. See below, text at nn. 48-50.
unconscionably severe in light of the acts proved to have been committed by the defendant. The jury should test the "legality" of the indictment and decide the fairness of the prescribed punishment. The elements of this new law-finding theory proved to be of great significance. They did not perish with the opposition to the Interregnum government but rather (as we shall see in Chapter 6) passed into the hands of the Quakers and subsequently became a staple of post-Restoration pro-jury argument.

I

For seven years the jury debate smoldered in revolutionary and Commonwealth England. The debate began with Lilburne's 1646 tract, *The Just Man's Justification*, and ended with the last of Lilburne's trials in 1653. Ironically, the most intense discussion of the jury came in the wake of Lilburne's trial in September, 1649, when the Levellers were no longer a large and unified force. Only then did it become clear that, at least for some of the more significant writers, the jury issue represented one of the truly unifying themes of Interregnum radical political theory.

However, at the outset of the entire reform movement, which encompassed the activities of many different groups reflecting various political views, the role of the jury in the everyday criminal trial was not of great concern. For virtually all reformers, other demands respecting the criminal law took precedence over the jury: among them bail, speedy trials, reform of the law of sanctions, and prison reform. These demands, which had their origin in early seventeenth-century reform agitation, continued throughout the Interregnum to interest most reformers, including both moderates and those radicals who came to oppose the new Cromwellian regime. Moreover, against the backdrop of the entire law reform movement, reform of the criminal law was for most reformers only one of many issues, and it was concerned less with a vision of a new society than with mitigation of the necessary evils of the old society. In time, the criminal law might wither away; for the present, it ought not to be so repressive.

The modest aims of early Leveller thought regarding the jury are reflected in the third *Agreement of the People* (1649), which declared that "judgments of conviction of life, limb, liberty or estate" must not be achieved other than by "twelve sworn men of the neighborhood; to be


chosen in some free way by the people . . . and not picked and imposed, as hitherto in many places they have been."

24. An Agreement of the Free People of England (London, May 1, 1649), [B.L.: E. 571(10)], p. 6, § xxv, reprinted in William Haller and Godfrey Davies, eds., The Leveller Tracts (Gloucester, Mass., 1964), pp. 318-28. (This tract was probably authored by Lilburne, William Walwyn, Overton, and Thomas Prince.) In an earlier section of the Agreement the authors stated that in all capital cases other than treason "recompense shall be made to the parties damnified, as well out of the estate of the malefactor, as by loss of life, according to the conscience of his jury" (p. 6, § xxi).

The 1647 Agreement of the People (London, Nov. 3, 1647), [B.L.: E. 412 (21)], reprinted in Aylmer, ed., Levellers in the English Revolution, pp. 89–96, did not deal directly with the jury. The 1648 Agreement of the People (London, Dec. 10, 1648), [B.L.: E. 476(26)], provided that "judgment or conviction of life, liberty, or estate" should be "only by twelve sworn men of the neighborhood" (p. 14, § 9).


26. E.g. The Representative of Divers well-affected persons in and about the City of London (London, Feb. 6, 1649), [B.L.: E. 541(16)], p. i: "[I]t is impossible to find a competent number of jurors to try any criminal or civil matter within any Hundred in England . . . whereunto there shall not be put in a lawful challenge, that they are either kinsmen, friends, tenants, parties, or concerned in the matter"; William Ashurst, Reasons against Agreement with . . . The Agreement of the People (London, Dec. 26, 1648), [B.L.: E. 536(4)], p. ii: "And all this justice to be done, and lie in the breasts of twelve men in every hundred, who may be chosen of men that can neither write, read, nor have any estates." See also below, nn. 112–20 and accompanying text.
1649, Lilburne focused attention on the law-finding role of the criminal trial jury. Only then did discussion center on the history and purpose of the institution rather than on its formal attributes.

Nevertheless, from 1646 on, Lilburne was feeling his way toward the proposition he announced in the heat of his 1649 trial. *Just Man's Justification* had called for trials “in the County, or Hundred . . . without any appeal but to a Parliament.” All causes civil and criminal should “monthly be judged by twelve men, of free and honest condition, chosen by themselves, with their grave or chief officer amongst them . . . .”27 For Lilburne, local trials meant both freedom from the obfuscations of Westminster jurists and jury control over determination of guilt or innocence. Jurors were to “judge” cases, a term Lilburne did not explain; control over law, as separate from and in addition to control over fact, was at most an implicit assumption of this early tract. Lilburne criticized what he implied were typical aspects of the criminal trial—the formidable justices, whose rulings were both incomprehensible to the defendant and beyond challenge by him; the incompetent jury, selected from know-nothings of the city rabble and willing to follow the judge’s lead.28 Lilburne sought in his 1646 tract to return the trial to what he deemed its historic place in the local community. The tenor of the tract suggests that despite the routine nature of the demands in successive versions of the *Agreement of the People*, the criminal trial jury played a significant role in Leveller thought.29

The Leveller conception of the criminal trial jury was based upon a distinctive view of the history and nature of English law. How was it that the Levellers’ legal theory could combine systematic criticism of the common law with a glorification of the jury system? To answer this question, it will be useful to set forth some elements of the Levellers’ “Norman Yoke” theory of history, which was a reaction against the establishment historical view inherited in the late 1630s from Sir Edward Coke.

28. Lilburne railed against the use of Latin (“and so without [the people’s] understand­ ing” [*ibid.*, pp. 11–12]), the inconvenience of the Westminster courts, and the coercive aspects of the Westminster bench (*ibid.*, p. 15).
29. See also John Lilburne, *The Copy of a Letter* (London, Aug. 9, 1645), [B.L.: E. 296(5)], p. 17, which may refer mainly to civil cases: “Oh for Justice! Justice betwixt a man and his neighbour, impartially, without respect of persons, which alone under God is the only cure of all England's maladies.” Hill [*Puritanism and Revolution* (London, 1958), pp. 76–77] recognized the importance of the criminal-trial jury for Lilburne in the pre-1649 period.
Coke had found a basis both for growth of the common law and for resistance to Stuart divine right pretensions in the common law itself. The common law in its purest form was expressive of reason; through long and careful study of it one might grasp the reasoning process that allowed for determination of what was right. This formulation had proved convenient to the common lawyers for denying the king's claim to be able to interpret the law.30

Moreover, Coke's view was attractive to the parliamentarians who beheaded the king in the name of the law. For if the common law was as old as English society and had never been supplanted by monarchical force—in 1066 William had confirmed and assented to the liberties of the common law—then law preceded kingship. Thus kingship and prerogative were part of and must conform to the rules of the common law, and the assembly of the kingdom was responsible for defense of the fabric of the common law. While this view of the common law and common law reasoning supported an argument against a particular king and against a peculiarly royalist concept of the law, it did not constitute an argument against kingship, as the rulers of the interregnum period came increasingly to understand. Coke's proposition was an argument for the common law and for reform of that law on an incremental basis, as those professional lawyers and judges trained to understand the legal system saw fit. It rested on an ingrained trust in the common law. The Puritan Revolution did not, after 1649, move steadily to the left until a reaction set in. The revolution, at least with regard to the essential structures of the common law, was the reaction.31

The Norman Yoke view, on the other hand, cut against the most fundamental political and social conceptions of the Cromwellian ruling elite. The Leveller historical argument constituted an attack on feudalism and on what were alleged to be Norman feudal perversions of the "true" law. The attack focused on the Norman invasion, which cut feudal England off, historically, from its Anglo-Saxon past. The Leveller "myth" of Anglo-Saxon liberties argued that in that almost forgotten age all men were "free," held their land freely, met in free popular assemblies, declared the law, and judged one another in their free, local, and popular courts. These assumptions were employed both sincerely and polemically to buttress arguments against a social and political hierarchy


that not only placed power in the hands of the central government but also drastically limited representation in Parliament.\(^{32}\)

The Levellers drew their political theory from history and Scripture.\(^{33}\) They found in these sources the basis for a contractual form of civil polity, one that England's rulers had often breached but which had always been revived, and one that would once again be restored by a new "Agreement."\(^{34}\) Their approach to Parliament reflected a deep ambivalence concerning the limits of valid delegation of authority. A people's representatives could not be deputized to pronounce law that conflicted with God's will. The remedy was either to reinstate the ancient tradition of local assemblies or to make Parliament more representative and to resist a Parliament that defied divine command.\(^{35}\)

32. See e.g. Hill, *Puritanism and Revolution*, pp. 75–82; W. Schenk, *The Concern for Social Justice in the Puritan Revolution* (New York, 1968), pp. 78–79. See also Robert Seaberg, "The Norman Conquest and the Common Law: The Levellers and the Argument from Continuity," *Historical Journal*, vol. 24 (1981), pp. 791–806. Seaberg argues, against Hill (*idem.*), Pocock (*The Ancient Constitution and Feudal Law*, pp. 125–27), and Richard T. Vann [*"The Free Anglo-Saxons: A Historical Myth," Journal of the History of Ideas*, vol. 19 (1958), p. 268] that the Levellers did not reject the notion of historical continuity, though the one they adhered to differed from that adopted by Coke and his followers. Seaberg rightly stresses the overlay of Norman procedures that, from the Levellers' point of view, undermined the true substance of the common law. He argues that the Levellers believed that the "true substance" remained implicit in the law and that the Levellers did not retreat from a historically based theory of rights to one based on "natural right and reason" (Pocock, p. 126). Rather, they called for a reform of institutions and procedures that would save the historically identified "true" law. This essay is not the place to attempt a resolution of the on-going debate on Leveller political and social ideas. Suffice it to say that not all Levellers agreed on this issue, and that arguments from history and from "natural right and reason" lay side by side in Leveller (as well as in other contemporary) thought. My discussion of the Leveller perspectives on the institution of the criminal trial jury complements Seaberg's approach.

33. For the Levellers' reliance on history see above, n. 32. I argue that the Levellers drew upon Scripture (see below, text at nn. 105–7) with regard to the criminal law and the rights of Englishmen before the law. I believe that some of the Levellers tended to equate the Anglo-Saxon past with a society that lived according to Scripture. This was the social context they hoped to revive; at some level it had never entirely lapsed, though Norman rule had nearly destroyed it. Thus, although the Leveller claims do have a "natural rights" ring [see Quentin Skinner, "History and Ideology in the English Revolution," *Historical Journal*, vol. 8 (1965), p. 162; Perez Zagorin, *A History of Political Thought in the English Revolution* (London, 1954), pp. 27–29], they do not constitute a rejection of historically based rights. See below, n. 107.


The Leveller argument was an argument not only for political leveling but for legal leveling as well. Law, according to the Leveller view, was a form of divine command comprehensible and accessible to the common man. Legal procedures and institutions could—and since Norman times did—vitiates the substance of true law. Thus the Levellers joined those who criticized the use of Law French, complicated legal terminology, expensive writs, inconvenient delays, and the other obstacles to speedy and "equal" justice. Legal institutions were supposed to guarantee that equal justice prevailed, and no institution was more important in this regard than the criminal trial jury.

Although the Levellers shared the Cokeian view that the jury preceded the Conquest, they broke with that view on two fundamental issues. First, the Levellers asserted that the jury also preceded an organized judiciary. Second, they argued that Norman feudal governance, far from embracing the jury, nearly destroyed it. According to the Levellers, the Normans and their successors had attempted to pervert and eliminate the jury, despite the fact that Magna Carta had confirmed its use and a succession of medieval monarchs had in turn confirmed Magna Carta. Of the true history of the criminal trial jury, they, like Coke, knew very little. The fact that the criminal trial jury emerged after Magna Carta; that its original role was, at least in the main, to gather evidence; that the medieval jury had nevertheless been able to apply the law almost at will; that its de facto role had been greatly reduced only in the sixteenth century: all this would have come as a surprise to the Levellers. Not only would it have clashed with the Levellers' reading of history, it would have undermined an important element of their argument concerning the practical impact of Norman and Plantagenet rule on English liberties.

Although the Levellers identified the jury as one of the first elements of English social and political life, they said very little about the institution's historical role. They appear at first to have accepted the view that the jurors' task was to find fact; law was for the (preferably community-
based) judges to pronounce. But if the judges found the law ineptly or wrongfully, they ought to be removed and punished according to the example set by the Levellers' hero, King Alfred.\(^\text{38}\) Before 1649, the Levellers did not go beyond this remedy to embrace a theory of jury intervention on behalf of the true law. Their predominant concern was to resist attempts to pack, influence, or overbear juries or to eliminate them altogether. The Levellers' glorification of the jury may have drawn them closer to the position that the jury, representing the people, ought to find the law directly rather than merely apply it in accordance with the instructions of the people's delegates and the delegates' chosen functionaries. But that position remained latent in the Levellers' political theory, in their understanding of institutional history, in their concept of the source and nature of law.

A modest form of law-finding was latent, too, in the Levellers' arguments for reform of the law of sanctions. The Levellers constantly invoked the notion of the "reason" and "equity" of the law.\(^\text{39}\) In their view, a true or godly magistracy interpreted the law in the light of "conscience," thereby doing justice according to God's will.\(^\text{40}\) And just as legal forms ought never to soil this process of doing justice, legal sanctions ought not to deviate from divine mandates concerning just deserts. Thus, the Levellers' (and others') attack on the death penalty in cases of theft was scripturally based; to take life for simple theft was contrary to equity and conscience, literally contrary to Scripture.\(^\text{41}\) It may


be that the Levellers considered the role of the trial jury to be particularly important in such cases. Whether the jury acted on its own or at the behest of the bench, it applied the law according to "conscience" in order to ensure that the defendant would receive his just deserts. This may be what Lilburne had in mind when he referred to the ancient practice by which jurors would "judge" cases. Reform might be achieved by statute, but statute could go only so far: each case, each instance of finding fact, required its own verdict according to "conscience." 42

In the years preceding Lilburne’s 1649 trial, Leveller political thought emerged largely piecemeal in tracts that were responses to immediate political developments. Moreover, before 1649 the chief political threat to Leveller leaders (and specifically to Lilburne) came not from the common law bench but from Parliament.43 Thus, alongside the reform movement’s denunciations of Norman legal institutions and procedures, there developed an attack on the parliamentary exercise of criminal jurisdiction over commoners. It was in this context that Walwyn, Overton, and Lilburne charged that Parliament had adopted the tyrannical ways of the Stuarts. Parliament (or what remained of it) had become, they charged, an arbitrary lawmaking body rather than a representative of the people that defended God’s law on the people’s behalf. Instead of stripping away the hated Norman perversions of the true common law, Parliament employed them for its own ends. Vindication of the "equity, justice, and mercy" of the law had not been achieved and could not be unless subjects were allowed recourse to their traditional right to trial by peers before a truly law-abiding magistracy.

Movement for Law Reform, pp. 128–36, for a discussion of the movement to abolish capital punishment for theft.

42. Lilburne wrote, in 1653, that laws should be devised so that "as little as possible . . . should be left to the discretion, will or pleasure of the Administrator." The Upright Mans Vindication (London, Aug. 1, 1653), [B.L.: E. 708(22)], p. 14. As we shall see, however, this did not apply (as of that date) to Lilburne’s views on the jury with respect to its taking notice of the probable sanction.

43. Lilburne, The Copy of a Letter, pp. 1–2. Lilburne had been arrested and imprisoned by the House of Commons in 1645. He sought specification of the cause of his imprisonment and asserted that he was entitled to "the lawful trial of his equals." Overton, England’s Miserie and Remede, pp. 1–6. Overton wrote on behalf of Lilburne, similarly castigating Parliament. Walwyn (England’s Lamentable Slaverie, pp. 1–6) joined the chorus of criticism of Parliament’s treatment of Lilburne in Oct., 1645. Lilburne’s major tracts decrying his imprisonment in 1649 and continuing his claim to a right to trial by jury include: The Legall Fundamentall Liberties (1st ed., London, June 8, 1649), [B.L.: E. 560(14)]; An Impeachment of High Treason; Strength out of Weaknesse (London, Sept. 30, 1649), [B.L.: E. 575(18)]. See also Walwyn, The Bloody Project (London, Aug. 21, 1648), in Haller and Davies, eds., Leveller Tracts, pp. 135–46.
Lilburne’s attacks on Parliament grew out of his arrest and imprisonment for allegedly libelous writings between 1646 and 1648. During those years he attacked both the laws he was charged with breaking and the claims of the Lords and the Commons to jurisdiction to try him. Lilburne’s most powerful pre-1649 tracts on the role of judge and jury date from early 1648, when he was seeking a writ of habeas corpus. After the writ was refused Lilburne (and others on his behalf) criticized the courts for acceding to parliamentary despotism. When Lilburne was eventually brought before King’s Bench and the court denied having power to release a person held by order of Parliament, Lilburne criticized and belittled the common law bench for its timidity. None of Lilburne’s writings during this period articulates a jury law-finding argument; their focus is the right to trial by peers and the alleged usurpation of legal authority by Parliament. The members of Parliament were neither his true judges nor his true jurors. Parliament, he claimed, had resolved law-finding and fact-finding into a single power and had taken that power upon itself.

Lilburne at this early stage expressed a traditional view of the common-law judge-jury relationship. His aim was to deny the right of Parliament to try him; he asserted that Parliament had in notorious instances arbitrarily and tyrannically summoned and convened men before them (for things decidable and determinable only at common law) without any due process of law, and have taken upon them, contrary to all law, justice, equity, and conscience, to be both informers, prosecutors, witnesses, parties, jury, and judges, and thereupon have passed most illegal, arbitrary, and tyrannical censures upon the free Commons of England... when as by the fundamental law of the land, no judge whatsoever, can be judge of matter of law and fact both, it being the proper right of the jury of twelve men, of a man’s peers or equals to be judge of matter of fact, which must be proved by legal witnesses duly

44. Gregg, Free-Born John, pp. 135-249.

45. Lilburne’s pleas for a writ of habeas corpus and for trial by common-law judge and jury include, e.g., The Prisoners Plea for a Habeas Corpus (London, April 4, 1648), [B.L.: 434(19)], p. 8 (Lilburne sought “justice without partiality, mercy, pity, or compassion”); The Prisoners mournful cry, against the Judges of the Kings Bench (London, May 9, 1648), [B.L.: E. 441(17)], p. 5 (Lilburne sought “the benefit of the law... that is all the favor, mercy, pity, and compassion he craves”).


47. Lilburne, People’s Prerogative and Priviledges, p. 41; Lilburne, A Whip for the present House of Lords, or the Levellers Levelled (London, Feb. 27, 1648), [B.L.: E. 431(0)], pp. 16-17; Lilburne, A Plea, or Protest (London, March 17, 1648), [B.L.: E. 432(18)], pp. 13-14; Lilburne, The Lawes Funeral, p. 7.
sworn, and not by the complainer, prosecutor, or party, and then the judge is only to be judge in matter of law. 48

Lilburne's division of law and fact, and his assignment of the former to the judge, can be found also in the writings of Overton and, indirectly, John Wildman. 49 Wildman approvingly reprinted the petition to the House of Lords in February, 1648, of the conservative Parliamentarian John Maynard, who had met and befriended Lilburne in the Tower. Maynard argued that the "jury are sworn to find according to the evidence." They are "bound to indifferency and impartiality," for they may themselves be passed upon as defendants on another occasion. The jury are to be of the neighborhood, for

the law presumes, that such may have either some cognizance of the fact, or of some circumstances thereof, or of the party accused, whose condition and manner of conversation is much to be regarded, for discovering his intention in any fact supposed to be treason or felony.

The matter of law, on the other hand, is entrusted to the judge "for preventing all errors, confederacies or partiality." 50

During the spring of 1648 Lilburne continued to seek release from the Tower and a trial by judge and jury. 51 He never abandoned the conventional law-fact distinction, although at one point he characterized the jury "as it were the God Almighty" and the judge "as the minister or priest to pronounce and declare the sentence and judgment of the God Almighty." 52 When King's Bench refused to free him in May, Lilburne declared that the judges were "indeed and in truth mere ciphers." 53 They were "ciphers" because they deemed themselves powerless to overturn the unlawful acts of the House of Lords, "their superiors." 54 Lilburne would use the epithet "ciphers" to great and different effect in 1649, when

48. Lilburne, People's Prerogative and Priviledges, p. 41. See also Lilburne, A Plea, or Protest, pp. 13–14.
49. [Overton?], Vox Plebis, p. 18: "That which is of matter of fact, is to be tried, per legalem judicium parium, or a lawful trial of a man's peers: That which is of matter of law, is to be tried by the judges"; John Maynard, The Humble Plea and Protest (London, Feb. 14, 1648), reprinted in John Wildman, The Lawes Subversion (London, Mar. 6, 1648), [B.L.: E. 431(2)], p. 35: "The matter of fact is only intrusted to the jury, and the matter of law to the judge, for the preventing of all errors, confederacies or partiality."
51. Lilburne, A Plea, or Protest, pp. 13–17.
52. Ibid., p. 17 (margin).
54. Idem. Lilburne repeated this charge in the spring of 1649, in a letter to Lenthall, the speaker of the House of Commons, to whom Lilburne complained about his imprisonment on order of the Lords. By allowing the Lords to act as they did, the Commons made "ciphers of [themselves]" (The Legall Fundamentall Liberties, p. 13).
he was allowed trial at common law by judge and jury. Then, when the
target was no longer a parliamentary tribunal, Lilburne found the bench
too powerful, declared that judges ought to be "mere ciphers," and
claimed that his jurors were judges both of law and of fact.\textsuperscript{55}

Lilburne's 1649 charge that the judges were mere "ciphers" and that
the jurors were true judges went to the heart of what the Levellers
believed was the establishment fallacy. The allegation challenged the
view that the government, rather than the community at large, was
ultimately responsible for determining the law. It also brought the myth of
the Anglo-Saxon popular (and law-deciding) jury into the courtroom and
into political debate. The impact of Lilburne's aphorism upon the history
of the English criminal trial jury was profound. But at the time of its
introduction, it was merely an aphorism and one without a fully articu-
lated historical basis.

\textbf{II}

Lilburne was tried in October, 1649, at the Guildhall, before a commis-
sion of oyer and terminer on a charge of high treason.\textsuperscript{56} The Rump
Parliament had passed several statutes of high treason in the spring of that
year, a period during which Lilburne was engaged in almost constant
publication against a government he succinctly characterized in the title
of perhaps his most famous pamphlet, \textit{England's New Chains}.\textsuperscript{57} The new
Treason Acts extended the crime to include expressions of opinion.\textsuperscript{58} The

\begin{footnotesize}
\begin{enumerate}
\item See below, text at nn. 67-77.
\item State Trials, 4:1269-1470. This account of the trial is a reprint of\textit{ The Triall of Lieut. Collonel John Lilburne} [compiled by Clement Walker] (London, Oct., 1649), [B.L.: E.
584(9)]. Walker worked "under Lilburne's direction, from documents provided by him and
a stenographic report of the trial" (Haller and Davis, eds., \textit{Leveller Tracts}, p. 31). My
account of the trial stresses Lilburne's invocation to his jury and his defense of his claim to
the jury right, a subject to which other accounts (understandably) give little space. For other
discussions of the trial see the splendid account in Brailsford, \textit{Levellers and the English
Revolution}, ch. 30; Gregg, \textit{Free-Born John}, ch. 25; Frank, \textit{The Levellers}, pp. 325-26, n.
105. The Commission included inter alia the Lord Mayor of London, the justices and barons of
all the courts of common law, and Richard Keble, one of the keepers of the Great Seal
(Brailsford, p. 528). As Aylmer remarks (\textit{Levellers in the English Revolution}, p. 46), it is not
clear why the authorities did not try Lilburne, without a jury, before the High Court of
Justice. Perhaps they did not dare. The jury had been "impanneled by the sheriffs of
London," presumably in the usual way. See John Jones, \textit{Jurors Judges of Law and Fact}
(London, Aug. 2, 1650), [B.L.: E. 1414(2)], p. 57. Lilburne challenged four of the original
panel before his jury was fully selected (Brailsford, p. 592).
\item John Lilburne, \textit{England's New Chains Discovered} (London, Feb. 26, 1649), in Haller
and Davies, eds., \textit{Leveller Tracts}, pp. 157-70 and \textit{The Second Part of England's New
\item Veall, \textit{Popular Movement for Law Reform}, p. 163.
\end{enumerate}
\end{footnotesize}
accusation against Lilburne was that by his writings he "maliciously, advisedly, and traiterously did plot, contrive and endeavour to stir up, and to raise force" against the government, and that to this end he both denied the supreme authority of the House of Commons and asserted that the government was tyrannical, usurped, and unlawful.59

The trial is now famous and Lilburne’s defense is well known. At the outset he denied both the authority of the trial commission and the legality of the proceedings, including the closing of the trial to the public.60 He strongly asserted a right to counsel to assist him in making his way through trial formalities (that he claimed mystified him) including a statute as well as an indictment written in foreign tongues.61 Lilburne’s initial protestations produced a remarkable reply from Judge Jermin that revealed how similar were the antagonists’ conceptions of the ultimate source of law, despite their differences on questions of the delegation of authority, the role of the judiciary, and, hence, the allocation of power in the courtroom:

"But you must know that the law of England is the law of God. . . . It is the law that hath been maintained by our ancestors, by the tried rules of reason, and the prime laws of nature; for it does not depend upon statutes, or written and declared words or lines. . . . Therefore I say again, the law of England is pure primitive reason. . . . A pure innocent hand does set forth a clear unspotted heart. . . . If you refuse to [hold up your hand] you do wilfully deprive yourself of the benefit of one of the main proceedings and customs of the laws of England.62"

Although Lilburne had spoken (without elucidation) of a "pretended crime" as the basis of his accusation, his plea, when it was finally coaxed from him, revealed no objection to the Act of Treason, either to the procedure that occasioned its passage or to its substance. He pleaded: "That I am not guilty of any of the treasons in manner and form, as they

59. Gregg, Free-Born John, pp. 294–95. Gregg lists the pamphlets named in Lilburne’s indictment: An Impeachment of High Treason, A Salva Libertate, The Legall Fundamentall Liberties, Outcry of Apprentices, Hue and Cry. According to an article in the weekly Mercurius Elencticus (London, Oct. 22–29, 1649), [B.L.: E. 575(38)] at p. 208, the grand jury foreman told the bench: "We have only found [Lilburne] guilty of writing some part of those books he is charged with in the indictment, but not of high treason: which so astonished the judges, that they looked as if they would have eaten the jury." This (allegedly) occurred in open court; Lilburne had asked that the grand jury that had indicted him appear and repeat its indictment. There is no mention of this incident in the State Trials account. A similar version of the incident is recounted in The First Days Proceedings (London, 1649), pp. 10–11.

60. State Trials, 4:1270–83. The doors to the courtroom were subsequently opened to the public.

61. Ibid., pp. 1291–94.

62. Ibid., pp. 1289–90.
are there laid down in that indictment.'” If Lilburne’s formal plea was that the Act was null and void, he gave no hint of it in the version of his plea that he himself later recorded.63

In the trial the government first presented its evidence, introducing witnesses to Lilburne’s role in the “treasonous” publications and then reading at length from some of them.64 Lilburne’s renewed request for counsel was met with the assurance that the court itself would act as his counsel when a matter of law arose. The bench was his protector; as Keble put it, “[W]e are on our lives too as well as you.”65 Thus having pleaded to the indictment, Lilburne raised two main arguments on the merits: there was no proof that the writings were published after the passage of the Treason Acts, an important factual issue; and the evidence did not suffice for a conviction, because the government could not meet the “requirement” of two witnesses or prove unlawful intent. The latter argument mixed a question of law (on which the court ruled, against Lilburne, that two witnesses were not required) and a question of fact, sufficiency of the evidence of intent (on which, it is possible, the jury, having set its own standard, based its acquittal of Lilburne).66

63. Ibid., p. 1294. But see Diane Parkin-Speer, “John Lilburne: A Revolutionary Interprets Statutes and Common Law Due Process,” Law and History Review, vol. 1 (Fall, 1983), pp. 276–96. Parkin-Speer, whose article appeared while my book was in press, makes an interesting case for reading Lilburne’s assertions to the bench at his 1649 trial in light of several claims made by Lilburne in Legall Fundamental! Liberties, published earlier that year. The assertions themselves should not be assumed to be part of Lilburne’s formal plea, but they are integral to his overall defense. How many of them were made before his jury is not clear; most were made to the bench before Lilburne’s jury was selected and sworn. But the assertions and the claims in Legall Fundamental! Liberties do indicate the direction in which Lilburne’s thought was moving. Parkin-Speer stresses Lilburne’s view that the special commission of oyer and terminer and, indeed, the continuation in power of the Rump itself, were unlawful. Presumably, this would have made the Act under which Lilburne was tried unlawful, though Parkin-Speer doesn’t stress this point (perhaps because Lilburne seems not to have stressed it). Parkin-Speer emphasizes Lilburne’s view that “when an Act of Parliament is against common right, or reason, or repugnant . . . the common law shall control it, and adjudge this Act to be void” (Legall Fundamental! Liberties, p. 50). This view, drawn (indirectly) from Coke’s famous dictum in Bonham’s Case, was applied to the Act that continued the Rump in power. Parkin-Speer discusses Lilburne’s view that, absent a lawful Parliament or bench, the defendant was left to interpret the common law. This the defendant could do given the nature and source of common law; Parkin-Speer relates Lilburne’s view in this regard to his “Protestant individualism,” and I do not think her approach here differs markedly from my own. My lengthy discussion of John Jones, below, provides a link between this view of law and the Leveller appeal to the jury, a matter about which Parkin-Speer has very little to say.

64. State Trials, 4:1320–73.

65. Ibid., p. 1317.

66. Ibid., pp. 1373–76, 1382–93. The jury’s reason for acquitting Lilburne will never be known. It is less likely that the jury nullified the Treason Acts on which the indictment was
Having been denied assistance of counsel in making his defense, Lilburne asked the court whether he might then speak to the jury on matters of law as well as fact:

that I may speak in my own behalf unto 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 as fact, and you [i.e., the court] only the pronouncers of their sentence, will and mind . . .

Lord Keble: Master Lilburne, quietly express yourself, and you do well; the jury are judges of matter of fact altogether, and Judge Coke says so: But I tell you the opinion of the Court, they are not judges of matter of law.

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; and in deed and in truth, if the jury please, are no more but ciphers, to pronounce their verdict.67

It is difficult to find a source for this remarkable claim as it applied to the jury; it does not appear in the pre-1649 writings.68 As it happened, it was Lilburne’s adoption of the role of defense counsel that occasioned his invocation of the jury’s right to judge matters of law. Had the court acceded to Lilburne’s extraordinary claim to counsel, he might never have made his claim to a jury right, although he could have hoped to provoke a debate on the law between his own counsel and the government’s attorney, a debate which the jury might then have resolved by its verdict, with or without the approval of the bench. Lilburne’s jury-right claim was, in part, couched in the familiar terms of the Norman Yoke theory. His judges were but “Norman intruders,” agents of the usurper William and his successors. But what was Lilburne’s conception of the pre-Conquest trial? Were there local “judges,” or did jurors fill the “judicial” role? In their writings Lilburne and the other Leveller leaders had left their view of the original role of the jury unclear; there is only based than that it determined Lilburne did not “traiterously . . . plot” to stir up revolution. (In his defense, Lilburne did not spare the jury the details of his acts of patriotism during the Civil War.)

67. Ibid., p. 1379. Note Keble’s use of the word “ciphers” earlier in the proceedings (ibid., p. 1314): “You [Lilburne] would make yourself judge in your own cause, which you are not, and so make ciphers of us.”

68. Hill (Puritanism and Revolution, p. 77) notes that, on an earlier occasion, Henry Marten “told [his] jury to put their hats on in court, to demonstrate the fact that they were ‘the Chief Judges in the Court,’ and the judges inferior to them.” But it is not clear that this meant judges of law; Marten may have been insisting upon the jurors’ right to make untrammelled determinations of fact.
occasional indication that they believed that pre-Conquest jurors were "judges." 69

We may learn something of the nature of Lilburne's theory of jury right from his ensuing colloquy with the bench. Lilburne turned the court's attention to his copy of Coke's *Commentarie upon Littleton*, which he had with him throughout the trial. The first page he quoted related to the assize of novel disseisin: "In this case the recognitors of the assize may say and render to the justices their verdict at large upon the whole matter." 70 This practice, Lilburne asserted, was common in "all actions of trespass or assault, where the jury do not only judge of the validity of the proof of the fact, but also the law, by assigning what damages they think just." 71 Moreover, he noted, Coke stated that verdicts might be general or special, and Littleton observed: "Also in such case, where the inquest may give their verdict at large, if they will take upon them the knowledge of the law, upon the matter they may give their verdict generally." 72 Coke, Lilburne stated, supported Littleton on this point. This, and only this, was the case that Lilburne put at his trial for his claim that jurors were judges of the law. His closing speech dealt with disputed questions of fact (the date of publications alleged to be his; the testimony of the witnesses; his intent), and assertions that his treatment, from the time of his arrest until the closing moments of his trial, prevented him from making a proper defense. Toward the end, he repeated his claim to the right of the jury to judge law as well as fact, again in the course of a protest against the absence of counsel. 73

The bench thought little of Lilburne's jury-right assertions. They dismissed his contention without addressing themselves to it. Keble's reply to Lilburne's citations from Coke was blunt: "You have spent a little time, but you have done yourself no good; I thought you had understood the law better than I see you do." 74 According to the surviving record, the bench was content to let the matter drop, as Lilburne turned immediately to matters of fact and thereafter made only rhetorical reference to the jury right.

The court may have considered Lilburne's jury-right claim too insubstantial to require rebuttal. At most, Lilburne had pointed out that where there were "mixed" questions of law and fact, the jury was permitted to apply the law to the facts as it found them. It is difficult to believe that Lilburne was unaware that the civil jury to which Coke was

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69. See above, n. 36 and accompanying text.
71. *Idem*.
referring was subject to attaint for mistaking the law. Surely nothing he read out suggested either that judges might not charge juries on the law or that juries might with impunity disregard judicial charges. Actually, Lilburne had disregarded Coke's contrary views in the very source from which he read to the court. At the end of Littleton's short statement on juries in cases of novel disseisin, from which Lilburne had drawn his first citation, Coke had appended his famous dictum: judges, not juries, are to respond to questions of law; juries, not judges, are to rule on questions of fact. In counterpoint to Littleton's most general statement about jury verdicts, the last to be cited by Lilburne (and the one Lilburne appeared to find most helpful), Coke had immediately juxtaposed: "Although the jury, if they will take upon them (as Littleton here says) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for if they do mistake the law, they run into the danger of an attaint. . . ." Lilburne had in fact read to the court from Coke's comment, but only so far as the words "general verdict"; on the matter of attaint, he had remained silent.

Lilburne's assertion regarding the jury right remained merely rhetorical, not surprisingly since there was no basis at English common law for the proposition that jurors were the only judges of law, and barely any that they might take their own knowledge of the law as their guide. Moreover, Lilburne did not distinguish civil and criminal cases. He found nothing in the law books that diminished the authority of the bench in the conduct of jury trials, though it was at least in part from his disrespect for judges that his inspiration regarding jurors was derived. He quoted out of context, in what the bench must have taken to be an outrageous fashion. Finally, Lilburne gave the jury little direction on those questions of law he apparently meant them to take upon themselves. He seems to have wanted the jury to find unlawful the entire proceeding, especially the standard refusal of counsel, and to acquit him on that account: Lilburne did not at this juncture specifically allege that the law on which he was indicted was void, due either to its substance or to the procedure attending its passage. He seems to have stood on his initial argument concerning the number of witnesses required in cases of treason, and he may have wanted to argue the law of intent. These were weak reeds, but perhaps they were among the issues of law on which his "countrymen" were to pass their judgment.

And pass judgment they did. Lilburne's jury took less than an hour to find him not guilty. Brailsford has described the ensuing scene:

75. Coke, Commentarie upon Littleton, p. 366.
76. Ibid., p. 368.
77. See above, nn. 63-66 and accompanying text.
The jury were then discharged, and through the cheering multitudes Major-General Skippon escorted the prisoner back to the Tower. The very soldiers who guarded him shouted for joy. . . . At the Fleet Bridge the people lit bonfires. . . . As the evening wore on, the church bells rang out and bonfires sprang up all over the City, while the people in their thousands shouted and drank and feasted in the streets. 78

In honor of the jury a medal was soon struck bearing their names, Lilburne’s portrait, and an 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.” 79 At least in London, events had given prominence to Lilburne’s invocation to his jury, whatever the common man took its meaning to have been.

The weakness of Lilburne’s jury-right claim must have been apparent to many contemporaries. Certainly it was apparent to lawyer Henry Parker, a proponent of moderate law reform, who launched a powerful attack on Lilburne in his tract, A Letter of Due Censure, published in the spring of 1650. 80 (Parker’s tract took no account of the recently published Judges Judged, the first of John Jones’s two tracts in defense of Lilburne. That tract and Jones’s second one—a reply to Parker—will be considered together in the next section.) Parker made short work of Lilburne’s “authorities”:

All that is affirmed by Littleton and Coke is this, that in some cases the inquest may render a verdict at large upon the whole matter. . . . In the application of these authorities, you rush hastily upon three gross errors. For first you strain these authorities to all cases and questions of law, whether easy or uneasy whatsoever, and this cannot be done without manifest violence to the words of your authors. Secondly, you strain these authorities to all jurors whatsoever, whether they have knowledge of the law, or not. . . . Thirdly . . . you infer: therefore the judges are mere ciphers, therefore the judges have no right or power to deliver their judgments, therefore the determination of the judges is no way forcible or obliging. This is a non sequitur. For though the verdict be given in upon the whole matter, and so enclose law as well as fact, yet the binding force of the verdict, as to matter of law, may be derived from the sanction and ratification of the judges, not from the jurisdiction of the inquest. And it may well be supposed, that the jurors may err in matter of law, in which case the judges must alter the erroneous verdict by a contrary judgment. 81

79. Ibid., p. 603.
80. Henry Parker, A Letter of Due Censure (London, June 21, 1650), [B.L.: E. 603(14)].
81. Ibid., pp. 23–24.
Parker excoriated Lilburne for belittling his judges and mocked him for setting up his jurors above the bench. Among the "common tradesmen, and husbandmen, such as ordinarily [are] empanelled, there is not one of a thousand that understands law in a point of any intricacy." \(^{82}\) Lilburne, Parker retorted, had concluded that "judges, because they understand the law, are to be degraded." \(^{83}\)

These were all points well taken. Lilburne appears foolish to have taken his stand on Coke, and the reliance on civil cases made his invocation of jurors' knowledge of law all too suspect. But Lilburne was headed in another direction. His claims were based not upon existing law or jury practice, but upon what he conceived to be his heritage, his birthright. They were claims upon "good law" and upon a tradition of resistance to longstanding adulterations of that law. \(^{84}\) Although Lilburne did not elaborate the point, the jury right was a claim—an aphorism—based on the Levellers' political theory. If Lilburne's claim is viewed in the light of the Levellers' understanding of England before the Conquest, that claim gains considerably in force and content.

### III

Lilburne's aphorism was given specific meaning in the two most detailed and interesting of the Interregnum jury tracts, *The Judges Judged* and *Jurors Judges*, written in 1650 by John Jones. \(^{85}\) These tracts were at once commentaries on Lilburne's 1649 trial and attacks on Coke's version of the history of the criminal trial jury. Jones's writings, which contained the most important discussion and analysis of trial by jury in England before the Restoration, built upon Leveller historical learning and politi-

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\(^{82}\) Ibid., p. 24.

\(^{83}\) Ibid., p. 21.

\(^{84}\) See *The Second Part of the Triall of Lieut. Col. John Lilburn* (London, Dec. 1, 1649), [B.L.: E. 598(12)], written by Clement Walker with Lilburne's help (see Frank, *The Levellers*, p. 227). The author(s) claim that in the trial of Sir Nicholas Throckmorton ("Throg-Morton") in 1554 "the jury took upon themselves to be judges of law as well as fact, and against the will and minds of all the judges acquitted the prisoner, and at the Bar justified their verdict and would not revoke it. . . . Without doubt . . . Lilburne had seriously read over that notable trial of . . . Throgmorton, in whose very steps he treads, in making his application to the jury, as the absolute guardians and judges of his life, as he in Queen Mary's time did" (pp. 27–28). Lilburne had probably found the account of Throckmorton's trial in Holinshed. See Raphael Holinshed, *Chronicles of England, Scotland, and Ireland* (orig. published ca. 1579, 6 vols., London, 1808), vol. 4, pp. 31–55. In Holinshed's account, Throckmorton told the jury that the statutes applied in his case were not according to God's law (p. 54), but in his final statement to the jury he did not directly appeal to them as judges of law (p. 55).

cal theory. Although Jones was not, strictly speaking, a Leveller, his works reveal the radical implications of the Leveller position.\textsuperscript{86}

In \textit{Judges Judged}, Jones labored to demonstrate that the later medieval monarchs had overturned a system of local determination of pleas in which the original royal justices in eyre had played a crucial and popular part. This historiographical tour de force, based upon an intricate and novel argument, developed more systematically than any other contribution to the Norman Yoke tradition an attack on the Westminster judiciary in general and on Sir Edward Coke in particular.

Are not all the people of England disseised of their freehold, liberties, franchises, and free customs, when they are deprived of that justice which they ought to have administered amongst them at home by virtue of the King’s writs ... directed to sheriffs of their own choice, in their own counties or stewards of hundreds, and courts baron, in their precincts, where the free-holders themselves are judges themselves, by ancient common-laws, and customs of England, before Magna Charta and by it declared, and confirmed unto them as aforesaid?\textsuperscript{87}

The answer to this rhetorical question was obvious.

But how had the original system of justice lapsed? King’s Bench, Jones argued, had imposed itself upon the system of popular justice. The critical turning point in the history of the judicial system, according to Jones, began with the failure of King’s Bench to follow up on indictments before sheriffs and itinerant justices that had not led to trial and punishment before justices in eyre. The Statute \textit{Articuli Super Cartas} (1300) sought to remedy this situation.\textsuperscript{88} It provided, said Jones, for temporary commissions to royal justices, the later justices of trailbaston, who were empowered to act \textit{on their own discretion} in pursuing indictments that had not been prosecuted. The result of this series of events was the undermining of the justices in eyre. This was doubly unfortunate. First, the justices in eyre had not been responsible for the original defects; the fault lay with King’s Bench, which had failed to ensure the making of indictments. Moreover, Jones asserted, the justices in eyre had never been entrusted with discretion to decide whether fines or imprisonment

\textsuperscript{86} Veall (\textit{Popular Movement for Law Reform}, p. 103) describes Jones as a pamphleteer “sympathetic to the Levellers.” My discussion places Jones as a critic of contemporary lawyers and legal practices, whose historical account of the bench and jury has much in common with Leveller notions about the source of human rights, the delegation of authority, and the constraints on the power of delegates. In the main, I believe that on these issues Jones was elaborating on Leveller thought in a way that the leading Leveller writers (who admittedly did not themselves speak with a single voice) would have approved, at least as of 1649–50.

\textsuperscript{87} \textit{Judges Judged}, p. 36.

\textsuperscript{88} Stat. 28 Edw. 1.
ought to be imposed. The grant of that power to royal justices in Westminster represented an unwelcome shift of power away from the local community. The final stage, regular and routine trial by royal justices of gaol delivery, destroyed whatever vestiges of the old, locally based system had persisted into the fourteenth century.89

Jones argued that, unlike King’s Bench, the justices in eyre predated Magna Carta and were confirmed by that document.90 Further, the justices were “chosen by the people,”91 a conclusion Jones drew from Coke’s assertion that “[o]fficers or ministers . . . for execution of justice . . . were . . . chosen in full and open county, by the freeholders . . . ,”92 which in reality referred to sheriffs, keepers of the peace, and coroners, but not, of course, to justices in eyre. Jones read Magna Carta’s prescription “that all offenders ought to be amerced by their equals, according to the quantity of their trespass” to have given freemen the power, in county court, before sheriffs or justices of local choosing, to determine fines and sentences of imprisonment. Jones purported to have understood this system to have predated Magna Carta, and in its essentials to have predated Henry II. He berated Coke for failing to acknowledge the seniority of the justices in eyre to the more recent King’s Bench, ascribing Coke’s view to “spite and envy.”

And where, in this leaf, he would persuade the people to suspect justices in eyre of corruption and of monopolizing justice to wrong the people that chose them, can the people believe that these justices (who are to be chosen by them, and to be displaced by them, when and as often as they see cause) will, or can wrong them more than those chosen by the King and his servants, without their consent, unless they can believe that they may be persuaded to give their consent to wrong themselves?93

Finally, Jones argued that the Crown had duplicitously turned the Statute Articuli on its head. The statute’s provision to supply justice “where no remedy was before,” he asserted, had in fact been intended to give justices in eyre power to move against the king’s servants in Westminster, who had failed to give force to the original system. The justices in eyre were supposed to remain an instrument of the people; their jurisdiction was to extend beyond enquiring into offenders against the laws—they were now to hear of the failure of royal justices to execute

89. Ibid., pp. 75–82.
90. Ibid., p. 79.
91. Idem.
upon the people's indictments and assignments of punishment. Coke's interpretation of the statute had supported that of the Crown, which, Jones argued, turned the mandate of Parliament against the people's courts and judges, and instead concentrated all judicial power in the hands of royal servants, the justices of King's Bench—a concentration of power to which Coke was himself heir.94

Jones's use of historical evidence was, to say the least, amateurish and manipulative. He primarily depended upon Coke's flawed account, which he reworked to suit his own point of view. The immediate target of Jones's attack was the Commonwealth bench. Rather than reject the entire history of the royal judiciary, Jones sought to divorce the early period of the eyre system from its successor stages. In this lay his originality, a flight of fancy that led to ludicrous conclusions: the hated eyres, whose justices were the scourge of the countryside, appeared in Jones's account as popular visitations to local tribunals whose ancient and definitive powers continued unabated, before whom fines and amercements were imposed by "equals," as ordered by Magna Carta. Judicial history had been rewritten in a way that actually glorified one of its darker moments.95

Jones's version of legal history after the Conquest deemphasized the importance of the Conquest itself and thus did not depend so heavily as some other accounts on the sparse Anglo-Saxon evidence. Unlike Lilburne's or later versions, it conceded a role for royal justices, while accounting for their authority in such a way as to make them agents of the people. Nevertheless, this elaborate attack on Coke and on the Westminster bench shared a central objective with the Leveller writings of the late 1640s: the resurrection and strengthening of the imaginary "original" jury system at the expense of the bench. Jones's history of the judiciary was in fact a history of the jury system, and it promoted two of the most important aims of the radical reform movement, the decentralization of legal institutions and the conferral upon the jury of control over the law. Jones's tract distorted history in the service of a theory of a community-based system of law and legal administration.

In *Jurors Judges of Law and Fact* Jones turned his attention more directly to the question of the role of the jury.96 This essay, published in August of 1650, filled in his historical account of the judiciary by

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95. See above, Chapter I, text at n. 43, for a discussion of the judicial eyre.
96. See above, n. 85. In *Judges Judged*, Jones had written about the jurors as judges of fact: "Are not men's lives triable for matter of fact, and not of law (except treasons that reach to thoughts?) Are not jurors the judges of matters of fact? What great learning, or experience in law is requisite for a judge to pronounce the sentence of death, where the verdict has determined the life?" (p. 27).
describing (once again in details drawn largely from Coke) the powers of jurors who gave evidence before royal officials. The tract also set forth a theory of law that substantiated Leveller claims. The occasion for Jones’s tract on jurors was the publication in June of Henry Parker’s *A Letter of Due Censure*, which attacked Lilburne’s arguments to the jury in his trial of the preceding year.97 Jones replied to Parker:

In the next place, where you say Mr. Lilburne promoted his twelve men to a new jurisdiction: I am sure, that is another lie of yours, for you may read in the Lord Coke’s *Institutions* upon the thirty-fifth chapter of Magna Charta that county courts, courts baron, sheriff’s tourns, and leets were in use before King Alfred’s time; in all of which courts the jurors were the judges, and their then untraversable verdicts were the judgments in all causes; and sheriffs and stewards, who were the King’s commissary judges in their tourns, and leets, . . . were and still are but the suitors’ clerks in counties, hundreds and courts baron, to enter their judgments, and do execution thereupon by themselves and their bailiffs, as public servants, or ministers of common justice, to their jurors, and the rest of the Commonwealth.98

Jones’s account of legal institutions in the period before King’s Bench and its circuit justices took control of all felonies managed to jumble public and private courts, criminal trials and view of frankpledge, local and royal officials, and, indeed, prefeudal and feudal England. All judicial proceedings, Jones asserted, culminated in the “untraversable” verdicts of jurors, verdicts that were attended and later executed by royal officials.99 That such officials had no power save that of execution and that such power involved no discretionary aspects was clear in Jones’s mind. Indeed, these were propositions that flowed from the nature and sources of legal command:

And what is dissenting, or not assenting to jurors’ verdicts, but a denial, which is more than a failure of justice, for the speeding whereof they [i.e., the judges] may have no negative voice; for ordinary jurisdiction that was the Supreme One that gave the sovereign (which is superior to every singular person) to Kings (as now to the keepers of the liberties of England); there is still the superlative jurisdiction beyond all comparison, that can be inferior to no authorities, but God’s that gave it to his people, to his children, not to be given by them to any above them in their generalities, but himself, from whom they have received, and to whom they must restore themselves and all that is theirs, but to be contrived, and substituted by them unto the worthiest

99. *Idem.*
men amongst them, to be employed for and under them, as they might find most convenient for their worldly peace and subordinate government; to which end they deputed kings, as now the Parliament hath done keepers of the liberties of England, reserving so much of their ancient ordinary jurisdiction to freemen, that none but such may be jurors, and none but such may be their judges for their lives, lands, and estates. And therefore as the keepers of our liberties are subordinate to the Parliament, so are their commissaries to them, and both in their judgments, to the verdicts of the jurors, which [are] their true saying of the whole matter, as well for law, as fact.\textsuperscript{100}

All that remained was the power, and duty, of execution, for which legal orders—writs de procedendo ad judicium, attachment, and compulsion to execute—were provided. The remedy of attaint was also available to the prosecution or the defendant, Jones announced, but it gained its force and effect only through the verdict (on law as well as fact) of a subsequent jury.\textsuperscript{101}

It was this system of jury domination of the law, Jones argued, that later and unwarranted extensions of power to royal justices undermined. The original and total jurisdiction of jurors derived from God’s grant of divine command to the people. All power was thereafter delegated by the people, through monarchs, their agents, to royal officials. Jurors were more “ancient” than such officials and retained full power over the law; as officialdom grew, embroiled itself in civil wars, and changed its form, “always the freemen judged their neighbors constantly.”\textsuperscript{102} Until, i.e., the destruction of justices in eyre by the Westminster bench. Thereafter the history of the judiciary was the history of the usurpation of a power implanted in the people by God. It was an account of a changing structure of officialdom, of centralization, and of waning local judicial institutions, that, by the seventeenth century, had produced a perversion of justice:

But how many true men have been hanged, and thieves saved by judges interposing, and obtruding their pestiferous pretended learning and experience in their laws between the weak consciences of ignorant jurors, and the truth? Which kind of jurors they make sheriffs return for such purposes, when they may have such returned as know the facts, and have sounder learning and experience in express law than themselves.\textsuperscript{103}

\textsuperscript{100. Ibid., pp. 32–35 (emphasis added).}
\textsuperscript{101. Ibid., pp. 35, 44.}
\textsuperscript{102. Ibid., p. 47. See also ibid., pp. 49 et seq., for Jones’s challenge to Parker’s assertion that “mechanics, bred up illiterately to handicrafts” were not capable of understanding the law.}
\textsuperscript{103. Judges Judged, p. 27. Jones’s (surprising) remark about thieves suggests that,
IV

Jones's history ended where the jury debate had begun: the complaints about judicial packing and badgering of juries that arose just before the creation of the Commonwealth. Jones resorted to historical discussion in order to counter the view that Lilburne's defense was based upon a fictional jury right. According to Jones, the right to jury trial was ancient and had never wholly been taken away, though its true purpose had been undermined by the development of the judiciary. Not only was jury trial ancient, but through usage and through that compilation of good usage, Magna Carta, it had been confirmed as one of the liberties of Englishmen. It was, however, more than one of the fundamental liberties. The very existence of jury trial, and the scope of the jurors' power, rested ultimately on the source of law. God had granted to the people—to the community—knowledge of his law. Though the people had, in turn, delegated ministerial functions to officials, judicial responsibility had been retained by the community; the jurors declared and applied the law in judging their fellows. Judicial badgering usurped the people's right and duty not only to find fact but to decide the law. To the people, as the source of knowledge of the true law, fell the responsibility to interpret the law. In this theory lay the originality and power of Jones's version of radical jury ideology.

At first glance, Jones's concept of the source of law does not seem a radical departure from Interregnum political theory. Even the most fervent republicans, who accorded absolute power to parliamentary edict, would have agreed that statute represented an application of divinely inspired reason by delegates of the people. The striking feature of Jones's view, however, was its insistence that the power of ultimate declaration of the law had not been delegated—not, at least, that declaration of law to be made in the context of judgment by peers. Presumably such judgment would by its nature conform to the essence of statutory pronouncement, but the latter was a collateral lawmaking process, less fundamental and less pure precisely because it was the by-product of the delegation of authority to enact law on divine command.

Establishment political theory developed the notion of delegation much further than Jones (and perhaps the more radical Levellers) allowed. Prudence—divinely inspired reason, Commonwealth officials might have said—dictated that because the law was by nature complex, its interpretation was beyond the lay mind. Consistency, fairness, and adherence to legislative intent required the knowledgeable guidance of the judge. The despite his strong reliance on Scripture, he was not among those who opposed the death penalty for theft—at least not in some kinds of cases.
people's legislative representatives had spoken in the framing of laws; what remained was the interpretation of those laws by trained legal minds. Jurors therefore had nothing to do with law; their province was solely the finding of fact.

In an attempt to defend Lilburne's claim regarding the right and duty of the trial jury, Jones drew upon ideas in Leveller writings of the late 1640s, making explicit for the first time the implications of those ideas. For most Levellers, as we have seen, the institution of the bench and its role in stating the law was a given. They shared Jones's view of the source and nature of law and seem to have gone well beyond the official notion of the jury's role in their discussion of verdicts according to conscience. But they had subsumed the jury's interpreting of legal mandate and its doing of discretionary justice within the fact-finding process. Jones spoke for all the Levellers when he articulated the relationship between jury verdicts and ultimate justice but only for some in his denial of a law-declaring role for the bench. History and theory mandated for Jones a conclusion that logic supported but did not necessitate. In reality, we have seen, judge and jury shared the law-finding power that traditional legal theory gave exclusively to the bench. So long as the bench accepted even discretionary, merciful jury verdicts as though they were purely findings on fact, the fact-finding process remained relatively open-ended and the Leveller discussion of the role of conscience and just deserts could be understood as a commentary upon that process. Disagreement might arise concerning the considerations appropriate to the finding of fact, but disagreement need not take the form of a debate over the legitimacy of the traditional law/fact dichotomy.

Lilburne's trial and Jones's tracts, however, made it difficult to view Leveller thought as concerned only with fact-finding. They brought the latent law-finding tendencies of Leveller writings to the surface, thereby seemingly connecting Leveller political and social thought to a theory of the trial that threatened governmental control over law and legal proceedings. Through Jones's tracts we may better understand not only the implications of Lilburne's claims but also how far those claims and the tendencies of the pre-1650 radical law tracts, even those with a conventional view of institutional arrangements, must have suggested a revolution in the administration of criminal law.

At base, the most radical theory of jury trial clashed with the Cokeian view on the issues of delegation and the nature, if not the original source, of law. The Levellers insisted that law was not inherently complex; in criminal trials it was just a matter of right and wrong. Law came to the

104. See above, nn. 39-41 and accompanying text. See, however, James Frese, A Second Why Not, p. viii.
mind and conscience of the simplest man. The very nature of law presumed judgment by peers in accordance with standards comprehensible to the defendant. Jury trial was not to be formed in the image of enacted laws; rather, enacted laws were to conform to the logic and purpose of trial by jury. The more they did so, the more they would become simple and direct expressions of reason based on divine command.  

Simple, direct expressions of reason: such were the worldly embodiments of God's law. If only the common law might be reduced to that form. There was, of course, an available source for determination of right and wrong and of the punishment appropriate to specific wrongful acts: Jones and most of the Levellers were ready to advert to the Scriptures. But what constituted commission even of those wrongs? When was there malice in the heart? That mixed question of law and fact required interpretation, an application of reason to the facts and, thus, a judgment according to divine inspiration. In short, it was within the province of the jury. There had been a time, so the theory ran, when the jury functioned in its purest form, before the growth of a meddling judiciary, and while laws were yet in the language of the people and were pronounced publicly by the wisest in the hundred moot. Those were the days of the vindication of God's law, as that law was meant to be vindicated. Now the post-Reformation Church had once again been purified, stripped of its diverting ritual, its members brought close to God. The importance both of the relationship between man and God and of the ongoing process by which men achieved an understanding of the meaning of God's will had been affirmed: each person would read, comprehend, and interpret Scripture for himself. Thus could the common law now be purified, returned to its original form and meaning, made conformable to the essence of Scripture. Like the Anglo-Saxon "lawmen," the latter-day jurors would come to know and interpret the law. Judgment would be passed as the conscience directed.  

"Conscience," of course, embodied the community's sense of justice. Only the community could know the particular nature of the actor and his deed. Legal decentralization meant less expense and delay, greater freedom from judicial interposition; but it also meant community control and a resurrection of the true jury of neighbors. It meant as well vindication of the community's sense of justice as guided by its knowledge of the defendant and his act, and as guided by its understanding of law. Thus were the most radical legal minds radical purifiers. Their vision

106. See Hill, *Puritanism and Revolution*, p. 81, for discussion of the importance of the translation of the Bible into simple and direct language.
of the true English society imagined a pre-Conquest community of Puritan freemen, equal in the eyes of God, whose judgments they passed upon their peers gone astray. 107

So read, the arguments of the radical Levellers augured a truly decentralized system of criminal law. 108 Not only would trials be local, but—as authorities especially might have perceived it—law itself would be local and no longer "common" in the original sense of that term. Moreover, the very purpose and nature of the legal system, as represented by the handful of most radical tracts, had little in common with the established understanding of that system. For the radicals, the criminal law was a matrix of community mores, to be imposed communally—neighbors judging neighbors. Shared experiences and context would guarantee fairness. This system was corrective, perhaps in a therapeutic sense, or retributive, as in the Old Testament tradition. The radical reformers were not primarily concerned with a national crime wave, with judicial administration, or with interpretation and enforcement of parliamentary statute. For them the criminal law was primarily a process of community self-identification and confirmation, and only second a system of rational self-defense.

V

Both Cromwell and the radical Levellers began with the Scriptures; their legal theories shared the same ultimate premise. For Cromwell, however, the exigencies of governance revealed the divine origins of delegation of authority to the Godly Magistrate. The criminal trial jury was a tool devised and employed by the Magistrate. It informed him in the use of his wisdom but only in a most limited sense. It comes as no surprise that Interregnum law reform conceded the existence of juries but not much more. Between 1652 and 1655, during the period in which the Hale Commission was active and after the publication of nearly all of the radical Leveller pamphlets, the government entertained proposals regard-

107. This I take to be the implication of Jones's account of law, community, and jury trial. I am bringing together a body of radical Leveller ideas in a way that not even Jones did in order to suggest what must have underlain Jones's view of the jury. It also seems to me that Jones saw in the jury the true embodiment of historical continuity—or the institution that retained the potential for vindicating God's law, the true theory of delegation, and the revival of England's "pure" society. Although the rights of Englishmen could be understood as "natural rights," they could also be identified with the original English society. See above, nn. 32, 33.

108. Hill (Puritanism and Revolution, p. 81) states that the oft-repeated Leveller demand for trials in the county or hundred was "like the elevation of the jury over the judge . . . an appeal from the existing state power to surviving vestiges of the old communal institutions."
ing jury composition and challenges to jurors, with the end of making the jury a more reliable system of fact-finding. The reforms were based on the assumption that the judges found the law and that the judges were themselves tightly controlled agents of a centralized system.

The law tracts of the early 1650s reveal the distance between the radical Leveller conception of the criminal trial jury and the perspective of moderate reform proponents. Though it was during this period that reform activity reached its height, it proceeded largely on establishment terms. The principal areas of reform interest included private law, equity, and court procedure. On the criminal side, the law of sanctions garnered most interest; and there was talk of gaol reform: even the most complacent men of affairs knew a scandal when they saw one.

The question of jury reform centered more often on the civil than on the criminal trial jury. The tracts resonate with the traditional concerns of men of property. Even the Levellers—men of property themselves—complained as much or more about the costs, delays, and inconveniences of private suits. Nevertheless, the criminal trial jury had come to symbolize the real testing point regarding lay participation in matters of government. The debate between Lilburne and Jones on the one hand, and Parker on the other, continued to reverberate even after the eclipse of the Leveller party.

Parker himself continued to criticize the Levellers’ program of decentralization. In a tract on the resolution of “Cases Testamentary” Parker advocated reforms that would reduce the “surplusage of testamentary business,” but he opposed shifting the locus of litigation from Westminster to the provinces. Conceding that local litigation was “the old manner of jurisdiction, which was used in England long before the Norman Conquest,” Parker asserted that England was no longer “a cantonized country” that “obeyed several petty princes.” He attacked “that party which would cantonize us the second time” and thereby increase “quarrels and controversies.” Parker’s targets here were “illiterate judges, and unexpert counsellors” rather than jurors who were...

109. The Commission’s discussions of reform proposals are preserved in “Minutes of the Extra-Parliamentary Committee for regulating the law,” B.L. MS Add. 35,863. Discussion of the jury (mostly civil) is at p. 41 (juror qualifications and methods of appointment), p. 65 (jurors to value land for payment of debt), pp. 77–81 (juries to be retained in probate cases). I am most grateful for the help of Professor Cotterell, who kindly furnished me with a guide to these and other parts of the “Minutes.” She corroborated my own conclusion that the Commission was attempting to strengthen the jury system by raising qualifications with regard both to economic status and to literacy.


111. Ibid., p. 100.
not up to the task.\textsuperscript{112} Other moderate reformers, however, did not spare the jury. Henry Robinson complained that “most commonly one or two active and nimble-pated men oversway all the rest . . . and too often for the worst.” Moreover, they escaped punishment:

If they give a corrupt or erroneous verdict, there cannot justly be any penalty inflicted on them, because they may pretend they did at first declare themselves unfit for such employment: that they undertook it unwillingly, but were compelled thereunto; and when they saw there was no avoiding it, they endeavored to proceed therein according to the uprightness of their own consciences; if they be thought to have done amiss, it was but what they could not remedy, and are heartily sorry for it.\textsuperscript{113}

Robinson, whose main concern was with civil causes, preferred a county-based system with one judge for each hundred. The judge, who would not be elected by residents of the locale, so that he would not be “swayed with alliance,” would decide cases without the use of a jury.\textsuperscript{114} John March, who professed to respect the jury in civil and criminal cases as “the most exact and equal way of trial in the world,” pleaded for reform of the rules of qualification.\textsuperscript{115} He sought “twelve able understanding gentlemen . . . such as are known in their country to be men of competent worth for so great an employment [i.e., jury service].” This would preserve the institution of the jury as “the only judges of matters of fact.” March resisted the notion that the jury ought to be closely directed by the judge. He acknowledged that juries were “weak and ignorant,” but sincerely desired to see the institution strengthened. March believed jurors ought to “judge [fact] according to their own conscience”; they might ask the judge’s advice but were not bound to do so, nor if they did ask were they “tied to follow it.”\textsuperscript{116} Only reform could save the virtues of the jury system, and that reform ought to deal with procedures for securing responsible (and respectable) jurors, not with the existing relationship between judge and jury. This was in fact the path of reform taken by the Hale Commission.\textsuperscript{117}

\textsuperscript{113} Henry Robinson, \textit{Certain Considerations . . . to a more speedy, cheap and equall distribution of Justice} (London, Nov. 14, 1650), [B.L.: E. 616(2)], pp. 2–3.
\textsuperscript{114} \textit{Ibid.}, p. ii.
\textsuperscript{115} John March, \textit{Amicus Reipublicae. The Commonwealths Friend or An Exact and Speedie Course to Justice and Right} (London, May 19, 1651), [B.L.: E. 1360(1)], p. 100.
\textsuperscript{116} \textit{Ibid.}, pp. 104, 103, 102, 103.
The voices of radical trial jury proponents were still audible during these years, but barely so. Stripped of a movement—even, for a time, of a prominent leader—and with no foothold within the moderate law reform camp that dominated the work of the Hale Commission (whose own place within the councils of government was tenuous), radical jury proponents were left to aim their arguments and epithets at a deaf political establishment. Walwyn's *Juries Justified*, the most significant jury tract to appear after the publication of Jones's writings and before Lilburne's 1653 trial, was a reply to Robinson's critique of the jury. Walwyn reiterated the Leveller historical position. Never one to accept all of Magna Carta uncritically, Walwyn distinguished its "superstitious" elements ("[that] are but as a French garb or clothing, which the Conqueror and his successors, by main strength, forced our forefathers to put on") from its "true English liberties" that had been "reduced into that excellent law . . . the Petition of Right, and wherein trials per juries is the principal." Robinson was wrong, Walwyn asserted: there were "understanding fit men" in every hundred. Everything depended, of course, upon what one thought the nature of law and the jury's task ought to be. For Walwyn, the jury was to discern "right and wrong," what "an ordinary capacity (careful to keep a good conscience, and [one] that is tender of an oath) shall soon perceive the true state thereof; and be able to do right therein according to the evidence." Walwyn denied that one or two wrongheaded jurors could determine the outcome; the unanimity requirement prevented that. Moreover, he rebutted Robinson's charge that there was no penalty for a corrupt or erroneous verdict; the jury, he said, faced the possibility of an attain." Perhaps Walwyn, like Robinson, had civil causes mainly in mind, for a controlled tone pervades *Juries Justified*. The issue was the right of the local community to resolve its own "causes and controversies" between private parties rather than to resolve those between society and an alleged criminal offender.

Walwyn's renewal of the Norman Yoke theme was carried forward in early 1652 by several tracts. Their authors opposed the setting of a steep property qualification for jury service, which would "violate" the "fundamental constitution." Causes were to be tried locally by people, to

119. Ibid., pp. 4, 9.
120. Ibid., pp. 10–11.
121. The *Onely Right Rule for Regulating The Lawes and Liberties of the People of England* (London, Jan. 28, 1652), [B.L.: E. 684(33)], p. 6. This tract also asserted "that until the Norman Conquest, the Nation never knew or felt the charge, trouble, or intanglements of judges, lawyers, attorneys, solicitors, filors, and the rest" (p. 5). See also *To the Supreme*
whom, in the words of one writer, "the laws shall be read by the minister . . . four times a year." In two of these tracts there was a distinctly religious tone reflecting the views of the radical religious reformers who had begun to figure more prominently than the remnant of the Leveller party. And there was, too, a shift of focus from the role of the jury to the appropriate sanctions for serious offenses. Here the last voices of the Leveller movement melded with those of many Interregnum reform proponents. It had long been common, and even respectable, to oppose the imposition of capital punishment for theft. One had only to separate the question of who would control the determination of punishment from the matter of what that punishment ought to be to gain an ear among even the moderate proponents of law reform.

The movement for reform of sanctions, which lasted until the closing years of the Interregnum, united those who believed that the criminal law ought to conform to scriptural command with those whose main concern was more practical—that, e.g., thieves, with little to lose, were more inclined to kill their victims so that they could not bear witness against them. The movement produced the first great burst of English penological writing, which subsequently fed into Continental streams and reemerged in England a century later. The English writings were themselves influenced by the early New England experience, where the ideas they expressed had been put into practice three decades before. In that setting, the administration of the criminal law was dominated by godly magistrates; the criminal trial jury played as yet a less significant role than it did in the parent country. The English experience, on the other hand,

*Authority, the Parliament of the Common-Wealth of England* (London, June 29, 1652), [B.L.: 699 f. 16(54)].

122. *Articles of High-Treason . . . against One Hundred and fifty Judges, Lawyers, and Attornies* (London, Feb. 21, 1652), [B.L.: E. 655(10)], p. 8. For the Levellers this did not mean the most common people. As has often been said, the Diggers viewed the jury, even the Leveller version of it, as an instrument of the propertied classes. See, e.g., Veall, *Popular Movement for Law Reform*, p. 156. I suspect, however, that Winstanley's political (as opposed to religious) objections to the jury had more to do with the civil than the criminal jury (save perhaps for criminal cases involving trespass to land).

123. *Articles of High-Treason*, p. 8. See also John Cook, *Monarchy no Creature of Gods making* (London, Feb. 26, 1652), [B.L.: E. 1238(1)]. Cook argued that law should be "that which the judicious and most learned men judge so to be, not the sense or judgment of any private man" (p. 34). See below, n. 125 and accompanying text. On religious radicalism and law reform see Shapiro, *Law Reform in Seventeenth Century England*, p. 290.

124. E.g. *The Onely Right Rule*, p. 9; *Articles of High Treason*, p. 8. See above, n. 41 and accompanying text.

125. For the movement to abolish the death penalty see Veall, *Popular Movement for Law Reform*, pp. 128–36.

126. See below, Chapter 7, section III.

127. See e.g. George L. Haskins, *Law and Authority in Early Massachusetts* (New York,
was doubtless influenced by the fact of juries and jury behavior. Reform writers rarely referred to actual practice, but it is difficult to believe that they were not seeking to legitimate attitudes given daily expression in the courts of law, where judge and jury shared the power of mitigation generally and in cases of theft especially. Moreover, most reformers were proposing an alternative sanction that accorded with prevailing notions of justice: imprisonment at hard labor, rehabilitation, and, above all, restitution.

Within this embryonic movement the contribution of the Levellers was distinctive. More than any other group, they connected the scriptural approach to sanctions with the role of the criminal trial jury. We have seen that for many Levellers the apportioning of just deserts was integral to the fact-finding process. After 1649 claims regarding the jury's duty to play this particular role melded with a broad-based assertion of the jury's right to find the law, a development that helped pave the way for Lilburne's 1653 defense. If the government would not reform the law of sanctions, or charge defendants at a level that accorded with justice, it was the jury's duty to intervene and to vindicate God's law on earth.

In some important respects, Lilburne's own position fell short of that of his most radical followers. Although his writings evidence a progression from his 1649 aphorism to a better defined position in 1653, they also suggest that he did not follow Jones in equating law with unmediated Scripture. Instead, he clung to the more traditional notion that English fundamental law was historically evolved but remained consistent with Scripture, and thus with a more traditional form of political and legal theory. By 1653 the jury, for Lilburne, was the common political
denominator. That it was of the English people at large was as important as that it was of the local community. The people did not ab initio find the law; rather, they retained the ultimate authority to overturn a judicial ruling, indictment, or statute on the grounds that it did not accord with the substance or sanctions of the fundamental law. He had not yet in 1649 formulated the argument, with specific reference to the jury, in just that way. He would do so four years later in what ultimately proved the most important of his trials. Then, in the shadows of Leveller defeat, he formulated an argument less radical than that of Jones and other proponents of a purely scripturally based and jury-found law but one that was to outlive the Cromwellian period.  

VI

Lilburne’s 1649 trial suggested an expansion of the jury’s function, thereby giving direction to Leveller and other early Interregnum political writings on law and legal institutions; his trial in 1653 produced a more enduring argument respecting the jury, one that survived among dissidents and reappeared a decade later in the aftermath of the Restoration. Lilburne returned to England in June of 1653 after two years of a perpetual banishment imposed upon him in 1651 by parliamentary statute. According to the terms of the statute, by returning Lilburne subjected himself to arrest, trial (to determine whether it was the real John Lilburne who had returned), and, potentially, sentence of death. By the time of his return, Cromwell had dissolved the Rump Parliament, and Lilburne, still a popular figure around whom political opposition to the regime might coalesce, evidently hoped that his statutory judgment would similarly be dissolved. Lilburne believed the statute to be void, an unlawful attainder passed upon him ex parte and without trial on the grounds of his alleged slander (against the privileges of a member of Parliament) of Sir Arthur Haselrig and the Committee of Haberdashers’ Hall. It is ironic that the most feared political opponent of the preoccupation with purely political reforms and the limitations of his desire for equality. Lilburne’s chief aim, we might sum up, was equality before the law; that of his more radical friends, equality established by law.”

137. John Lilburne, A Second Address directed to his Excellency the Lord Cromwell (London, June 16, 1653), [B.L.: 669 f. 17(20)]: “Parliament in the said Act did not judge your petitioner an offender according to any law in being.”; “[T]he said Act is a law made after
Cromwellian regime had been placed in extremis because of his remarks opposing the resolution of a case involving the sequestration as royalist property of a Lilburne family colliery.\textsuperscript{138} The statutory judgment, the basis for the 1653 trial, proved to be crucial to the shaping both of Lilburne’s defense and of his theory of the jury’s right to decide questions of law. The development of this theory marked the third, and final, phase of the Interregnum jury debate.

Lilburne’s defense and the surrounding pamphlet literature, which he publicized on his own behalf between the time of his return and arrest in mid-June and his acquittal in mid-August, dealt both with the allegedly unconstitutional nature of the statute of banishment and with the inequitable and, hence, unlawful sentence of death for a minor crime.\textsuperscript{139} The defense was anticipated in a remarkable tract, \textit{A Jury-man’s Judgement upon the Case of Lieut. Col. John Lilburn}, which was written anonymously (but likely by Lilburne himself) and published within a week of Lilburne’s arrest. By subtitle the tract purported to prove to “every jury-man’s conscience” that he “may not, cannot, ought not find [Lilburne] guilty upon the Act of Parliament”; to do so would make a juror a murderer “by the law of England.”\textsuperscript{140}

Addressed to “my dear friends and loving countrymen,” \textit{A Jury-man’s Judgement} warned that it was necessary to “consider things very well beforehand, and come substantially furnished and provided with sound and well-grounded consciences,” lest one be called upon to serve and then to find himself, from “fear, hope or favor,” a murderer.

\begin{quote}
[E]xcept we are fully satisfied in our consciences, that [Lilburne] has committed . . . some crime, which in the known law of England and the very nature of the offence is felony, and justly deserves to die for it, with what conscience can any of us pronounce him guilty? . . . [N]o, the law of England has not placed trials by juries to stand between men the fact is done.”; “[Y]our petitioner was not tried with liberty of defense.”; “[T]hat sentence is not proportionable to the offense.”
\end{quote}

\textsuperscript{138} Gregg, \textit{Free-Born John}, pp. 305-11.


\textsuperscript{140} \textit{A Jury-man’s Judgement upon the Case of Lieut. Col. John Lilburn} (London, June 22, 1653); [B.L.: E. 702(6)].
and death to so little purpose, as to pronounce men guilty without
to the nature of the offence, or to what is to be inflicted
thereupon.141

Moreover, jurymen must be “satisfied in [their] understandings of the
Parliament’s authority to make such an Act.” The author denied that
it was ever a felony under English law “to scandalize members of a
committee” or “to break the unknown privileges of a Parliament.”142
Thus the Act of banishment was “null and void.”143 Moreover, the
parliamentary judgment itself was “contrary to the standing laws of the
nation” because it was a judgment of life and limb without trial by
peers and without the due process entailed in such trials.144 Had
Lilburne had such a trial “the jury [would have] been bound by the law
of England to have proportioned the punishment to the offense.”145
The tract exhorted its readers to consider that ultimately they too
would be judged:

[F]or what shall it profit us, either to please the malice or opinions of
men, for to lose our own souls, rather let it be our choice not to fear
those that can kill these bodies of ours, but to fear him who is able to
cast both our bodies and souls into hell fire. . . . [T]he justness of our
proceedings is that which will bear us out in the great and terrible day
of the Lord.

And let us all pray earnestly unto God, that he will be pleased to give
us all eyes to see, and hearts to consider, how much the safety and
happiness of us all depends upon our sticking close to the old and good
laws of the land, and to lay to heart how much it concerns the good men
of England, the jurymen, especially, who are to determine all causes,
to be able to judge, and to distinguish between true and counterfeit
laws.146

The proceedings against Lilburne at the Old Bailey began in mid-July
(from the thirteenth to the sixteenth) and were carried over to mid-August
(from the eleventh to the twentieth).147 Lilburne refused to plead before
seeing a copy of the indictment.148 Here he won a great victory: a copy of
the indictment and assistance of counsel were allowed him; indeed he was
given time to enter written exceptions. In the course of arguing for these
“rights,” Lilburne established the framework of his defense, stating by
way of “exceptions” several of his central claims. He questioned whether

141. Ibid., pp. 1–2, 6.
142. Ibid., pp. 2–3, 6.
143. Ibid., p. 7.
144. Idem: “... by twelve good men of his neighbourhood, giving also liberty of
exception and challenge of five and thirty, without showing cause.”
145. Ibid., p. 8.
146. Ibid., pp. 10, 12–13.
the "Act for the Execution of a Judgment" was an act of a true parliament of England. Furthermore, he asserted that a judgment of the sort contained in the act could only follow "an indictment, presentment, or some information or accusation" for "some crime," and a trial at which the accused was present; otherwise it was void in law and any indictment for breach of a condition of the judgment was likewise void.\textsuperscript{149} The exceptions did not, however, focus on the failure of the Act to state facts that amounted to capital felony under the English law. This charge Lilburne reserved for the jury stage of his trial, which came on, after a month's recess, in mid-August.

Lilburne's speeches to the court and jury in August of 1653 are not well preserved.\textsuperscript{150} But it seems clear that the defendant termed the Act grounding his indictment "a lie and a falsehood, an Act that has no reason in it, no law for it."\textsuperscript{151} He repeated his charge that no true parliament had passed the Act and that, in any case, the judgment it imposed could only be imposed by a jury following trial at common law. Lilburne then called upon his jury to decide law as well as fact, to acquit him on the ground that the Act, the judgment, and the ensuing indictment were all null and void under the true law of England.\textsuperscript{152} It appears, also, that Lilburne reiterated the exhortation contained in the opening paragraph of a short tract, anonymously authored, which he circulated at the outset of the August session. A Word to the Jury in the behalfe of John Lilburn\textsuperscript{153} blended the Old Testament flavor of the radical Puritan jury tracts with the forthright appeal to English law that had been sounded in A Jury-man's Judgement:

You [i.e., the jury] are of the neighbour, and Christ shows in the 10th [chapter] of Luke that that person is a neighbour that does works of love and mercy; it would be an abominable cruelty if you should find him guilty upon that pretended Act of Parliament, in regard he was not legally accused or convicted of any crime or fact for which he was banished or that it could be made felony if he returned.\textsuperscript{154}

\textsuperscript{149} Ibid., pp. 419-41.
\textsuperscript{150} Ibid., p. 443. The account in State Trials, written mainly by Lilburne, states that "[n]othing of these three last days [August 18-20] proceedings are printed." What we infer about Lilburne's speeches on these days comes from contemporary tracts, including those by Lilburne himself. See Gregg, Free-Born John, pp. 331-32 and 395, n. 31.
\textsuperscript{152} Gregg, Free-Born John, p. 332; State Trials, 5:443-44.
\textsuperscript{153} A Word to the Jury in the behalfe of John Lilburn (London, Aug. II, 1653), [B.L.: 669 f. 17(44)].
\textsuperscript{154} Idem.
The tract characterized the Act as a bylaw, "such as have been . . . made [by tyrants] to succour themselves in their tyranny." The Rump Parliament had set itself up as a supreme power despite the flow of petitions exhorting its members "to surrender their power to a new Representative equally chosen by the people." The tract spoke also to the "soldiery," which had been raised to aid the people against tyrants and which was now obliged to use its arms "against those that impose such illegal, cruel, and bloody commands." The merciful neighbor was to judge statute in the light of good English law and, finding it the law of a tyrant, to oppose it. Thus had Parliament's act of banishment provided a basis for the merger of the jury-right claim and the long-standing argument against the very basis of the Rump's power. Whereas the 1649 trial had produced a remarkable attack upon the judiciary, that of 1653 resulted in an attack on Parliament. The theory of a jury right remained the same: original power lay in the people; trial by jury assured protection against the usurpation of that power, whether by King, Cromwell, or Parliament, at least where it threatened to result in judgment of life and limb or in forfeiture of estate.

A second anonymous tract, More Light to Mr. John Lilburnes Jury, published during the course of the trial, began with Coke's passage on chapter 29 of Magna Carta and with the crimes of Empson and Dudley, who (like the present judges) executed "unlawful Acts of Parliament." Again, Parliament had usurped the role of the jury: "For they judge him that are not by law his judges; that belonging only to juries...." Moreover, Parliament judged him without due process and for a fact that was never before known, or declared by any law to be a crime, whereby Mr. Lilburne or any other could be warned from the same.

And the reason is evident, for if there should be no firm, standing and established unalterable law which Parliaments, juries and all people were bound to maintain, no man could be certain of anything. Thus it was more than a question of an unjust law; even conceding its justice, it had been applied to Lilburne after the fact, in a manner that he could not have foreseen.

If the jury convicted Lilburne, according to More Light, it would "give encouragement" to Parliament. Not only would the jurors condemn

155. Idem.
157. Ibid., p. 3.
158. Ibid., p. 4.
159. Ibid., p. 5.
160. Ibid., p. 6.
Lilburne, they would condemn everyone, including themselves. The jury was bound in conscience, therefore, "to try all laws made by Parliament, by the fundamental laws." They could not "expect the direction of judges and recorders in the case, who many of them lie under sore temptations of losing their honors and places of profit" to go against Parliament's will: "[B]ut since it is evident to every one of your consciences, that [Lilburne] is not charged with anything that in the true law of England is a felonious crime, nor has in the least deserved to die, you can do no less than pronounce him not guilty." 161 And this, on August 20, is what Lilburne's jury did. "John Lilburne," the jury said, "is not guilty of any crime worthy of death." 162

That Lilburne's jury, or at least that several of its members, took themselves to be judges of law as well as fact is evidenced by statements made to the Council of State, which examined the jurors closely on August 23. 163 Some jurymen stated that they were dubious whether the John Lilburne who was tried was the same John Lilburne who was referred to in the Act, an obvious ploy. 164 It is clear from the examination that the bench, in its charge to the jury, had stated that the jurors were judges of fact only. One juror asserted that, notwithstanding the charge, "the jury were otherwise persuaded from what they heard out of the law books." 165 This may refer to the long speech Lilburne addressed to the jury toward the end of the trial. An account of what he said has been lost, but we can infer that Lilburne challenged the validity of the Act, raised questions regarding proof of his being the John Lilburne, and, citing "relevant" authorities, exhorted the jury to find the law void and the sentence unlawful in its relationship to the crime alleged. 166

Lilburne's aphorism regarding the jury as judges of the law had been given new definition and effect. In one regard, though, the claim Lilburne made in 1653 was more limited than his earlier one. Lilburne did not as a general matter deny the authority of the bench; nor did he deny the right of the bench to instruct jurors on the law. 167 Rather he invoked the jury as a shield, adjuring them to reject "void" law and to act on behalf of the

161. Ibid., pp. 6, 8.
163. State Trials, 5:445-50. Lilburne was held in prison pending the results of the examination. See John Lilburne, An Hue and Cry after the Fundamental Lawes and Liberties of England (London, Sept. 26, 1653), [B.L.: E. 714(1)]. He was thereafter ordered to be held prisoner "for the peace of this nation." He remained a prisoner of State until his death in 1657. See Gregg, Free-Born John, pp. 333-34.
164. E.g. Juror Emanuel Hunt (State Trials, 5:447).
people, whose powers of delegation of authority to true representatives had been wrongfully usurped. His judges were not "Norman intruders"; they were, in a sense, weak and dependent, mere extensions of an unlawful Parliament. Free elections and adherence to the fundamental law of England were the proper correctives, not political decentralization and adherence to local community mores.

As we have seen, Lilburne only hinted at the substance of his views on the jury at his 1649 trial. He invoked the Leveller version of English history without connecting it explicitly to his theory of jury right. Perhaps he had not worked through in his own mind the problem of the origins of the jury. Subsequently, the "logic" of his position was developed by John Jones and others, though it is not clear how far Lilburne agreed with them. In the event, the 1651 statute on which he was tried in the summer of 1653 inspired a different argument concerning the jury's duty. The Act, both in the procedures attending its passage and in its substance, was easier to characterize as in conflict with the common law. Lilburne's 1653 defense strategy revealed how vulnerable Cromwell's new government might be made to appear and resulted in a constitutional debate concerning the constituency of the Rump and the legal basis of its acts.

Moreover, the facts alleged to be criminal were less serious than those for which English law had in the past exacted the penalty of death. It was this aspect of the prosecution that came closest to reviving the concept of "neighbors doing justice to neighbors." The jury was an instrument of mercy, its verdict mandated just deserts. It was, therefore, of no small importance that the jury found Lilburne "not guilty of any crime worthy of death." Lilburne had effectively drawn upon this most ancient aspect of the jury's role. He thus united his call to the jurors to resist tyranny with the claims of the many Interregnum reform writers who opposed the imposition of capital punishment for theft. As we shall see, this juxtaposition of ideas became a significant motif in eighteenth-century writing on the criminal trial jury.

For the moment, however, the most significant aspect of Lilburne's 1653 claim was his invocation of the jury's duty to examine the charges against the defendant and to reject them if it found that the facts cited did not amount to a crime under English law. The claim was particularly well suited to political cases, whether for crimes that were statutorily based or for ones that depended upon judicial construction, that brought the government into conflict with vocal opposition. Passed on to the next generation of jury proponents, this claim dominated the Restoration literature on the jury. In the mid-1650s the Quakers inherited both the soul

168. See above, n. 41.
of Lilburne, who converted to their cause two years after his acquittal, and his new concept of the right and duty of the true English criminal trial jury.


170. See below, Chapter 6. For a different example of the influence of Lilburne’s trial tactics see Colonel Penruddock’s “Directions for all my Fellow Prisoners, now to be tried for their Lives by a Special Commission of Oyer and Terminer” (1655), in *A Collection of Scarce and Valuable Tracts (Somers’ Tracts)*, vol. 6 (London, 1811), pp. 325-29. Penruddock had taken part in an abortive Cavalier rising against Cromwell in 1655. “Directions” refers to Lilburne and his “several juries” (p. 329). Penruddock, who wrote the tract while awaiting his trial for treason, advises his codefendants to exercise their full right of challenge, to “say we conceive the indictment is not sufficient in law,” to ask for counsel, etc. (p. 325). The defendants should put their “plea to the jury, and put it upon their consciences, that God has made them over judges between us and the judge. . . . If the jury seem fearful to clear us absolutely, tell them that it is safest for the jury to find a special verdict, which gives the point in law to all the judges whether or not it is treason . . . and [places] all the bloodshed upon the judges” (p. 263). Penruddock addressed his own jury in these terms (*State Trials*, 2:261) but he was found guilty and beheaded. The device of a special verdict, or a variation upon it wherein the jury returned a verdict of “guilty of [certain specific facts]” *without* asking the bench to apply the law, was frequently employed by the Quakers and by jurors in trials for seditious libel. See below, Chapters 6 and 8.