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Towards a New Magna Carta for Early Modern England

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Abstract

This Article examines the influence of the Magna Carta on the development of rights in the Anglo-American common law tradition, especially in the seventeenth century. Originally issued by King John of England in 1215, the Magna Carta set forth numerous rights and liberties that helped shape subsequent developments in the Western law. The Magna Carta and its provisions served as symbolic ideals for English pamphleteers and jurists like John Lilburne and Edward Coke, during the tumultuous period between 1640 and 1660. In this same period, the great poet and philosopher, John Milton, used the Magna Carta as a springboard for a robust defense of freedom of religion, speech, and press that would prove prophetic for the Anglo-American common law.

INTRODUCTION

In his splendid chapter in this volume, Professor John Baker shows that the Magna Carta of 1215/25 was a critical early source of common law rights and liberties that later Parliaments, courts, and jurists slowly made ever more real and inclusive.¹ In his equally splendid chapter herein, Professor R.H. Helmholz shows that charters and other formal declarations of rights and liberties were quite common in the medieval *ius commune* of the Continent, too, and they may well have influenced the development of rights in the medieval common law, if not in the Magna Carta itself.²

Both of these eminent historians are part of a growing cadre of scholars who have shown that the Middle Ages were a fertile seedbed for the growth of rights and liberties in the Western legal tradition.³ The Magna Carta and its immediate medieval progeny

¹ See chapter by J Baker herein, pp 00-00.

² See chapter by R Helmholz herein, pp 00-00.

³ See detailed recent sources and discussion in J Witte and F Alexander (ed), *Christianity and Human Rights: An Introduction* (Cambridge, 2010) and classic studies of B Tierney, *The Idea of Natural Rights*:

made ample provision for early forms of jury trial, fair taxation, various criminal procedural protections, rights of marriage, private property, and inheritance, freedom of trade, travel, and commerce, freedom of the church, and more.⁴ Particularly prescient for later Western constitutionalism were Articles 39 and 40 of the 1215 Magna Carta (Articles 29 and 30 in the better known 1225 version): ‘No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.’ ‘To no one will We sell, to none will We deny or delay, right or justice.’⁵ To be sure, Magna Carta and other medieval charters were no comprehensive modern statements of rights and liberties. Particularly the fundamental freedoms of religion, speech, press, and association, Professor Baker shows, though taken for granted today, were only narrowly drawn even in the most progressive of medieval legal texts. And many other commonplace rights today, particularly those set out in the 1966 International Covenants on Civil and Political Rights and on Social, Cultural, and Economics Rights were hardly prefigured at all in the Middle Ages.

A number of historians have now begun to map and measure how we got from there to here – how these medieval seeds of rights and liberties eventually grew into the thick forest of human rights norms in place today. In this chapter, I focus on one important stage in this growth of rights in the common law tradition, namely seventeenth-century England.⁶ This was a time, not unlike the early thirteenth century, when chronic royal abuses prompted the clergy, aristocracy, and military to join Parliament in rebelling against the King and demanding greater liberty. This was also the time when jurists like Sir Edward Coke and political thinkers like John Milton pressed not only for the restoration of the old Magna Carta but also for the preparation of a new Magna Carta that embraced even more rights and protected even more English subjects than its medieval ancestor. While no new Magna Carta came forth, the old Magna Carta was given vibrant new life in the turbulent seventeenth century, and many of the other provocative rights ideas, especially those concerning freedom of religion, speech, and press, gradually made their way into the common law. They were reflected in early English documents like the Petition of Right (1628) and eventually in the Bill of Rights and Toleration Act of 1689 as well. And these rights ideas also entered directly into the many founding seventeenth-century charters of colonial America, Canada, and other

Studies on natural rights, natural law, and church law, 1150-1625 (Grand Rapids, MI, 1997); H Berman, *Law and Revolution: the formation of the Western legal tradition* (Cambridge, MA, 1983).

⁴ See J Holt, *Magna Carta* (Cambridge, 1965); A Pallister, *Magna Carta: the heritage of liberty* (Oxford, 1971).

⁵ In A Howard, *Magna Carta: Text and Commentary* (Charlottesville, VA, 1964), 13-16, 43.

⁶ For earlier treatments, see M Ashley, *Magna in the Seventeenth Century* (Charlottesville, VA, 1965); H Butterfield, *Magna Carta in the Historiography of the Sixteenth and Seventeenth Centuries* (Reading, 1969); F. Thompson, *Magna Carta: its role in the making of the English constitution* (Minneapolis, 1948).

common law colonies of the British Empire, anchoring their extensive bills of rights in local colonial laws and in post-revolutionary constitutions.⁷

THE ENGLISH REVOLUTION

In 1640, the English ‘world turned upside down’.⁸ For the first time in eleven years, King Charles called Parliament into session, and the members erupted in unprecedented fury against decades of royal abuses. The landed aristocracy and merchants had chafed under oppressive taxation, property confiscations and strangulating regulations of trade. Clergy and laity had suffered under harsh new establishment laws that drove religious nonconformists first out of their families, pulpits and churches, then out of England altogether. Much of the country had come to resent the increasingly belligerent enforcement of oppressive royal measures by the prerogative courts – Star Chamber, Admiralty, High Commission and Requests. When finally called into session, Parliamentary leaders seized power by force of arms, and civil war erupted between the supporters of Parliament and the supporters of the monarch. The Parliamentary party prevailed and passed an act ‘declaring and constituting the People of England to be a commonwealth and free state’. The Commonwealth Parliament abolished the kingship, and the deposed King Charles was tried, convicted for treason and executed in 1649. Parliament also abolished the aristocratic House of Lords and declared that ‘supreme authority’ resided in the people and their representatives. ‘Equal and proportional representation’ was guaranteed in the election of local representatives. The Church of England was formally disestablished.

This radical Commonwealth experiment lasted only until 1660, when the monarchy, Anglican establishment and pre-revolutionary law were all restored. But in that brief twenty years, the Commonwealth saw an avalanche of new writings that would prove prescient for the eventual expansion of rights in the common law tradition. More than 22,000 pamphlets, sermons and other tracts were published from 1640 to 1660, many denouncing the tyranny of church and state and calling for more robust protections of the ‘people’s rights and liberties’.⁹

⁷ See further the chapter by D. Little herein (pp 00-00) and my *The Reformation of Rights: law, religion, and human rights in early modern Calvinism* (Cambridge, 2007), 277-319.

⁸ C Hill, *The World Turned Upside Down: radical ideas during the English revolution* (reprinted edition, New York, 1988). This chapter is drawn in part from my *The Reformation of Rights*, 209-275, and used with permission of Cambridge University Press.

⁹ See *Catalogue of the Thomason Tracts in the British Museum* (London, 1906); C Gillett (ed), *Catalogue of the McAlpin Collection of British History and Theology: index* (New York, 1930). See samples in W Haller, *Tracts in the Puritan Revolution, 1638–1647*, 3 vols (New York, 1934); D Wolfe (ed), *Leveller Manifestoes of the Puritan Revolution* (New York, 1944); A Woodhouse, *Puritanism and Liberty, Being the Army Debates (1647–9) from the Clark Manuscripts* (second edition, Chicago, IL, 1951). I have

Many pamphleteers pointed first to the Magna Carta with its guarantee that ‘the church of England shall be free and shall have all her whole rights and liberties inviolable’ and that all ‘free-men’ shall enjoy sundry rights and liberties. For some pamphleteers, like Sir Henry Vane, the Magna Carta was a pristine statement of ‘those fundamental laws or liberties of the nation, which are so undeniably consonant to the law of nature, or light of reason’.¹⁰ Vane and others advocated extending these fundamental guarantees to all peaceable churches, not just the Church of England, and to all English subjects, not just aristocratic ‘freemen’.¹¹ Puritan leader, John Lilburne, was an ardent champion of this view, and he called Magna Carta ‘the birthright’ of every Englishman. In pressing for greater protection of public, private, penal, and procedural rights alike, he declared: ‘I build upon the Grand Charter of England,’ especially its famous Articles 29 and 30. While ‘I am no freeman ... I have as true a right to all the privileges that do belong to a freeman, as the greatest man in England.’¹²

Some leading common law jurists of the day shared this view. In 1616, for example, Sir Francis Ashley, a barrister in the Middle Temple, declared that, on account of the Magna Carta, all English subjects “have property in our goods, title to our lands, liberty for our persons, and safety for our lives.... [B]y force of this statute every free subject may have remedy done to his persons, lands, or goods. And not only so for that would but give recompense for a wrong done, but this statute also prevents wrongs, for by virtue hereof, no man shall be punished before he be condemned, and no man shall be condemned before he be heard, and none shall be heard but his just defense shall be allowed.”¹³ Similarly, Sir Edward Coke, the greatest English jurist of his day, called the Magna Carta not just a dusty and dispensable agreement foisted onto King John by the barons, as some of his colleagues were calling it.¹⁴ It was the ‘Great Charter of the Liberties of England,’ and ‘the principal ground of the fundamental laws of England,’ said Coke. Neither the King nor Church nor Parliament could breach its fundamental principles. ‘Magna Carta is such a fellow that he will have no sovereign.’¹⁵ In his monumental *Institutes of the Laws of England* (1628), Coke sought to make good on

modernised the spelling of quotations from old English sources, but have retained the original spelling of the titles. See discussion in W Haller, *Liberty and the Reformation in the Puritan Revolution* (New York, 1955); G Yule, *Independents in the English Civil War* (Cambridge, 1958); H Brailsford, *The Levellers of the English Revolution* (Stanford, CA, 1959); G Gooch, *English Democratic Ideas in the Seventeenth Century* (second edition, New York, 1959) and analysis of more recent scholarship in D Wootton, ‘Leveller democracy and the puritan revolution’ in J Burns (ed), *The Cambridge History of Political Thought, 1450–1700* (Cambridge, 1991), pp 412–442.

¹⁰ In J L Malcolm (ed), *The Struggle for Sovereignty: Seventeenth-century political tracts*, 2 vols (Indianapolis, 1999), vol 2, p 536.

¹¹ See Haller, *Tracts*, vol 1, pp 102–107, 111–113, 177–178, 182; vol 2, pp 170ff; vol 3, pp 263–265, 305, 311–315, 365–366; Malcolm (ed), *Struggle for Sovereignty*, vol 2, pp 502–504, 535–542.

¹² In P Gregg, *Free-born John*, repr. ed. (London, 2000), 120–122, 129, 149.

¹³ In Lord Parker of Waddington, *Magna Carta and the Rule of Law* (Jamestown, VA, 1965), p 9.

¹⁴ See esp. his colloquies with Francis Bacon, discussed in Ashley, *Magna Carta*, pp 8–17.

¹⁵ In S Sheppard (ed), *The Selected Writings of Sir Edward Coke*, 3 vols (Indianapolis, IN, 2003), vol 3, p

this claim, by assembling four centuries of English statutes and cases built on the foundation of Magna Carta.¹⁶

Beyond the Magna Carta, the seventeenth-century pamphleteers pointed further to the Petition of Right of 1628, which Coke had also helped to shape. Parliament had pressed this document on a very reluctant King Charles in exchange for their consent to new taxes. The Petition called for no further taxation without the 'common consent' of Parliament; no forced loans from the people; no taking of a man's life or liberty 'but by the lawful judgment of his peers, or by the law of the land'; no taking of a man's land, no imprisonment and no disinheritance without 'due process of law'; no suspension of the writ of habeas corpus; no forced quartering of soldiers or mariners in private homes; no non-statutory crimes; and no use of martial law save in true emergencies. All these 'rights and liberties', the Petition declared, were to be maintained and enforced 'according to the laws and statutes of this realm', without 'prejudice' to the people or to their Parliament.¹⁷

Given that royal abuses continued apace, however, various pamphleteers in the 1640s and 1650s called for further and stronger rights documents. Magna Carta 'is but a part of people's rights and liberties,' wrote Puritan leader William Walwyn to his colleague John Lilburne; and through repeated royal abuses it has 'become a very blotted book.' We need 'a new Magna Carta' that provides sturdier safeguards against 'the tyranny of Crown, Church and Commonwealth'.¹⁸ Walwyn and Lilburne thus joined forces with Richard Overton and Thomas Prince in 1649 to draft an *Agreement of the Free People of England*, which was popularly called 'a new Magna Carta'.¹⁹ The 1649 Agreement was in reality a proposed new English constitution. It focused carefully on the forms and functions of government, calling for a representative Parliament, with annual election of members and no member serving consecutive terms. All persons were to be eligible to run for office, save Catholics and foreigners. Interference in elections by anyone was a serious crime. Parliament was to stick to its clearly enumerated powers, including importantly the power to impose taxes only at an 'equal rate' 'upon every real and personal estate'. Parliament could not interfere with the judiciary or executive or interfere in military matters, beyond appointment of generals and raising military revenues when needed. Enumerating and limiting the powers of government was considered essential to protecting the people's rights.²⁰

Enumerating the people's rights in full was also considered essential. The 1649 Agreement added to Magna Carta and the Petition of Right several rights that would

¹⁶ In *ibid.*, vol 2, pp 745-914 with analysis in H Berman, *Law and Revolution II: the impact of the Protestant reformations on the Western legal tradition* (Cambridge, MA, 2006), pp 214–216, 238–245, 257–260, 263–269; D Parsons, *After Runnymede: Magna Carta in the Middle Ages* (Charlottesville, VA, 1965).

¹⁷ C Stephenson and F Marcham (eds), *Sources of English Constitutional History from AD 600 to the Present* (New York, 1972), pp 450–453.

¹⁸ Haller, *Tracts*, vol 3, pp 313-315.

¹⁹ In Wolfe, *Leveller Manifestoes*, pp 400–410, with prototypes in *ibid.*, pp 223–234 and 291–303.

²⁰ *Ibid.*, pp 139, 317.

become fundamental in the later common law tradition. A strong new religious freedom clause prohibited

any laws, oaths, or covenants, whereby to compel by penalties or otherwise any person to anything in or about matters of faith, religion or God's worship or to restrain any person from the profession of his faith, or to exercise of religion according to his conscience.

Also included was a guarantee of freedom from compulsory tithes and appointed clergy and freedom for members of each parish to elect and contract with their own ministers. In other pamphlets, the authors of the Agreement had also called for freedom from compulsory oath-swearing and military service for the conscientiously opposed, freedom from 'a single form of church government' enforced by excommunication, and a guarantee that no one could 'be punished or persecuted as heretical' 'for preaching or publishing his opinion in religion in a peaceable way'.²¹ They had also called for a more general freedom of 'speaking, writing, printing, and publishing' and freedom of the people for 'contriving, promoting, or presenting any petitions' to Parliament concerning their 'grievances or liberties'.²²

In addition to freedom of religion and speech, the Agreement elaborated several criminal procedural guarantees: no prosecution or punishment for crimes in cases 'where no law hath been before provided'; a guarantee of the privilege against self-incrimination; the right to call witnesses in one's own criminal defence; the right to jury trial; no capital punishment 'except for murder' or other 'like heinous offences', notably treason; punishments in non-capital cases that were 'equal to the offence'; and no imprisonment for private debts. Elsewhere, the authors of the Agreement also called for 'just, speedy, plain, and unburdensome' resolution of 'controversies and suits in law', at least two witnesses 'of honest conversation' for capital conviction, and no detention or imprisonment without a warrant.²³

Finally, the Agreement protected commerce, business and private property. It included guarantees of tax- and excise-free domestic and foreign trade as well as freedom from government-sponsored business monopolies, a subject of frequent complaint in earlier pamphlets. It forbade any government actions designed to 'level men's estates, destroy property, or make all things common', and required officials to make provision for the poor and restore to the families the private estates of criminals, save those who had been executed for treason.²⁴

The authors of the 1649 Agreement and other English pamphleteers pressed these rights not merely as positive rights created by the state, but as 'natural rights'

²¹ Ibid, pp 122–123, 139.

²² Ibid, pp 195, 329.

²³ Ibid, pp 139–140.

²⁴ Ibid, pp 268–270, 288–289.

created by God and deserving of constitutional protection. As Richard Overton put it in 1646:

For by natural birth, all men are equally alike born to like property, liberty, and freedom, and as we are delivered of God by the hand of nature into this world, everyone with a natural, innate freedom and property (as it were writ in the table of every man's heart, never to be obliterated) even so we are to live, everyone equally and alike to enjoy his birthright and privilege; even all where God by nature hath made him free. ... [E]very man by nature [is also] a King, Priest, and Prophet in his own natural circuit and compass, whereof no second [person] may partake, but by deputation, commission, and free consent from him whose right and freedom it is.²⁵

The most elaborate defence of this expanded corpus of rights and liberties came from the pen the great English poet and philosopher John Milton, who advocated 'true and substantial liberty for all'.²⁶ While he touched on various rights, Milton's most memorable and influential arguments concerned the rights and liberties of religion and speech. Those will be my focus here in this brief summary of his position.

MILTON ON RELIGIOUS RIGHTS AND LIBERTIES

Freedom of conscience and religious exercise

Milton regarded freedom of conscience and religious exercise as a God-given and God-directed natural right. By being created in God's image, Milton argued, each person has something of the 'mind of God' within him, a 'conscience or right reason' that gives him access to divine truth and direction and a will and capacity to act on that knowledge. Each person has the law of God written into his or her conscience, heart and mind. By this law, each person knows the duties owed to God, neighbour and self. He knows what is right and wrong, good and bad, holy and evil. He knows the cardinal virtues of justice and charity, wisdom and prudence, sincerity and industry.²⁷

Each person, however, has been created with a natural freedom to choose how to act on the knowledge taught by this natural law of conscience. God did not make persons as blind automatons who loved him out of reflex or servile subjects who obeyed him out of fear. Rather than constrain each person under 'a perpetual childhood of prescription', Milton wrote, God 'trusts him with the gift of reason to be his own chooser'. Animals and plants are created simply to obey the laws of nature around them. Persons are created with the freedom to accept or reject the natural laws of conscience or adopt

²⁵ In Haller, *Tracts*, vol 1, p 113.

²⁶ J Milton, *Areopagatica and Other Political Writings*, ed J Alvis (Indianapolis, IN, 1991), pp 408–409.

²⁷ J Milton, *The Complete Prose Works of John Milton*, ed D Wolfe, 8 vols (New Haven, CT, 1953–1982), vol 2, pp 415-518; vol 6, pp 128-133, 351–354; vol 7, pp 241–244.

a wide range of conduct in between. That is what it means to be created as an image-bearer of God, with a natural reason and will that reflect something of the reason and will of their Creator.

When God gave [Adam] reason, he gave him freedom to choose, for reason is but choosing; he had been else a mere artificial Adam, such an Adam as he is in the motions. We ourselves esteem not of that obedience, or love, or gift, which is of force: God therefore left him free, set before him a provoking object, ever almost in his eyes, herein consist his merit, herein the right of his reward, the praise of his abstinence.²⁸

None of this changed with Adam's fall into sin, Milton continued. The natural law remains inscribed on the conscience of each person, and the natural freedom to act in response to these commandments likewise remains in place. 'A kind of gleam or glimmering' of the natural law 'remains even in the most evil of men', though it is often too dim and diffuse to provide much direction for the earnest pursuit of truth, justice and goodness. To find their way to true virtue, to true love of God, neighbour and self, persons need the fuller spiritual light of God's Word. To exercise their natural freedom meaningfully, they need supernatural direction. 'If there were no God', Milton wrote in rebuke of purely rationalist theories of natural law,

there would be no real dividing line between right and wrong. What was to be called virtue, and what vice, would depend upon mere arbitrary opinion. No one would try to be virtuous, no one would refrain from sin because he was ashamed or feared the law, if the voice of conscience or right reason did not speak from time to time in the heart of every man, reminding him ... that a God does exist, and that everyone must render to him an account of his actions, good and bad alike.²⁹

As both the Bible and other ancient sources make clear, God 'reminded' persons of the natural law of conscience in different ways over time and across cultures. In the time of Noah and his progeny, God largely left persons to live by the natural law of conscience alone – though He occasionally sent angels and oracles, plagues and miracles to drive home His most important commandments.³⁰ In the time of Moses, God elected to give his chosen people of Israel a much fuller 'reminder' and revelation of His law in the detailed ceremonial, juridical and moral laws to govern their relations with God, neighbour and self, to guide their every step on the way to virtue.³¹ Now that the Gospel of Christ has come, however, the Mosaic law has been rendered obsolete. The Gospel teaches the same fundamental lessons of virtue taught by the law of Moses, but

²⁸ Ibid, vol 2, pp 514–521, 527; vol 3, pp 198–206.

²⁹ Ibid, vol 6, 132, 396, 516.

³⁰ Ibid, vol 1, pp 761–768; vol 6, pp 351–381, 515–520.

³¹ Ibid, vol 6, pp 517–519, 666–715; vol 7, pp 273–321.

it guides us by general principle, rather than govern us by specific precept. It sets forth examples and illustrations of how to live by the spirit of the law; it does not set down rules and procedures of how to observe its every letter. It offers the perfect example of Christ to be imitated, but leaves Christ's followers with a mature 'manly freedom' to follow that example in various peaceable ways under the guidance of the Holy Spirit. It restores in all who accept Christ 'the freedom to exercise their faith' in accordance with the duties taught by nature, conscience and Scripture.³²

The state must protect the freedom of conscience and religious exercise of all peaceable persons, Milton insisted. For the state was ordained by God and is formed by political contract for the sake of protecting external order and peace and preserving 'the people's rights and liberties' – including those of religion. The state deals exclusively with 'the body and external faculties of man', 'his life, limbs, and worldly possessions'. The state may set limits on how a man may use his religious rights so that the 'public peace and private rights' of others are respected and protected. State officials may take a person's property by 'just taxes' or by fines or forfeitures following 'due process'. Officials may even use force and violence against the outer man when appropriate and proportionate to punish crimes, to right wrongs or to wage wars.³³

But state officials have no power to use force or violence against 'the inner man and his religion'. No person has 'power to give them such a commission' to anyone else in the social or political contract. Religion is by nature and Scripture the 'unalienable right' of the individual: it cannot be given away or taken away by anyone, especially by a state official. Milton returned to this point repeatedly. 'Both our belief and practice, which comprehend our whole religion, flow from faculties of the inward man, free and unconstrained by themselves by nature [and] incapable of force'; '[N]either traditions nor councils nor canons of any visible church, much less edicts of any magistrate or civil session, but the Scripture can be the final judge or rule in matters of religion'; 'If any man', particularly a political official, 'shall pretend that the Scripture judges to his conscience for other men, he makes himself greater not only than the church, but also than the Scripture, [which is] a presumption too high for any mortal.'³⁴

'Christ hath a government of his own', Milton continued, 'sufficient of itself to all his ends and purposes in governing his church; but much different from that of the civil magistrate.' Christ's government 'deals only with the inward man and his actions, which are spiritual and to outward force not liable'. Through this spiritual government, Christ and his church 'show us the divine excellence of the spiritual kingdom, able without worldly force to subdue all the powers and kingdoms of this world, which are upheld by outward [force] only'. In this Christian kingdom and spiritual government, 'the Gospel should not be made a matter of compulsion, and faith, liberty, and conscience cannot

³² Ibid, vol 6, pp 415–484, 517–524; vol 1, pp 588-589.

³³ Ibid, vol 1, pp 835–836; vol 6, pp 797–799; vol 7, pp 242–247, 262; Milton, *Areopagatica*, p 287.

³⁴ Milton, *Complete Prose Works*, vol 1, p 844; vol 6, pp 797–799; vol 7, pp 242–247, 256–262.

be'. The magistrate has 'neither right nor can do right by forcing religious things'. If he tries, he will get only 'counterfeit performances' and 'feigned exercises' of a false faith.³⁵

It is no answer to this argument, Milton insisted, to point to the example of Old Testament judges and kings, who did use state law and coercive force to govern biblical Judaism. That was the time of the Law. This is the time of the Gospel. That was a time of 'bondage and works', when believers were 'children' for whom 'force was not unbefitting'. This is the time of 'grace, manhood, freedom and faith; to all which belongs willingness and reason, not force'. That was a time when the king was custodian of the two tables of the Decalogue. This is a time when the two tables of Decalogue are the custodians of us all. That was a time when church and state were united, and when kings had a detailed written law of God to apply and 'immediate divine direction' to guide them. This is a time when church and state are separate, and when the law of God lies 'unwritten' in each man's conscience to be discovered and applied for himself. 'If church and state shall be made one flesh again as under the law', said Milton, 'let it be with all considered that God who then joined them hath now severed them.'³⁶

It is also no answer to cite Romans 13 and other New Testament passages that point out that 'the powers that be are ordained by God' and that we must obey them as we obey God. No one doubts that legitimate authorities deserve obedience, Milton allowed, for 'without magistrates and civil government there can be no commonwealth, no human society, no living in the world'. But nothing in Romans 13 'gives judgment or coercive power to magistrates ... in matters of religion'. Indeed, a whole series of biblical passages state the exact opposite. Just read John 4:21–23, Romans 14:5, 9–10, 1 Corinthians 7:23, 9:19, 2 Corinthians 3:17, Galatians 2:16, 4:3, 9–10, 26, 5:13–14 and Colossians 2:8, 16, 23, among many other texts, Milton urged. The force of all these biblical texts read together is that we must obey magistrates, but only so long as they hold to their political contract and stay within their civil jurisdiction – keeping watch over 'taxes', 'revenues', 'bad conduct' and other civil subjects that the New Testament identifies by name. But if magistrates encroach on the spiritual jurisdiction of God, they must be resisted by those whom God has ordained as sovereigns of the spiritual realm on earth, namely, each and every individual Christian armed with the Gospel and its weapons of freedom.³⁷

It is finally no answer to say that each nation must have an established faith, and that the state must work to ensure that the national church remains 'schismless'. Nothing in the New Testament commands this, Milton insisted, and nothing in the history commends it. Indeed, it is far better for the state to tolerate a lively plurality of Christian churches than to impose 'a mum and child-like stupidity of the soul, an unactive blindness of mind upon the people by their leaden doctrine' and 'to persecute all knowing and zealous Christians' who might read Scripture differently. Rather than let 'fresh sprouts of new ideas' spring forth under the bright light of the Holy Spirit, national

³⁵ Ibid, vol 6, pp 612–614, 797–799; vol 7, pp 242–247, 255–268.

³⁶ Ibid, vol 7, pp 251–271.

³⁷ Ibid, vol 6, pp 611–612; vol 7, pp 250–252, 260–263; Milton, *Areopagatica*, pp 162–168.

religious establishments keep the national church in 'frozen captivity' to a 'counterfeit, coerced, and conceited uniformity'. This is no way to discover Christian truth or to prevent religious schism in a nation; rather 'The timeliest prevention of schism is to preach the Gospel abundantly and powerfully throughout all the land, to instruct the youth religiously, to endeavour how Scripture may be easiest understood by all men.' Christian truth will come from 'a free and lawful debate at all times by writing, conference or disputation of what opinion soever, disputable by Scripture'. If such sincere, honest and open disputation on Scripture is not only tolerated but encouraged by the state, Milton argued, 'I trust God will manifest' what is truth and what is falsehood and heresy. Indeed, God's Truth will eventually come riding triumphantly down 'a lane of sects and heresies on each side'.³⁸

Separation of church and state and disestablishment of religion

As this last quote illustrates, Milton tied the principles of freedom of conscience and religious exercise of all peaceable faiths to the principles of separation of church and state and disestablishment of religion. Milton took sharpest aim at the Anglican establishment – with its legally prescribed *Book of Common Prayer*, its Thirty-Nine Articles of the Faith, its Authorized (King James) Version of the Bible and its ornate ecclesiastical laws administered by a network of church courts. Many of these were, in Milton's view, old Catholic traditions that had been absorbed into the 'half papalist' Anglican Church created by Henry VIII a century before. Rather than live by 'the simple Truth' of Scripture and the 'primitive Christianity' of Christ and his apostles, Milton argued, the Anglican Church has fabricated a massive network of 'idle and idolatrous doctrines', 'false and foolish customs', 'erroneous and embellished traditions' all designed to 'entangle' and 'strangle' the free Christian conscience. Rather than lead Christians in a humble and quiet life of charity, prayer and Scriptural meditation, the church has adopted all manner of elaborate liturgies, masses, cults and ceremonies that stink with the 'vomited paganism of sensual idolatry'. Rather than let individual Christians search the Scripture for themselves under the guidance of the Holy Spirit, the church has bound and tied them to calendars and liturgies, rituals and lectionaries, Sabbath days and holy days that smother every breath of private Christian inspiration, imagination and innovation. Those teachings of Christianity that should be indifferent are made essential. Those that should be left discretionary are made dogmatic. All this error and idolatry masquerading as Christianity, Milton charged, has caused a mighty 'wrenching and spraining of the text' of Scripture and a massive 'strangling and choking' of its teachings of Christian liberty.³⁹

Milton further castigated the Anglican clergy for lording it over the laity in worldly luxury and moral laxness. 'To do the work of the Gospel, Christ our Lord took upon him the form of a servant', Milton wrote; 'how can his servant in this ministry take upon him

³⁸ Milton, *Complete Prose Works*, vol 1, pp 779–800; vol 7, pp 249–250.

³⁹ *Ibid*, vol 1, pp 520–532; see also *ibid.*, pp. 561, 584–585, 592–593 and notes in Don M. Wolfe, *Milton in the Puritan Revolution* (New York, 1941), pp 45-49.

the form of a lord?' But lords the Anglican clergy have certainly become – and not just those high clergy in the House of Lords. In every house of worship, Anglican clergy have become landed aristocrats, with vast properties, powers and prerogatives at their call. Milton railed in disgust at the Anglican clergy, calling them 'a tyrannical crew', a 'corporation of imposters', 'halting and time-serving' 'Egyptian taskmasters of ceremonies', 'a heap of hard and loathsome uncleanness', a 'whip of scorpions', 'illiterate and blind guides', 'a wasteful band of robbers', 'a perpetual havoc and rapine', 'a continual hydra of mischief and molestation', 'importunate wolves', 'wild boars', 'locusts and scorpions', 'downtrodden vassals of perdition' and on and on.⁴⁰

Milton singled out for special criticism the Anglican clergy's exemptions from taxation and immunities from prosecution, the high compulsory tithes and religious taxes that supported their extravagant sanctuaries, sinecures and cemeteries, their lush clerical gowns, surplices and tippets, their ornate icons, artwork and altars, all neatly railed off from any touch or use by the laity. He attacked the English church courts, those hated and powerful tribunals that controlled the intimate and interior lives of the laity with their 'dreadful works of holy discipline, censure, penance, excommunication, and absolution', to say nothing of their rapacious fees and fines. These clerical 'leeches' 'suck and suck the kingdom' of its life blood. 'What a mass of money is drawn from the veins into the ulcers of the kingdom this way; their extortions, their open corruptions, the multitude of hungry and ravenous harpies.' What a 'loud stench of avarice, simony, and sacrilege' belches out of these 'unctuous and epicurean paunches' purporting to be Christ's humble servants in his church, even while living as lavish lords and preying as greedy thieves. All such clerical exploitation violates not only our religious liberty 'but all the right[s] we have to our own bodies, goods, and liberties guaranteed since the Magna Carta'.⁴¹

Even if none of these abuses obtained, why should there be a 'state church' and 'statute-religion' at all, Milton demanded?⁴² Why should Christianity of any sort be established by human laws? Why should its clergy be ruled by secular magistrates? After all, Christ's most famous political admonition was to 'render to Caesar the things that are Caesar's, and to God the things that are God's' (Matt. 22:21). The early church lived faithfully by this Gospel teaching for three centuries, and thrived and grew despite the bitter persecution of those 'separated Caesars'. It was the first Christian emperor, Constantine, who in the fourth century first defied this basic political teaching of Christ, Milton charged. It was Constantine who first took 'the things that are God's' and made them 'the things that are Caesar's'. It was Constantine who prescribed the church's doctrines and liturgies and punished its heretics and enemies. It was Constantine who convened the church's councils and synods and controlled its polity and property. It was Constantine who appointed the church's bishops and clerics and collected its tithes and

⁴⁰ Milton, *Complete Prose Works* vol 1, pp 113–115.

⁴¹ *Ibid*, vol 1, pp 589–593, 603–617; vol 3, pp 239–241.

⁴² *Ibid*, vol 7, p 257; see also *ibid.*, vol 3, pp 1–9, 92–97, 130–136, 196, 259–334.

taxes. What Constantine and his successors first established in ancient Rome, the church has maintained for more than a millennium, with only a few brave Church Fathers and early Reformers dissenting. To this day, most Protestants and Catholics alike lie 'enthralled' and 'seduced' by Constantine's 'lavish superstition' – that both the establishment of Christianity by law and the rule of church by state are essential to the survival of each.⁴³

But Christianity does not need laws to survive, nor does the church need the state to thrive. The very opposite is true, Milton insisted. Separation and division -- not 'conflation and confusion' – of church and state are the proper way of Christ. We 'should not suffer the two powers, the ecclesiastical and the civil, which are so totally distinct, to commit whoredom together, and, by their intermingled and false riches, to strengthen indeed in appearance, but in reality to undermine, and at last to subvert one another'. It is 'absurd' that Christians have 'not learned to distinguish rightly between civil power and ecclesiastical'. The Bible makes clear that 'Christ's kingdom is not of this world', and his church 'does not stand by force or constraint, the constituents of worldly authority'. Nor is Christ's church like some 'vine' that 'cannot subsist without clasping about the elm of worldly strength', or some building that cannot support itself 'without the props and buttresses of secular authority'. To the contrary, Milton argued, 'it is because the magistracy and church have confuse[d] their jurisdictions' that 'all Christendom' has reaped a 'bitter harvest' of crusades and wars, inquisitions and pogroms, bloodshed and persecution. It is because church and state have 'conflated' their powers and offices that the church has become 'a pontifical despotism decked, under pretence of religion, with the spoils of civil power, which it has seized unto itself contrary to Christ's own precept'.⁴⁴

'Christ's own precept' is that the 'main foundation' of the church and 'the complete text' of the Christian faith is the Bible. It is blasphemy for anyone to add to or subtract from the Bible by human laws and traditions in their governance of the church and the Christian faith. Christ's further precept is that the true rulers of the church are each and every humble individual Christian who meditates on and lives by the 'simple Truth' of the Bible. Every Christian is called by Christ to be not only his prophet and his priest, but also his king, his ruler, within the church. Every Christian has the 'Word of God before him', 'the mind of Christ within him' and 'the Spirit of God' to guide him in his understanding. 'No man or body of men in these times can be the infallible judges or determiners in matters of religion to any other men's consciences but their own.' This is 'God's own birthday gift to us', 'the true birth-right of every true believer', the 'sovereign prerogative' of every 'kingly individual' called to rule in Christ's church.⁴⁵

⁴³ Ibid, vol 1, pp 551–557, 573–577; vol 2, pp 257–258; vol 7, pp 260–268, 279–280, 290–294, 307–308; Milton, *Areopagatica*, 157–158, 162–165, 197–198.

⁴⁴ Milton, *Areopagatica*, pp 111–112, 406–407; Milton, *Complete Prose Works*, vol 1, p 476, 554; vol 6, pp 798–799; vol 7, pp 253, 255, 262–268; Milton, *Areopagatica*, pp 111–112.

⁴⁵ Milton, *Complete Prose Works*, vol 1, p 844; vol 6, pp 797–799; vol 7, pp 242–247, 262; Milton, *Areopagatica*, p 157.

But the church is more than the sum of its conscientious kingly parishioners just as the state is more than the sum of its sovereign individual subjects. Here Milton converted the familiar contract theory of the state into a contract theory of the church as well. Just as each state is voluntarily created by a consensual covenant among like-interested individuals in the state of nature, so each church is created by 'common consent' among 'like-minded believers', who have 'willingly joined themselves in a covenant of union'. Just as state subjects agree to alienate a portion of their natural rights to elected state authorities in order to secure peace, order and proper rule of law in the community, so church members agree to share a portion of their religious rights with other church members in order to secure proper preaching, discipline and diaconal care in their communion. Just as citizens of the state may remove elected political officials who betray their office and become tyrants, so parishioners in the church may defrock elected church officials who betray the Scripture and become tyrants or heretics. Just as individuals may choose to enter, leave or abstain from a local political community without compulsion or deterrence, so individuals may choose to enter, exit or stay outside the local church without coercion or penalty.⁴⁶

This analogy between the formative contracts of church and state was not perfect, of course. Milton insisted that each church was bound to follow the detailed teachings and examples of the Bible in a way that the state was not. As he read the Bible, this meant that preachers, presbyters and deacons were fine, but that prelates, bishops and monks were not. It meant that congregational elections for church offices were required, and that prelatical or political appointments of clergy were barred. It meant that congregational meetings were expedient, but that general councils were unfounded. It meant the voluntary contributions to the church's coffers were encouraged, but that mandatory tithing of parishioners was banned. It meant that clerical marriage was allowed, but that mandatory celibacy was not. It meant that clerical proclamations on justice were fine, but that 'clerical disturbance in civil affairs' was not. It meant that church co-operation with the state was licit, but that church dependence on the state was 'poison'. And it meant that spiritual discipline, even 'the horrid sentence' of excommunication, was allowed to the church, but that disciplinary actions 'against the life or limb, or any worldly possession' of church members were strictly forbidden to and in the church.⁴⁷ In scores of pages, scattered over twenty years of publications, Milton sought to prove one-by-one from Scripture that these were the practices and prohibitions that Christ decreed for his church. But he insisted that the exact combination and elaboration of these biblical teachings be left entirely to each

⁴⁶ Milton, *Complete Prose Works*, vol 3, pp 240–247; vol 6, pp 563–574; vol 7, p 245; Milton, *Areopagatica*, pp 111–112.

⁴⁷ Milton, *Complete Prose Works*, vol 1, pp 835–847; vol 3, pp 240–241; vol 6, pp 573–613; vol 7, pp 244–247, 258, 273–321.

congregation's discretion. He insisted further that each individual Christian be left free to be a 'church of one' so long as he or she lived by the Bible.⁴⁸

For Milton, 'real and substantial' religious liberty thus consisted of five main principles. First, it required liberty of conscience for all peaceable biblical believers, the liberty of each person to search out and act on the natural law within him and the biblical texts before him without coercion, control or penalty from either church or state. Liberty of conscience, Milton wrote, is our 'dearest and most precious' right.⁴⁹ Second, religious liberty meant freedom of the individual to worship, dispute and publish freely on the strength of his faith, and freedom to enter and exit a church and community of his own choice or to forgo church association altogether. Third, religious liberty meant state toleration of every peaceable church that was grounded, however unusually, on a sincere and earnest interpretation of the Bible. Fourth, religious liberty meant separation of the offices and operations of church and state, leaving the church free to organise and support itself voluntarily and democratically, and relieving the state of the burden of collecting tithes, operating courts or maintaining properties on the church's behalf. Finally, religious liberty required that there be no legal establishment of a single national religion, but instead a free and open disputation in the nation of a plurality of religions based on Scripture.

Here, in early modern Christian terms, Milton had set out the core principles of religious liberty that would come to dominant in ever more inclusive forms the common law in the following centuries – liberty of conscience, free exercise of religion, equality of a plurality of faiths before the law, separation of church and state, and (outside the United Kingdom) disestablishment of a national religion. Each of these five principles of religious liberty set forth by Milton had ardent advocates among other English writers of his day. Some fellow Englishmen pressed one or two of these principles further than Milton dared. But few writers embraced all five of these religious liberty principles together, or cast them in such strident and articulate terms as Milton. Only Roger Williams, the founder of Providence and Rhode Island,⁵⁰ could match Milton in the power and depth of his ideas of religious freedom, and their prophetic prescience for the common law and broader Western legal tradition.

Just because of the radicality of these religious liberty principles, however, Milton's views did not carry the day. Indeed, they were often cavalierly ignored by other Puritan reformers in the Commonwealth.⁵¹ Even Oliver Cromwell, who supported Milton and appointed him as his Secretary for Foreign Languages for nearly a decade, could not adopt his principles for religious liberty despite Milton's repeated prodding. The Restoration monarchy in 1660 rejected every one of them out of hand, and returned

⁴⁸ Ibid, vol 6, p 568.

⁴⁹ Ibid, vol 7, p 456.

⁵⁰ See the chapter in this volume by David Little (pp 000–000).

⁵¹ See Haller, *Tracts*, vol 1, pp 128–139.

England to a firm Anglican state establishment, featuring close regulation, stern oaths, stiff tithes and vicious repression of dissenters. But three decades later, in the Glorious Revolution, Miltonian religious liberty principles came to partial constitutional form in the famous Toleration Act of 1689 and to even more vivid expression in John Locke's *Letter Concerning Toleration*.⁵² And the eighteenth-century American constitutional experiment of religious freedom took Milton's ideas as axiomatic, and converted them into state and federal constitutional guarantees.⁵³

MILTON ON FREEDOMS OF SPEECH AND PRESS

Like his defence of religious freedom, Milton's defence of freedom of speech, rested on the same fervent belief in Truth, with a capital T – The Truth of God and Scripture, the Truth of reason and nature, all to be discovered by free and robust education and inquiry, experiment and debate. Only when freed from the tyranny of prelates and monarchs, of tradition and custom, of ignorance and error, of censors and licensors, he believed, could divine, natural and human Truth finally be discovered and developed. Milton also premised his logic of freedom of religion and speech on a fervent faith in the inherent goodness and potential of every English man and woman. Once freed from the tyrannies of church and state and of mind and heart, once steeped in the virtues of Scripture and nature and of learning and literature, every Englishman would seize the Truth with alacrity and soar to splendid new heights of understanding and accomplishment, inquiry and learning, self-rule and self-direction.

It takes a bit of historical explanation to appreciate the radicality of Milton's vision of the virtues of 'the fierce encounter of Truth and falsehood' through free speech and press. Before 1640 in England, truth was not so much debated as declared, and public platforms and publications for doing so were reserved to those licensed by the government. To be sure, England knew the classical Greek and Roman teachings on *rhetorica*, *parrhesia* and *licentia*, and these ancient ideas were given ample ventilation by scholars of the day.⁵⁴ A century before, in the heady days of Henry VIII's reformation, Protestants and humanists alike had exploited these earlier rhetorical traditions as well as the prophetic traditions of the Bible to issue their many sermons and pamphlets. But with the Elizabethan settlement after 1559, and even more with the establishment policies of James I from 1603 on, much of this radical rhetoric was subject to increasing

⁵² In Stephenson and Marcham, *Sources*, pp 607–608. See further J Waldron, *God, Locke and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge, 2002); J Perry, *The Pretenses of Loyalty: Locke, Liberal Theory and American Political Theology* (Oxford, 2011).

⁵³ See J Witte, Jr and J Nichols, *Religion and the American Constitutional Experiment* (third edition, Boulder, CO, 2011), ch 3.

⁵⁴ D Colclough, *Freedom of Speech in Early Stuart England* (Cambridge, 2005), pp 12–76.

restriction. The dominant legal assumption, though not always the social reality, was that public and published speech required prior government licences.⁵⁵

The proper place for freedom of speech, petition and debate was thought to be in Parliament. There, traditions going back to the thirteenth century gave members licence to speak freely, frankly and forcefully within the confidence of their chambers in order to offer their best counsel to the Crown and to craft the best policies for the Commonwealth. Thus, when James I and Charles I suspended the Parliaments for a time and then tried to curtail the speech of its members when called, Parliament rose up in indignant protest. The members issued several striking documents defending these ancient rights of free Parliamentary speech. The Form of Apology and Satisfaction of 1604, for example, declared to James I that these Parliamentary 'privileges and liberties' were not a 'mere privilege' that could be restricted or removed by the Crown. 'Full and frank speech' was a 'fundamental privilege', 'our right and due inheritance, no less than our very lands and goods'.⁵⁶

When King James I again sought to curtail this freedom of speech, Sir Edward Coke confronted him in an epic speech in the House of Commons in 1621. Members of Parliament, Coke declared, have an 'ancient right' and 'undoubted inheritance' to a 'freedom to speak what we think good for government, either in church or commonwealth and what are the grievances' therein that need be redressed. Citing Magna Carta and several later medieval statutes and cases, Coke argued that Parliament must represent and speak for the whole people, and thus that 'the freedom of the House is the freedom of the whole land'; 'We serve here for thousands and ten thousands'.⁵⁷ Such views, which landed Coke and other members in prison, figured prominently in the formal Commons' Protestation of 1621 and were echoed again in the many speeches surrounding the Petition of Right of 1628. Anyone who wanted more could read with profit the pages on point in Coke's *Institutes*.

Even as restricted, the laws governing freedom of speech in Parliament were considerably more liberal than those governing public speech, especially publication. For a private person to print a book was akin to minting a coin; it always required a prior government licence. Without a licence, the publication was presumed a counterfeit, and printing, selling or possessing it was an actionable crime.⁵⁸ King Henry VIII had put such a licensing law in place already in 1530, and this early law was broadened and tightened in a dozen later acts culminating in Charles I's Star Chamber Decree of 1637. Under this latter law, the Crown's Stationers' Company issued the licences to print, the Bishop of London or Archbishop of Canterbury reviewed and censored the illicit books,

⁵⁵ C Clegg, *Press Censorship in Elizabethan England* (Cambridge, 1997); idem, *Censorship in Jacobean England* (Cambridge, 2001).

⁵⁶ See Colclough, *Freedom of Speech*, pp 122–23, 138–168.

⁵⁷ Quotes in *ibid*, pp 172–181.

⁵⁸ Haller, *Liberty and Reformation*, pp 134–142.

and the Court of Star Chamber punished the unlicensed printers and authors, sometimes quite severely. The Stationers' Company had wide jurisdiction to 'search what houses and shops' they saw fit and to seize illegal publications and papers and to seek prosecution of their authors, printers and distributors before the Star Chamber.⁵⁹

This traditional licensing law, though not revoked, ground to a halt during the first years of the Long Parliament, with the abolition of the Court of Star Chamber in 1641. This resulted in a massive torrent of new publications, the Puritans' and Milton's early writings on freedom among them. But on June 14, 1643, the Long Parliament issued a new licensing order in an effort to stamp out the 'many false, forged, scandalous, seditious, libellous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and government'. The Order left it again to the Stationers' Company to issue the licences. But now a dozen Protestant ministers, assigned by Parliament, replaced the Bishop of London as the censors of books on religious matters, and Parliament itself replaced the Star Chamber as the final enforcer of the licensing law.⁶⁰

It was in response to this new law that Milton wrote his famous *Areopagatica: a speech by Mr. John Milton for the liberty of unlicensed printing*, which would become a classic defence of free speech and press in the common law tradition. Milton laid out his argument in brilliant rhetorical layers. He started with an historical argument that book licensing and censorship were papal tools sharpened by the Inquisition that had no place in Protestant England. Ancient Greece and Rome knew no such system of licensing and censorship, save in cases of outright blasphemy or libel, and the early Church Fathers and Christian emperors held to this policy. It was the medieval Catholic papacy that first introduced the censor and the index of prohibited books – particularly after the invention of the printing press and the publications of early reformers like John Wycliffe and John Hus. This system reached its height when the papacy called on 'the tyrannous Spanish Inquisition' to enforce the decrees of the Council of Trent. These hated inquisitors 'perfected these catalogues, and expurgating indexes'. They 'rake[d] through the entrails of many a good author' and invented 'new hells' for the many Protestants whom they tortured and killed for their writings.⁶¹

Surely, no self-respecting English Protestant could think of adopting such a system, Milton intoned gravely, conveniently ignoring a century of English Protestants who did: 'I am certain that a state governed by the rules of justice and fortitude, or a church built and founded upon the rock of faith and true knowledge, cannot be so pusillanimous.' After all, it was the great leaders of Parliament who first 'brought on all this free writing and free speaking'. 'You cannot make us now less capable, less knowing, less eagerly pursuing of the truth unless you make yourselves ... less the

⁵⁹ Milton, *Complete Prose Works*, vol 2, pp 158–164, 793–796.

⁶⁰ *Ibid*, vol 2, pp 797–799.

⁶¹ *Ibid*, vol 2, pp 493–505, 529, 537–541, 549–551; vol 1, pp. 668-672.

founders of our true liberty.' Surely, 'freedom of writing' cannot now suddenly 'be restrained by a discipline imitated from the prelates and learned by them from the inquisition'. Surely we did not all join the Reformation cause against Catholic censorship and superstition only to return 'censors to their seats under another name'? Surely, this short 'cruise of truth' has not already run its course, leaving 'freedom of learning' destined to 'groan again' under 'old fetters'.⁶²

Milton's next main argument was that licensing and censorship were impractical to implement and impossible to limit. As the prior experiment of unlicensed printing had made all too clear, censors simply could not keep up with the pace of publication in England, nor stop the flow of illegal foreign books imported in sundry ship holds and saddlebags. Even if they tried, most licensors had neither the wit nor the wisdom to judge many of the writings that came before them. Nor could they be expected to sustain their interest or attention in the task, given the volume of work. Even if the licensors could do their work, the printers could not. They would be forever waiting on the bureaucrats to make up their minds and approve the texts. They would never really know whether they needed licences to reprint old books. Would the Bible, for instance, need a licence, and could it honestly get one given its rather graphic language about sin, sex, and violence? Would the Bible have to be abridged, leaving out, say, the Song of Songs with its preoccupation with female anatomy or the steamy passages on Samson and Delilah? What if an author revises his work or makes a change to the approved copy: were new licences needed or did the old licence need amendment? What if the original licensor was away or had moved on; was a whole new licence needed? How much should the printer charge, especially one forced to sit so long on his other literary wares? The mechanics and economics were just impossible, Milton concluded. And ultimately, why should this system be restricted to the printing of books? Will not Parliament inevitably be moved to require licences for pamphlets, music, art and poetry, and eventually for unwritten speech, too – sermons, speeches, songs, plays, board meetings, indeed plain talk altogether and everywhere? There is no stop on this slippery slope of licensing and censorship once the perilous first step is taken.⁶³

But the real harm of licensing and censorship is done to the author and even more to the reading public. It is bad enough that the author has to bear the 'dishonour and derogation' of having to deal with petty and pecuniary bureaucrats who inevitably will delay and drive up the price of his publications. It is worse that every author, even a great doctor and professor, has to sit 'under the correction of his patriarchal licensor'. This might well be a 'puny' man, half his age and intelligence, who can still tell the author to 'blot or alter what precisely accords not with the hidebound humour' that purports to be the censor's 'judgment' on behalf of the government and people. Many of the best authors will leave England or fall silent, rather than sit 'under the wardship of some overseeing fist' or watch their books 'bear the scars' of their 'fairest print' and most 'cunning thoughts' cut out. Worst of all is that each of these bureaucrats, however incompetent, is made 'a judge to sit upon the birth, or death of books'. This is tragic,

⁶² Ibid, vol 2, pp 540–542, 559, 568–569.

⁶³ Ibid, vol 2, pp 523–526, 532–533.

Milton wrote. For a book holds 'the breath of a man's reason', the 'efficacy and extraction' of his 'living intellect'. It is filled with the 'precious life-blood of a master spirit'. An author 'summons up all his reason and deliberation to assist him; he searches, meditates' and then pours his 'life, mind, and soul' into his writing. Books, therefore, 'are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are'. It is 'as good almost kill a man as kill a good book; [he] who kills a man kills a reasonable creature, God's image; but he who destroys a good book kills reason itself, kills the image of God, as it were in the eye'. Censorship is a 'kind of homicide', 'sometimes a martyrdom', even 'a kind of massacre'.⁶⁴

Milton used this startling term 'massacre' to signal the grave threat that he thought censorship posed to the English Protestant nation as a whole. The very nature of being a Protestant, Milton argued, is to protest, to challenge, to reform, to fight falsehood with Truth. The Protestant Reformation was born in this very 'struggle of contrarities' about the most fundamental truths of Scripture and nature. The Protestants' strongest weapons in this struggle were their published books and fiery sermons. Their best tactics were their open clashes of ideas with Catholics and with each other. And their wisest conclusion was to call their followers to continue the struggle, to be constantly at work at further discovery and reform – *semper reformanda*, always reforming, as John Calvin had put it.⁶⁵

The reformation must go on in the English state and society as much as in the church and home, Milton insisted. And it must go on with the same methods and insights that earlier Protestants had forged for the reformation of the church – but now writ larger and more generic. The Protestant premises of this new perpetual reformation are these: All have equal access and claim to the Truth. All have vocations and contributions that count. All are prophets, priests and kings with the freedom and duty to proclaim, to pastor, to participate fully in the commonwealth. And all must write and speak, all must read and study the books of their fellows, just as they always read and study the Bible separately and together. England is 'entering a new and great period', Milton wrote with building passion, 'even to reforming of [the] Reformation itself'.

Behold now this vast city; a city of refuge, the mansion shop of liberty, encompassed and surrounded with his protection; the shop of war hath not there more anvils and hammers waking, to fashion out the plates and instruments of armed Justice in defence of beleaguered Truth, then there must be pens and heads there, sitting by their studious lamps, musing, searching, revolving new ideas wherewith to present, as with their homage and fealty the approaching Reformation: others as fast reading, trying all things, assenting to the force of reason and conviction. What could a man require from a nation so pliant and

⁶⁴ Ibid, vol 2, pp 492–493, 532–533.

⁶⁵ Ibid, vol 2, pp 550, 552–553.

so prone to seek after knowledge. What wants there to such a towardly and pregnant soil, but wise and faithful labourers, to make a knowing people, a nation of prophets, of sages, and of worthies.⁶⁶

This was Milton's ideal – a nation where each and every person is unstintingly engaged in the great struggle and debate between Truth and Falsehood in order to bring greater and better reformation to state and society. This great struggle will perforce feature 'much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making'. But such factions and differences of opinion in the state and society should be celebrated, much as 'sects and schisms' are celebrated in the church. Different private groups and opinions will sharpen and censor each other. Each will reflect new light from above, new angles on truth. So long as we all show 'a little generous prudence, a little forbearance of one another, and some grain of charity', we can all 'unite into one general and brotherly search after Truth'; 'out of the many varieties and brotherly dissimilitudes that are not vastly disproportional arises the goodly and graceful symmetry that commends ... great reformation'.⁶⁷

Freedom of speech and press, of course, brings not only 'goodly and graceful' speech but also at times evil and harmful speech. Bad speech that rises to the level of blasphemy of God, treason against the state or defamation of another person, Milton insisted, must be subject to 'the sharpest justice' against the 'malefactors'. But none of this can and should be prejudged by a censor; let the reader make these judgments after the fact of publication. So many books – from the classics to modern day printings – have bad and good speech inextricably intermixed within them. Man is both sinner and saint, and his writings will invariably reflect both qualities. To censor a book is to deny human nature.⁶⁸

To censor a book is also to deny the nature of human judgment, Milton continued. God created all of us as rational creatures, with a reason and conscience to choose a virtuous life, and with a promise of eternal reward for those who make wise choices. Every person, from Adam and Eve forward, has been given 'the knowledge of good and evil' and is confronted with sin and temptation. God, 'though he command us temperance, justice, continence, yet powers out before us even to a profuseness all desirable things, and gives us minds that can wander beyond all limit and satiety. Why should we then affect a rigor contrary to the manner of God and nature, by abridging or scanting those means, which books freely permitted are, both to the trial of virtue, and the exercise of truth.' Virtue can be better known and appreciated by seeing its opposite in vice. And the choice of a virtuous life is more genuine and praiseworthy when it is real

⁶⁶ Ibid, vol 2, pp 553–554; Milton, *Areopagatica*, pp 179–180; Milton, *Complete Prose Works*, vol 3, pp 496–497, 516, 533–537.

⁶⁷ Milton, *Complete Prose Works*, vol 2, pp 550–555.

⁶⁸ Ibid, vol 2, pp 402, 492, 517–521.

and not artificial. 'If every action which is good or bad or evil in man at ripe years, were to be under pittance, and prescription, and compulsion, what were virtue but a name?'

I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly, we bring not innocence into this world, we bring impurity much rather: that which purifies is trial, and trial is by what is contrary.⁶⁹

'Truth and understanding', then, 'are not such wares as to be monopolized and traded in by tickets and statutes, and standards' of licensors and censors. Truth comes through revelation not restriction, through persuasion not compulsion, through debate not declaration. Truth comes forth from the individual and collective judgments of each and every private person, who discerns and discriminates for him or herself after hearing and reading all opinions on all sides: 'A wise man, like a good refiner, can gather gold out of the drossiest volume, and ... a fool will be a fool with the best, yea, or without a book.' But most Englishmen are not fools. They are 'a free and ingenuous sort of such as evidently were born to study, and love learning for itself, not for lucre, or any other end, but the service of God and of truth'. England is 'a Nation not slow and dull, but of quick, ingenious, and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to'.⁷⁰

Give Englishmen some real education and real intellectual exercise, said Milton. Let 'all the Lord's people become prophets' with the freedom to speak, challenge, and debate. Let the people take up 'the study of highest and most important matters to be reformed' by 'disputing, reasoning, reading, inventing, discoursing, even to a rarity, and admiration, things not before discoursed or written of'. Give them freedom 'to know, to utter, and to argue freely according to conscience, above all liberties'. Do all this, said Milton, and

I see in my mind a noble and puissant nation rousing herself like a strong man after sleep, and shaking her invincible locks: Me thinks I see her as an eagle muing her mighty youth, and kindling her undazzled eyes at the full midday beam; purging and unscaling her long abused sight at the foundation itself of heavenly radiance.⁷¹

Part of the point of all this flowing rhetoric about freedom of speech was to prove just how powerful and edifying real free speech could be. Many of Milton's fellow reformers in his day saw this point exactly, and echoed his views with power and

⁶⁹ Ibid, vol 2, pp 514–517, 527–528.

⁷⁰ Ibid, vol 2, pp 521, 531, 535–536, 551; vol 1, pp 125–127, 684–685, 690.

⁷¹ Ibid, vol 2, pp 556–560.

eloquence. Their arguments and Milton's were important precedents for the eventual protections of freedom of speech and press set out in the English Bill of Rights of 1689, and eventually in American colonial charters, state constitutions, and the First Amendment guarantees of free speech and press as well.⁷²

Stripped of its ornate rhetoric, Milton's theory of freedom of speech was at heart his theory of freedom of religion writ large. Freedom of the religious and Spirit-filled conscience now became freedom of the rational and inquiring mind. The devout and faithful parishioner in the pew now became the good and solid citizen on the street. The prophet, priest and king in the church now became the critic, minister and ruler of the state. The tolerated plurality of Scriptural interpretations and applications in private now became the open marketplace of true and false ideas competing in the public square. The second reformation of the church now became the second reformation of the commonwealth altogether. And Milton predicated all this on the same firm belief that God's truth would triumph once freed from human errors and controls. Just as 'all the winds of doctrine were let loose to play upon the earth, so Truth be in the field', Milton wrote; 'we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?'⁷³

⁷² In Stephenson and Markham, *Sources*, pp 599–605.

⁷³ Milton, *Complete Prose Works*, vol 2, pp 561–562.