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ALGERNON SIDNEY ON PUBLIC RIGHT

*Hon. Edward Dumbauld**

In response to criticisms that the Declaration of Independence lacked originality,¹ its author Thomas Jefferson explained that the political purpose and object of that document was:

not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing,² it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, & c.³

Among the "elementary books of public right," to which Jefferson referred as possible sources contributing to the sentiments proclaimed in the renowned Declaration, was Algernon Sidney's *Discourses Concerning Government*.⁴ This work was published in 1698, and as early as 1771 Jefferson was familiar with it "as it is on the list of books he sent to Robert Skipwith in August of that year,

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1. E. DUMBAULD, *THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY* 56 (1950).

2. On another occasion Jefferson said: "[W]hether I had gathered any ideas from reading or reflection I do not know. I know only that I turned to neither book nor pamphlet while writing it. I did not consider it as any part of my charge to invent new ideas altogether, and to offer no sentiments which had ever been expressed before." Letter from Thomas Jefferson to James Madison (August 30, 1823), *reprinted in* 12 *THE WORKS OF THOMAS JEFFERSON* 307-08 (P. Ford Fed. ed. 1905) [hereinafter *WORKS*].

3. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* 12 *WORKS*, *supra* note 2, at 409.

4. A. SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* (London 1698) [hereinafter *DISCOURSES*].

and subsequently appears on many of his suggested reading lists."⁵ An edition of 1763 contained some memoirs of Sidney's life as well as letters to his father and to an English diplomat Henry Savile, together with the proceedings at Sidney's trial and his *Apology*.⁶

In 1804 Parson Weems of cherry-tree fame, apparently contemplating republication of Sidney's treatise, solicited an endorsement from Jefferson which would "render it the dazzling desideratum of thousands." President Jefferson replied that

The world has so long and so generally sounded the praises of his Discourses on government, that it seems superfluous, and even presumptuous, for an individual to add his feeble breath to the gale. They are in truth a rich treasure of republican principles, supported by copious & cogent arguments, and adorned with the finest flowers of science. It is probably the best elementary book of the principles of government, as founded in natural right which has ever been published in any language: and it is much to be desired in such a government as ours that it should be put into the hands of our youth as soon as their minds are sufficiently matured for that branch of study.⁷

Accordingly, Sidney's *Discourses* was included among the approved texts for instruction at the University of Virginia.⁸

The preface to the *Discourses* states that a paper delivered to the sheriffs immediately before Sidney's execution in 1683 showed that "he had left a Large and a Lesser Treatise written against the principles contained in [Sir Robert] Filmer's Book⁹ and that a small part of

5. 3 E. SOWERBY, CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, NO. 2330, at 12 (1953).

6. A copy of the 1763 edition [hereinafter DISCOURSES (1763 ed.)] is listed among Jefferson's books now in the Library of Congress. *Id.* See *infra* note 36. Concerning Sidney's *Apology*, see *infra* text accompanying note 112.

7. Letter from Thomas Jefferson to Mason Locke Weems (December 13, 1804), *reprinted* in 3 E. SOWERBY, *supra* note 5, at 13. Jefferson expressed the view that "In publishing it, I think his life, trial & letters should be thrown into one volume & the Discourses into another. This latter is the most important, & many purses can reach one volume which would not conveniently extend to the other." *Id.*

8. Resolution of the Board of Visitors of the University (March 4, 1825), *cited* in E. DUMBAULD, THE POLITICAL WRITINGS OF THOMAS JEFFERSON 192 (1955).

9. R. FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS (London 1680). Filmer's vogue as defender of absolute monarchy evoked, in addition to Sidney's DISCOURSES, John Locke's *Two Treatises of Government*. Peter Laslett's edition of Locke, first published in 1960, contains valuable notes and commentary. He states that though the first edition "bore the date 1690, it was actually printed and on sale in 1689," but had been written, for the most part, a decade earlier. J. LOCKE, TWO TREATISES OF GOVERNMENT 24, 64, 78 (P. Laslett rev. ed. 1963) (3d ed. 1698). Locke's influence on the Declaration of Independence was plainly discernible. E. DUMBAULD, *supra* note 1, at 20, 48-49, 57, 60, 64, 69, 76-77, 82, 85, 104, 142,

the lesser Treatise¹⁰ had been produced for evidence against him at his Trial." The *Discourses* constitute the "Large work mentioned in that Paper, and not the Lesser."¹¹

Sidney's treatise lacks coherent structure¹² and is frequently repetitious.¹³ Its fame is perhaps in large part due to the author's status as a prominent figure in the struggle for popular government and his being a martyr in the cause of liberty.¹⁴ He was beheaded on Tower Hill with a single stroke on December 7, 1683, after a trial for treason before the notorious Chief Justice George Jeffreys on November 21, 1683.¹⁵

That offense required proof by two witnesses.¹⁶ The only testi-

148. "Richard Henry Lee charged it as copied from Locke's treatise on government." 12 WORKS, *supra* note 2, at 307.

10. The paper delivered to the sheriff does not mention a "Lesser Treatise;" the papers used at Sidney's Trial "plainly appear to relate unto a large treatise written long since, in answer to Filmer's book." 9 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS, 913 (London 1811) (commonly called *Howell's State Trials*, as volumes XI-XXI of the series were compiled by Thomas B. Howell [hereinafter STATE TRIALS]). Similarly in Sidney's *Apology* (as to which see text accompanying note 112) they were described as "some scraps of a large treatise . . . they were but a small part of a polemic discourse." 9 STATE TRIALS, *supra*, 926, 943; see also *id.* at 950, 985, 987-88. Of this treatise only "the fiftieth part of it was produced, and not the tenth of that offered to be read." *Id.* at 915. The passages received in evidence at the trial are said not to be part of the book published in 1698. *Id.* at 855-58. However, they are similar in tone and content to passages in DISCOURSES. See, e.g., DISCOURSES, *supra* note 4, at 178, 284, 312-13, 349, 354, 376, 400, 436, 438, 450. A brief summary of the treatise involved at the trial is given by Sidney in his paper delivered to the sheriff. DISCOURSES (1763 ed.), *supra* note 6, at 38.

11. DISCOURSES, *supra* note 4, at 2.

12. It is divided into three chapters, none of which seem to concentrate upon any particular theme or division of the general subject. Chapter I (pp. 3-58) contains 19 sections; Chapter II (pp. 59-249) 32 sections; and Chapter III (pp. 250-462) 46 sections. See DISCOURSES, *supra* note 4.

13. For example the argument that the laws governing succession to the crown are different in various nations frequently recurs. DISCOURSES, *supra* note 4, at 46, 188, 330, 401.

14. "If he had not been arrested for his real or supposed complicity in the Rye House Plot, it is quite possible that his reputation would have been no greater than that of the author of *Plato Redivivus* The government of Charles II realized too late that his martyrdom was more dangerous than his continued existence as a frustrated plotter could have been During the American Revolution Sidney's *Discourses* was more of a Bible to the revolutionaries than any other works of the century, Milton only excepted." C. ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMEN 41, 43, 46 (Atheneum ed. 1968). On Henry Neville and his *Plato Redivivus*, see *id.* at 32-34.

15. For proceedings at Sidney's trial, see 9 STATE TRIALS, *supra* note 10, at 817-1022. The "bad eminence" of Jeffreys as an arbitrary and cruel "hanging judge" is largely based upon his treatment of participants in the Duke of Monmouth's rebellion in 1685. *Id.* at 936-38. He became Chief Justice in 1683 in time to try Sidney. *Id.* at 580-81. See also *infra* note 69.

16. E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 373-74, 373 n.7, 383 (1964) (citing 25 Edward III st. 5 c. 2). In the United States the two-witness rule was embodied in Article III, section 3, clause 1, of the Constitution.

mony implicating Sidney was that of Lord Howard of Escrick, who was not a particularly trustworthy witness.¹⁷ But the court ruled that "the want of a second witness was supplied by the production of a discourse found in [Sidney's] closet, and evidently written many years before, in which it was maintained that kings were accountable to the people for their conduct."¹⁸

On February 13, 1688/9,¹⁹ soon after the Glorious Revolution when William of Orange and his queen Mary, daughter of James II, were placed upon the throne (marking the end of the doctrine of divine right of kings),²⁰ Sidney's attainder was reversed, on petition of his brothers Philip, third earl of Leicester, and Henry Sidney, who by King William was created Earl of Romney.²¹

Algernon Sidney was born in 1622, the second surviving son of Robert, second earl of Leicester, and Dorothy Percy, daughter of Henry, ninth earl of Northumberland.²² In 1632 he was in Paris and Rome with his father. And in 1637, with his elder brother Philip (later third earl of Leicester), he accompanied his father upon a diplomatic mission to the court of King Christian IV of Denmark.

In 1641 he went to Ireland with his brother, Philip, and was commissioned to lead a troop of horse. On returning from Ireland in August, 1643, the brothers were detained upon suspicion of royalist attachment. But Algernon Sidney espoused the Parliamentary cause, and on May 10, 1644, became captain of a troop of horse in the earl of Manchester's regiment. As a lieutenant colonel he led a charge and was wounded in the battle of Marston Moor on July 2, 1644. In April, 1645, he was given command of a cavalry regiment in Crom-

17. Sidney called several witnesses of good standing who testified that Howard had repeatedly asserted Sidney's innocence. 9 STATE TRIALS, *supra* note 10, at 870, 872-73. There was also testimony that Howard said "I have been a prisoner, and I had rather do any thing in the world than be a prisoner again." *Id.* at 873. At Lord Russell's trial, Dr. Thomas Cox testified that Russell had said Howard "was a man of excellent parts, . . . but he had the luck not to be much trusted by any party." *Id.* at 622.

18. 9 STATE TRIALS, *supra* note 10, at 889, 892-93. See also T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 376 (8th ed. 1919).

19. Historians employ these double numbers for certain dates because "Old Style" years (up to 1700) began on March 25, rather than January 1.

20. DISCOURSES (1763 ed.), *supra* note 6, at 41-43; 9 STATE TRIALS, *supra* note 10, at 996-1000.

21. DISCOURSES (1763 ed.), *supra* note 6, at 42. As stated in Algernon Sidney's *Apology*, "though I am not a peer, I am of the wood of which they are made." 9 STATE TRIALS, *supra* note 10, at 922. Henry Sidney was one of the signers who on June 30, 1688 (the day on which the Seven Bishops were acquitted) invited William of Orange to come to England and defend the liberties of the nation against his father-in-law King James II. J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689 at 261 (1928).

22. DISCOURSES (1763 ed.), *supra* note 6, at 41-43.

well's division of Fairfax's army. On May 10, 1645, he was made governor of Chichester, in Sussex.

In December, 1645, Sidney was chosen a member of Parliament for Cardiff. In July of 1646, while his brother was Lord Lieutenant of Ireland, Sidney was made governor of Dublin; but on April 8, 1647, he was recalled, and later made governor of Dover Castle.

In January of 1648, he refused to serve on the tribunal which condemned Charles I.²³ He explained

that there were two reasons why he could not take part in their proceedings: first, the King could not be tried by that court; secondly, no man could be tried by that court. To which Cromwell replied, with characteristic impatience of forms when his mind was once made up, "I tell you, we will cut off his head with the crown upon it."²⁴

Sidney was removed as governor of Dover Castle in 1651, and spent several months in Holland, but in the autumn returned and became a member of the council of state. However, he disapproved of Cromwell's assuming supreme power as Lord Protector in December, 1653. Sidney retired and returned to Holland, but when the Long Parliament was restored in 1659 he returned to the council of state.²⁵

These incidents illustrate Sidney's rugged independence and stubborn determination. He was a stout commonwealth-man, and as he declared at the time of his execution willingly died "for that Old Cause in which I was from my youth engaged."²⁶ But, in modern vernacular, he was a "loner" rather than a "team player." Bishop Gilbert Burnet of Salisbury described him as "a man of most extraordinary courage, a steady man, even to obstinacy, sincere but of a rough and boisterous temper that could not bear contradiction."²⁷

When brought before the Privy Council during the Rye House Plot²⁸ Sidney "took the Fifth." He said "he must make the best defence he could, if they had any proof against him; but he would not

23. *Id.* at 2.

24. J. TANNER, *supra* note 21, at 154.

25. DISCOURSES (1763 ed.), *supra* note 6, at 3.

26. 9 STATE TRIALS, *supra* note 10, at 916. He wrote while in exile abroad: "I hope I shall die in the same principles in which I have lived." DISCOURSES (1763 ed.), *supra* note 6, at 16. He "chose rather to remain beyond the seas" since he "durst not recede from the ways of righteousness." He attributed the asperity of his persecution in exile to the fact that "it was known that I could not be corrupted." 9 STATE TRIALS, *supra* note 10, at 917.

27. 9 STATE TRIALS, *supra* note 10, at 492 (extract from G. BURNET, HISTORY OF HIS OWN TIME (London 1724-34)).

28. It has been aptly said that "his presence among the conspirators . . . was almost enough to ensure that nothing would be agreed on." C. ROBBINS, *supra* note 14, at 43.

fortify their evidence by anything he should say.”²⁹ Later “a committee of council . . . went to Sidney, who treated them more roughly: he said, it seemed they wanted [lacked] evidence, and therefore they were come to draw it from his own mouth; but they should have nothing from him.”³⁰

In the summer of 1659 Sidney and two others were appointed commissioners to mediate a dispute between the kings of Sweden and Denmark. They arrived at Elsinore on July 21, 1659. By June 16, 1660, agreement had been reached and Sidney was ready to return home. He considered his powers extinguished by the coming in of King Charles II at the Restoration,³¹ and took leave of the courts to which he had been accredited with as little ceremony as possible.³²

Sidney's father advised him to avoid England, pointing out several actions which the government did not relish. At the University of Copenhagen Sidney had inscribed in the visitors' book the stirring motto: *Manus haec inimica tyrannis Ense petit placidam sub libertate quietem*.³³ Moreover, he had spoken disparagingly of the king personally; and when a fellow diplomat politely remarked “I think you were none of the late king's judges, nor guilty of his death” Sidney reportedly exclaimed: “Guilty! do you call that guilt? Why it was the justest and bravest action, that ever was done in England, or anywhere else.”³⁴

Sidney found that his father's advice was good. England would have been unsafe and intolerable for him.³⁵ After traveling through Hamburg and Frankfurt-am-Main he had a pleasant sojourn at Rome. He was hospitably received by several cardinals, and heard the Pope celebrate Easter mass at St. Peter's. “When the time of the elevation came, I retired behind the cardinal's bench, that I might neither give scandal, or doe any thing that I did dislike.”³⁶ He reported to his father that Prince Pamphili, nephew of the preceding

29. 9 STATE TRIALS, *supra* note 10, at 500.

30. *Id.* at 502.

31. DISCOURSES (1763 ed.), *supra* note 6, at 3-6.

32. *Id.* at 6. Since the commissioners had been sent to negotiate with both Sweden and Denmark, it is correct when the title page of *Discourses* describes the author as “Ambassador from the Commonwealth of England to Charles Gustavus King of Sweden” and when Burnet says “he was ambassador in Denmark at the time of the Restoration.” 9 STATE TRIALS, *supra* note 10, at 492.

33. This hand, enemy of tyrants, seeks with the sword peaceful rest under liberty.

34. DISCOURSES (1763 ed.), *supra* note 6, at 7-8, 14.

35. *Id.* at 14-16, 24-27.

36. Letter of Algernon Sidney to his father Robert, Earl of Leicester, April 18/8, 1661, (postscript), DISCOURSES (1763 ed.), *supra* note 6, at 40. (Note that the 1763 edition, besides the text of Sidney's treatise, contains biographical *Memoirs*, and *Letters*, all separately

pontiff, "hath given me very convenient lodgings in his *Villa di Belvedere*, which is one of the finest of Italy," half a mile from Frascati.³⁷ In this rustic retreat "My conversation is with birds, trees, and books Whatsoever hath bin formerly the objects of my thoughts and desires, I ha[v]e now intention of seeking very littell more th[a]n quietnesse and retirement"³⁸ Here is what I look for, health, quiet and solitude. I am with some eagerness fallen to reading."³⁹

In 1663 he moved to Flanders and Holland. This change of scene proved fortunate, for upon the outbreak of the war with the Dutch in 1665 ten assassins were set to Germany by the English government to dispose of him, but could not find him.⁴⁰ In 1666 he established himself in southern France and passed eleven years in retirement there.⁴¹ In 1677 (through the favor of the French court) Sidney obtained permission to return to England to see his ailing father, who died in November of that year.⁴²

With the aid of his friend William Penn, Sidney stood for Parliament in 1678 as a candidate for Guilford in Surrey, and again in 1679 for Bramber in Sussex, but lost both times. On August 10, 1679, he was returned for Amersham in Buckingham, but when the Parliament met in October, 1680, his election was declared void.⁴³

These political stirrings may to some extent contradict Sidney's

paginated. Citations heretofore have all been to the *Memoirs*. Where a citation, as in this note, is to a letter, the reference is to the *Letters*; otherwise it is to the *Memoirs*).

37. Sidney to his father, June 1/11, 1661, *id.* at 51.

38. *Id.*

39. Sidney to his father, June 23,/July 8, 1661, *id.* at 53. He added: "I finde stupidity an advantage; nature hath given me a large proportion of it." *Id.* at 54.

40. *Id.* (*Memoirs*) at 33; 9 STATE TRIALS, *supra* note 10, at 917.

41. 9 STATE TRIALS, *supra* note 10, at 918.

42. DISCOURSES (1763 ed.), *supra* note 6, at 33. On November 13, 1677, Sidney was home at Penshurst and discharged his father's executors for legacies of £ 5000 and £ 100. *Id.* at 35.

43. *Id.* at 35. The Pension Parliament sat from 1661 for eighteen years, but was dissolved on January 24, 1679, to prevent publicity regarding the king's secretly receiving money from the French monarch Louis XIV. The 1679 Parliament was overwhelmingly Protestant and a bill was introduced to exclude the Duke of York from the throne. Charles II dissolved this Parliament, and elections held in October, 1679, returned an equally hostile Parliament which the king prorogued before it met. It did not actually sit until October, 1680. An exclusion bill was carried in the Commons but defeated in the House of Lords. The king summoned a new Parliament to meet at Oxford on March 21, 1681, but it was abruptly dissolved after a third exclusion bill had been introduced. Thereafter Charles II reigned without a Parliament until his death on February 6, 1685, obtaining sufficient secret funds from Louis XIV of France to carry on government. J. TANNER, *supra* note 21, at 217, 241, 244, 246, 247, 251. The Duke of Monmouth's rebellion against James II was speedily put down, and the "bloody assize" which followed the battle of Sedgemoor made the name of Judge Jeffreys a household word. See sources cited *supra* note 15.

assertion that after his father's death he expected "to return to Gascony, there to pass the remaining part of my life [but] was hindered by the earl of Leicester my brother, who questioned all that my father had given me for my subsistence; and by a long and tedious suit in chancery, detained me in England, until I was made a prisoner."⁴⁴ He may well have been receptive to any practicable proposals to rid the nation of popery and absolutism.⁴⁵ Did Sidney not say: "[H]e is a fool who knows not that Swords were given to men, that none might be Slaves, but such as know not how to use them"?⁴⁶

Several factors contributed to the unrest then being felt by those favoring liberty. There was strong sentiment throughout the nation in favor of the exclusion of papists from sensitive public posts, and the Duke of York from succession to the crown; but the Stuarts were never reliably religious in support of the Anglican church.⁴⁷ Anthony Ashley Cooper, first Earl of Shaftesbury, patron of the Carolina plantation and skilled political wire-puller, who had been at the summit of his power in the Parliament of 1680, felt frustrated and restless when Charles II undertook to rule without Parliament.⁴⁸ Shaftesbury supported the Duke of Monmouth (rather than William of Orange) as successor to Charles II, and was himself prosecuted for treason in 1681, but the grand jury returned an *ignoramus*, which occasioned great rejoicing with bells and bonfires on the part of the London populace.⁴⁹ To diminish the power and influence of the city of London, the crown instituted *quo warranto* proceedings to revoke the ancient charters of London and other cities throughout England.⁵⁰ A controversy over the election of sheriffs for London in 1682 resulted in the prosecution of the sheriffs then in office, Thomas Pilkington and Samuel Shute, for riot in continuing the polling on June 24, 1682, after the Lord Mayor had adjourned the meeting. The convictions were reversed after the Glorious Revolution.⁵¹ The long and acrimonious

44. 9 STATE TRIALS, *supra* note 10, at 918.

45. See *infra* text accompanying note 112.

46. DISCOURSES, *supra* note 4, at 270. Sidney's words bring to mind the stirring lines of the German poet Ernst Moritz Arndt:

Der Gott der Eisen wachsen liess

Er wollte keine Knechte.

(The God who let iron grow

He wished no slaves.)

47. See J. TANNER, *supra* note 21, at 226. See also sources cited *supra* note 43.

48. J. TANNER, *supra* note 21, at 246, 286-89.

49. *Id.* at 288; 8 STATE TRIALS, *supra* note 10, at 759, 821.

50. 8 STATE TRIALS, *supra* note 10, at 1039-1358.

51. 9 STATE TRIALS, *supra* note 10, at 187-298. According to Lord Howard's testimony,

controversy over the "imposition of sheriffs" by the crown was one of the principal causes of hostility to the government of Charles II, for the ancient liberties and privileges of the City of London were highly esteemed and cherished by their possessors. All these grievances united to foment real or imaginary schemes of insurrections, such as the Rye House Plot which agitated the nation in 1683.

The Rye House Plot, which brought Sidney to the scaffold, took its name from a supposed scheme of several alleged conspirators to kill King Charles II and his brother the Duke of York (later King James II) at a place called Rye House;⁵² this house belonged to Richard Rumbold, and was located along the road which the royal pair was expected to travel returning to London from Newmarket.⁵³

Rumbold was a courageous cavalryman who had served under Cromwell. He denied an accusation that he was the masked executioner when King Charles I met his death outside Whitehall on January 10, 1649, but admitted being on horseback guarding the gallows on that occasion.⁵⁴ He denied complicity in the Rye House Plot, but fled to Holland, where he made the acquaintance of the Duke of Argyll, with whom he invaded Scotland. He was captured on the way to England. He killed one man and wounded two before he could be taken; and might have escaped all his pursuers if one of them had not resourcefully thought to shoot his horse from under him.⁵⁵

Rumbold was brought to trial in Scotland⁵⁶ on June 26, 1685, on charges involving both the Rye House Plot and the invasion of Scotland with Argyll. However, the king's advocate dropped the charge about the Rye House Plot,⁵⁷ and Rumbold admitted his participation in the Argyll invasion.⁵⁸ He was convicted, sentenced, and executed

the imposition of sheriffs was thought to be the principal grievance suffered by the people. *Id.* at 859.

52. "The Rye-House in Hertfordshire, about eighteen miles from London, is so called from the Rye, a meadow near it." Near the House the route from Newmarket to London passes over a narrow causeway, a toll-gate, and a narrow lane, and then bridges over the Ware river and the New river. *Id.* at 527-28.

53. *Id.* at 496, 498. Because of a fire in Newmarket the king came back a week sooner than he intended, and this was thought to be a miraculous deliverance frustrating the plot. *Id.* at 497, 499.

54. 11 STATE TRIALS, *supra* note 10, at 882.

55. *Id.* at 881, 883.

56. Though the government might have preferred his trial and execution to take place in England, he was so severely wounded that he would probably have died a natural death before that could be accomplished. *Id.* at 883.

57. *Id.* at 873, 875, 882.

58. *Id.* at 877. Argyll had been found guilty of treason in 1681, but had escaped before sentence and fled the kingdom. 8 STATE TRIALS, *supra* note 10, at 946. When his 1685 inva-

at the Market Cross in Edinburgh on the same day.⁵⁹

In his speech before he suffered death, he made the memorable remark that "none comes into the world with a saddle on his back, neither any booted and spurred to ride him"⁶⁰ which Thomas Jefferson included in his valedictory greeting to the celebration in Washington of the fiftieth anniversary of the Declaration of Independence: "The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their back, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."⁶¹ A similar comment appears in Sidney's *Discourses* in connection with his assertion that "The Liberty of a People is the gift of God and Nature [and that] God only who confers this right upon us, can deprive us of it [Such deprivation could occur only if God] had so declared by express Revelation, or had set some distinguishing marks of Dominion and Subjection upon men; and, as an ingenious Person not long since said, caused some to be born with Crowns upon their heads, and all others with Saddles upon their backs."⁶²

Besides the Rye House Plot, there was alleged against Sidney a conspiracy for an uprising, to commence whenever a council of six leading conspirators thought the time propitious.⁶³ The six were the Duke of Monmouth (Lord Shaftsbury's candidate for the crown, as has been seen), Algernon Sidney, Arthur Earl of Essex,⁶⁴ John Hampden (grandson of the ship-money patriot), Lord William Russell,⁶⁵ and William Lord Howard of Escrick. Howard was involved in

sion failed, he was brought captive to Edinburgh castle on June 20, 1685, and executed ten days later. 11 STATE TRIALS, *supra* note 10, at 1026.

59. 11 STATE TRIALS, *supra* note 10, at 878.

60. *Id.* at 881; *see also id.* at 883.

61. E. DUMBAULD, THOMAS JEFFERSON AND THE LAW xiv-xv (1978). This letter to Roger C. Weightman (12 WORKS, *supra* note 2, at 477) was written on June 24, 1826, and Jefferson died on the Fourth of July, as did John Adams. The passing of these two venerable patriarchs on that date seemed to terminate in solemn fashion the nascent nation's formative era.

62. DISCOURSES, *supra* note 4, at 406.

63. 9 STATE TRIALS, *supra* note 10, 846-48.

64. While in the Tower, Essex was found with his throat cut by a razor. Though generally regarded as having committed suicide, he was thought by some Whigs to have been murdered. Laurence Braddon and Hugh Speke were convicted of misdemeanor for spreading the murder rumor. 9 STATE TRIALS, *supra* note 10, at 1127, 1213, 1224.

65. This was a courtesy title: He was the eldest son of the earl of Bedford, and a strong supporter of the exclusion bill. *Id.* at 578, 691-92. Russell's only connection with the Rye House Plot was that he was at a wine-merchant's to taste sherry and may have heard some conversations about the assassination scheme. *Id.* at 599-600, 692. This would amount to no greater offense than misprision of treason. *Id.* at 719.

both plots. He was the only witness against Sidney.⁶⁶ Hampden was tried for a misdemeanor only, as the prosecution knew it did not have the two witnesses needed to prove treason.⁶⁷ Later Hampden was tried for treason.⁶⁸ Monmouth, the illegitimate son of Charles II, was pardoned, but later banished when he angered the king by taking back a letter confessing the plot.⁶⁹ Howard, the prosecutor's star witness, received his pardon,⁷⁰ but not "till the drudgery of swearing" was over.⁷¹

Chief Justice Francis Pemberton of the Court of Common Pleas presided at the trial of Lord Russell,⁷² but his fairness to the defendant led to his removal from office shortly afterwards. Sir Edmund Saunders (the eminent pleader, who had been counsel for the king in the *quo warranto* case involving the charter of the City of London) was appointed as Chief Justice of the Court of King's Bench, but he was stricken in court on May 22, 1683, and died on June 19, 1683, shortly after sending a message that he voted in favor of the king in the *quo warranto* case. Thereupon Sir George Jeffreys, who had prosecuted on behalf of the crown in Lord Russell's case, was appointed to succeed Saunders in time to preside at the trial of Algernon Sidney.⁷³ The trial took place on November 27, 1683.⁷⁴

66. *Id.* at 849-52. Chief Justice Jeffreys accepted the papers found in Sidney's closet as the equivalent of a second witness. *Id.* at 853-58.

67. *Id.* at 1053. For Howard's testimony see *id.* at 1065-73. For his testimony at Russell's trial, see *id.* at 602-612. He said Sidney had sent an emissary, Aaron Smith, to Scotland to obtain support from Lord Argyll and others in Scotland. *Id.* at 610.

68. 11 STATE TRIALS, *supra* note 10, at 479. After a plea of guilty and death sentence, he was pardoned but the shame and ignominy led him to cut his throat ten years later. *Id.* at 484.

69. 9 STATE TRIALS, *supra* note 10, at 958-59, 861-62, 1015-17; 11 STATE TRIALS, at 1084. After James II became king on February 6, 1685, Monmouth returned to England landing at Lyme on June 11, 1685, proclaiming himself king (he said this was necessary to protect his followers from prosecution for treason by making them adherents of a *de facto* king; but little good did that reasoning do them when they fell into the hands of Chief Justice Jeffreys). The insurgents were speedily defeated at the battle of Sedgemoor on July 6, 1685. Monmouth was attainted for treason, 11 STATE TRIALS, *supra* note 10, at 1048, taken captive on July 8, 1685, *id.* at 1102, and beheaded at Tower Hill on July 15, 1685, *id.* at 1068, 1082.

70. 9 STATE TRIALS, *supra* note 10, at 1076.

71. *Id.* at 875.

72. There was a vacancy in the office of Chief Justice of the King's Bench. *Id.* at 581.

73. *Id.* at 580-81; 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 527-30, 567 (1926). The record of Lord Russell's trial was received in evidence at Sidney's trial, apparently to show that Howard's testimony had been found credible by a different jury. 9 STATE TRIALS, *supra* note 10, at 859.

74. Jeffreys also presided when Sidney was arraigned on November 7, 1683. Sidney was brought into court by a writ of habeas corpus issued to the Lieutenant of the Tower, before any indictment had been returned against Sidney. 9 STATE TRIALS, *supra* note 10, at 817, 920. Sidney's opinion of Jeffreys is revealed in the paper he delivered to the sheriff at his execution: "Lest the means of destroying the best protestants in England should fail, the bench must be

Review of the printed proceedings of the trial⁷⁵ establishes the fact, previously noted,⁷⁶ that the only real evidence against Sidney was the testimony of Lord Howard.⁷⁷ And the law is clear that two witnesses are required to prove the crime of treason.

Sidney was prejudiced by the ruling that the political treatise found in his study could be accepted as equivalent to the second witness. Jeffreys in his charge to the jury emphasized that "If you believe, that that was Colonel Sidney's book, writ by him, no man can doubt but it is sufficient evidence, that he is guilty of compassing and imagining the death of the king."⁷⁸

Jeffreys asserted that:

[T]his book contains all the malice, and revenge, and treason, that mankind can be guilty of . . . [T]he late unhappy rebellion, and the bringing the late blessed king to the scaffold was first begun by such kind of principles: They cried, he had betrayed the trust that was delegated to him from the people.⁷⁹

Just before imposing the death sentence Jeffreys exclaimed "I am sorry to see you so earnest in the justification of the book, in which there is scarce a line, but what contains the rankest treason, such as deposing the king: it not only encourages, but justifies all rebellion."⁸⁰ Sidney had contended that "those words, that are said to be written in the Paper, that there is nothing of treason in them . . . there is no treason in it."⁸¹ Jeffreys responded:

There is not a line in the book scarce but what is treason . . . [W]hen men are riveted in opinion, that kings may be deposed, that they are accountable to their people, that a general insurrection is no rebellion, and justify it, it is high time, upon my word, to call them to account.⁸²

The stress laid by Jeffreys upon the political principles set forth

filled with such as had been blemishes at the bar." DISCOURSES (1763 ed.), *supra* note 6, at 39. See *infra* note 111.

75. It is said that Jeffreys struck out from the printed account of the trial whatever he wished, especially Sidney's objections that the jurors were not freeholders. 9 STATE TRIALS, *supra* note 10, at 815. The printed account does not mention that point until the time of sentence. *Id.* at 897.

76. See *supra* note 17 and accompanying text.

77. See *supra* text accompanying notes 66-67.

78. 9 STATE TRIALS, *supra* note 10, at 892. Sidney did not admit authorship of the papers seized in his study. *Id.* at 866.

79. *Id.* at 893.

80. *Id.* at 902.

81. *Id.* at 898.

82. *Id.* at 898.

in the treatise⁸³ strengthens the charge that Sidney's death was sought, not because he had violated the law, but because he was a commonwealth-man.⁸⁴

The crime for which Sidney was indicted was conspiring to kill a king,⁸⁵ not levying war. Assuming for the sake of argument the royalist hypothesis that a general insurrection would lead inevitably to the death of a king, it is still impossible to show that Sidney's polemic treatise on political philosophy caused the people to rise in rebellion unless it can be proved that it was communicated to the people by publication.

According to Sir John Hawles, Solicitor General under William III:

This was the first indictment of high treason, upon which any man lost his life, for writing anything without publishing it But admitting col. Sidney wrote that book⁸⁶ and published it; yet if it were not done with a design to stir the subjects up into a rebellion, but was writ and published only 'disputandi gratia', as the impact of the books [*sic*] shews plainly it was, it was no . . . treason . . . and how could a jury, upon their oaths, say it was done with a design to raise a rebellion against king Charles the Second, when for aught appeared, it was writ before he was king, or thought of?

It might have been directed against Charles I, or Cromwell, or a foreign prince, "and therefore could not be treason against king Charles the Second."⁸⁷

Another respect in which Sidney's trial was unfair was the wholesale use of hearsay testimony to prejudice the defendant. After Robert West (who never saw Sidney during the conspiracy in which West was involved) in response to prosecutor North's insistence gave a long hearsay account of "the plot in general,"⁸⁸ Colonel John Rumsey did likewise.⁸⁹ Jeffreys himself (after Sidney inquired "whether it

83. In his charge to the jury Jeffreys denounced as treason the political views set forth in the treatise. *Id.* at 893.

84. The charge was made by Sir John Hawles, Solicitor General under William III. *Id.* at 999. It was denied by Roger North, who assisted in the prosecution of Sidney. *Id.* at 841-42.

85. *Id.* at 859, the first branch of the celebrated statute of 25 Edw. III. See Sidney's argument to the jury on this point. *Id.* at 877.

86. Sidney argued that under *Lady Carr's case* [*Roy v. Ma. Carr*], 1 Siderfin 418, 419 (K.B. 1670), stricter proof of handwriting is required in criminal cases than in civil cases. 9 STATE TRIALS, *supra* note 10, at 864. He also argued that in criminal cases the whole document, rather than excerpts, should be read to assure its proper interpretation. *Id.* at 869-70, 901.

87. *Id.* at 1002, 1003; see also *id.* at 866, 901.

88. *Id.* at 844-47.

89. *Id.* at 847-48.

be ordinary to examine men upon indictments of treason concerning me that I never saw, nor heard of in my life,") snorted "I tell you, all this evidence does not affect you, and I tell the jury so."⁹⁰

Perhaps Jeffreys thought this comment took care of the hearsay problem. But in his charge to the jury, after stating that hearsay testimony regarding the general conspiracy "does not at all affect the prisoner at the bar, but is made use of as a circumstance to support the credibility of the witness," Jeffreys proceeded to repeat and elaborate upon the hearsay account of the plot.⁹¹ Jeffreys likewise repeated Howard's story, and defended his credibility, asking:

But do you think because a man goes about and denies his being in a plot, therefore he was not in it? Nay, it seems so far from being an evidence of innocence, that it is an evidence of his guilt. What should provoke a man to discourse after this manner, if he had not apprehensions of guilt within himself? . . . Would you have the king's counsel to call none but men that were not concerned in this plot, to prove that they were plotting?⁹²

Other features of the trial which may simply reflect the benighted practice of the time, but may also show a particular hostility toward Sidney, were the repeated refusal to furnish him a copy of the indictment,⁹³ or to have the assistance of counsel.⁹⁴

After Lord Howard's story,⁹⁵ Sir Andrew Foster and one Atterbury testified that several Scotch gentlemen came to London and absconded.⁹⁶ The Attorney General (Sir Robert Sawyer) then undertook "to shew that while this emissary was in Scotland, at the same time the colonel . . . was writing a treasonable pamphlet."⁹⁷ Sir Philip Lloyd identified papers found at Sidney's house and seized pursuant

90. *Id.* at 848. Josiah Keiling then testified that Richard Goodenough said "that Colonel Sidney, whom I don't know, had a considerable part in the management of that affair." *Id.* at 848-49. It is not clear whether this refers to a general insurrection or the "taking off the king" at Rumbold's house near the Rye.

91. *Id.* at 889-90. At sentence Sidney reminded the Chief Justice that "your lordship did promise, in summing up the evidence, that the jury should be informed what did reach me and what did not, and I do not remember that was done." Jeffreys replied "I did it particularly, I think I was as careful of it as possibly I could be." *Id.* at 900, 901.

92. *Id.* at 890-92, 894-95.

93. *Id.* at 836-37.

94. *Id.* at 820. Sir William Williams did provide Sidney with instructions on how to conduct the case. *Id.* at 823-35.

95. *Id.* at 849-52.

96. *Id.* at 852-53.

97. *Id.* at 853. To appreciate how far the actual evidence fell short of proving this allegation, see *supra* text accompanying note 87.

to a warrant.⁹⁸ One Sheppard (probably Thomas Sheppard, the wine merchant visited by Lord Russell) believed the papers to be in Sidney's hand. Sheppard had seen him endorse bills of exchange. One Cary had seen his endorsement upon bills. One Cooke never saw Sidney write but had paid notes with Sidney's endorsement on them and was never called to account for mispayment.⁹⁹ Extracts were then read from the papers.¹⁰⁰ Lord Russell's conviction was received in evidence.¹⁰¹

Upon the conclusion of the crown's case, after an opening statement,¹⁰² Sidney called ten witnesses to attack Howard's credibility by his prior inconsistent statements.¹⁰³ Sidney then made his closing argument to the jury,¹⁰⁴ followed by the Solicitor General (Heneage Finch).¹⁰⁵ Following the charge by Jeffreys,¹⁰⁶ the jury in about half an hour found the prisoner guilty.

On November 26, 1683, Sidney appeared for sentence. He argued that his jury had not been composed of freeholders; he insisted that the indictment omitted the king's title *defensor fidei*, which made the indictment void. He denied that the paper had any treason in it.¹⁰⁷ After Jeffreys pronounced sentence, Sidney exclaimed:

Then, O God! O God! I beseech thee to sanctify these sufferings unto me, and impute not my blood to the country, nor to the city, through which I am to be drawn; let no inquisition be made for it, but if any, and the shedding of blood that is innocent, must be revenged, let the weight of it fall only upon those, that maliciously persecute me for righteousness sake.¹⁰⁸

Jeffreys responded: "I pray God work in you a temper fit to go unto

98. *Id.* at 853-54.

99. *Id.* at 854.

100. *Id.* at 854-58. Sidney's request to have all the papers read was denied.

101. *See supra* note 73.

102. 9 STATE TRIALS, *supra* note 10, at 860-69.

103. These were Lord Anglesey, Lord Clare, Philip Howard, Dr. Burnet, Joseph Ducas, Lord Paget, Edward Howard, one Blake, and two servant girls Grace Tracy and Elizabeth Penwick. A bystander, one Wharton, stood up and said that he could quickly produce counterfeit copies of any of the sheets of paper seized in Sidney's study, as the hand was very easy to imitate. *Id.* at 869-76.

104. *Id.* at 876-80.

105. *Id.* at 880-88.

106. *Id.* at 888-95. Justice Withins announced that the other judges concurred in the points of law laid down by Jeffreys. *Id.* at 895.

107. *Id.* at 897-98; see *supra* text accompanying note 81. A lawyer named Bramfield as *amicus curiae* also raised the point about the king's title, but the court was satisfied. 9 STATE TRIALS, *supra* note 10, at 901.

108. *Id.* at 902.

the other world, for I see you are not fit for this.”¹⁰⁹ Holding out his hand, Sidney replied: “My lord, feel my pulse, and see if I am disordered; I bless God, I never was in better temper than I am now.”¹¹⁰ The prisoner was taken back to the Tower, and beheaded with one stroke on December 7, 1683 at Tower Hill.

Before his death he delivered a paper to the sheriff,¹¹¹ and also left behind a lengthier *Apology*¹¹² in testimony that “as I had from my youth endeavoured to uphold the common rights of mankind, the laws of this land, and the true Protestant religion, against corrupt principles, arbitrary power, and Popery, I do now willingly lay down my life for the same.”¹¹³

After the foregoing account of the life and death of Algernon Sidney, it is appropriate to attempt to identify passages in the *Discourses* which may have consciously or subconsciously influenced Jefferson in formulating the political philosophy proclaimed in the Declaration of Independence.

Perhaps the proposition that first springs to mind in this connection is the familiar tenet that governments derive “their just Powers from the Consent of the Governed.”¹¹⁴ This doctrine did not originate with Jefferson. As Merrill Jensen has pointed out, this notion was “in the air” during the decade preceding independence,¹¹⁵ and “was a constant theme of the more radical writers from 1765 on, and notably of Samuel Adams,”¹¹⁶ who declared in 1771 that “No body can have a power to make laws over a free people, but by their own consent, and by authority received from them.”¹¹⁷ Adams “made it clear that, so far as he was concerned, the people of Massachusetts had never given that authority to Parliament.”¹¹⁸

Likewise a town meeting at New London, Connecticut, resolved on December 10, 1765:

[First]. That every form of government rightfully founded, originates from the consent of the people.

109. *Id.*

110. *Id.* at 902-03.

111. *Id.* at 907-16. This paper is printed in *DISCOURSES* (1763 ed.), *supra* note 6, at 37-40.

112. 9 *STATE TRIALS*, *supra* note 10, at 916-50.

113. *Id.* at 916.

114. E. DUMBAULD, *supra* note 1, at 52 (quoting the Declaration of Independence para. 1 (U.S. 1776)). See *id.* at 67-68, 70 (1950).

115. Jensen, *Commentary* to R. ADAMS, *POLITICAL IDEAS OF THE AMERICAN REVOLUTION* (3d ed. 1958) 30.

116. *Id.* at 29.

117. Samuel Adams, quoted in *id.* at 29.

118. *Id.* at 29.

[Second]. That the boundaries set by the people in all constitutions are the only limits within which any officer can lawfully exercise authority.

[Third]. That whenever those bounds are exceeded, the people have a right to reassume the exercise of that authority which by nature they had before they delegated it to individuals.¹¹⁹

Similarly the Massachusetts House on March 2, 1773, informed Governor Thomas Hutchinson that "It is consent alone, that makes human laws binding" (quoting John Locke and Richard Hooker to the same effect).¹²⁰ And even conservative John Dickinson declared in 1774 that "the freedom of a people consists in being governed by laws, in which no alteration can be made, without their consent."¹²¹

Nor did the doctrine originate in eighteenth century America. A resolution of Parliament on January 4, 1649, in connection with the trial of Charles I, declared "That the People under God are the Original of all just Powers."¹²² And even the Byzantine absolutism of the Roman empire was based theoretically upon the power of the people, which had been transferred to the emperor by a fictitious *lex regia*.¹²³

Chapter 12 of Magna Carta required consent to new impositions not based upon the existing feudal relation itself.¹²⁴ The Petition of Right, to which Charles I gave assent on June 7, 1628, prohibited, *inter alia*, the exaction of taxes or forced loans not consented to by Parliament.¹²⁵ And the English Bill of Rights of December 16, 1689, provided "That levying money . . . without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal."¹²⁶

With this background in mind, we examine Sidney's pronouncements on consent as the sole basis of just government. In the state of nature, he observes,

The Liberty of one is thwarted by that of another; and whilst they are all equal, none will yield to any, otherwise than by a general consent. This is the ground of all just Governments; for violence

119. *Id.* at 28-29.

120. E. DUMBAULD, *supra* note 1, at 70.

121. *Id.*

122. 7 J. RUSHWORTH, *HISTORICAL COLLECTIONS* 1383 (London 1721-22).

123. E. DUMBAULD, *supra* note 1, at 68 n.6.

124. "No scutage or aid is to be levied in our realm except by the common counsel of our realm, unless it is for the ransom of our person, the knighting of our eldest son or the first marriage of our eldest daughter . . ." Magna Carta ¶ 12, *reprinted in* J. HOLT, *MAGNA CARTA* app. IV at 321 (1965).

125. E. DUMBAULD, *supra* note 16, at 7.

126. E. DUMBAULD, *supra* note 1, app. III at 165 (1950).

or fraud can create no Right; and the same consent gives the Form to them all, how much soever they differ from each other.¹²⁷

In another place Sidney boldly states that "I . . . deny any Power to be just that is not founded upon consent."¹²⁸ He asserts the rights of the people "as the gift of God and Nature, no otherwise to be restrained than by Laws made with their consent."¹²⁹ He emphasizes that:

Whatsoever therefore proceeds not from the consent of the People, must be *de facto* only, that is, void of all right; and 'tis impossible there should not be a right of destroying that which is grounded upon none; and by the same rule that one man enjoys what he gained by violence, another may take it from him.¹³⁰

Moreover, "just Governments are established for the good of the governed," not for the glory or profit of the rulers.¹³¹ "The only ends for which Governments are constituted, and obedience render'd to them, are the obtaining of justice and protection; and they who cannot provide for both, give the People a right of taking such ways as best please themselves, in order to their own safety."¹³²

From the fact that governments are established by the consent of the people and for their own good, it follows that every nation has the right to determine its own form of government as it pleases and thinks best. God having given "to all Men in some degree a capacity of judging what is good for themselves, he hath granted to all likewise a liberty of inventing such Forms [of government] as please them best, without favouring one more than another."¹³³ Since "it is the fundamental Right of every Nation to be governed by such Laws, in such manner, and by such persons as they think most conducing to their own good, they cannot be accountable to any but themselves for what they do in that most important affair."¹³⁴ The people which institutes magistrates "may proportion, regulate, and terminate their Power, as to time, measure, and number of persons, as seems most convenient to themselves."¹³⁵

Sidney asserted that "[l]awful Kings are Kings by the Law: In

127. DISCOURSES *supra* note 4, at 23.

128. *Id.* at 78; *see also id.* at 155.

129. *Id.* at 101. Hence the liberties enjoyed by the people do not arise "from the Concessions of Princes." *Id.* at 242.

130. *Id.* at 403.

131. *Id.* at 279, 438.

132. *Id.* at 407.

133. *Id.* at 14; *see also id.* 48, 304, 367, 389. Sidney's own preference is for mixed government. *Id.* at 130, 155, 352, 448.

134. *Id.* at 417; *see also id.* at 294.

135. *Id.* at 55.

being Kings by the Law, they are such Kings as the Law makes them, and that Law only must tell us what is due to them."¹³⁶ The name or title given to a magistrate does not determine the scope of his official powers.¹³⁷

Every Nation acting freely, has an equal Right to frame their own Government, and to employ such Officers as they please. The Authority, Right and Power of these must be regulated by the judgment . . . of those who appoint them, without any relation at all to the name that is given . . . The same name is frequently given to those, who differ exceedingly in right and power; and the same right and power is as often annexed to Magistracies that differ in name[;]¹³⁸ [for] as all Nations give what form they please to their Government, they are also judges of the name to be imposed on each man who is to have a part in the power: and 'tis as lawful for us to call him King, who has a limited Authority amongst us, as for the *Medes* or *Arabs* to give the same name to one who is more absolute.¹³⁹

Sidney proudly proclaimed that "we in *England* know no other King than he who is so by Law, nor any power in that King except that which he has by Law."¹⁴⁰

Another rule which Sidney stressed is that "they who institute a Magistracy, best know whether the end of the Institution be rightly pursued or not."¹⁴¹ None can better determine whether magistrates are properly or improperly exercising the powers conferred upon them than the people who conferred such powers. "They who create Magistracies, and give to them such name, form and power as they think fit, do only know, whether the end for which they were created,

136. *Id.* at 291. "Every one has a right to that which is allotted to him by the Laws of the Country by which he is created." *Id.* at 88-89. Sidney cites the familiar passage of Bracton that the king should be under God and the law, since the law makes him king (*quia Lex facit Regem*). *Id.* at 290; see also *id.* at 310.

137. The learned and witty John Selden, deflating royalist pretensions that certain prerogatives were inherent in kingship, aptly remarked: "A king that claims privileges in his own country because they have them in another is just as a cook who claims fees in one lord's house because they are allowed in another. If the master of the house will allow them, well and good." J. SELDEN, *THE TABLE TALK OF JOHN SELDEN* 90 (S. Reynolds ed. 1892). "To know what obedience is due to the prince, you must look into the contract betwixt him and the people, as if you would know what rent is due from the tenant to the landlord, you must look into the lease." *Id.* at 191. As Sidney puts it, "Nations can owe nothing to Kings merely as Kings, but what they owe by the Contract made with them." *DISCOURSES*, *supra* note 4, at 268.

138. *DISCOURSES*, *supra* note 4, at 304; see also *id.* at 178, 404.

139. *Id.* at 353.

140. *Id.* at 354.

141. *Id.* at 400; see also *id.* at 348, 349.

be performed or not."¹⁴²

Hence the people are to be the judge when controversies arise as to whether the king has violated his coronation oath or compact with the governed. "The Law that gives the Power, regulates it; and they who give no more than what they please, cannot be obliged to suffer him to whom they give it, to take more than they thought fit to give, or to go unpunished if he do."¹⁴³

Likewise the people have the right to resist their rulers when the latter violate their duty.

There must therefore be a right of proceeding judicially or extrajudicially against all persons who transgress the Laws; or else those Laws, and the Societies that should subsist by them, cannot stand; and the ends for which Governments are constituted, together with the Governments themselves, must be overthrown. Extrajudicial proceedings by Sedition, Tumult, or War, must take place, when the persons concern'd are of such power that they cannot be brought under the Judicial.¹⁴⁴

Citing Grotius, Sidney holds that "There is such a thing amongst men as just War."¹⁴⁵ Thereby may tyrannical rulers be corrected or deposed.¹⁴⁶

If improvements in technology and technique may be used "to build Houses, Ships and Forts better than our Ancestors . . . why have we not the same right in matters of Government, upon which all others do almost absolutely depend?" Sidney cogently inquired.¹⁴⁷

It can now be seen how the principles expounded by Sidney in his *Discourses* support the American position in the conflict which led to independence. With respect to the right of resistance, when the ruler violated the constitution from which his very existence and his power was derived, the question whether George III could be "deposed from kingly office" by the Americans had been clearly decided

142. *Id.* at 438. "But as that which the Law gives, is given by those who make the Law, they only are capable of judging, whether he to whom they gave it, do well or ill employ that power, and consequently are only fit to correct the defects that may be found in it." *Id.* at 376.

143. *Id.* at 178; *see also id.* at 312, 313, 436, 438. According to Locke also "the people shall be judge" whether the government has violated its trust. E. DUMBAULD, *supra* note 1, at 76.

144. DISCOURSES, *supra* note 4, at 180. Sidney's position is similar to that of Grotius, who regarded war as an equivalent for judicial procedure in cases where such procedure is unavailable (*nam ubi judicia deficiunt incipit bellum* / for where judicial proceedings cease war begins). E. DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS* 66 (1969). *See also id.* at 33, 59-60.

145. DISCOURSES, *supra* note 4, at 291-92; E. DUMBAULD, *supra* note 144, at 43, 66.

146. DISCOURSES, *supra* note 4, at 247, 261.

147. *Id.* at 281; *see also id.* at 364-67.

by the precedent of 1689 when William and Mary were placed upon the throne in lieu of the fugitive James II. In like fashion the Declaration of Independence asserted that George III had "abdicated Government here, by declaring us out of his Protection and waging War against us." Insofar as his former American subjects were concerned, "it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security."¹⁴⁸

The Declaration of Independence similarly proclaimed Sidney's principle that "it is the fundamental Right of every Nation to be governed . . . in such manner . . . as they think most conducing to their own good."¹⁴⁹ In the terms adopted by the Continental Congress, the principle prescribes that:

whenever any Form of Government becomes destructive of these Ends [for which it was instituted, namely to secure "certain unalienable Rights" including "Life, Liberty, and the Pursuit of Happiness"] it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.¹⁵⁰

Indeed, Sidney's spirited defense of the propriety of improvement and innovation in government just as in all other areas of life is in keeping with Jefferson's later statement that it is as natural for people to modify their government from time to time as it is for a boy to cast off child's clothing and put on new garments as he grows to manhood.¹⁵¹

During the controversy leading to American independence Jefferson and his colleagues in the Continental Congress were always mindful of the course of the earlier struggle between Whig Parlia-

148. E. DUMBAULD, *supra* note 1, 52 (quoting Declaration of Independence para. 1 (U.S. 1776)). In April of 1788 the proposals of the minority of the Maryland convention which had ratified the United States Constitution reasserted the doctrine that "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to, reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 179-80 (1957).

149. *DISCOURSES*, *supra* note 4, at 417.

150. *Id.* at 407.

151. E. DUMBAULD, *supra* note 1, at 80-81. Sir Matthew Hale had used the same analogy: "[H]e, that thinks a state can be exactly steered by the same lawes in every kind, as it was two or three hundred years since, may as well imagine that the cloaths that fitted him when he was a child should serve him when he is grown a man." Quoted in M. HOWE, *READINGS IN AMERICAN LEGAL HISTORY* 98 (1949).

ment-men and the Stuart kings.¹⁵² The fate of Sidney and the vigorous polemic of his *Discourses* were not forgotten when the stirring language of the Declaration of Independence was forged and put before the world out of "a decent Respect to the Opinions of Mankind."

152. E. DUMBAULD, *supra* note 1, at 22.