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# The Experience of Revolution in Stuart Britain and Ireland

*Essays for John Morrill*

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*Edited by*

Michael J. Braddick and David L. Smith

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## 8 Law, liberty, and the English Civil War: John Lilburne's prison experience, the Levellers and freedom

D. Alan Orr

### I

The historical significance of the Levellers has been the subject of long-standing controversy. There is arguably no prevailing scholarly consensus on the Levellers and their role in the development of Anglo-American constitutionalism or the emergence of liberal democracy in the West. Historians and historians of political thought have portrayed them variously as proto-proletarian revolutionaries, proto-democrats, proto-liberals, ideologues of possessive individualism and, more recently, as advocates of a populist form of civic republicanism.<sup>1</sup> Liberals, neo-liberals, Marxists and neo-Marxists have obsessed over them, while revisionists have disparaged or dismissed them in their efforts to recast England's troubles of the mid-seventeenth century, not as an ideologically driven contest for sovereign power or a struggle for liberty, but as a catastrophic breakdown in a hitherto successfully functioning system of monarchical government.<sup>2</sup> Indeed, for the revisionism of the 1970s the significance of the Levellers lay largely in their insignificance. However, as the first popular political 'movement' to advocate the establishment of a written constitution, liberty of conscience, the extension of the franchise to all male heads of households and concomitantly the abolition of most property requirements, they remain an important object of historical enquiry.

<sup>1</sup> H. N. Brailsford, *The Levellers and the English Revolution*, ed. J. E. Christopher Hill (Stanford, 1961); Joseph Frank, *The Levellers: A History of the Writings of Three Seventeenth-Century Social Democrats: John Lilburne, Richard Overton, William Walwyn* (Cambridge, MA, 1955, repr. New York, 1969); M. A. Gibb, *John Lilburne the Leveller, a Christian Democrat* (1947); Pauline Gregg, *Freeborn John: A Biography of John Lilburne* (1961); C. B. Macpherson, *The Political Theory of Possessive Individualism, Hobbes to Locke* (1962), ch. 3; S. D. Glover, 'The Putney debates: popular versus elitist republicanism', *Past and Present*, 164 (1999), 47–80.

<sup>2</sup> See my previous discussion of this literature: D. Alan Orr, 'Sovereignty, supremacy, and the origins of the English Civil War', *History*, 87 (2002), 474–6.

Lilburne (1614?–1657) during the mid to late 1640s. During this period Lilburne either wrote from his prison cell or under the imminent threat of arrest and imprisonment; for Lilburne, the experience of revolution was largely the experience of incarceration.<sup>3</sup> Situating his writings in this context, this chapter argues that Lilburne's continuing historical significance lay in the early articulation of what the late Sir Isaiah Berlin termed a 'negative' conception of liberty.<sup>4</sup> As the period of his imprisonment extended, Lilburne's view of liberty derived increasingly from the actual experience of being constrained behind prison walls. This view of liberty was more in keeping with that of Thomas Hobbes in his *Leviathan* (1651) than with that of the 'democratical gentlemen' who, Quentin Skinner has argued, led the English Parliament down the path towards civil war.<sup>5</sup> For Lilburne liberty became less the 'republican' view of liberty as the absence of a condition of dependence on the will of another – a condition of slavery – than simply the absence of external physical impediment to act as he desired. This distinction is significant, because Skinner has identified this 'proto-liberal' conception of liberty as the mere absence of constraint more strongly with Royalist authors, including not only Hobbes, but also Griffith Williams, John Bramhall, Dudley Digges and Sir Robert Filmer. For these authors the condition of liberty bore no necessary relationship to the constitutional provision for self-government.<sup>6</sup> In contrast, for republicans such as John Milton, James Harrington and the sometime Leveller John Wildman, the provision for self-government, in which the representatives of the whole body of the citizenry exercised the sole law-giving power, was essential to the preservation of liberty. For republicans freedom was only possible in a free state where the citizenry remained subject only to their own collective wills.<sup>7</sup>

Furthermore, as his term of imprisonment lengthened, Lilburne increasingly appealed not to the sources of classical republicanism, but

<sup>3</sup> David Loewenstein, *Representing Revolution in Milton and his Contemporaries: Religion, Politics, and Polemics in Radical Puritanism* (Cambridge, 2001), ch. 1.

<sup>4</sup> Isaiah Berlin, 'Two concepts of liberty', in *Four Essays on Liberty* (Oxford, 1969), pp. 118–72; Quentin Skinner, 'A third concept of liberty', *Proceedings of the British Academy*, 117 (2002), 237–68; Skinner, 'Rethinking political liberty in the English Civil War', *History Workshop Journal*, 61 (2006), 156–70.

<sup>5</sup> Skinner, 'Third concept', 245–7; Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge, 2008); Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (1985), ch. 21.

<sup>6</sup> Quentin Skinner, *Liberty before Liberalism* (Cambridge, 1998), p. 6; Skinner, *Hobbes and Republican Liberty*, pp. 149–57.

<sup>7</sup> Skinner, *Liberty before Liberalism*, chs. 1–2; see also Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, 1997).

to the sources and authorities of the common law, or what Philip Pettit has characterized as 'traditional non-dominating institutions'.<sup>8</sup> With the continued, tyrannical sitting of the Long Parliament, and the failure to reach a consensus on a new *Agreement of the People* in December 1648, Lilburne appealed increasingly to the law of the land as interpreted, not by judges or parliament, but by a jury of his peers as judges of both law and fact.<sup>9</sup> Lilburne's experience of prolonged incarceration, therefore, led him to evolve a 'radical' or, more appropriately, 'populist' conception of what J. G. A. Pocock has termed the 'ancient constitution' in which the right to a jury trial was foundational.<sup>10</sup> To this effect, Lilburne drew heavily on the recently published writings of the late Chief Justice Sir Edward Coke (1552–1634) – the Long Parliament's 'own oracle' of the law.

Rather than offering a 'systematic unity', as Andrew Sharp has argued, Lilburne's writings of the mid to late 1640s reveal an ongoing, and sometimes subjectively reactive *process*, in which the immediate conditions of his imprisonment were critical to the development of his political thinking.<sup>11</sup> His experience of actually being constrained, combined with his increased exposure to common-law sources and his interaction with more formally trained fellow inmates, were all crucial to this process. During this time Lilburne developed a series of communicative

<sup>8</sup> Pettit, *Republicanism*, p. 89.

<sup>9</sup> For Lilburne and jury law-finding see T. A. Green, 'Conscience and the true law: the ideology of jury law-finding in the Interregnum', in T. A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago, 1985), pp. 153–99; see also Annabel Patterson, 'For words only: from treason trial to liberal legend in early modern England', *Yale Journal of Law and Humanities*, 5 (1993), 389–416.

<sup>10</sup> J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study in English Historical Thought in the Seventeenth Century* (Cambridge, 1957, repr. Cambridge, 1987); Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (1992); J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore, MD, 2000); for the Levellers' relationship to the traditions of the common law see R. B. Seaberg, 'The Norman Conquest and the common law: the Levellers and the argument from continuity', *HJ*, 24 (1981), 791–806; Diane Parkin-Speer, 'John Lilburne: A revolutionary interprets statutes and common law due process', *Law and History Review*, 1 (1983), 276–96; Rachel Foxley, 'John Lilburne and the citizenship of "freeborn Englishmen"', *HJ*, 47 (2004), 849–74; and Martin Dzelzainis, 'History and ideology: Milton, the Levellers, and the Council of State in 1649', *Huntington Library Quarterly*, 68 (2005), 269–87. I prefer to use the term 'populist' rather than Janelle Greenberg's suggested term 'radical' in characterizing Lilburne's conception of the ancient constitution: Janelle Greenberg, *The Radical Face of the Ancient Constitution: St Edward's 'Laws' in Early Modern Political Thought* (Cambridge, 2001).

<sup>11</sup> Andrew Sharp, 'John Lilburne's discourse of law', *Political Science*, 40 (1988), 18–33; Sharp, 'John Lilburne and the Long Parliament's *Book of declarations*: a radical's exploitation of the words of authorities', *History of Political Thought*, 9 (1988), 19–44.

strategies centred on the activities of reading and writing aimed at securing the concrete goal of his release. These strategies involved not only engagement with the published authorities of the common law, specifically the writings of Coke, but also the activity of writing and the publication of a significant pamphlet literature in support of his cause.<sup>12</sup> The result was a conception of negative liberty firmly grounded in the received traditions and authorities of the common law.

## II

During the mid to late 1640s John Lilburne was constantly in and out of prison. On 11 June 1646 he was summoned before the bar of the Lords to answer for his illicit printing activities, and was subsequently committed close prisoner first to Newgate and then to the Tower of London. He remained in the Tower until he was finally granted bail on 9 November 1647, shortly after the Putney Debates and the publication of the first *Agreement of the People*. His bail was revoked on 17 January and Lilburne was returned to prison for his role in organizing Leveller petitioning along with his new associate John Wildman shortly after a meeting at Wapping which both men had attended. He was not released until 2 August 1648, during the Second Civil War. In the aftermath of the regicide on 30 January 1649, his attacks on the legitimacy and legality of the Rump Parliament and the Commonwealth's newly established Council of State soon landed him back in the Tower after the publication of *The second part of Englands new chaines* on 24 March 1649. This controversial tract openly challenged the legality of the Rump Parliament's claim to 'Supreme Authority', and in particular the legality of its erection of a Council of State and a High Court of Justice for the 'judging and taking away of mens lives in an extraordinary way, as done for no other end, but make way for their own domination'.<sup>13</sup> Aside from a brief period of bail in July to visit his family, then ill with smallpox, he remained in prison until his treason trial by jury at the London Guildhall on 24–25 October 1649. On his acquittal, he and his confederates were released on 8 November 1649.<sup>14</sup>

<sup>12</sup> Loewenstein estimates that Lilburne produced over four-fifths of his corpus from behind bars: Loewenstein, *Representing Revolution*, p. 26; more generally see Jerome de Groot, 'Prison writing, writing prison during the 1640s and 1650s', *Huntington Library Quarterly*, 72 (2009), 193–215.

<sup>13</sup> E 548(16), [John Lilburne, Richard Overton and Thomas Prince], *The second part of Englands new chaines* (1649), in William Haller and Godfrey Davies, eds., *The Leveller Tracts, 1647–53* (New York, 1944), pp. 171–89 (quotation at p. 183).

<sup>14</sup> For details of Lilburne's life see Andrew Sharp, 'John Lilburne, 1615?–1657?', *ODNB*.

During this period Lilburne became increasingly consumed with escaping the coercive apparatus of the state and discovering legal rules that would protect him from arbitrary interference with his person. Towards this end he deployed whatever political ideas came to hand, either from the established legal canons of the day or from contact with his fellow prisoners, most significantly the Welsh Royalist jurist David Jenkins, who 'strengthened his legalism with his friendship and example'.<sup>15</sup> While maintaining that his legal knowledge was still considerable before encountering the Royalist and that he remained 'the same man in principles' that he ever was, Lilburne also explicitly acknowledged his indebtedness to Jenkins in print, confessing that he had 'gained much . . . in the knowledge of the Law' from his fellow prisoner.<sup>16</sup> Through this contact with more formally educated prisoners and his own reading of common-law sources, Lilburne achieved during his long and frequent periods of incarceration a good standard of jailhouse lawyer. This was not the long years of study needed to develop the 'artificial reason' of the common lawyers, but a more haphazard, goal-directed process undertaken with the practical aim of securing his release. Lilburne's writings were frequently derivative; however, he remains significant in representing a pivotal moment in the development of the idea of liberty, when the traditions of the English law as the customary, unwritten rationality of the ages entered into an alliance with Leveller populism to fashion a common-law conception of negative liberty.

The main published resource to which Lilburne increasingly turned during his incarceration was the legal writings of Sir Edward Coke. James I had dismissed Coke from the bench in 1616; however, Coke remained a significant public figure, playing an active role in the parliaments of the 1620s and composing the four volumes of his *Institutes*, the first of which, his commentaries on Littleton's *Tenures*, appeared in print in 1628 as *The first part of the institutes of the lawes of England; or a commentarie upon Littleton, not the name of a lawyer but of the law it selfe*. In 1632, on hearing that he was writing a book on Magna Carta, Charles I ordered Coke's papers to be seized; at his death in 1634 the remaining three completed volumes of Coke's *Institutes*, including the second *Institutes*, consisting of his commentaries on Magna Carta, remained in manuscript and out of

<sup>15</sup> *Ibid.*

<sup>16</sup> E 427(4), John Lilburne, *The peoples prerogative asserted and vindicated, (against all tyranny whatsoever)* (1648), p. 4; for Lilburne's association with Royalist prisoners in the Tower of London and the influence of Jenkins on his writing and his thinking see Gregg, *Freeborn John*, pp. 197–205; J. T. Peacey, 'John Lilburne and the Long Parliament', *HJ*, 43 (2000), 640–1; Parkin-Speer, 'John Lilburne', 282–6; J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1955), ch. 8.

circulation for the duration of the Personal Rule.<sup>17</sup> The Long Parliament made the recovery of Coke's lost writings a priority, and on 5 December 1640 the House of Commons appointed a committee to inquire after the late lord chief justice's papers and to investigate on whose authority they had been seized.<sup>18</sup> On 13 February 1641 the Long Parliament ordered that eleven seized volumes of Coke's papers, including the manuscripts of the second, third and fourth volumes of the *Institutes*, be restored to Sir Robert Coke, son of the late lord chief justice.<sup>19</sup>

Printed on the order of the Long Parliament, Coke's commentaries on Magna Carta appeared as *The second part of the institutes of the lawes of England: containing the exposition of many ancient and other statutes in 1642*; the remaining two volumes appeared in 1644 as *The third part of the institutes of the laws of England concerning high treason and other pleas of the crown, and criminall causes* and *The fourth part of the institutes of the laws of England concerning the jurisdiction of the courts*.<sup>20</sup> Although Richard Helgerson has argued that these later three volumes never enjoyed the same degree of authority as the first volume, *Coke's Littleton*, their appearance did have a substantial influence on Lilburne and the development of his political thinking during the mid to late 1640s.<sup>21</sup> Lilburne was fulsome in his praise for the writings of the former chief justice, writing in spring 1648 that 'I heartily wish and desire that every man in England, that hath any spare money and time would buy them, and read, and study them, as the absolutest discoverers of the true mind of the Law of England.'<sup>22</sup> Lilburne's engagement with the *Institutes*, while at times highly selective, was significant, because Coke's writings were not exemplars of the language of natural law and natural right, commonly identified with Leveller thought, but instead appealed strongly to the authority of the common

<sup>17</sup> Kevin Sharpe, *The Personal Rule of Charles I* (New Haven and London, 1992), pp. 656–7.

<sup>18</sup> *CJ*, II, pp. 45–6.

<sup>19</sup> It would appear that Kevin Sharpe's contention that the papers 'never came to light' is somewhat erroneous: Maija Jansson, ed., *Two Diaries of the Long Parliament* (New York and Gloucester, 1984), p. 85; Sharpe, *Personal Rule*, p. 657.

<sup>20</sup> Sir Edward Coke, *The second part of the institutes of the lawes of England: containing the exposition of many ancient and other statutes* (1642); Coke, *The third part of the institutes of the laws of England concerning high treason and other pleas of the crown, and criminall causes* (1644); Coke, *The fourth part of the institutes of the laws of England concerning the jurisdiction of the courts* (1644).

<sup>21</sup> Richard Helgerson, *Forms of Nationhood: The Elizabethan writing of England* (Chicago, 1992), pp. 91–2; D. Alan Orr, *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge, 2002), pp. 21, 67–9, 128, 136, 156–9.

<sup>22</sup> John Lilburne, *The oppressed mans importunate and mournfull cryes to be brought before the barre of justice* (1648), p. 2. This pamphlet is dated 7 April 1648, a second edition appearing 18 April 1648; George Thomason did not possess a copy of this pamphlet.

law as immemorial custom handed down time-out-of-mind from England's ancient past.<sup>23</sup>

Misconceptions about the Levellers' relationship to the traditions of the common law have had a long history. Christopher Hill, in his original discussion of 'The Norman yoke', offered John Lilburne in particular as the exemplar of Leveller anti-Normanism – the belief that the existing English law was the illegitimate imposition of a foreign conqueror, William of Normandy, and that its imposition had somehow abrogated the existing English law. Hill argued that, while Lilburne may initially have cited the sources of the common law such as Magna Carta and Coke's *Institutes*, his experience in the courts over the course of the mid to late 1640s led him increasingly to the language of natural law and natural right.<sup>24</sup> In this interpretation, the political discourse of 'radicalism', with its attendant language of natural right and natural law, superseded the language of Coke and the common lawyers in Leveller political thinking. The Levellers concomitantly rejected the historical continuity of the common law from pre-Conquest times, making a decisive shift, in the words of Keith Thomas, from 'historic right to natural right'.<sup>25</sup>

Much of the evidence for Hill's interpretation derived from a June 1646 pamphlet entitled *The Just mans Justification*.<sup>26</sup> The pamphlet, an epistle to Justice Reeve of the Court of Common Pleas concerning a suit on behalf of Colonel Edward King lying against Lilburne in that court, made explicit reference to the 'Norman Yoke' set upon the English people at the time of the Conquest. Complaining of the common law's inaccessibility to the common man, and in particular of the continued use of Latin and law French in the courts at Westminster, Lilburne claimed that 'the greatest mischief of all, and the oppressing bondage of England ever since the Norman yoke, is this, [that] I must be tried before you by a law (called the Common Law) that I know not, nor I thinke no man else, neither do I know where to find it, or reade it; and how I can in such a case be punished by it I know not'.<sup>27</sup> Lilburne went on to argue

<sup>23</sup> Pocock, *Ancient constitution*, chs. 2, 3; see also Glenn Burgess, *Absolute monarchy and the Stuart constitution* (New Haven and London, 1996), ch. 6.

<sup>24</sup> J. E. Christopher Hill, 'The Norman Yoke', in Hill, *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the Seventeenth Century* (1958), pp. 75–6.

<sup>25</sup> K. V. Thomas, 'The Levellers and the franchise', in G. E. Aylmer, ed., *The Interregnum: The Quest for Settlement* (1972), p. 64.

<sup>26</sup> E.340(12), John Lilburne, *The just mans justification, or a letter by way of plea in barre* (1646); Mark A. Kishlansky appears to have confused this pamphlet with E.342(2), *The just man in bonds, or Lieut. Col John Lilburne close prisoner in Newgate by the order of the House of Lords*, a work by William Walwyn published on 23 June 1646 after Lilburne's arrest and imprisonment; Mark A. Kishlansky, *The Rise of the New Model Army* (Cambridge, 1979), p. 316.

<sup>27</sup> Lilburne, *Just mans justification*, p. 11.

that, as a result of the Norman Conquest, the current practices in the law courts at Westminster were corrupted from their original pre-Conquest forms. He particularly complained about the continued use of Latin, a language that neither he 'nor one of a thousand of my native Country men' could understand, leading him to conclude that the form of current legal proceedings in the central courts flowed 'not from God nor his Law, nor the law of Nature and reason, no not yet from the understanding of any righteous, just or honest men, but from the Divell and the Will of Tyrants'.<sup>28</sup>

While eloquently narrated, and at times visionary, the pitfalls of recipe-card scholarship frequently marred much of Hill's work; the result was isolated fragments of quotation recorded thematically, and then cited out of context in order to produce an unsympathetic coherence that could be highly misrepresentative of authorial intent. As R. B. Seaberg has established, Lilburne actually distinguished between the substance of the common law which remained intact from before the Norman Conquest and the accretion of corrupt Norman procedures since the Conquest – most notably the use of Latin and law French as the languages of pleading and record.<sup>29</sup> While the 'Norman rules' imposed by William I remained 'in the administration of the *Common Law at Westminster Hall*', Lilburne asserted later in the same work that common-law learning had survived 'after the making of *Magna Charta*', and that 'divers learned men in the lawes . . . kept Schooles of the Law in the City of London, and taught such as resorted to them the Lawes of the Realme, taking their foundation from *Magna Charta* and *Charta de Forresta*'.<sup>30</sup> Reinforcing his assertion of the substantive continuity of the common law, Lilburne cited extensively not only from the historical writings of Samuel Daniel, but also more significantly from the *Proem* to the second part of Coke's *Institutes*.<sup>31</sup>

The House of Lords and in particular the earl of Manchester, who had been Lilburne's commander in the Army of the Eastern Association, were not pleased at the appearance of *The just mans justification*.<sup>32</sup> On 11 June Lilburne was summoned before the bar of the Lords to answer for his alleged libels and in *The free-mans freedom vindicated*, published

<sup>28</sup> *Ibid.*

<sup>29</sup> Seaberg, 'Argument from continuity'; see also more recently Dzelzainis, 'History and ideology', 279–85. Lilburne vehemently denied authorship of *Libertie vindicated against slavery*, which one of the warders of the Tower of London, John White, had mistakenly attributed to him: E 351(2), Anon., *Libertie vindicated against slavery* (1646); E 359(17), [John Lilburne], *Londons libertie in chains discovered* (1646), pp. 59–63; see also E 373(1), John Lilburne, *The oppressed mans oppressions declared* (1647), pp. 8–9.

<sup>30</sup> Lilburne, *Just mans justification*, p. 14.

<sup>31</sup> *Ibid.*, pp. 13–14. <sup>32</sup> Sharp, ODNB, 'John Lilburne'.

eight days later, he offered a narrative of his appearance and his replies to the Lords interrogations. Lilburne's legal case at this point was simple: he was a freeborn commoner in England, and because of that birthright, the House of Lords had no jurisdiction over his person in summoning him before their bar and arbitrarily imprisoning him contrary to chapters 14 and 29 of the Magna Carta. Lilburne disputed the Lords' right to command his appearance before them and appealed instead 'to the Barre and tribunal of my competent, proper and legall tryers and Judges, the Commons of England assembled in Parliament'.<sup>33</sup> In a later pamphlet narrating his appearance before a committee of the House of Commons in November 1646, Lilburne reinforced this argument, stating that 'their Lordships sitting by virtue of Prerogative patents, and not by election or common consent of the people; have (as Magna Charta and other good lawes of the land tell me) nothing to do to try me as a commoner whatsoever, in any criminall case, either for life, limb, Liberty or estate'.<sup>34</sup> Lilburne framed these arguments appealing not only to the law of nature but also to the notion of birthright: the right to judgment by a jury of his peers – commoners of his own condition – was a right conferred on him by the specific historical conditions of his birth as a freeborn commoner of England.

The initial conditions of Lilburne's imprisonment from the time of his arrest in June to his appearance before the Commons committee in November were extremely close. His prison experience during this time, simply put, was one of physical constraint, and this was reflected in his lack of literary production during the months of July, August and September.<sup>35</sup> By Lilburne's own account he was forced to communicate with his wife Elizabeth by shouting from his cell window in Newgate to her in the window of an adjacent building. Even this expedient was subject to extreme measures, with the clerk of Newgate, Henry Briscoe, threatening to board up Lilburne's cell window or have him moved to a cell with no window at all if he did not desist.<sup>36</sup> During this time Lilburne did not simply live under the threat of being deprived of his liberty. Instead he lived with the complete deprivation of his ability to do as he wished, whether that was writing in his own defence or enjoying the

<sup>33</sup> E 341(12), John Lilburne, *The free-mans freedom vindicated* (1646), p. 6; Thomason dates this pamphlet 23 June 1646 although the imprint is 19 June.

<sup>34</sup> E 362(6), John Lilburne, *An anatomy of the Lords tyranny and iniustice exercised upon Lieu. Col. John Lilburne, now a prisoner in the Tower of London* (1646), p. 3; Lilburne dated this pamphlet 6 November.

<sup>35</sup> Seaberg, 'Argument from continuity', 798–9.

<sup>36</sup> *An anatomy of the lords tyrannie*, p. 6.

society of his wife and friends.<sup>37</sup> His condition was the complete negation of freedom and this experience of unfreedom would be deeply formative.

There were many problems with Lilburne's constitutional position as it developed over his initial period of imprisonment in summer 1646. *Floyd's Case* (1621) had definitively established that the House of Commons was *not* a court of record, and did not have the legal power to administer the oaths necessary for deposing witnesses. As a result, in instances of parliamentary judicature committees established for the taking of depositions, while they might include members of the lower House, also necessarily included representatives from the Lords. The provisions of Magna Carta to which Lilburne appealed instead pertained to the individual's right to be tried by a jury of peers – individuals of their own condition, whether lord or commoner. This was, of course, the birthright of all freeborn Englishmen as well as the king's Irish subjects, and *post nati* – Scots born after James I's accession to the English throne in 1603.<sup>38</sup> By the authority of Sir Edward Coke's writings, Lilburne was correct in the sense that, although the House of Lords had 'of ancient time' given judgment against those who were not of their condition, it had subsequently been enacted that 'hereafter no Peeres of the Realme shall be driven to give judgement on any others then on their Peeres according to the law'.<sup>39</sup> However, in spite of Lilburne's initial appeals to the Commons as his lawful triers, the lower House simply was not a court of record in a position to overturn the Lords' committal of him, enjoying only a limited jurisdiction over their own membership. Lilburne needed to go to law school, and the Tower of London became his inn of court.

Like any good jailhouse lawyer, Lilburne turned his attention to the legal arguments against his imprisonment. In this he was clearly aided by his contact with Jenkins and his exposure to Sir Edward Coke's writings. David L. Smith has characterized Jenkins as a 'constitutional' Royalist, a man strongly committed to the rule of law who had opposed monopolies and ship money during the 1630s.<sup>40</sup> In spite of their political differences, Jenkins and Lilburne were both victims of the Long Parliament and the Leveller and the Royalist had in common that they viewed

<sup>37</sup> *Ibid.*, pp. 16–17.

<sup>38</sup> This privilege, notably, did not extend to foreign peers, who would be accounted commoners in England: see *Lord Sanchar's Case*, 9 *Coke Reports*, 117a–b; and my discussion of Maguire's trial in 1645: Orr, *Treason and the State*, pp. 160–1.

<sup>39</sup> Coke, 2nd *Institutes*, fo. 50.

<sup>40</sup> David L. Smith, *Constitutional Royalism and the Search for Settlement, c. 1640–1649* (Cambridge, 1994), pp. 234–7.



their ongoing imprisonment as contrary to law. They also undoubtedly feared that Archbishop Laud's fate – attainder by parliamentary ordinance – would soon become their own. However, while Jenkins was concerned with establishing constraints on the powers of Parliament in general and protecting the king's place in the constitution, Lilburne was more specifically concerned with establishing constraints on the Long Parliament in particular, until such time as permanent provisions for a self-governing commonwealth could be established under a new Agreement of the People. With a new Agreement in place, the present parliament would be dissolved and a new, uncorrupted representative body elected.

Jenkins in his *Discourse touching the inconveniencies of a long continued parliament* of June 1647 had already laid out many of the arguments that Lilburne would later utilize in attacking both the authority of the Long Parliament and its continued sitting.<sup>41</sup> Jenkins's principal target was the 'Act to prevent inconveniencies which may happen by the untimely adjourning, proroguing, or dissolving this present Parliament' of 10 May 1641, which had declared that the present parliament could not be dissolved (or even prorogued or adjourned) except by an act of parliament.<sup>42</sup> This, according to Jenkins, had created a 'perpetual parliament' – a thing contrary to both law and reason. Jenkins's arguments were subtle, and included, for example, an appeal to the language of the original writ of summons setting out limits on the powers of Parliament, confining them to the purpose for which Parliament was summoned. Jenkins, singling out the House of Commons in particular, argued that the Commons had no legal power to 'commit any man to prison, who is not of the said House, for Treason, Murder, or Felony, or any thing but for the disturbance of the publique Peace, by the priviledge of the whole body'.<sup>43</sup> The reason for this was that the writ of summons 'for them is onely *ad faciendum et consentiendum* to those things, whereof His Majestie shall consult and treat with his Prelates and Nobles, *et de communi consilio Regni* shall be there ordained, as appeares by the Writ'.<sup>44</sup> Furthermore, in keeping with the

<sup>41</sup> E 392(30), David Jenkins, *A discourse touching the inconveniencies of a long continued parliament* (1647).

<sup>42</sup> Gardiner, *CD*, pp. 158–9. <sup>43</sup> Jenkins, *Discourse*, p. 6.

<sup>44</sup> *Ibid.* For the writs to which Jenkins refers see E 157(11), William Hakewill, *The manner of holding parliaments in England collected forth of our ancient records* (1641), pp. 24–6. Lilburne would also cite Hakewill: E 370 (12), [John Lilburne and Richard Overton?], *Regall tyrannie discovered: or, a discourse, shewing that all lawfull (approbational) instituted power by God amongst men, is by common agreement, and mutual consent* (1647), p. 97; contrary to David Wootton's opinion, I believe that this work was probably a joint composition of Lilburne and Overton and not the sole composition of the latter: David Wootton, 'Leveller democracy and the Puritan revolution', in J. H. Burns and Mark

precedents of the early 1620s and *Floyd's Case*, Jenkins asserted that the Commons had 'no power to examine any man' under oath independently of the Lords because they were not a court of record.<sup>45</sup>

However, the most powerful precedent that Jenkins invoked was that of Coke's report of *Bonham's Case* (1611) contained in his eighth *Reports*. This, of course, is the case that modern legal scholars associate with the development of the notion of judicial review now entrenched in US constitutional practice.<sup>46</sup> The case, dating from 1610 and first published in 1611, concerned a dispute between one Dr Bonham and the London College of Physicians, in which Bonham claimed that graduates of Oxford and Cambridge were legally permitted to practise medicine within the city of London without joining the college. The college, citing their letters patent of Henry VIII subsequently confirmed by act of parliament, vehemently disagreed, and took action against Bonham, first imposing a fine of £5, and then having him arrested and imprisoned when he continued to practise.<sup>47</sup> Coke, in ruling that Bonham had been falsely imprisoned, found that the college in making itself a judge in its own cause had violated a fundamental maxim of the common law. More famously, in his printed report he stated further that 'When an act of Parliament is against common right or Reason, or repugnant, or impossible to be performed, the Common Law shall controle it and adjudge this Act to be void; they are the words of the Law'.<sup>48</sup>

Citing *Bonham's Case*, Jenkins' *Discourse* argued that the statute made subsequent to the Triennial Act was void because it was both against common right and reason and impossible to be performed. A perpetual parliament, Jenkins argued, was against reason because it extended parliamentary immunities against lawsuits indefinitely, obstructing the rights of other subjects to recover debts and damages. Jenkins argued that 'The law of the land allowes no protection but for a yeare, to be free from suits . . . but a Parliament perpetuall may prove a protection, not for a yeare, but for ever, which is against all manner of Reason'.<sup>49</sup>

Goldie, eds., *The Cambridge History of Political Thought, 1450–1700* (Cambridge, 1991), p. 426.

<sup>45</sup> Jenkins, *Discourse*, p. 7.

<sup>46</sup> Charles M. Gray, 'Bonham's Case reviewed', *Proceedings of the American Philosophical Society*, 116 (1972), 35–58; see also James R. Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence, KS, 1992), ch. 3.

<sup>47</sup> Stoner, *Common Law and Liberal Theory*, p. 49.

<sup>48</sup> Coke, 8 *Reports*, 118a; Jenkins, *Discourse*, p. 2.

<sup>49</sup> Jenkins, *Discourse*, p. 3; see also E 393(39), John Lilburne, *Rash oaths unwarrantable* (1647), p. 27.

Furthermore, the statute was impossible to be performed because the death of the king would necessarily dissolve Parliament; because Parliament did not have the power to legislate a dead man back to life, the Long Parliament could not possibly make itself perpetual under the provisions of the statute.<sup>50</sup>

The same parliament-yoking arguments later re-emerged in many of Lilburne's pamphlets, especially in his post-regicide writings, when the seemingly limitless powers of the Rump Parliament and its outgrowth, the newly erected Council of State, emerged as an ominous threat to Lilburne and his confederates. His *Legall fundamentall liberties*, composed in prison and appearing in June 1649, reiterated many of the arguments which, mediated through his contact with Jenkins, he had appropriated from Coke's published works.<sup>51</sup> Writing in the aftermath of the trial of the king by a specially erected High Court of Justice and the establishment of the Commonwealth regime, Lilburne pursued a number of now-familiar strategies. As with Jenkins in 1647, his primary target was the act subsequent to the Triennial Act, forbidding the dissolution of the Long Parliament without its own consent. In attacking the 'tyranny' of the Rump Parliament, the developing pattern of appropriation is clear. Lilburne cited at length the same passage from *Bonham's Case* – the famous 'judicial review' passage – that Jenkins had previously deployed in attacking the Long Parliament in 1647.<sup>52</sup> He also appealed to the limitations set down in writ of summons in arguing that parliaments were 'principally called for the maintenance of the Lawe, and for the redresse of divers mischiefs and grievances that daily happen; and sutable [*sic*] to this are the ends contained in the Writs that summon them, and the intentions of those that chuse the Members and send them'.<sup>53</sup> Furthermore, because the king's writ was 'the Basis in law, and Foundation of this Parliament', his death had necessarily dissolved Parliament and the Rump's continued sitting was illegal.<sup>54</sup> 'I would fain know how it's possible for a Parliament to confer or treat with King CHARLES now he is dead?' asked Lilburne.<sup>55</sup> Furthermore, the act was 'repugnant' to the previous

<sup>50</sup> Jenkins, *Discourse*, p. 3.

<sup>51</sup> E 560(14), John Lilburne, *The legall and fundamentall liberties of the people of England revived, asserted, and vindicated* (1649); Thomason's date is 18 June for the first edition. Lilburne had of course previously used this argument.

<sup>52</sup> Lilburne, *Legall and fundamentall liberties*, p. 51.

<sup>53</sup> *Ibid.*, p. 2; for an earlier example see E 411(21), John Lilburne, *The grand plea of Lieut. Col. John Lilburne* (1647), p. 7; the imprint is 20 October 1647, while Thomason's date is 25 October 1647. Significantly, Lilburne also cited in *The legall and fundamentall liberties* Coke 4th *Institutes*, fos. 9, 11, 37–9, 41–2.

<sup>54</sup> Lilburne, *Legall and fundamentall liberties*, p. 53.

<sup>55</sup> *Ibid.*, p. 52.

Triennial Act, Lilburne argued, because 'how can every three years a Parliament be begun if this [Parliament] be perpetual?'<sup>56</sup>

Diane Parkin-Speer has argued that Lilburne, relying on Coke's report of *Bonham's Case*, 'applied rigorously the doctrine of judicial review of statute law, indeed applied it so vigorously that it became a weapon of the lay individual to evaluate whether a law was just or unjust, thus providing a theoretical justification for resistance to authoritarian government, whether revolutionary or traditional'.<sup>57</sup> These conclusions, linking Coke and subsequently Lilburne to a mature doctrine of judicial review, now appear overly ambitious. Insofar as they can be reconstructed, Lilburne's reading practices as he approached Coke's writings were not always rigorous, but were clearly selective, and directed towards not only the goal of securing his release but also that of improving the immediate conditions of his imprisonment. For example, on the issue of jailors' fees Lilburne, citing the second and fourth volumes of Coke's *Institutes*, argued that 'it is an abusion of the Law that prisoner . . . pay any thing for their entries into the Gaole, or for their goings out; that is the common Law; there is no fee at all due any Goalers whatsoever by the common Law'.<sup>58</sup> Elsewhere in the second *Institutes*, however, Coke stated with regard to unlawful imprisonment that 'If the Sherriffe, or Goaler retain a prisoner in Gaole after his acquittal, unlesse it be for his fees, this is false imprisonment'.<sup>59</sup> Coke's position was in fact much more complicated than Lilburne allowed, further revealing the sometimes haphazard nature of the Leveller's reading practices.<sup>60</sup> In reality, the late lord chief justice was probably more concerned with curbing abuse than altogether extirpating the practice of collecting jailors' fees.<sup>61</sup>

While relating Lilburne to a broader body of thought on competing conceptions of liberty, this chapter has also examined his writings in relation to the immediate circumstances of his imprisonment, his experience of unfreedom and, in particular, the reading practices that he developed as he approached the sources of the common law. Lilburne's reading and writing practices, his oral communication with other prisoners and the overall web of communicative strategies that he deployed in attempting

<sup>56</sup> *Ibid.*, p. 47. <sup>57</sup> Parkin-Speer, 'John Lilburne', 295.

<sup>58</sup> Lilburne, *Oppressed mans oppressions*, pp. 5–6 (quotation at p. 5); the citations from Coke are 2nd *Institutes*, fos. 74, 209, and 4th *Institutes*, fo. 41.

<sup>59</sup> Coke, 2nd *Institutes*, fo. 53.

<sup>60</sup> Anthony Grafton and Lisa Jardine, "'Studied for action": how Gabriel Harvey read his Livy', *Past and Present*, 129 (1990), 30–3; William Sherman, *John Dee: The Politics of Reading and Writing in the English Renaissance* (Amherst, MA, 1995), ch. 3.

<sup>61</sup> John Goodwin and his congregation appear to have come to Lilburne's rescue after his June arrest, as evidenced by a published letter thanking them for their support: E 400(5), John Lilburne, *Jonah's cry out of the whales belly* (1647), pp. 5–6.

to secure his release were all crucial to understanding the process of his political thinking during his period of imprisonment. For Lilburne, legal education was rough and ready; it was something that an ordinary citizen such as himself, literate but not learned, could achieve provided the law was printed in English. Coke's intended audience for the *Institutes*, written as they were in English, had been the Parliamentarians of the 1620s. These were men who were literate but not always learned in the ways of the common law, or comfortable with the legalistic jargon of law French which was the customary language of legal reporting until mid-century. For them there was none of the careful study over a lengthy period of years that Coke deemed necessary for the development of the 'artificial reason' that common-law jurists applied in making their judgements. Confined to the vernacular, and to the Tower of London, Lilburne developed a set of communicative strategies in his reading of Coke's published works for a very different purpose than that for which they were originally intended. In doing so, he fashioned a common-law conception of negative liberty.

### III

In the 1980s, as part of a scholarly reaction against revisionism's perceived over-emphasis on the consensual nature of early Stuart political culture, Johann P. Sommerville resurrected the notion of long-term ideological causes for the English Civil War. In this interpretation the beginnings of deep and substantial ideological polarities were already evident by the start of the seventeenth century, setting the stage for conflict. Furthermore, these divisions would become even further exacerbated with the growing influence of an absolutist-leaning clerical estate that succeeded in gaining, first, the ear of King James I and then subsequently that of an even more sympathetic King Charles I.<sup>62</sup> In the 1990s Markku Peltonen argued that republican consciousness had already significantly developed during the seven decades prior to the outbreak of civil war, suggesting that Britain's republican experiments of the 1650s had deeper origins in English political culture.<sup>63</sup> More recently, Quentin Skinner has suggested that the 'democraticall gentlemen' who predominated in the Long Parliament had a recognizably republican conception of liberty that envisioned self-government as integral to the preservation of freedom.<sup>64</sup>

<sup>62</sup> Johann P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603–1640* (1986; 2nd edn, Harlow, 1999).

<sup>63</sup> Markku Peltonen, *Classical Humanism and Republicanism in English Political Thought, 1570–1640* (Cambridge, 1995).

<sup>64</sup> Skinner, 'Third concept'.

The 1630s – a period in which Parliament did not sit – was a period of tyranny in which self-government stood in abrogation. With these arguments, the idea of long-term 'ideological causes' of the English Civil War, once consigned to the dustbin of Whig historiography, has re-emerged with a vengeance.

The notion of self-government, now closely identified with republican thought of the period, stood at the heart of Leveller political thinking. The call for a significantly broader franchise and frequent parliamentary elections in order to guard against what James Harrington would term the 'prolongation of magistracy' were hallmarks of their political programme.<sup>65</sup> The Leveller *Agreements* simply and concisely set forth blueprints for the reformation of the English constitution to form a self-governing commonwealth.<sup>66</sup> To borrow a phrase from J. C. Davis, the Leveller programme in this sense intended both to 'restore' and to acknowledge publicly what Mark Goldie has termed the 'unacknowledged republic' – the complex network of indigenous, self-governing local regimes through which the English effectively governed themselves. While hardly the deferential, consensus-oriented utopia that revisionist scholars presented in the 1970s and 80s, this highly decentralized, plural and complex constitutional order functioned relatively well, at least in the sense that there had been no conflict resulting in a full-scale civil war since the closing decades of the fifteenth century. However, by the mid-1640s the Long Parliament's development of an infinitely more oppressive military and fiscal apparatus than that of the Personal Rule had seriously undermined these traditions of local self-government.<sup>67</sup> This was when the Levellers emerged as a clearly identifiable group, as both defenders and advocates of these existing indigenous traditions of self-government.

John Lilburne's principal formative experiences, however, were less those of the unacknowledged republic, or those of a citizen participating in a self-governing commonwealth, than those of religious and political

<sup>65</sup> The Levellers, while rejecting the Harringtonian notion of 'equal' government, certainly agreed with him on the need for frequent rotation: James Harrington, *The Commonwealth of Oceana and a System of Politics*, ed. J. G. A. Pocock (Cambridge, 1992), pp. 8–42 (i.e. 'The first part of the preliminaries').

<sup>66</sup> I have addressed these issues elsewhere: D. Alan Orr, 'Constitutionalism: ancient, modern, and early modern in the *Agreements of the People*', in Philip Baker and Elliot Vernon, eds., *Foundations of Freedom: The Agreements of the People, the Levellers, and the Constitutional Crisis of the English Revolution* (Basingstoke, 2011).

<sup>67</sup> J. C. Davis, 'Afterword: reassessing radicalism in a traditional society: two questions', in Glenn Burgess, ed., *English Radicalism, 1550–1850* (Cambridge, 2007), pp. 356–8; Mark Goldie, 'The unacknowledged republic: officeholding in early modern England', in Tim Harris, ed., *The Politics of the Excluded c. 1500–1850* (Basingstoke, 2001), pp. 153–94.

persecution. His early political socialization consisted in being publicly flogged and locked up for a good stretch of time at the hands of a prerogative court in which there was no jury of his peers and defendants were customarily deposed under oath against themselves. Once he had been released from that prison, he again became a prisoner at the hands of the Royalists at Oxford. Then he became a victim, first of the Long Parliament, then of the Commonwealth, and then finally, after a period of exile, Oliver Cromwell's Protectorate. Quite simply, in the words of Thomas Hobbes, Lilburne during these periods of imprisonment was not free from 'opposition', or 'externall Impediments of motion'.<sup>68</sup> He was kept under lock and key.

Lilburne remained at this time a staunch advocate of self-government, identifying the right to the franchise in both local and parliamentary elections as a birthright of all freeborn Englishmen handed down time-out-of-mind since before the Norman Conquest and subsequently reconfirmed in Magna Carta.<sup>69</sup> He spoke the language of natural law and natural right, but he did so in the same breath as he spoke of native right and birthright. As a firm and vocal advocate of self-government, he was the primary author of *Foundations of freedom*, the second *Agreement of the People* published in December 1648, and he later played a major role in the Levellers' final *Agreement*, written, fittingly enough, from a cell in the Tower in late April 1649.<sup>70</sup> However, unlike the more republican John Wildman, who closely identified the idea of being 'at liberty' with the provision for self-government, Lilburne's views on the liberty of the subject were not nearly as closely intertwined with his views on the need to create – or re-create after the model of pre-Conquest conditions – a self-governing commonwealth.<sup>71</sup> For Lilburne liberty meant something far simpler and at the same time more complex and subjective. His experience of incarceration during the period 1646–9 taught him that parliaments, like kings, could become tyrannical; as a result, by mid-1649 the rule of law, as adjudged by a jury of peers, became his primary recourse.

Recent scholarship has once again made it fashionable to entertain the notion that Britain's military conflagrations of the mid-seventeenth

century had long-term origins.<sup>72</sup> However, the intention here has been to demonstrate that the situation as it developed during the 1640s was far more complex, factionalized and ideologically messy than historians of political thought such as Sommerville, Skinner and Peltonen have hitherto allowed. Lilburne may have become a martyr for the Parliamentary cause, and fought in the parliamentary armies, but he was hardly the kind of 'democraticall gentleman' who took the Long Parliament into war. He did not sit in the Long Parliament, the Short Parliament or any other parliament for that matter, and he would have been in his mid-teens at the calling of the most recent parliament prior to spring 1640. Most of what he knew about parliaments came from the books that he read, conversations with friends and fellow prisoners, being arraigned at the bar of the House of Lords and being interrogated before parliamentary committees. The prison experience was crucial to Lilburne's formation, because his experience of persecution at the hands of the Long Parliament and his exposure to more learned prisoners of differing political creeds led him to develop a common-law conception of negative liberty as simply the condition of non-constraint, or non-imprisonment, that was more in keeping with Royalist writers than with parliamentary apologists. It is often said that politics finds strange bedfellows. The same is true for political thought.

<sup>72</sup> For a recent example of this trend see Alan Cromartie, *The Constitutional Revolution: An Essay on the History of England, 1450–1642* (Cambridge, 2006).

<sup>68</sup> Hobbes, *Leviathan*, p. 261.

<sup>69</sup> E 304(17), [John Lilburne], *England's birth-right justified* (1645), p. 33; also in William Haller, ed., *Tracts on Liberty in the Puritan Revolution*, vol. 3 (New York, 1934), p. 291; [Lilburne], *Londons libertie*, pp. 2–3, 14–16.

<sup>70</sup> Donald M. Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution* (New York, 1944), pp. 293–303, 400–10.

<sup>71</sup> E 968(3), [John Wildman], *The Leveller: or the principles and maxims concerning government and religion which are asserted by those that are commonly called the Levellers* (1659).