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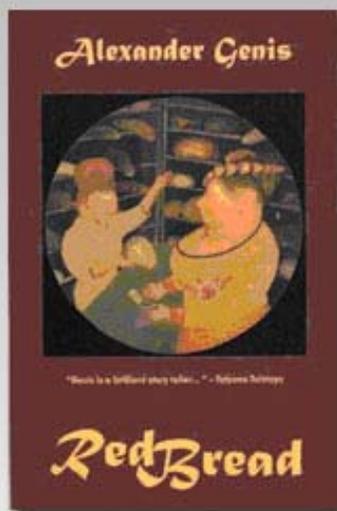
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THE PEDIGREE OF AMERICA'S CONSTITUTION: AN ALTERNATIVE EXPLANATION

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Abstract: *The paper explores alternative explanations to the origins of the American constitution. The authors' first-hand experience in "pirate" radio broadcasting takes them on an unexpected research journey, which leads them to the discovery of an "alternative" figure that may have been at the basis of modern constitutional democracy.*

At this time and in this forum, raising controversy over inspiration for the United States Constitution might appear to be somewhat puzzling, since it would seem that this matter was settled long ago. Therefore, any new answers to this question would appear to be better relegated to "fringe" discussions. However, in this instance the person who redirected the authors' attention to reexamine this issue was a late United States Supreme Court Justice.

While traditional explanations for this Constitutional inspiration offer links to the Magna Carta of 1215; the English Bill of Rights of 1689 and the contemporaneous works of John Locke (that were often referenced by Thomas Jefferson in his own writings), Justice Hugo L. Black offered an alternative and somewhat controversial pedigree worth considering (see Dillard 1963: 34-35).

Origins of this Present Work

Origins of the authors' present work examining that pedigree are to be found in an unlikely chain of human events that began in Orwell's year of 1984, for that is when news coverage of pirate radio engineers and broadcasters of the Twentieth Century briefly collided with the history of pirate printers and publishers of the Seventeenth Century.

Beginning in that fabled year of “Big Brother,” a series of international news stories about plans to revive a floating commercial offshore (“pirate”) station slated to broadcast from a ship anchored off the coast of southern England called “Wonderful Radio London International” (WRLI), appeared in both broadcast and print media, over numerous dates following March 1984 (e.g., on the ‘Media Network’ program of Radio Netherlands’ World Service; in *Broadcast* magazine on 23 March and in *Hörzu’s* radio section on 3 August in 1984, as well as on the front page of the *Dallas Times Herald* on 8 July, 1985). From the early 1980s onwards both Gilder and Hagger were to various degrees associated with the revival of the “Big L” station (see Gilder 2003: 100, fn 58).

The original demise of Wonderful Radio London took place on August 14, 1967. “On that day millions tuned in to the last few hours of broadcasting ...” (Gilder 2003: 88). That station died as a result of a drought in advertising revenue that had been brought about by a new draconian censorship law which “made it a criminal offense for British citizens to work for, or to supply an offshore broadcasting station in any form or manner, whatsoever” (Gilder 2003: 106, fn 76). The station’s second coming had been heralded as though it was a new shoot from an old root attempting to break through the same parched soil that had killed the original venture. In the following years, however, that drought had only intensified and by 1985 it raised a basic WRLI question: “Why can you play rock and roll all day on the radio in America, but not in the United Kingdom?”

An Unexpected Education

During August 1985, this impromptu query soon turned into a casual comparative study of licensing history as it relates to the development of copyrights, publishing and broadcasting in the UK and USA (see Gilder 2003: 74-75). When Hagger randomly reached for the *Book of the Year 1968* which happened to be located near to the control board in the WRLI project studio, he began thumbing through its pages and came across an article commissioned by the encyclopedia: “Democracy’s Heritage: Free Thought, Free Speech, Free Press” (Black 1968). The article had been written under the byline of U.S. Supreme Court Justice Hugo L. Black, but had been actually penned by his wife (see Black & Black 1968). Hugo Black had given his wife “three or four very dull books to read to help me in my first draft ...” (Black & Black 1968: 164.) She was prompted to become more interested in her

assignment when the yearbook's publishers, *Encyclopedia Britannica*, offered her husband an additional \$1,000 if he would expand his article (its eventual length was six encyclopedia pages) (Black & Black 1968: 165).

The essence of the Blacks' combined recital is that the story of modern constitutional democracy really began with one John Lilburne, an Englishman who was born around the year 1617 to a family with roots in northern England but raised to the south within the shadow of Greenwich. Their completed article hailed Lilburne as America's prototype 'Founding Father' who became clothed in the role of an activist fighting both inside and outside of the courtrooms of England on behalf of individual "freeborn rights":

... his long fight with the government made him so much a public hero that his opponents could never secure his conviction by a jury, and after some of his parliamentary convictions, the officers holding him in custody had to be protected from the thongs of people who appeared to applaud him as a friend of the people because he was a foe of the government (Black 1968:40).

Prior to 1985, Hagger (who was born in England) had never heard of John Lilburne, but Black claimed that the views and activities of Lilburne and his associates:

... were the natural forerunners, if not the ancestors of the original written constitution of the American states, the U.S. Constitution, and the Bill of Rights. ... The claims of Lilburne ... were well known to Englishmen, their families and friends who left England to settle in the new land of promise in America (1968:41).

Sparked by Black's introduction, Hagger adapted Lilburne's "Freeborn" prefix to his own pen name of "John England" and, together with Gilder and co-founder Genie Baskir (who subsequently named her daughter Jane Lilburne), changed their WRLI project into a "Four Freedoms Federation" to continue this line of research. When the American Express Company sponsored a 1987 tour of the United States with an eighteen-wheeled truck emblazoned "Magna Carta to the Constitution — Roads to Liberty," the Federation challenged that interpretation with the alternative explanation offered by Black, "Americans must know the true origins of their rights in order to ensure they will be preserved" ('Federation tries' 1987) and "Four Freedoms Federation says ... Roads to Liberty Tour does

not contain any of the works of John Lilburne” (‘Activist disputes’ 1987). One year later (31 October, 1988), *Newsweek* magazine contrarily referenced John Lilburne as their lead-in for “A Loss of Liberties: Britain’s War on Terror” (1988: 47). (The article was about a then-new British law based upon ending Lilburne’s hard-won right to remain silent when accused of a crime, because the British would be allowed to interpret the silence of Irish Republican Army detainees as an admission of guilt.)

By 1992 the fledgling Federation had folded, but not before its work had been aired on a weekly radio broadcast over an international network of stations for a period of several years, as well as on a daily cablecast within the U.S. State of Texas for over a year. It had also engaged in political activism in an attempt to modify Texas school history textbooks by offering challenges to their un-amended review for approval. Its work was then kept alive by an offshoot project known as the “John Lilburne Research Institute” (England 1992).

How Hugo Black came to Embrace “Freeborn” John

Hugo Black’s personal interest in John Lilburne had become manifest as early as 1947 within footnote 14 of his U.S. Supreme Court lengthy Dissent in *Adamson v. California*. In that opinion, Black’s focus was centered upon the origins of the Fifth Amendment, which he traced to Lilburne’s 1637 Court of Star Chamber trial in London where attempts had been made to force Lilburne to testify under oath against his own free will. Lilburne’s agitated response was to loudly proclaim his rights as a freeborn Englishman. Leonard W. Levy’s 1968 *Origins of the Fifth Amendment* supports Black’s interpretation of Lilburne:

No one was a greater pamphleteer. Lilburne ... was the catalytic agent in the history of the right against self-incrimination. He appeared at the right moment (1986: 273).

When he wrote his 1947 dissent in *Adamson*, Black was only partially aware of Lilburne’s contributions, but by the autumn of 1953 his interest had really become focused:

Black’s daughter JoJo was always looking for books or ideas that could be helpful to him. In one of her college courses, she read selections from the Levellers ... (Newman 1994: 450).

The Levellers were Lilburne's Seventeenth-Century associates. When Black read JoJo's textbook about their proposed written constitution for England called an "Agreement of the People," of which there were three major revisions and expansions, he came to regard them as "the first real constitutionalists" (Newman 1994: 450). Black claimed in his "Democracy" article (1968: 41) that latter works by the Levellers were ancestors of the U.S. Constitution and Bill of Rights.

Black's consuming passion for Lilburne did not go unnoticed by other Supreme Court Justices or clerks. In 1954, Justice William O. Douglas wrote *An Almanac of Liberty* and devoted the dates of February 13 and 14 (pages 236-237), to a brief survey of Lilburne's activities. When Black read Frank's *The Levellers* in 1955, one of his U.S. Supreme Court law clerks remarked that:

it became one of the most marked-up volumes in his library. ... when he got started talking about the Levellers and especially their leader, John Lilburne ... it was hard to stop him. (Newman 1994: 450)

Towards the close of 1955, the U.S. Supreme Court heard *Ullmann v. United States*, and in March 1956, Douglas wrote a dissenting opinion with Black concurring:

Lilburn marshaled many arguments against the oath *ex officio*, one of them being the sanctity of conscience and the dignity of man before God. (Douglas also cited Lilburne's 1653 publication *The Just Defence*) ... Another fundamental right I then contended for was that no mans conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so (350 U.S. 422).

In 1966, Justices Black and Douglas were joined by Chief Justice Earl Warren in reciting the works of John Lilburne. Between 28 February and 1 March of that year, *Miranda v. Arizona* was argued before the Court. On June 13 Chief Justice Warren gave the Opinion of the Court:

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came, and the fervor with which it was defended. ... The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England These sentiments worked their way over to the Colonies, and were implanted after great struggle into the Bill of Rights (384 U.S. 436).

In 1980, page 388 of William O. Douglas' autobiographical account of *The Court Years — 1937-1975*, again focused attention upon Lilburne's 1637 Court of Star Chamber fight for the same right that became known in America as the Fifth Amendment to the U.S. Constitution.

Reinterpreted Transatlantic Confusion

During the 1960s, the culture of youth began to flow back and forth like tides whose waves lapped against the shores of both Britain and America. With each wave came the byproducts of commercial consumerism. Just as Little Richard had influenced Paul McCartney, so too the collective sounds of the "*British Invasion*" influenced stations such as KLIF in Dallas, Texas, which, in turn, had influenced the creation of Wonderful Radio London funded by Texas entrepreneurs and broadcasting from offshore into England (Gilder 2003:82).

While these entrepreneurs were embracing the Americanized spirit of Lilburne, listeners were imbibing the Americanized spirit of Gerrard Winstanley's Christian Communist Diggers (or the "True Levellers) of 1649 whose name and ideas had been hijacked by a consortium of Haight Asbury Hippies and Hells Angels in San Francisco (Grogan 1972: 237). Rather than continuing Black's advocacy for inalienable human rights based upon the work of Lilburne and the Levellers, these Hippies were mimicking Winstanley's theme in their own slogans of "free food", "free radio" and free everything else in-between.

Yet the British "pirate stations" (which soon became known as "free radio stations") were championing the sentiment of capitalist *laissez faire*, rather than communism tinged with anarchy (see Leonard 1996: 162-3 on formation of the Free Radio Association; Bernstein 2000, which places Winstanley and the Diggers in context with the development of Marxist communism]; and Hill 1984, which places Lilburne, the Levellers and Diggers in context of the seventeenth century]).

Who was John Lilburne?

John Lilburne came to the attention of the English Court of Star Chamber when he imported a book that had been printed and published in Holland, but not licensed by the English authorities. It was this act that resulted in his original arrest, trial and imprisonment of 1637. He would suffer many more arrests and terms of imprisonment throughout his life.

Lilburne fought with Parliamentary forces in the 1640s against the Royalist Cavaliers of King Charles I during England's first Civil War, but he parted company when Oliver Cromwell attempted to turn the former kingdom into a republican military dictatorship. Lilburne reacted by joining with others who were accused by their adversaries of leveling laws so that they were applied equally and without favor. While imprisoned in the Tower of London, Lilburne became co-author of the third edition of a proposed written constitution for England. Cromwell reacted to Lilburne's egalitarian overtures by exiling him from England and jailing him for life upon his return.

Lilburne was fiercely independent in both political thought and action which unsettled many in authority as well as his wife Elizabeth, who on one occasion rescued him from execution (Frasier 1984: 236). In the following century when Member of Parliament John Wilkes (1725-1787) was brought into court the magistrate exclaimed: "God bless me! Friend Wilkes, you are another John." Wilkes asked if the magistrate was referring to John Hampden who Wilkes admired. The magistrate replied: "No, John Lilburne" (Williamson 1974: 67)

Linking Thomas Jefferson with John Lilburne

In his "Democracy" article, Black had linked the ancestry of Lilburne and his associates with America's founding documents (1968: 41), and his claim raises the question as to where Thomas Jefferson fits into the ideological chain? A partial answer had been provided back in 1918 within William G. Stanard's article, "Lilburne-Randolph-Jefferson" published by *Virginia Magazine of History and Biography*.

Jefferson's maternal grandfather was Isham Randolph and in 1717 at Shadwell Parish Church in London he married Jane Lilburne, a first-cousin descendant of Freeborn John. Isham and Jane had two daughters: one married Peter Jefferson (father of Thomas) who named his Virginia family home *Shadwell*. The house burned down in 1770 and it consumed most of Thomas Jefferson's original books and papers. The second daughter of Isham and Jane married Charles Lewis who named a son Charles Lilburne Lewis. That son married Lucy Jefferson, sister of Thomas and they named a son Lilburne Lewis. Randolph Jefferson (brother of Thomas and Lucy) named a son Lilburne Jefferson.

In 1790, Thomas Jefferson's daughter Martha (Patsy) married her second cousin Thomas Mann Randolph and they established their Virginia home at *Edgehill*. The house was named after the site of the first major battle in the English Civil Wars during which Lieutenant-Colonel John Lilburne fought (Frasier 1984: 236).

Unfortunately the two Jefferson nephews who carried the Lilburne name became engaged in a saga resulting in the murder of a slave, which resulted in the suicide of one and the flight from justice of his companion (see Merrill 2004). Aside from acknowledging the existence of his nephew named Lilburne, Thomas Jefferson did not insert any references to his genealogical and political Lilburne pedigree within post-*Shadwell* writings.

Obfuscating Lilburne

In 1988, American author Benjamin Hart wrote about Lilburne in his *Faith and Freedom: The Christian Roots of American Liberty*. While Hart clearly understood the differences between the Levellers and the Diggers and did not confuse the two, he nonetheless paved the way to creating a new religious interpretation of America's heritage. Yet, by 2007, Hart's interpretation (which linked the era of John Lilburne to the formation of America's founding documents) was severed by U.S. author Michael Barone in *Our First Revolution*. Barone leaped over the Lilburne years to 1688-1689 (when Freeborn John and the English republic were both dead and the restored monarchy of England had been captured by the invasion of William of Orange during his so-called "Glorious Revolution"). Barone brushed aside the Levellers and Diggers as being one and the same:

For much of the second half of the twentieth century, academic historians ... have devoted ... attention to the events of 1641-60 ... that brought to the fore radicals who could be seen as ancestors of the Marxist revolutionaries of the Twentieth Century (2007: 2).

Using the pretext of suppressing future 9/11 terrorist acts, America's inalienable freeborn rights are now being swept away with Cromwellian force, and Barone's work seemingly provides academic cover for such political actions, ignoring the libertarian insights of Justices Black, Douglas and Warren (and, by extension, Lilburne). As a result, their names have become anathema in an age of "Big Brother" revisionism that pretends past freedoms had never been fought for nor achieved.

Note

Lilburne is currently spelt by most contemporary writers with an “e”, but most U.S. Supreme Court and historical works spell his surname without an “e”.

References

- Adamson v. California*, 332 U.S. 46 United States Supreme Court — Appeal from the Supreme Court of California. No.102. Argued: January 15-16, 1947 — Decided: June 23, 1947. Dissent: Hugo L. Black (joined by William O. Douglas) (See n.14: (John Lilburn(e)’s trial 3 Howell’s State Trials 1315; 4 id. 1269, 1280, 1292, 1342.)
- Barenblatt v. United States*, 360 U.S. 109 *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit No. 35. Argued: November 18, 1958 — Decided: June 8, 1959. Dissent: Hugo L. Black with whom The Chief Justice and Justice William O. Douglas concur, dissenting (*n.b.* “The memory of one of these, John Lilburne ...”).
- Barone, M. 2007. *Our First Revolution: The Remarkable British Upheaval that Inspired America’s Founding Fathers*. New York: Crown Publishers.
- Bernstein, E. 2000 (1930). *Cromwell and Communism: Socialism and Democracy in the Great English Revolution*. Translated by H.J. Stenning. Nottingham: Spokesman Books.
- Black, H. L. “Democracy’s heritage: Free thought, free speech, free press”, in *Book of the Year 1968*. Chicago: Encyclopedia Britannica, Inc., pp. 39-44.
- Black, H.L., Elizabeth Black. 1968. *Mr. Justice and Mrs. Black, Memoirs*. New York: Random House.
- Dillard, I. 1963. *One Man’s Stand for Freedom: Mr. Justice Black and the Bill of Rights*. New York: Knopf.
- Douglas, W. O. 1954. *An Almanac of Liberty*. Garden City: Doubleday.
- Douglas, W. O. 1980. *The Court Years — 1937-1975, Autobiography*. New York: Random House.
- England, J. 1992. “Who is John Lilburne? Textbooks don’t tell us” in *Startext Ink (Fort Worth Star Telegram [TX])* January 1992, p. 7.
- Frasier, Antonia. 1984. *The Weaker Vessel*. New York: Knopf.
- Gilder, E. 2003. *Mass Media Moments in the United Kingdom, the USSR and the USA*. Sibiu: “Lucian Blaga” University of Sibiu Press.
- Grogan, E. 1972. *Ringolevio: A Life Played for Keeps*. New York: Little/Brown.
- Hart, B. 1988. *Faith and Freedom: The Christian Roots of American Liberty*. Dallas: Lewis and Stanley.
- Hill, C. 1984 (1972). *The World Turned Upside Down: Radical Ideas during the English Revolution*. London: Peregrine (Penguin).
- Leonard, M. 1996. “WRLI”, in *From International Waters: 60 Years of Offshore Broadcasting*. Heswall: Forest Press, p. 397.
- Levy, L L. 1986 (1968). *Origins of the Fifth Amendment*. New York: Macmillan.

- Miranda v. Arizona*, 384 U.S. 436 United States Supreme Court — *Certiorari* to the Supreme Court of Arizona. No 759. Argued: February 28-March 1, 1966 - Decided: June 13, 1966. Opinion of the Court: Chief Justice Earl Warren.
- Merrill, B., Jr. 2004 (1976). *Jefferson's Nephews: A Frontier Tragedy*. Princeton: Princeton University Press.
- Newman, R. K. 1994. *Hugo Black: A Biography*. New York: Pantheon.
- 'Pirate waves: Texans plan North Sea station despite European limits on radio' *Dallas Times Herald*, 8 July, 1985, p.1.
- 'Pop und oldies aus der nordsee' *Hörzu* (Hamburg) 3 August 1984, Radio-TV section 32/84.
- Stanard, W. G. 1918. "Lilburne-Randolph-Jefferson", in *Virginia Magazine of History and Biography* 28, pp 321-324.
- 'The strife on the ocean waves' *Broadcast* magazine [UK], 23 March 1984, p.52.
- Ullmann v. United States*, 350 U.S. 422 United States Court of Appeals for the Second Circuit. Number 58, Argued: December 6, 1955 — Decided: March 26, 1956. Dissent: William O. Douglas) with Hugo L. Black concurring.
- Williamson, Audrey. 1974. *Wilkes: A Friend To Liberty*. New York: E. P. Dutton.