

A “Complete Anachronism”?

Common Informing, Popular Participation, and Social Philosophy in Eighteenth- and Twentieth-Century England

Abstract: This article analyses the tensions between popular participation and democracy using the example of common informing in eighteenth- and twentieth-century England. Common informing describes the enforcement of penal laws by private citizens from the Middle Ages until its abolition in 1951. The instrument was always controversial, but for different reasons: in the early modern period, the populace often rebelled against the use of the instrument by governments. Going to court for the common good was set against the higher social value of freedom from blackmail, harassment, and denunciation. In the twentieth century, on the other hand, the instrument was regarded by MPs as a “complete anachronism” precisely because it allowed too much political participation. The article thus aims to contrast the debates around common informing in the eighteenth and twentieth centuries with a view to the underlying ideas and contradictions of fundamental rights, popular participation, and democracy.

Keywords: common informing, qui tam, Gin Acts, whistleblowing, popular participation

What are the political, social, and moral limits of popular participation? Whereas we tend to assume that it was predominantly the non-democratic political structures of premodern Europe that severely limited the political participation of the individual citizen, the story is not always that straightforward. In the context of the modern state’s monopoly of executive and judiciary political functions, for instance, citizens are typically excluded from a number of practices that were regarded as ‘rights’ or ‘freedoms’ under premodern conditions. Certain forms of private or commu-

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nity policing, as well as privately initiated legal prosecutions, were even accepted as essential to the functioning of premodern political regimes.¹ In recent years, moreover, these same forms have resurfaced as severe complications and contradictions of the postmodern state, typically under the guise of derogatory terms such as ‘whistleblowing’ or ‘vigilantism’. But given that these forms of political action can be viewed as basic forms of political participation, their moral and political status remains ambiguous: is this a democratic trend, in the sense that citizens avail themselves of the exercise of fundamental rights of participation for the benefit of the common good? Or are we witnessing the erosion of democracy and fundamental rights through the ochlocratic usurpation of the exclusive functions of the modern state? Much depends on how these questions are answered. If nothing else, such a view helps to complicate established narratives of the rise of democracy and human rights in the wake of the French Revolution. It suffices to remember that the moment of the ‘birth’ of fundamental rights, and in particular the terror years of 1793 and 1794, witnessed an intense ideological battle over what exactly ‘liberty’ and ‘equality’ should mean. Freedom and liberty, as the events in France illustrate, required a leash.² Thus to understand that the modern European state is only *one* answer to the question of democracy and fundamental rights may ultimately also help to shift away from the convenient assumption that Europe’s modernity has some kind of exclusive claim to democracy and fundamental rights.

In framing the issue of democracy and fundamental rights, the article may seem to ignore or disregard an established assumption about democracy being participatory in the premodern period, whereas it became representative in the wake of constitutional changes in the nineteenth century.³ However, in direct response to the main questions of the special issue to which this article belongs, and as a conscious provocation to such established narratives, it seeks to complicate the picture of a neat transition from participation to representation with a type of popular participation that does not easily fit either typology. Namely, the article analyses this basic tension of popular participation under pre/modern conditions through the example of common informing in eighteenth- and twentieth-century England. Common

1 See Maarten Prak, *Citizens without Nations. Urban Citizenship in Europe and the World, c.1000–1789*, Cambridge 2018, 116–139.

2 See for instance Jonathan Israel, *Revolutionary Ideas. An Intellectual History of the French Revolution from the Rights of Man to Robespierre*, Oxford/Princeton, NJ 2014.

3 On this argument, see, among others: Mark Goldie, *The Unacknowledged Republic. Officeholding in Early Modern England*, in: Tim Harris (ed.), *The Politics of the Excluded, c.1500–1850*, Basingstoke 2001, 153–194; David Churchill, *Rethinking the State Monopolisation Thesis. The Historiography of Policing and Criminal Justice in Nineteenth-Century England*, in: *Crime, History and Societies* 18 (2014), 131–152; Mark Knights, *Trust and Distrust. Corruption and Office in Britain and its Empire 1600–1850*, Oxford 2021.

informing – itself based on the common law principle of *qui tam* – describes the enforcement of penal laws by private citizens. It was used in England, and later in the United Kingdom, from the Middle Ages until its abolition in 1951. Throughout this period it was highly controversial for a number of reasons: plaintiffs did not have to be legally aggrieved to bring a case; they received monetary rewards after successful prosecutions; and the outcome of the legal proceedings was binding even on the sovereign. As a result, the instrument was perennially criticized, politically, for its potential violation of sovereignty and, socially, for its tendency towards denunciation and blackmail.⁴ What makes this legal instrument particularly relevant to the above question is that it did not in its basic form change at all. What did change, on the other hand, is the constitutional and ideological framework in which it operated. The controversy around common informing thus differed markedly over time: in the sixteenth to eighteenth centuries, it was usually the populace that openly rebelled against the government's use of the instrument, thereby forcing governments to make concessions. Political participation in the form of recourse to the law for the common good was set against the higher social value of freedom from blackmail, harassment, and denunciation.⁵ By contrast, in the twentieth century, and particularly in the abolition debate of the 1930s and 1950s, the legal instrument was regarded by parliamentarians across the benches as a “complete anachronism” and unbecoming to “the life of a free nation” precisely because it allowed too much political participation.⁶ The article thus aims to contrast the debates around common informing in the eighteenth and twentieth centuries with a view to the underlying ideas and contradictions of fundamental rights, popular participation, and democracy.

4 See in general Hannes Ziegler, *Qui tam pro domino rege quam pro se ipso. Über die Herrschaftswirkungen Privater Strafverfolgung (Common Informing) im frühneuzeitlichen England*, in: *Historische Zeitschrift* 315 (2022), 289–318; J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, in: *North Carolina Law Review* 78 (2000), 539–642; Leon Radzino-wicz, *A History of English Criminal Law and its Administration from 1750*, vol. 2. *The Clash between Private Initiative and Public Interest in the Enforcement of the Law*, London 1956.

5 See for instance Geoffrey Elton, *Informing for Profit. A Sidelight on Tudor Methods of Law-Enforcement*, in: *Cambridge Historical Journal* 11 (1954), 149–167; Maurice Beresford, *The Common Informer, the Penal Status and Economic Regulation*, in: *Economic History Review* 10 (1957), 221–238; D. R. Lidington, *Parliament and the Enforcement of the Penal Statutes. The History of the Act ‘In Restraint of Common Promotors’ (18 Eliz. I, c. 5)*, in: *Parliamentary History* 8 (1989), 309–328.

6 For these quotes, see *Parliamentary Debates (Hansard)*, Fifth Series, House of Commons Official Report (=Hansard HC Deb.), vol. 483, col. 2091–2093, and vol. 293, col. 843–846.

1. Sunday observance, 'Tory democracy', and the ambiguity of popular participation

The legal principle of *qui tam* was formally abolished in the United Kingdom in 1951 by the Common Informers Act.⁷ The immediate background to this legal change is, at first glance, curious: in 1951 the British government planned to celebrate the 100th anniversary of the Great Exhibition of 1851 with a Festival of Britain. Even in the planning stages, it became clear that the opening of the festival attractions on Sundays might cause problems for the organizers. The Sunday Observance Act of 1780, still in force at the time, imposed penalties on any venue offering public entertainment or amusement on Sundays if an admittance fee was charged. Enforcement of the Act, moreover, was open to the common informer via *qui tam*, that is, to any member of the public who sued the respective venue in return for a share of the fine.⁸ To avoid the embarrassment of a government-sponsored event being lawfully and successfully sued on that same government's behalf, Parliament aimed to exempt the festival through a tailor-made Sunday Opening Act.⁹ In the course of the debate MPs also expressed surprise and disgust that *qui tam*, a legal principle so seemingly out of tune with modern democracy, was not only still on the Statute Book, but was regularly practised in the courts. How was it that random private citizens could assume the role of plaintiff in exchange for money? How could the common good possibly be furthered by private greed? Lionel Heald, MP for Chertsey, swiftly took the opportunity to draw up a private members' bill to abolish the use of *qui tam* in all acts containing such clauses, which were then still on the Statute Book. In one case, these instances dated as far back as the fourteenth century, with many others originating in the sixteenth century. On 9 February 1951, at the second parliamentary reading of the bill, a lengthy debate signalled broad cross-party support for the initiative, and the bill gained royal assent in June of that year.

What is striking about the parliamentary debate in the present context is the extent to which it questioned the constitutionality of *qui tam* in the context of a modern democratic polity. Its use, argued Christopher Hollis MP, was a "complete" and "pure anachronism". This was because private gain, or "private greed", was seen as the primary motive for common informing. What other motivation could private parties, unaffected by the breach of law itself, have for bringing such actions? Enlisting such a motive for enforcing the law and for the common good, Hollis added, was "now ridiculous, odious, anachronistic and unnecessary".¹⁰ This view was widely

7 Common Informers Act 1951 (14 & 15 Geo. 6, c. 39).

8 Sunday Observance Act 1780 (21 Geo. 3, c. 49).

9 Festival of Britain (Sunday Opening) Act (14 & 15 Geo. 6, c. 14).

10 Hansard HC Deb, vol. 483, col. 2091–2093.

shared across Parliament that day, as was the notion, introduced in Heald's speech, that the instrument was particularly prone to blackmail. Heald even cited the case of a common informer by the name of Green, alias Houghton le Touzel, who in recent decades had established a seemingly lucrative business either bringing *qui tam* actions or, more problematically, threatening to do so to obtain recurring payments.¹¹ Such methods, the majority agreed, had no place in a modern democracy and were contrary to the "liberty in this country".¹² With the growth of modern policing, the civil service, and the democratically organized rule of law, such reliance on private initiative had become irrelevant, Heald summarized the general consensus. This was all the more true because civil society had sufficiently evolved to remove the need to incentivize action for the common good with money.¹³

Such sweeping claims, however, required a careful distinction. For MPs at the time, the exact meaning of 'informing' was fuzzy at best. Heald, for example, had to distinguish between the mere act of informing the authorities of a breach of the law and the narrower practice of common informing, which, he was keen to stress, was "a well-known technical expression" with an "established meaning in our law".¹⁴ There was "nothing in the least wrong" with the former, which was in fact the duty of every citizen, and failure to do so was in some cases a criminal offence. The latter, however, was as unnecessary as it was detrimental because its prime incentive was of a monetary nature. In other words, while modern democracy was firmly based on the former, the latter was supposedly diametrically opposed to it: "There is something utterly despicable to present day sentiment in a procedure of this kind"; it was "obnoxious to modern ideas".¹⁵

This seemingly straightforward position was – and is – problematic in more than one sense. Given the mood of the day, no one openly opposed the measure on 9 February 1951, but the lengthy debate nonetheless offered much in the way of subtle objections. Supporters of the bill rightly pointed out, for instance, that the text of the bill did not actually change existing laws in any material way; it simply removed a means of enforcing those laws. This argument was obviously designed to make it more palatable to the traditionally-minded that the bill would in fact abolish a legal instrument several hundred years old: "a very ancient institution".¹⁶ But to more sceptical observers, such pusillanimity was in fact one of the problems of the bill: James Hudson MP pointed out, probably rightly, that the "opprobrium" of common inform-

11 Ibid., col. 2086.

12 Ibid., col. 2150.

13 Ibid., col. 2082.

14 Ibid., col. 2080.

15 Ibid., col. 2132, 2133.

16 Ibid., col. 2082.

ing was not due to the procedure alone, but “due to the fact that it has been found possible to use Acts of Parliament so completely out of date”. In other words, would it not have been better to tackle the outdated laws themselves rather than the means of enforcing them? “What we are saying”, Marcus Lipton urged along the same lines, “is that there are a number of Acts on the Statute Book which we have not the courage to tackle for fear of offending the susceptibilities of certain sections of the community”.¹⁷

A second possible line of criticism concerns the overly optimistic notion of civic duty. Hector Hughes, in particular, highlighted his own present as an “age of better citizenship” which meant that citizens were now prepared to do their duty willingly, whereas previously they had to be incentivized by money:

“Happily, we live in a better and nobler age when there is a lively civic conscience, a sense of public duty which makes the average good citizen realise his duty to the community and to the administration of justice, and when the good citizen takes the view that it would be disgraceful to take money for doing that which it is his bare public duty to do.”¹⁸

Whereas no one present that day openly challenged the idea of civic society having outgrown a darker age, there was, in some quarters, tangible unease about the fragility of the argument. It was, for a start, overly optimistic, as many must have been aware. But it was also potentially inconsistent. Repeatedly, MPs stressed that common informing was obsolete because the “administrative machinery of the State” had evolved sufficiently to make the common informer’s services unnecessary. The advent of nationwide policing in 1856 in particular had removed the need for it once and for all.¹⁹ At the same time, and despite the reference to the now superior administration of law enforcement, several MPs emphasized the continuing need for informing for policing and law enforcement in modern times. Without it, “the work of the police and of the Special Branch would be severely handicapped.”²⁰ Faced with the question of whether or not informers were necessary after all, the majority actually tended to see them as essential, even to an administratively evolved machinery. The objection was almost exclusively that money was the prime motive for such actions. But any discussion of motive led to even murkier grounds: what about the anonymous letter to the authorities and other forms of delation and denunciation? Was it to be assumed that all these acts were motivated by patriotism, as some MPs tended to think, and were justified? What was at stake here, as became increasingly obvious during the debate, was a more fundamental question.

¹⁷ Ibid., col. 2122, 2157.

¹⁸ Ibid., col. 2098.

¹⁹ Ibid., col. 2159.

²⁰ Ibid., col. 2155.

Most of the above contradictions can in fact be subsumed under perhaps the strongest contradiction of all. This concerns the concept of liberty as it emerged in the course of the debate. Major Legge-Bourke, for instance, regarded the bill as a way “to increase the liberty of the subject”. This was because the bill removed common informing as a specific form of “sneaking” where “under certain regimes in other countries, neighbours inform on neighbours”.²¹ In this veiled reference to communism, common informing was seen as ultimately interfering with “the liberty of others”.²² Emphatically framing the bill as a “step forward towards greater liberty in this country”, however, was a dubious strategy at best, because this position conveniently overlooked that one could only be informed against if one had committed a crime. This position, in other words, was latently inconsistent with the will to uphold the rule of law, equally prominent in the debate. More importantly, the position was inconsistent with another potent sentiment, expressed, among others, by Geoffrey Bing, who regarded common informing as a historical manifestation of “private enterprise”.²³ Common informing, Bing argued, was one of private enterprise’s “first spheres, where, in a way, it first established itself and where it was at its purest”. In those earlier days “of untrammelled private enterprise”, he continued, the “profession” of informing had much to recommend it and “there was a proper appreciation of it”.²⁴ In other words, what Bing advertised was that the instrument of common informing should be regarded as an admittedly outdated but nonetheless important expression of a liberal, low-regulation state. So was common informing an expression of the liberty of the subject or an attack on the liberty of the subject?

In an earlier parliamentary debate on the subject in 1934, Sir Gerald Hurst had referred to the common informer as the “complete sneak”, and to his actions as “legalised blackmail”. In Hurst’s view, he was “a very fit person to be employed under tyrants and dictators”, but had no place “in the life of a free nation”.²⁵ Hurst may have known about the historical origins of the legal instrument in Roman times, during the early imperial reigns from Tiberius to Nero, and he may well have based his characterization on such knowledge.²⁶ But he did hit a nerve: the 1951 debate also referred to the informer’s actions as inherently tyrannical and suggested that its proper place was in a totalitarian regime.²⁷ Equally prominent, however, was the sense that while the common informer had an honourable place in British his-

21 Ibid., col. 2108.

22 Ibid., col. 2142.

23 Ibid., col. 2115.

24 Ibid., col. 2118.

25 Hansard HC Deb, vol. 293, col. 843–846.

26 On ancient precursors to common informing, see Steven Rutledge, *Imperial Inquisitions. Prosecutors and Informants from Tiberius to Domitian*, London 2002.

27 Hansard HC Deb, vol. 483, col. 2100.

tory, his time had simply passed and conditions had changed. Further, when his actions were framed not as blackmail and denunciation, but as an expression of private enterprise incentivized by money, some MPs on the Conservative benches were reluctant to condemn his existence outright. This was to do with the Tories' social philosophy at the time, and here perhaps lies the crucial contradiction.

In the very last intervention of the 1951 parliamentary debate, Labour MP James MacColl congratulated Heald on introducing the bill, but he also pointed to the irony of the Conservative Party moving to abolish an important legal example of private enterprise, openly wondering at the changes in social philosophy within the Conservative Party. Heald himself, in the briefest of interjections, delivered the appropriate political term: "Tory democracy".²⁸ With this, he was referring to the then dominant Tory philosophy. "Tory democracy" or, more commonly, "One-Nation Conservatism" was then described as a set of ideas aimed to preserve established institutions in a democratic environment, with a commitment to gradual reform and a relatively open mind to state intervention in economic and welfare areas.²⁹ This comparatively "left-wing" attitude, as expressed in the present bill, MacColl taunted the other side of the House, would ultimately tempt the left wing of the Conservatives to "find their way over to this side of the House". Common informing was, after all, a profession, and one that was open to competition and closed to monopoly. Was its abolition not an interference "with the sanctity of contract?" And what about the abolition of this ancient profession without any compensation? Was this really in the conservative spirit? MacColl's irony was sharp:

"Is it really fair that because there are some bad common informers the rights of the good common informers, those firm believers in unrestricted private enterprise, those opponents of monopoly, should be treated in this cavalier fashion?"³⁰

Ultimately, MacColl went on, this was a question of differences in social philosophy. While "our social philosophy is clear-cut", he claimed, the "benches opposite" were obviously in need of "a new social philosophy". Common informing, MacColl concluded, was "an example in microcosm of the major question which divides us".³¹

²⁸ Ibid., col. 2160.

²⁹ See for instance Hugh Bochel, One Nation Conservatism and Social Policy, 1951–64, in: *Journal of Poverty and Social Justice* 18 (2010), 123–134; P. Bridgen, The One Nation Idea and State Welfare. The Conservatives and Pensions in the 1950s, in: *Contemporary British History* 14 (2000), 83–104; Robert Walsh, The One Nation Group and One Nation Conservatism, 1950–2002, in: *Contemporary British History* 17 (2003), 69–120; Robert Walsh, The One Nation Group. A Tory Approach to Backbench Politics or Organization, 1950–55, in: *Twentieth Century British History* 11 (2000), 183–214.

³⁰ Hansard HC Deb, vol. 483, col. 2160–2162.

³¹ Ibid.

That major question was the status of private initiative or private enterprise in the context of a modern democracy. Depending on one's social philosophy, such initiative was either a fundamental right and an expression of the liberty of the subject – or an illegitimate attack on that same liberty.

2. Spirituous liquors, British liberties, and “the many notorious riots upon informers”

In the hundred years before 1951, no newly passed Act of Parliament had included a *qui tam* provision. The only exception was the Representation of the People Act of 1949, which was a consolidating piece of legislation rather than a novel enactment.³² Despite this, many Acts were still in force during these decades that contained *qui tam* clauses and which were, furthermore, actually used. Of these Acts, however, only the Sunday Observance Act of 1780 had any real teeth. By 1934 Gerald Hurst had identified several cases of this Act being used in ways that seemed increasingly out of date, such as the 1875 case against the Brighton Aquarium for exhibiting fish on Sundays.³³ In the grand scheme of law enforcement, these examples were a nagging oddity, but ultimately a relatively minor one. They were a far cry from the political climate of the 1780s, when the issue of religious and social policy was the object of renewed informer activity.³⁴ But even then, the common informer's fortune was in inevitable decline. The last time a British government effectively used *qui tam* actions to push through a major piece of social policy was during the 1730s and 1740s, when informing focused on the policy surrounding the Gin Acts. As in 1951, *qui tam* met with considerable resistance. But the political and constitutional implications were markedly different.

The Gin Acts were a series of Acts of Parliaments against the free sale of spirituous liquors passed between 1729 and 1751. The immediate background was the so-called ‘gin craze’, that is, the unrestricted consumption of gin especially by the more vulgar sort of people in the big cities, particularly London.³⁵ A 1735 report

32 Representation of the People Act 1949 (12, 13 & 14 Geo. 6 c. 68).

33 Hansard HC Deb, vol. 483, col. 2160–2162.

34 See Joanna Innes, *The Protestant Carpenter – William Payne of Bell Yard (c.1718–82). The Life and Times of a London Informing Constable*, in: Joanna Innes, *Inferior Politics. Social Problems and Social Politics in Eighteenth-Century Britain*, Oxford 2009, 279–341.

35 On the Gin Acts and the social historical background, see Jessica Warner/Frank Ivis, ‘Damn You, You Informing Bitch! Vox Populi and the Unmaking of the Gin Act of 1736’, in: *Journal of Social History* 33 (1999), 299–330; George Rudé, ‘Mother Gin’ and the London Riots of 1736, in: George Rudé, *Paris and London in the Eighteenth Century. Studies in Popular Protest*, London 1974, 201–221; Peter Linebaugh, *The London Hanged. Crime and Civil Society in the Eighteenth Century*, London 1991; Robert B. Shoemaker, *The London Mob. Violence and Disorder in Eighteenth-Century*

to the Middlesex quarter sessions neatly summed up the relevant concerns. It was with the “deepest Concern” that the committee observed “the strong Inclination of the inferior Sort of People to these destructive Liquors”. The effect of the ubiquitous and excessive consumption of spirituous liquors was “visibly ruinous and destructive” to the morals of the people, to their capacity for hard work and even to the readiness of the armed forces. Gin destroyed families and individual lives from an early age. It also had rather “mischievous Effects” on trade and “publick Welfare”, so that the “publick Welfare and Safety of the Nation” was ultimately at stake.³⁶ In 1729 a first Act imposed a duty on all spirituous liquors and required dealers to obtain a yearly licence for £20.³⁷ This legislation was amended in 1733, when Parliament changed the relevant duties. The new law also forbade for the first time the “hawking and peddling” of spirituous liquors, that is, the sale of gin in small quantities on the streets and outside licensed establishments. The fine for any misdemeanour was £10, half of which was paid to the successful informer, who was introduced for the first time by this Act as a potential agent of enforcement alongside the formally responsible Board of Excise.³⁸

Despite the *qui tam* provision, it does not seem that informing became a relevant feature of law enforcement at this time. This may be because the conditions for a real take-off were not met by the Act. According to Jessica Warner and Frank Ivis, these conditions were threefold. Firstly, the pool of potential offenders had to be large. The rewards, secondly, had to be large enough to incentivize informers to come forward against their own neighbours. And these rewards, thirdly, had to be guaranteed.³⁹ The 1733 Act did meet the first two conditions, but not the third, because on failure to pay the fine, offenders could choose to go to the house of correction for up to three months, in which case informers gained nothing at all.⁴⁰ In theory, the exact same clauses applied to the 1736 Gin Act. But there was one crucial difference. In addition to the prohibition on hawking and peddling, regular retailers were once again required to obtain a costly licence to carry on business, with heavy fines for failure to do so.⁴¹ As Warner and Ivis have shown, most retailers chose not to obtain a licence. Moreover, if being sued by informers, publicans and inn-keepers, unlike the more destitute hawkers, could usually pay their way out of court, thus guaran-

England, London/New York, NY 2004, 7–8; Peter Clark, The “Mother Gin” Controversy in the Early Eighteenth Century, in: *Trans. Roy. Hist. Soc.* 38 (1988), 63–84.

36 London Evening-Post, 20–22 Jan. 1736.

37 Taxation (No. 2) Act 1728 (2 Geo. 2, c. 17).

38 Spirit Duties Act 1732 (6 Geo. 2, c. 17).

39 Warner/Ivis, *Vox*, 1999, 302–303.

40 Spirit Duties Act 1732 (6 Geo. 2, c. 17).

41 Spirit Duties Act/Gin Act 1736 (9 Geo. 2, c. 23).

teeing payment to the informers.⁴² As a result, informing became an extremely widespread pastime all over London over the next few years; thousands of offenders were brought before the courts, most of them probably rightly so; common informing had become a trade, and a lucrative one at that. According to George Rudé, in the 22 months between the autumn of 1736 and the summer of 1738, some 12,000 informations were laid in London alone.⁴³

The rise of informing against the retail of spirituous liquors, however, was accompanied by a rise in popular resistance to common informing. George Rudé has analysed some of these events in detail.⁴⁴ To give but one example: in January 1737, the “Effigy” of a known informer was carried in a procession through London, at the end of which it was fastened to a pole in Hanover Square and a halter was tied around its neck. “In the Sight of a vast Concourse of People”, it was then burned.⁴⁵ Whereas the example shows a relatively ritualized form of non-violence, on other occasions violence became real. In January 1738, a female informer was attacked “with such Severity, by beating, kicking, and cramming Dirt into her Mouth, that we hear she is since dead of her Wounds.” In the same week, another woman was dragged through Brewer Street in St James and thrown into the horse pond.⁴⁶ One reason for such resistance to informing was the methods used by informers. Newspaper reports and court proceedings clearly show that informers often used dubious methods. These ranged from blackmail and extortion to actual perjury in court.⁴⁷ Some informers, moreover, seem to have organized themselves into criminal gangs and used all sorts of tricks to get the unwary to break the law, such as asking for gin under false pretences or going about in disguise.⁴⁸ The people of London were clearly averse to being harassed by such devious methods from within their own midst. The sudden difficulty in obtaining cheap liquor, on the other hand, may well have exacerbated such feelings. These sentiments, moreover, were not limited to the general populace. Juries were sympathetic to the accused, and generally against the informer, so that a number of offenders against the Gin Acts were acquitted to the “general Joy” of the assembled.⁴⁹ Constables, on the other hand, were increasingly reluctant to support informers, and the same is true for JPs. The *London Evening-Post* reported that “the

42 Warner/Ivis, Vox, 1999, 303–304.

43 Rudé, London Riots, 1974, 217, counts ca. 12,000 information between September 1736 and July 1738.

44 Ibid.

45 London Evening-Post, 15–18 Jan. 1737.

46 Read’s Weekly, 7 Jan. 1738.

47 London Evening-Post, 27–29 April 1738 (Blackmail and Extortion); Common Sense, 13 May 1738 (Extortion); Common Sense, 16 Sep. 1738 (Perjury); London Evening-Post, 28–31 Jan. (Perjury).

48 Common Sense, 28 Oct. 1738 (Going in Disguise); Common Sense, 16 Sep. 1738 (False Pretences);

49 Common Sense, 13 May 1738; Common Sense, 26 Aug. 1738.

Business of Informing seems almost at an End, for the Informers are such despicable Fellows, [...] that the Justices do not care to take their Informations”.⁵⁰ In short, London was having none of it.

The government, on the other hand, was unwilling to reconsider its position. Initially at least, its response was to tighten the legislation further. The 1737 Gin Act, for instance, increased the pressure on offenders to pay fines rather than to go to the house of correction by mandating that any offender who chose the latter was to be stripped naked and whipped “until his or her body be bloody”.⁵¹ An important step further went the 1738 Gin Act, which made any attack on an informer a felony punishable as such. Furthermore, if no money was paid by the offender, informers were to be reimbursed by the Excise, thus guaranteeing their reward. And whereas all former Acts had required a JP to authorize an arrest, now anyone could apprehend suspected informers and then notify the constables. Given the civil liberties traditionally enjoyed by freeborn Englishmen, this was indeed dangerous ground. Finally, and tellingly, any constable unwilling to assist in such procedures was liable to a fine of £20.⁵² Clearly, the government hoped to close any loopholes in the existing laws and strengthen the case for proper enforcement. Any hopes that this would solve the patchy enforcement of the Gin Acts as well as the violent attacks on the informers, however, were soon dashed. In fact, after the passage of the 1737 and 1738 Acts, riotous proceedings and isolated acts of violence increased greatly. In the early months of 1738, hardly a week went by without “many notorious Riots upon Informers”.⁵³ The government, which had quite recently learned a harsh lesson in the power of the urban crowd from the Porteous Riots in Edinburgh in September 1736, was increasingly wary of these spontaneous outbursts of popular feeling.⁵⁴ The fear of Jacobite agitation exacerbated such apprehensiveness.⁵⁵

But how political were these riots? Leaving aside the more complicated question of social class,⁵⁶ can we discern a defence of individual or civil liberties in these events, or were they rather spontaneous outbursts of popular sentiment without principle? It helps to distinguish the events, however roughly, into three different categories. Firstly, there were events which appear to be relatively small-scale, local,

50 London Evening-Post, 5–7 Jan. 1738.

51 National Debt Act 1736 (10 Geo. 2, c. 17).

52 Retailers of Spirits Act 1737 (11 Geo. 2, c. 26).

53 London Evening-Post, 4–7 March 1738.

54 Linebaugh, *London Hanged*, 1991, 333–356.

55 Rudé, *London Riots*, 1974, 218.

56 On this debate, see for instance Douglas Hay/Peter Linebaugh/John G. Rule/E. P. Thompson/Cal Winslow (eds.), *Albion's Fatal Tree. Crime and Society in Eighteenth-Century England*, London 1975; John Rule, *Social Crime in the Rural South in the Eighteenth and Early Nineteenth Centuries*, in: John Rule/Roger Wells (eds.), *Crime, Protest, and Popular Politics in Southern England, 1740–1850*, London 1997, 153–168.

and spontaneous riots. The cry: “Informer!” was often sufficient to initiate them.⁵⁷ On other occasions, informers were so foolish as to walk down St Martin’s-Lane “in an insulting and daring Manner” until the inhabitants finally rose up against them and “disciplin’d” them.⁵⁸ A second set of events were different in terms of the sheer scale of the riots or in that they displayed a certain level of premeditation. The rescue of offenders from the hands of the authorities, as well as the purposeful whipping of the mob by individuals, clearly shows that these riots could be a deliberate strategy. The authorities, for their part, often believed to be able to identify the “Head”, “Ring-leader”, or “Captain of the Mob” guilty of “raising a Mob”.⁵⁹ On other occasions, the events were marked by the sheer size of the crowd. “The Mob was so vastly great” in February 1738, that “all Monmouth-street” was filled.⁶⁰ In May of the same year, “a great Mob to the Number of 3 or 400 Persons, rose near Covent Garden”.⁶¹ And, finally, in January 1738, a crowd of “about 1000 People” besieged the house of JP Col. De Veil – one of the staunchest executors of the Gin Acts in London – for several hours before they could be dispersed by the soldiers from nearby St James.⁶² Similar to the Porteous Rights of 1736, this was political action with a purpose, however inarticulate the crowd may have been about that purpose. It was no coincidence that the target in January 1738 was the house of a JP. The crowd rose to see a grievance redressed by the authorities.

This aspect is also clearly visible in the third type of events. These can be characterized as what an observer called “rough Musick”, that is, acts of usually ritualized and highly symbolic resistance, “by which the good People of this Town usually express their Resentments and Detestation, when they have no other way of doing it”.⁶³ Examples include setting bonfires and burning the political target in effigy,⁶⁴ and throwing or dragging the offender into water (usually a horse pond).⁶⁵ Others were stripped naked and pelted with stones, or “set upon an Ass”, pelted with stones and paraded “up and down Bond-Street”.⁶⁶ Most traditional perhaps was the threat

57 Reads’ Weekly, 18 Feb. 1738.

58 London Evening-Post, 4–7 Feb. 1738. Other instances of spontaneous mob violence in London Evening-Post, 23–25 Feb. 1738 and 25–28 Feb. 1738.

59 London Evening-Post, 18–20 May 1738; London Evening-Post, 20–23 May 1738.

60 London Evening-Post, 9–11 Feb. 1738.

61 London Evening-Post, 20–23 May 1738.

62 London Evening-Post, 21–24 Jan. 1738.

63 See Anon., *A Short History of the Gin Act. Or An Impartial Account of the Conduct of Some of those Who Have Been Instructed with the Execution of It*, London 1738, 40.

64 Common Sense, 26 Aug. 1738; London Evening-Post, 15–18 Jan. 1737.

65 London Evening-Post, 5–7 Jan. 1738; London Evening-Post, 9–11 Feb. 1738; London Evening-Post, 18–21 Feb. 1738.

66 London Evening-Post, 18–21 Feb. 1738.

“to pull down the House” of an offender.⁶⁷ In cases such as these, informers were subjected to the “rough Discipline of the Rabble”, who, in keeping with traditional community values, subjected these men and women to highly ritualized forms of punishment for breaking the solidarity of the community. In this particular sense, these were highly political acts, aimed not at punishing the respective individual, but at preserving the established order and the accepted social equilibrium.⁶⁸ If the cry for “Liberty!” was missing on these occasions, they were nonetheless an expression of perceived fundamental and customary rights, that is, a clear manifestation of the “Resentments” of the “good People of this Town” who typically had “no other way of” expressing these views.⁶⁹

If the crowd, in their riots against the common informer and the policy of the Gin Acts, did not articulate exactly their political grievances lay, others did. In particular, lobby groups for distillers and dealers of gin were politically quite vocal in the aftermath of the Gin Acts and their indented and unintended consequences. Unlike the 1951 parliamentary debate, however, which had centred on constitutional issues, the political debates around the Gin Acts focused on the social and economic consequences of both the content of the Acts and the enforcement methods. Yet in defending their vested interests and perceived rights, these lobby groups also harked back to questions of lawfulness and constitutionality. In *A Short History of the Gin Act*, published in 1738, the author remained broadly supportive of the government and instead attacked the perceived abuses of common informing, such as the many instances of perjury and blackmail. In several instances, however, it is also clear that the author thought the laws themselves at fault, the unintended consequences of which the government had simply not foreseen. It remained that, in his overall view, there was no law “more grievous to the subject” and “not a Law in the whole voluminous Body of the English Law, which it would be more acceptable to the People in general to have repealed”.⁷⁰

Even more blunt was the *Perfect View of the Gin Act* of 1738. The Act, the author lamented, was unsuited “to the Welfare and Liberty of Subjects”. Indeed, distillers, and others in the gin business “may be truly said in a great Measure to be deprived of their Birthright, Magna Charta, the great Bulwark of British Liberties.”⁷¹ How so?

67 London Evening-Post, 7–10 Jan. 1738.

68 See E. P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, in: E. P. Thompson, *Customs in Common*, Pontypool 1991, 185–258.

69 Anon., *A Short History of the Gin Act*, 1738, 40. See also Adrian Randall, *Riotous Assemblies. Popular Protest in Hanoverian England*, Oxford 2006; Andy Wood, *Riot, Rebellion and Popular Politics in Early Modern England*, Basingstoke 2002.

70 Anon., *A Short History of the Gin Act*, 1738, 67.

71 See Reay Sabourn, *A Perfect View of the Gin Act, with its Unhappy Consequences*, London 1738, 4, 5.

The objection raised here was only partly to the Gin Acts, because the pamphlet stood in a tradition of criticizing the Excise as an unfit and even hostile tax regime for business. First voiced under Cromwell, when the Excise was first introduced, this particular grievance took a long time to die down, only to be revived in the early 1730s in the context of Walpole's failed Excise scheme.⁷² But this line of criticism also found particular resonance in the Gin Act and common informing, because, the pamphlet argued, the informer could, "for the sake of a little sordid Gain", "for the sake of a little filthy Lucre", swear away the liberties of an honest manufacturer and trader.⁷³ The author took particular offence at the fact that any person, however dishonest, however "loose and idle", was considered a credible witness against the honest trader in court. Of course, informers were generally "necessary evils", but could not the enforcement of the Gin Act be entrusted to the Excise officers instead?⁷⁴ As things stood, "our Noble Standard of Liberty" and the "greatest Securities of [...] Liberty and Property" were greatly weakened by letting informers enforce the Gin Acts.⁷⁵ The Acts, in fact, were characterized as a "yoak just ready to be fastened about" the necks of Englishmen; they struck "at the very roots of Property".⁷⁶

Common informing and the Gin Acts were thus understood, at least in part, as an attack on the liberties of the British people. The political debate in the pamphlets against the Gin Acts expresses this as well, if differently, as the instances of rioting and rough music by the populace. The liberty to engage in private enterprise without harassment, the liberty from denunciation, and the liberty of consumption were, each in its own way, regarded as higher virtues than the enforcement of penal laws by common informing. The contradiction vis-à-vis these liberties was therefore not in the way in which common informing was perceived by the population, but rather in the way in which it was applied by the authorities. Whereas the government of the early 1730s clearly recognized this form of enforcement as problematic, Walpole's parliaments not only made free use of the instrument, but, in the face of opposition, doubled down on their efforts to enforce social and economic policy through a denunciatory mechanism. From a purely political point of view, the governments of the 1730s and 1740s did not perceive common informing as being in conflict with the fundamental rights of the subjects; the latter having not even been codified. The population, on the other hand, already had a firm understanding of such liberties and rights, and was prepared to defend them.

72 Paul Langford, *The Excise Crisis. Society and Politics in the Age of Walpole*, Oxford 1975.

73 Sabourn, *A Perfect View of the Gin Act, 1738*, 14, 15.

74 *Ibid.*, 17–18, 19.

75 *Ibid.*, 6–7.

76 Cited by Rudé, *London*, 1974, 215.

3. Democracy, public interest, and “sneak culture”

The fundamental tension inherent in these scenarios, that is, between the liberty from harassment and denunciation and the need to engage private enterprise for the common good, has not disappeared. If anything, it has become more acute in recent years. To give but one example: in September 2020, in the wake of a Covid19-related lockdown, British people, like others at the time, were restricted in whom they could meet and under what conditions. When asked whether she would report her own neighbours for breaching these conditions, Priti Patel, then UK home secretary, said she would definitely call the police if she witnessed a breach of the law in this respect. The *Guardian*, who reported on the debate, asked some of Patel’s London neighbours the same question. Most were spontaneously reluctant to such informing. “It’s not a good idea, to be honest”, one said, because if he called the police on his neighbours, wouldn’t they feel inclined to do the same? Another pointed to “live and let live” as his relevant philosophy in the matter.⁷⁷ Only a few days later, Boris Johnson, the then prime minister, joined the debate. People, Johnson urged, should discuss their concerns with their neighbours first. Only if there was a “huge kind of Animal House party taking place” would there be a significant threshold at which people should, of course, contact the authorities. He himself was not a fan of “sneak culture”.⁷⁸

Johnson’s position on the question of informing and denunciation echoes to some extent the positions taken in the parliamentary debate of the early 1950s: people should generally be free from such harassment by their own neighbours. In his own case, of course, this position on “sneak culture” and indoor parties has acquired a sharp irony of its own, and the several instances of parties in 10 Downing Street during lockdown contributed decisively to his resignation. But there is a deeper issue at stake in the debate, one that goes beyond the specific situation of the Covid19 pandemic.

To this day, the common law provision of *qui tam* is very much alive in the Statute Book of the United States. Unlike in Britain, it was never fully abolished in the US and in fact has grown massively in importance in the past forty years. Initially, the now relevant Statute, the so-called False Claims Act, originated during the American Civil War as a means for the US government to discover and take action

77 Kevin Rawlinson, ‘Rule of six’. Priti Patel’s Neighbours Unimpressed by Her Shopping Lawbreakers, in: *The Guardian*, 15 September 2020, <https://www.theguardian.com/politics/2020/sep/15/rule-of-six-priti-patels-neighbours-unimpressed-about-her-shopping-lawbreakers> (28 January 2025).

78 Jessica Elgot, ‘Sneak culture’. Boris Johnson Appears to Criticise Priti Patel for Rule of Six Snooping, in: *The Guardian*, 17 September 2020, <https://www.theguardian.com/world/2020/sep/17/sneak-culture-boris-johnson-priti-patel-rule-of-six-snooping-england-covid> (28 January 2025).

against fraudulent army contractors. The Act continued to be used for this specific purpose into the twentieth century, but more recent changes to the legal provision, as well as cultural changes regarding the figure of the ‘whistleblower’, have significantly widened the scope of application. In recent decades, for example, the provision has been widely used in the healthcare sector and against pharmaceutical companies.⁷⁹ Given the indeed large potential profits to be made from such whistleblowing under the False Claims Act, there is now an abundance of attorneys and law firms in the United States offering services to individuals seeking to pursue a *qui tam* action. In view of the popularity and apparent success of enforcement through whistleblowing, both for the state (in terms of averted fiscal and financial damages as well as more abstract benefits for the common good) and for the individual (in terms of the compensation received), it is perhaps no surprise that many countries have seen a debate on the opportunities of introducing similar legal channels. Some have even already done so. In Germany, for instance, there is an ongoing debate about the potential benefits and drawbacks of such legislation, particularly in the economic sector.⁸⁰ In the United Kingdom, too, the legal tradition, once firmly abolished, has regained its appeal. As recently as 2013, the Labour Party called for the introduction of the UK’s very own False Claims Act.⁸¹

It is important to note, however, that even in these current debates, the old tensions and ambiguities of private enforcement have not disappeared. Opinion pieces tend to emphasize the potential benefits of *qui tam* enforcement, calling it, among many other things, a “citizen’s sword”,⁸² a “check” on “unconstitutional exercises of executive power”,⁸³ or, more broadly, an “old tool for modern society”.⁸⁴ Academic research in law, sociology, and the political sciences, on the other hand, tends to be more balanced, but nonetheless appears broadly supportive of such methods of enforcement. Papers for instance highlight how *qui tam* actions “could fight public corruption”, how and to what extent they can further the “public interest”, and even

79 <https://www.whistleblowerfirm.com/healthcare-fraud/false-claims-act> (28 January 2025).

80 Ralf Kölbel, Zur Wirtschaftsrechtlichen Institutionalisierung des Whistleblowing. Lehren aus der Praxis des “Qui tam”-Verfahrens, in: Juristenzeitung 63 (2008), 1134–1141.

81 Theo Blackwell, It’s Time for A UK False Claims Act, in: Labour List, 16 July 2013, <https://labourlist.org/2013/07/its-time-for-a-uk-false-claims-act> (28 January 2025).

82 Julie Spitzer, ‘Qui Tam’. The Citizens’ Sword, in: Wisconsin Watch, 5 November 2017, <https://wisconsinwatch.org/2017/11/qui-tam-the-citizens-sword> (28 January 2025).

83 Masha Simonova, Using Qui Tam Statutes to Check Unconstitutional Exercises of Executive Power, in: Lawfare, 12 June 2020, <https://www.lawfareblog.com/using-qui-tam-statutes-check-unconstitutional-exercises-executive-power> (28 January 2025).

84 Christine Bartholomew, Refashioning Old Tools for Modern Society, in: Courts Law JOTWELL, 24 October 2022, <https://courtslaw.jotwell.com/refashioning-old-tools-for-modern-society> (28 January 2025).

how they can be used for “flipping markets to virtue”.⁸⁵ Often, the impetus of such research and policy papers is to broaden the scope of the existing legislation, for example, to include privacy law.⁸⁶ This is despite the fact that many of the legal issues surrounding these actions remain a matter of academic debate, not least whether the “real party” to the legal action is the private individual suing on the government’s (and his own) behalf, or indeed the government itself.⁸⁷

On the other side of the spectrum, however, are claims that *qui tam* actions threaten the very core of democracy.⁸⁸ They do so by placing the executive branch of government beyond democratic accountability. “If upheld”, Carrillo and Duvernay have recently argued forcefully, “these laws will be copied and expanded, and potentially threaten independent judicial power and democratic government itself”.⁸⁹ Such powerful statements notwithstanding, it should be noted that there is currently no consensus on the impact of private enforcement on democratic processes and democratic rights. A coherent case can be made that *qui tam* is both “socially inefficient” and “democratically illegitimate”.⁹⁰ At the same time, it can be argued that *qui tam* actions, by contrast, increase participation and confidence in democracy precisely because they provide “a feasible method for direct intervention by members of the public at large”.⁹¹ Similarly, *qui tam* actions can be seen as part of a system of “restorative justice” essential to providing citizens with the opportunity “to learn to be democratic, to learn how to activate their consciences about justice in a restorative circle”.⁹² Ultimately, all debates about the use of *qui tam*, common informing, and the enlistment of private initiative for the common good in a modern society face what Martin Redish has recently called “the Democratic Difficulty”.⁹³ The ultimate goals, namely the preservation of the common good and the protection of civil and individual liberties, are, even and especially in a modern democratic society,

85 Aaron R. Petty, How *Qui Tam* Actions Could Fight Public Corruption, in: University of Michigan Journal of Law Reform 39 (2006), 851–888; Christina Orsini Broderick, *Qui Tam* Provisions and the Public Interest. An Empirical Analysis, in: Columbia Law Review 107 (2007), 949–1001; John Braithwaite, Flipping Markets to Virtue with *Qui Tam* and Restorative Justice, in: Accounting, Organizations and Society 38 (2013), 458–468.

86 Peter Ormerod, Privacy *Qui Tam*, in: Notre Dame Law Review 98/1 (2022), 267–335.

87 Valerie R. Park, The False Claims Act, *Qui Tam* Relators, and the Government. Which Is the Real Party to the Action?, in: Stanford Law Review 43 (1991), 1061–1093.

88 David A. Carrillo/Stephen M. Duvernay, Citizen Enforcement Laws Threaten Democracy, in: Fordham Law Voting Rights and Democracy Forum 1/2 (2023), 124–132.

89 Ibid., 124.

90 David Freeman Engstrom, Private Enforcement’s Pathways. Lessons from *Qui Tam* Litigation, in: Columbia Law Review 114 (2014), 1913–2006, 1917.

91 Petty, Actions, 2006, 871.

92 Braithwaite, Markets, 2013, 463.

93 Martin H. Redish, Class Actions and the Democratic Difficulty. Rethinking the Intersection of Private Litigation and Public Goals, in: University of Chicago Legal Forum 2003/1 (2003), 71–139.

squarely at odds with the task of a legally active participation of private citizens in the democratic process.

4. Conclusion

Common informing, that is, a form of popular participation of both historical and contemporary importance, is subject to very different interpretations, depending on what common informing stands for ideologically and, equally, on what the individual motivations for such participation are seen to be. As a result, these forms of popular participation are seen as either inherently bad or intrinsically good: they are understood either as an expression of individual liberties or as an attack on these same liberties; they are an integral part of the democratic process or, instead, undermine that very process as essentially undemocratic tools. Ultimately, therefore, the interpretation of common informing as a political tool depends very much on one's interpretation of what constitutes a good polity, whether in premodern societies or in a modern democracy. In other words, the relationship between fundamental rights of popular participation and the concept of democracy is not necessarily a stable, mutually affirmative one. They can also be very much at odds with each other. Rights and liberties, and even the concept of democracy, are neither stable nor monolithic – they are the shifting sands of political history.