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William III and the Legalist Revolution

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One doesn't have to be a deconstructionist to understand that people and things are full of surprising complexities. Hugh Macgill is no exception: a passionate believer in the essential equal worth of human beings with an amused affection for Confederate history; a consistent seeker after institutional innovation with a strong sense of the value of tradition; a stickler for parliamentary form and personal courtesy with a genius for informal and direct communication. It is the complicated coexistence of such disparate preferences and talents, of course, that has enabled him to make the extraordinary contributions to the improvement of this school from which so many of us have benefited.

A symposium dedicated to the paradoxical idea of rebellious leadership, therefore, is a particularly apt way to honor Dean Macgill's tenure. This phrase also captures a notion that is especially fruitful when applied to basic questions of constitutional structure and political value. Every legal system rests, at the end, on a set of political assumptions. Every instance of law, that is, is ultimately supported by something that is not law. When, as inevitably happens, there develops a fundamental disharmony between the artifacts of law and the political values of a society the law will have to give way. When this phenomenon occurs—at least when it occurs abruptly—we call it a revolution.1

There thus appears to be a fundamental opposition between law and revolution. But the same people and the same events may exhibit an affinity for both notions. Since every legal system must refer either explicitly or implicitly to its alegal source, every invocation of law is, at the same time, a kind of implementation of the original revolutionary act. Somewhat less obviously even revolutionaries may demonstrate an attachment to law—even to the law of the constitutional system they are destroying.

A case in point is the English Revolution of 1688-89. In that Revolu-
tion, King James II lost his throne after an invasion force of about 15,000 men landed in England under the command of the king’s Dutch nephew and son-in-law, William, Prince of Orange. William’s venture was supported and joined by significant English political and military forces. James, a Roman Catholic, had made himself profoundly unpopular by his policy of tolerating and promoting the interest of Catholics and by ignoring legal restrictions on the capacity of Catholics to hold office or to practice their religion. James fled the country and an ad hoc Convention consisting of an assembly of peers and an irregularly elected House of Commons declared that the king had “abdicated” and offered the crown jointly to William and his wife, Princess Mary, the daughter of King James. The political grievances against James turned on his unilateral exercises of state power. As such, the Revolution marked a significant turn toward the recognition of an indispensable role for Parliament in the great decisions of the kingdom. This understanding was reflected in the promulgation of the Declaration of Rights as part of the offer of the throne to William and Mary.2

The point about the Revolution I wish to stress is its inescapable illegality. There are many uses of the term “law.” But the events of 1688-1689 were at odds with almost all of them. If there was one feature of the English constitution to which the statesmen of that period expressed more attachment than any other it was the principle of hereditary succession. The Whig lawyer, Henry Pollexfen, William’s first Attorney-General and then Chief Justice of the Court of Common Pleas declared in the first post-revolution Parliament that “[a]ll men love their Monarchy, and if you make men believe that it is elective, you will catch a great many. No man ever dreamed of this.”3 Yet the central event of the Revolution was the depositing of a king who held the throne by undoubted hereditary right and the substitution of an unprecedented joint monarchy by two members of the royal family who were second and fourth in the line of succession. No amount of obfuscation could conceal this clear act of revolution.

Nevertheless the revolutionaries of 1688-89 strove mightily to make their actions appear to conform with existing law. In part this was dictated by the underlying political charges they leveled against James II. His offenses were largely framed as violations of the law. The Declaration of Rights announced that the king and his counsellors “did endeavour to Subvert and extirpate the Protestant Religion, and the Lawes and Liberties of

Having justified the Revolution by the illegality of the king's behavior they were surely uncomfortable in dwelling on the illegality of their own. Even beyond this, they were, for the most part, genuinely committed to the maintenance of legal continuity. Most of them were willing to chance the breach but wished to do so—insofar as they were able—under a cloak of legal justification.

The critical central figure in this enterprise was William III, Prince of Orange. By the time his fleet sailed, he was determined to settle for nothing less than the crown itself. But he was an unlikely revolutionary. Surely he was skeptical of the idea that governments must respond to the changing preferences of the population. He was a strong monarchist and attached a great importance to his own claim to a hereditary sovereignty—the tiny principality of Orange. He premised his invasion of England in part on a right to protect his and his wife's patrimony. He had little patience with the intricacies of constitutional form. He had been repeatedly frustrated as Stadhouder of the United Provinces by the elaborate rules for consultation with, and consent from, the various representative institutions of the Netherlands. Once established in England he resisted parliamentary efforts to whittle down the prerogative. He complained that the laws of England gave the king "the power to destroy the nation and not to protect it."

Indeed it is generally conceded that apart from the impetus of personal ambition, William's reasons for invading England were not constitutional, but military and diplomatic. William was engaged in a lifelong conflict with Louis XIV of France. The expansion of the Sun King's empire continually threatened to devour the Netherlands. At the time of the revolution William was assembling a tenuous alliance of the United Provinces, Spain, the Holy Roman Empire and certain German states. But the power of this alliance to resist France was a matter of doubt. England, ostensibly neutral, was pivotal in determining the balance of forces. Should James openly ally with France, the risk to the rest of Europe would be measurably increased. Should England adhere to the anti-French coalition, a formida-

4. The Declaration of Rights sect. 1, introduction (Eng. 1689), reprinted in Schwoerer, supra note 2, app. 2 at 299 [hereinafter Declaration].
5. There is a continuing dispute over exactly when William decided to seek the crown. See Speck, supra note 2, at 74-75; see also Stephen B. Baxter, William III 223-24 (1966). But all agree he had a settled determination after December 11, 1988, when King James II fled to France. See, e.g., Robert Beddard, A Kingdom Without a King 33 (1988).
6. See Baxter, supra note 5, at 227 (His wife's support for the invasion was more strongly motivated by a desire to "preserve her claim to the throne."); see also Tony Claydon, William III's Declaration of Reasons and the Glorious Revolution, 39 Hist. J. 87, 98-99 (1995) (noting that William ventured to England to secure the balance of power between Catholicism and Protestantism in Europe but might also have had an interest in the throne).
7. See, e.g., Baxter, supra note 5, at 189.
8. Id. at 270.
ble military force was possible.  

Whatever his real motives, however, the political circumstances of England made anything but a legal defense impossible. Of course the brute facts of invasion and the necessarily irregular means by which the new government was established made the construction of such legal justification a challenging task. But at almost every point the new king sought to deal with the issues confronting him in a way which could maintain at least a colorable claim to legality. Even as he bemoaned the irrational strictures of English law he insisted a king of England must govern by law "if he hath conscience."11

In this paper, I will offer some illustrations of the way in which the preference for legality manifested itself at every step. Thus the convention which effected the settlement was depicted as a parliament, and the installation of Queen Mary as a co-sovereign was a concession to her somewhat stronger legal claim to the crown. The new king recoiled from suggestions that he declare himself a conqueror, and his regime deviated from such legal protection as habeas corpus with the greatest reluctance. When accurate statements of the revolutionary character of the new regime were uttered, they were quickly squelched. The oaths of allegiance constructed for the new government were designed especially to soothe the conscience of its legalistic adherents.

The legalist tone of the Revolution and the new government was set even before the Dutch fleet set sail from Helvoetsluyts. On September thirtieth William published in the Hague a Declaration justifying his action. This document, partly drafted by the Anglican clergyman and future Bishop of Salisbury, Gilbert Burnet, reads like a bill of indictment of the king. Over and over William recounts the violations of law committed by James. He condemns the king’s “Evil Counsellors” who, as it was later to be stated in the Declaration of Rights “endeavor[ed] to Subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome.”12 The king’s dispensing with statutes is something those counsellors “pretend [is] according to law.”13 The decision of the court of King’s Bench in which the king’s dispensing and suspending authority was upheld is mocked “as if it were in the power of the Twelve Judges to offer up the Laws, Rights and Liberties of the whole nation to the king.”14

10. BAXTER, supra note 5, at 270.
11. DECLARATION, supra note 4, sec. 1., introduction.
racion, moreover, states William’s objectives to be merely the restoration of law by the assembly of a free and legal Parliament, something it claims the king’s counsellors thwarted because they knew that they would then be brought to an account for all their open violations of law. The contrast the Declaration draws is between the outlawry of James II and the order and regularity of the rule of law. William urged Englishmen to support him so that we may prevent all those miseries which must needs follow upon the nation’s being kept under arbitrary government and slavery, and that all violences and disorders, which may have overturned the whole Constitution of the English government, may be fully redressed in a free and legal parliament.

But even if he were fully determined to act by law it was clearly impossible to follow that course and still achieve the ends for which the descent on England was undertaken. Some of the difficulties arose immediately in connection with William’s pledge to secure a legal parliament. On December twenty-third, James made his second, and this time successful, flight from England. While, in many ways, the departure of the king simplified matters for William, it seriously complicated his plans for a new “lawful” parliament. That is because under accepted law a genuine Parliament consisted of the king, the Lords and the Commons. The House of Lords could meet only on a summons from the king and the members of a House of Commons could be elected only on the king’s writ. James had reputedly dropped the Great Seal of England into the Thames, in part, for the purpose of frustrating any attempts to convene a parliament. A few days before his departure he told the French ambassador that

The Prince of Orange . . . will find himself very much embarrassed what form of government to establish. The meeting of a Parliament cannot be authorised without writs under the great seal, and they have been issued for fifteen counties only; the others are burned: the great seal is missing. The Chancellor had placed it in my hands eight days before I went away. They cannot make another without me. All this will create difficulties and incidents, which afford me occasion to take suitable measures.

That James was astute in this strategy is shown by William’s reaction to a proposal formulated in two meetings of his supporters in Hungerford on December eighth and ninth. They suggested demanding that James re-
call the new writs for a parliamentary election that had been issued. (This may have been motivated by a belief that a delayed election would favor the Whigs.) William refused to assent to such a request and would not even hear arguments supporting it. "By your favor, Sir Harry," he replied to Sir Henry Capel, "we may drive away the king; but perhaps we may not know how easily to come by a Parliament." The same proposal was made in a second meeting and the prince again objected to it.

Any possibility of an authentic parliament summoned on the writs of James II was made impossible by the sabotage of the escaping king. But the effort the revolutionaries devoted to approximating such a body tells us something about the value they put on legal form. The debate on the way to secure a parliament in these circumstances took place, at the outset, in an ad hoc assembly of peers that had convened to take charge of the government after the first attempted escape of the king. The most obvious and most certainly legal alternative was also the most impractical. That was to call back the king to issue genuine writs for a new election. The Earl of Nottingham suggested that the king be called back on the understanding that the new parliament would establish safeguards against future royal arbitrariness and on the express condition that its members would be absolved from their oaths of allegiance should the king fail to cooperate. A second possible expedient anticipated the ultimate settlement by treating James' departure as a "demise in law." In that event, the Princess Mary would automatically assume the throne and she would be able to call the new Parliament into being. Finally, it was proposed to use the writs issued by King James. The king had ordered the writs destroyed but enough survived to elect 184 members. Those legally chosen members could then provide for the election of the remainder. None of these devices was acceptable as a legal solution. The last two posed problems of legality almost as serious as those associated with a convention. The first, while impeccable as a matter of law, was a political impossibility.

18. Clarendon Correspondence, supra note 16, at 222.
19. See id.
23. See id. at 70. Mary was the rightful heir to the throne if the baby Prince of Wales, born the previous summer were, as was widely—but almost certainly wrongly—assumed, a "suppositious" heir intended to defraud the country into a Catholic dynasty. See Prall, supra note 9, at 167-68.
24. See Horwitz, supra note 22, at 68.
Consequently, it was agreed that the Prince of Orange should be asked to issue circular letters for the election of a convention. On Christmas Day the Lords took their request to the prince, asking, as well, that he take charge of the administration of the government. But he deferred responding until he had the advice of another body. On the twenty-third he had called together an assembly consisting of all of the local men who had sat in the Parliaments of Charles II (significantly, not the members of the compliant Parliament of James convened in 1685), the Lord Mayor and Aldermen of London and fifty members of the Common Council. As in the case of the irregular assembly of Lords, William asked this group for suggestions on the way to call a free Parliament. This mock House of Commons met in the Commons chamber on December twenty-sixth, the day after the Lords had made their address and they acquiesced in its recommendations.26

These two groups that initiated the call for the convention exhibit the schizophrenic character of the Revolution. On the one hand, nothing could be clearer than their non-legal character. The Lords met on their own initiative, not on a summons from the monarch. The “Commons” were not called by the king, and whatever past or present official status they held was in no way equivalent to that of real members of Parliament. On the other hand, they behaved very much like houses of Parliament, electing officers (including the appointment of eminent lawyers to advise them in place of the judges), and following parliamentary procedures.27 William was not content with the assent of the Lords to the calling of a convention. He insisted, as well, on the agreement of a representative group of commoners, thus crudely mirroring a true parliamentary action.

The tension between the desire to maintain some resemblance to ordinary legal form and the need to accomplish the substantive business of the Revolution was also evident in the procedures employed to elect the convention. The election departed in numerous details from the standard procedure for choosing a parliament. Sustained efforts of the last two kings to remodel the constituencies so as to assure the election of members friendly to the court had made many of the local officers who would ordinarily supervise the elections untrustworthy. Consequently, William’s letters to the counties were addressed not, as was usual, to the Sheriffs, but to the Coroner; and the letters to the boroughs, cities and cinque-ports were addressed to “an ambiguously named ‘Chief Magistrate.’”28 As the clergy were also suspect, the letters were not published in the churches but in the market towns. Concessions were also made to the urgency of the situation by shortening the period during which the letters were to be posted. Moreo-

26. See JONES, supra note 25, at 11-12.
27. See id.; SCHWOERER, supra note 2, at 133.
28. SCHWOERER, supra note 2, at 137.
ver, the usual forty day period of notice was waived to allow the conven-
tion to assemble earlier. In fact, the letters were issued on December
twenty-eighth and twenty-ninth, only two days after the ad hoc assemblies' request, and the Convention met on January twenty-second. These pro-
cedures, as Lois Schwoerer has pointed out, reveal William's "pains to
preserve legal procedures."

The deviations in procedure were nothing in comparison to the prin-
cipal defect of the election: the fact that it was called by "circular letters"
from the Prince of Orange and not by writs issued by the king of England
under the Great Seal. It was impossible to forget that the convention could
not be a Parliament. Indeed, the very choice of the word "convention,"
which was used by William and the houses themselves, betokened a recog-
nition of the irregular character of that body. The term had already been
used for some time to signify an assembly lacking the prerequisites of a
legal Parliament. Early in the century it had been asserted that if the
Houses of Lords and Commons met without passing a bill for royal assent
there was, in law, no session. That rule was relevant in a 1623 case in
which the judges had to apply a statute that declared it would be in force
until the end of the next session of Parliament. In deciding that that period
would not include a meeting where no bill had been passed, the judges said
such an assembly "is but a Convention and no Parliament or Session."
The same word was used regularly through the interregnum of the 1650s
by those who wished to argue that Cromwell's various legislative exper-
iments lacked the status of a genuine parliament.

The Houses of Lords and Commons that met in 1660 to effect the res-

toration of Charles II, like the convention of 1689, lacked the critical le-

gitimating authority of royal writs. Nevertheless, the members never re-
ferred to themselves as anything but a Parliament. In popular usage,
however, that body soon became known as a convention. One pamphlet
writer in that year distinguished it as a "convention" lacking the "right con-
nstitution of a parliament" and, in response, another writer defended "the
parliament whom he maliciously calleth a convention." Gilbert Burnet
referred to it as "the new parliament, or convention as it afterwards came to
be called, because it was not summoned by the king's writ."

29. See id.
30. See JAMES REESE JONES, THE REVOLUTION OF 1688 IN ENGLAND 312 (1972).
31. SCHWOERER, supra note 2, at 139.
32. J. Franklin Jameson, The Early Political Uses of the Word Convention, 3 AM. HIST. REV. 477, 480 (1898) (quoting HUTTON, REPORTS 61 (1656)).
33. See id. at 482-85.
34. See id. at 481.
35. Id. at 481 (quoting a 1660 pamphlet entitled The Valley of Baca).
36. Id. (quoting A Scandalous Pamphlet Answered, reprinted in 7 SOMERS TRACTS 399-401, 486 (Walter Scott ed., 1809-15)).
37. Id. (quoting 1 GILBERT BURNEt, HISTORY OF MY OWN TIME 160 (1900)).
that 1660 convention had, as its first act, enacted a statute declaring that "the Lords and Commons now sitting at Westminster in this present Parliament, are the two Houses of Parliament notwithstanding any want of the Kings Majesties Writt,"\textsuperscript{38} the doubts attaching to its status were such that it was felt necessary to pass a confirming act in the next Parliament, ratifying its actions. In contrast to the Convention Parliament's own declaratory act, however, the subsequent Parliament which, having been called by the king, was beyond any scruple of legality, carefully avoided using the term "Parliament" to describe the convention, referring only to "[t]he Lords and Commons being assembled att Westminster . . . in the Twelfth yeare of His Majesties Reigne."\textsuperscript{39} The illegality of the 1689 Convention is highlighted by the fact that the more radical authors of 1688-89 embraced the irregularity as the predicate to establishing a fundamental constitutional settlement. Such writers often positively despised the idea of a mere Parliament, much preferring a genuine "convention."

For the men in control of events, however, this anomaly was to be minimized if not denied. The Prince of Orange had little interest in exercising any pre-legal authority to reshape the constitution. Those preferences were also revealed in his insistence on the meeting of some kind of parliament and on his reluctance to accept the crown except on the invitation of some body that might claim constitutional license to offer it. Shortly after his arrival in England, several of his supporters had argued for such a course. Having landed in England with a large armed force, having turned back the army of his opponent, and having triumphantly made his way to the seat of government while King James fled the country, it naturally occurred to some of his supporters that the Prince should simply assume power in the time-honored way of conquerors. After King James's first departure, Henry Pollexfen, a leading Whig lawyer, told the Earl of Clarendon that William "had nothing to do, but in the head of his army to declare himself king."

A contemporary reported that several of the "greatest lawyers" had urged the same course on William after his arrival in London.\textsuperscript{42}

It was, of course, hard to deny that, as a matter of brute fact, many a dynasty had originated in conquest and English history provided no exception. But this raw reality was difficult for the legalist statesmen of the later seventeenth century to accept in its unvarnished form. This was especially the case in 1689 in light of the vehemence of the charges of illegal conduct lodged against the late king. To the extent those charges were phrased as

\begin{itemize}
\item \textsuperscript{38} Statutes of the Realm, 1660, 12 Car. 2, ch. 1 (Eng.).
\item \textsuperscript{39} Statutes of the Realm, 1661, 13 Car. 2, ch. 7 (Eng.).
\item \textsuperscript{40} See Richard Ashcraft, Revolutionary Politics & Locke's Two Treatises of Government 566-67 (1986).
\item \textsuperscript{41} Clarendon Correspondence, supra note 16, at 225.
\item \textsuperscript{42} See Schwoerer, supra note 2, at 132 (quoting Roger Morrice).
\end{itemize}
undermining the "original contract" or the "ancient constitution," the historical fact of the 1066 conquest was a troublesome issue. J.G.A. Pocock has demonstrated the serious threat the Conquest posed to the idea of immemorial rights. The conquest left "an indelible stain of sovereignty on the English constitution." Any subsequent liberties would, in their origin, be matters not of fundamental law but of royal grace. The risks associated with such a slender constitutional root were so great that the response was a mass historical delusion. The Conquest, it turned out, was no conquest at all. William I took the crown not by mere force but by lawfully authorized "trial by battle" and he, therefore, took it within an established system of law whose limitations he and his successors regularly confirmed.

The theories of conquest offered to William III in 1688 and 1689, were similarly bowdlerized. Two refinements of the idea were current at the Revolution: the conquest as a sign of divine sanction for the actions of the Prince and the conquest as a just response to illegitimate action by James II, authorized by the law of nations.

The first version depicted the conquest not as a legitimating event in itself but as a sign that William's enterprise was an instrument of God's providence. This victory in particular was so extraordinary that it could only be explained as a divine intervention. The most celebrated exposition of this view was published by the cleric William Sherlock, explaining his 1690 decision to adhere to the new regime after a period of public resistance. His *Case of Allegiance* appeared only after William had prevailed at the Boyne. This sealed the success of the new regime and permitted Sherlock to argue that the "thorough settlement" of the Revolution signified God's approval. This understanding mitigated the crude notion of simple conquest, as God could not be expected to have endorsed the imposition of an unjust and tyrannical government.

But such an explanation was open to obvious difficulties. It pinned legitimacy on the caprices of warfare. "The Revolution is supposed to be right," wrote Samuel Johnson, "because at Torbay the wind chopped about." More pointedly it read God's approval into the success of every tyrant. If it made submission to William's government proper it equally justified obedience to Cromwell's. It reduced legitimacy to a matter of "might makes right." As such it was little improvement over the doctrine of the right of conquest simpliciter.

The second reformulation of the theory of conquest relied on the writings of continental jurists who had attempted to specify the conditions under which the use of force against states and governments could be justi-

44. See HOWARD NENNER, BY COLOUR OF LAW 101-03 (1977); POCOCK, supra note 43, passim.
46. See id. at 24-28.
fied. Those conditions were denominated rules of the *jus gentium*, the law of nations. Some English writers of the time cited to the work of Grotius on the just war. Edmund Bohun, for example, applied Grotius' rules to the circumstances of England in 1688-89. The attempts of a monarch to usurp the power of the legislature or to transgress the limits of his authority deprived him of the right to allegiance and converted the action of a foreign prince to depose him from an unlawful aggression to the vindication of a just and lawful cause. By measuring the conquest against a set of abstract rules about the just conduct of princes, this position seemed to invite other sovereigns to examine the constitutionality of the behavior of the English king, an unsettling prospect to English statesmen interested in establishing a stable regime.

William, at any rate, was apparently not satisfied to take a title by conquest. Indeed, what king-to-be, looking forward to a long reign, would not be worried by such a notion? No such idea was expressed in the debates on the offer of the crown nor in the instruments by which it was offered. Its unacceptability was shortly demonstrated in the parliamentary reaction to the publication, in 1693, of an anonymous tract (the author was Charles Blount, a radical Whig and iconoclast) entitled *King William and Queen Mary, Conquerors* in which a "just conquest" defense of the Revolution was set forward. Edmund Bohun, now licensor of the press, not surprisingly, found it suitable for publication. The reaction to the piece was swift and decisive. The author being unknown, Bohun was called before the House of Commons which demanded his removal from office. The book was ordered burned by the common hangman, on the grounds that it was "highly injurious to their majesties rightful title to the crown of this realm, and inconsistent with the principles, on which this government is founded, and tending to the subversion of the rights of the people." At about the same time, *Pastoral Letter* by Bishop Burnet, written in 1689, suggesting the same theme was also ordered burned, and Burnet himself was the subject of an unsuccessful demand for impeachment. If the idea of a rightful conquest was unacceptable in 1689, in 1693, four years into a now reasonably well settled reign, it appeared positively dangerous.

Such scruples for legality, however, had their limits as became clear when the exact nature of William’s accession to power became an issue. As already noted, the more "legal" resolution of the change in regime

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50. See 3 MACAULAY, *supra* note 48, at 640-42.
would have had Princess Mary ascend to the throne in her own right, and there was a small but important faction at the Convention that advocated such a course. It was, perhaps, the neatest solution available to revolutionaries committed to maintaining at least the form of the existing constitution. It required merely the distortion of fact in connection with James's intentions in leaving the country and the birth of his son. Neither of these fictions was, in the context of that time, particularly hard to swallow. But it foundered on an insoluble problem. William of Orange let it be known that he would settle for nothing less than both the power and the title of king. It should be noted that William, himself, had something of a legal claim to the succession as the nephew of the king, and was, in fact, next in line after his wife and the Princess Anne. He had, at one time, believed his right superior to their's on the ground that James's marriage to their mother, Anne Hyde, a commoner, should have been incapable of producing children with any claim to the throne. Only after he decided that such a claim was unsustainable in English law had he agreed to marry Princess Mary. In fact, at the time of the Convention it was argued in some pamphlets (assuming a kind of Salic law) that his position as the closest male heir gave him the right to the succession. William also might have claimed the throne as part of his wife's marital estate, but the precedents of applying this property rule of the common law to the special case of the crown were decidedly mixed. None of these arguments were really plausible and William, himself, never relied on any of them in demanding or accepting the crown.

Nevertheless, at a meeting with key members of the House of Lords on February third, he expressed clearly his unwillingness to take any part in the English government that did not include the royal title. He would not oppose the settlement of the crown on Mary. Crowns, he told them, had no "charms" to him, but he "would hold no power dependent upon the will of a woman." He thus confirmed what a Dutch associate had told several members of the convention, some days earlier, the prince "would not like to be his wife's gentleman usher." Should the convention refuse him the title he would return to Holland, "happy in the consciousness of the serv-

51. Another alternative favored by the more law-minded revolutionaries—the establishment of a "regency" for an incapacitated King James—was defeated in the Convention by a narrow vote. See JONES, supra note 25, at 22-23.
53. See Nenner, supra note 52, at 93.
54. See id.
55. PRALL, supra note 9, at 272.
56. 2 THOMAS BABINGTON MACAULAY, HISTORY OF ENGLAND 377 (Heron Books 1967) (1848-61).
ices he had endeavoured, though in vain, to do" for England. William's reasons for this position rested, however, on more than personal ambition or pride. He deemed it critical to secure his position for life. Should Mary predecease him, she would be succeeded by her sister, Princess Anne, and William's influence would be at an end. His foresight in this regard was accurate as the queen died at the end of 1694, and William survived her for more than seven years during which time the military and political balance in Europe was critically changed. Given the Prince's position, any hope of saving the appearance of hereditary succession by conferring the crown on Princess Mary was doomed. Revolutionaries of all constitutional persuasions agreed that the leadership of William in the new settlement was essential. Indeed the issue was made moot when the Princess sent a letter to the Earl of Danby declaring her intention to refuse the title unless William were also made king. Since, by refusing to renounce her own right, Mary might also have blocked succession by her sister, this effectively removed a hereditary solution from the table. The (barely) plausible claim of Mary was made unavailable to the revolutionaries except in tandem with the plainly implausible claim of William.

The result was the curious institution of the "dual monarchy" whereby William and Mary were made joint king and queen—he a king regnant and she a queen regnant—neither merely a consort. This unprecedented and never repeated device was made workable in operation by a proviso in the offer of the throne stipulating that the sole exercise of the regal power was to be vested in the king. While it failed to eliminate a number of practical problems this solution nicely captures the conflicting tendencies of legal form and political necessity that characterized the Revolution: Mary with the superior legal claim, representing legality; William, the indispensable political actor, representing overriding substantive necessity.

Two incidents in the early years of the new government illustrate how intent it was on avoiding any taint of revolutionary lawlessness. In November, 1689 Sir Joseph Tredenham reported to the House of Commons that "major-general Ludlow is come into England." The reference was to Edmund Ludlow. A veteran of the Parliamentary and Commonwealth armies, he had twice commanded the English forces in Ireland. He was
among the most radical of the prominent republicans. On being asked by Cromwell what would satisfy him, he is reported to have replied: "[T]hat which we fought for, that the nation might be governed by its own consent."⁶⁴ He was a member of the High Court of Justice that decreed the execution of Charles I and on the Restoration had fled to exile in Switzerland. Now in 1689, aged seventy-two and one of the last surviving regicides, he returned to England for the purpose, as he told the magistrates of Vevey, of "strengthen[ing] the hands of our Gideon, who is miraculously raised up to deliver us from the house of bondage."⁶⁵ In his memoirs Ludlow indicated that he had been summoned by the new government to assist in the reduction of Ireland and there is at least one contemporary account tending the same way.⁶⁶ But, as Barbara Taft concludes in the most extended study of the incident, this "report is neither substantiated nor plausible" in light of William's documented fear and distaste for English republicanism.⁶⁷

Whatever his original inclination, William's actual response to the appearance of Ludlow is consistent with a preference for the existing monarchical constitution and an unmixed hostility to the radical and regicidal strains of English political thought. In warning the Commons of Ludlow's presence Tredenham reminded the House that they were dealing with a "declared enemy to the king and kingdom."⁶⁸

To what end do we raise taxes upon the people, but to support the government? To what can these persons pretend, but to bring us into the same anarchy as formerly? Now, we are setting things in order, they are contriving to make us victims to their passions. I am for the public security, and it is to that end I stand up.⁶⁹

The Commons adopted a resolution calling on the king to apprehend Ludlow and to offer a reward for his capture. When the resolution was presented to William, he is reported to have replied "[t]hat the address was so reasonable, and the desire so just, that he would order a proclamation to be issued out immediately for that purpose."⁷⁰ The proclamation was published the next week offering a reward of £200 for the apprehension of

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⁶⁴. 12 DICTIONARY OF NATIONAL BIOGRAPHY 257 (Leslie Stephens & Sidney Lee eds. 1963). "Without being exactly a leveller or an anabaptist himself, he sympathised strongly with both parties, and was trusted by them." Id. at 256.


⁶⁶. See 12 DICTIONARY OF NATIONAL BIOGRAPHY, supra note 64, at 256-57; see also Taft, supra note 65, at 217 (discussing reports that King William had requested Ludlow's presence in Ireland and that Ludlow was fit for service in that region).

⁶⁷. Taft supra note 65, at 217.

⁶⁸. 5 PARL. HIST. ENG. 412 (1689).

⁶⁹. Id.

⁷⁰. Id. at 413.
Ludlow "who stands attainted of high treason by Act of Parliament for the horrible and execrable murder of our Royal Grandfather [who] hath presumed to come into this our kingdom and there in privity lurketh." Before he was found, however, Ludlow escaped to Europe where he died in Vevey in 1692.

The same anxiety about any association of the new government with the constitutional experimentation of the past is illustrated by an incident taking place two years later in Abingdon. In his charge to the Grand Jury, Robert Atkyns, the Chief Baron of the Exchequer Court, was reported to have said that the government of England was undoubtedly monarchical, but that it was not a hereditary but an elective kingdom. The source of this remarkable statement was one of the most prominent lawyers and jurists in England. A third generation barrister, he was both son and brother to former Chief Barons. He had been sacked from the Court of Common Pleas by Charles II because of political differences and had assisted in the defense of the opponents of the regime including Lord Russell who was executed for participation in the Rye House Plot.

Atkyns published two pamphlets at the time of the Revolution. In them he expressed clearly his political philosophy. On the central constitutional issue of the Revolution, the capacity of the monarch to act in significant ways independently of the houses of Parliament, he expressed no doubt: "None but the lawmaker can dispense with the law, not he that hath but a share in the legislature." Indeed, he was later to claim that the coronation oath effectively demoted the king's authority below that of the Lords and Commons as he was obliged by it to assent to such laws as they proposed.

Naturally, Atkyns welcomed the Revolution. In the convention he served as one of the peers' legal advisers and was consulted by the new king on the best way to turn the Convention into a genuine Parliament. In April of 1689, William appointed him to the Exchequer Court and it was in his judicial capacity that he addressed the grand jurors of Abingdon. His naked concession of the facts of the Revolution sent a shudder through Westminster. In July of 1689, the judges going on circuit were lectured by George Treby, the Attorney-General, at the king's order to tell the people that "this government has the greatest legal confirmation that it was capa-

73. Id. For a background of Atkyns' views on the power of the monarchy, see generally id. at 235-40 & 361-63; 1 Dictionary of National Biography 703 (Leslie Stephens & Sidney Lee eds. 1963).
74. See Weston & Greenberg, supra note 72, at 216.
In June the minutes of the Council meeting record a request to the Attorney General to see "what can be done to Atkyns for this charge." Subsequently Nottingham, the Secretary of State, wrote to a Mr. Edward Pococke asking for an investigation and account of the charge "which is represented as containing matters destructive to the government and very pernicious to the peace of it." Pococke responded confirming the subversive character of Atkyns' speech. It was apparently decided, however to let the matter rest and Atkyns remained on the bench for another three years. The promptness and thoroughness with which the matter was taken up, however, is a further indication of the government's determination to maintain its legal character.

This attitude was manifested even on occasions when the security of the regime was thought to be at stake. During the Revolution and in the early weeks of the new government the courts had ceased to function. Some of the judges of James II had fled and others, for obvious reasons, had been discouraged from exercising their judicial functions. Hilary Term in January, 1688-89 was not held, a fact which was to cause no little inconvenience. Another consequence of the cessation of judicial authority, however, may have been regarded as providential by the new regime. During this most fragile of periods the effective government, administered by William both before and after he had become king, could and did round up people and hold them without the risk of an appeal to the judiciary for their release. But with the reopening of the courts, it was to be expected that writs of habeas corpus would be sued out again. On March first, the king sent a message to the Parliament, noting that such detentions were essential for the security of the settlement, but assuring them that he was "unwilling to do anything but what shall be fully warranted by law." He asked for their advice as to how to deal with this dilemma. A bill was quickly proposed to allow the king to commit "for two or three months" such persons as "he shall suspect to be obnoxious ... without the benefit of habeas corpus."

76. 2 ROGER MORRICE, ENT'RINg BOOK, BEING AN HISTORICAL REGISTER OF OCCURRENCES FROM APRIL, ANNO 1677 TO APRIL 1691, at 591 (July 2, 1689) (unpublished manuscript) (on file with Dr. Williams's Library, London) (Permission is granted by the Director of Dr. Williams's Library on behalf of the Trustees to use and quote from Morrice's Ent'ring Book.).
77.  See 3 REPORT ON THE MANUSCRIPTS OF THE LATE GEORGE ALLAN FINCH 138, 149, 396 (Hist. Manuscripts Commission Rep. No. 71, 1957). The anomaly of accommodating the political justification of the Revolution to adjudication in the new regime was also exposed in an earlier incident reported in a June 1689 letter from Robert Harley referring to an incident much like that involving Atkyns: "The Judge's charge would have been high treason eighteen months ago. The assertion was that King's [sic] are made by the people." WESTON & GREENBERG, supra note 72, at 257 (quoting 3 MANUSCRIPTS OF THE DUKE OF PORTLAND 439 (Hist. Manuscripts Commission Rep. No. 14, 1894)).
78.  See 1 D ICTIONARY OF NATIONA L B IOGRAPHY, su pra note 73, at 704.
79.  See Statutes at Large, 1688, 1 W. & M. ch. 4 (Eng.) (responding to the difficulties imposed by the cancellation of the Hilary Term).
80. 5 PARL. HIST. ENG. 155 (1689).
The suspension of habeas corpus was, no doubt, a bitter remedy. The Whig and former Lord Mayor, Sir Robert Clayton, who supported it, noted that “[h]ad it not been for the Habeas Corpus Act, there had not been many of us here now; we had been dead and rotten in prison.” 83 But it was mainly Tories who hesitated. Clarges advised rather that “great security” should be demanded for the prisoners’ appearance “than that Bill [the Habeas Corpus Act] should be entrenched upon; a thing so sacred.” 82 To deal with the problem by setting high bail, however, was too reminiscent of the “violation of your liberties . . . in the late king’s time” 83 and William in his message to the House had reminded it of the grievance against excessive bail in the Declaration of Rights. 84 Still others suggested that the House’s advice to the king to continue to detain the disaffected would be sufficient without legislation. Moreover, when the Whig William Pultney argued that a judge asked to release an applicant on a writ of habeas corpus could not very well refuse just because “the House of Commons have advised the king otherwise,” 85 Heneage Finch remarked that no action at all was really necessary, since “as there are no judges yet appointed, they can have no writs and so no necessity of bailing them immediately.” 86 The bill, however, received a first and second reading and was committed all in one day and, when it was brought up again on the fourth, all serious opposition had disappeared. Minor amendments were proposed, but the only successful one was an explicit statement that the act should not be understood to abridge the privilege of members of Parliament. 87

The act, as finally passed, allowed the king or privy council to detain “without bail or mainprize” any person for “suspicion of high treason or treasonable practices” until May twenty-fifth. Moreover, until that day, “noe judge or other person shall bail or try any such person . . . any law or statute to the contrary notwithstanding.” 88 The suspension of judicial recourse was renewed in May and again in the autumn of 1689. 89 This meticulous attention to, and the earnest debate concerning what President Lincoln, two centuries later, also in emergency circumstances, would call a law “made in such extreme tenderness of the citizen’s liberty that practically it relieves more of the guilty than of the innocent,” 90 demonstrates the solicitude of the revolutionaries for the forms of law.

81. Id. at 156.
82. Id. at 155.
83. Id.
84. See id. at 154.
85. Id. at 156.
86. Id. at 156.
87. See id. at 158-59.
88. 1688, 1 W. & M., ch. 11 (Eng.).
89. See HORWITZ, supra note 22, at 45.
90. ABRAHAM LINCOLN, MESSAGE TO CONGRESS IN SPECIAL SESSION (July 4, 1861) reprinted in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1832-1865, at 430 (Roy P. Basler ed. 1974).
A final example confirms the craving for legality which characterized the revolutionary government established in 1688-89. One of the most vexing problems for the new regime was the character and extent of the oaths of support it would require. The question arose immediately upon the decision to make William and Mary king and queen. The traditional oath called for a declaration of loyalty to the king as "lawful and rightful." That was an oath many of the men who acquiesced in the Revolution could never take to this king and queen. Many had justified their part in the Revolution by reference to an ill defined but venerable concept—that of the de facto monarch. Under this theory it was permissible to adhere, at least temporarily, to an unlawful ruler who was in thorough control of affairs. But it was something else to acknowledge explicitly a legal title which they knew was false. When the Speaker of the Lords, the Marquis of Halifax, stated that refusal to impose such an oath would subvert the new monarchs' title, Lord Danby wanted to know "if the Lord in the chair wished to argue him into perjury." A compromise was worked out in which new oaths of loyalty would be required but they would omit the critical references to legality. The offer of the crown and Declaration of Rights set forth the new text: "I, A.B., doe sincerely promise and sweare [t]hat I will bee faithfull and beare true [a]llegiance to their Majesties, King William and Queen Mary. Soe help me God." It was significant for two omissions. No reference was made to the "rightful and lawful" title of the king and queen. Nor was there included a promise of continuing loyalty to their "heirs and successors." This streamlined oath allowed scrupulous members of the Convention to act on the basis of the de facto theory acknowledging a duty to authorities not sanctioned by law. In supporting the change, the Earl of Nottingham acknowledged that, while William's title was not legal, a subject "must now owe and expect his protection from William as king de facto." The oath, as Charles Mullet has written, "was not declaratory of any title. It merely specified what the oath taker would do." But since it only specified appropriate behavior in a particular set of circumstances, it was an inherently flawed foundation for the new settlement. It was profoundly ambiguous as to the proper response to a reassertion of authority by the prior, lawful, regime—the most serious threat to the new settlement. In

91. The theory had received more or less official recognition in a statute of Henry VII exempting from treason prosecution a person who had aided a king "for the time being." 1494, 11 Hen. 7, ch. 1 (Eng.).
92. JONES, supra note 25, at 36 (citing Ballard MS 45, fol. 27 (Bodleian Library)).
93. DECLARATION, supra note 4, sec. 3, para. 2.
94. Id.
95. HORWITZ, supra note 17, at 82.
February the Earl of Clarendon asked the Earl of Chesterfield, whether he would subscribe to the new oaths. Chesterfield "thought he should, looking upon them to signify no more than that he did swear to pay him all lawful obedience, which was nothing if ever King James came back again. For he said he was of my opinion that he could not be absolved from his allegiance whenever he was in a capacity of paying it."

As the Declaration changing the oaths did not have the force of law, the issue arose again in connection with the effort of the Convention to transform itself into a Parliament. By existing law no one could sit in Parliament without taking the oaths of supremacy and allegiance to the king, prescribed in statutes of 1562 and 1609, as well as satisfying the Test Act of 1678, by declaring against Catholic beliefs and practices. Naturally no member of the Convention had taken these oaths. The statute making the Convention a Parliament dispensed with the requirements but it did so by taking the most conservative legal approach available. After stating that the assemblies of Lords and Commons in the Convention constituted a genuine Parliament, the act stated that the Oath and Test acts relating to the qualification of members of Parliament were "hereby repealed to all intents and purposes." But, as this repeal, if it were effective at all, would normally be construed as prospective only, the act went on to provide a substitute and retroactive technique for qualifying the sitting members. The members of "this present Parliament" were to subscribe to the Test Oath, the new oath of allegiance (the oath from the Declaration, restated verbatim in the statute), and a combined and radically condensed version of the old anti-papal oaths of the reigns of Elizabeth and James I. Such actions "shall be good and effectual to all intents and purposes as if the said oaths. . . had been taken in such manner and at such time as by the said [prior] act or acts or any of them, they are required." No verbal formulation could overcome the basic impossibility of giving this statute legal effect under the prior rules. It is instructive, however, to note the pains the drafters took to connect their actions to those prior rules. They did not merely change the rules for parliamentary qualification. They formulated new oaths and then attempted to enact that these oaths should, in law, operate as the prior oaths for the purposes of allowing them to make the changes. Few events in the course of the Revolution reveal so plainly the intensity with which these statesmen wished to maintain, even in the teeth of insuperable obstacles, the continuity of the rules of law.

What can account for this unquenchable thirst for legality? Every legal system has a beginning in time—a point where its own justification must

97. CLARENDON CORRESPONDENCE, supra note 16, at 264.
98. See 1562-23, 5 Eliz., ch. 1, §§ 8-16 (Eng.); 1558-59, 1 Eliz. 1, ch. 1, § 19 (Eng.); 1605-56, 7 Jam. 1, ch. 6, (Eng.); 1605-56, 3 Jam. 1, ch. 4, § 9 (Eng.).
99. 1678, 30 Car. 2, ch. 1, stat. 2, (Eng.).
100. 1688, 1 W. & M., ch. 1., (Eng.).
be political and not legal. The institution of that system must be, at the same time, a rejection of the regime it displaces. Consequently one might expect those who engage in such action to scorn the legal artifacts of the discarded constitution. This is, indeed, sometimes the case. In 1917 Lenin relished the illegality of the Bolshevik Revolution which he unabashedly referred to as a "direct "usurpation." But things are not always so clear. Every new regime must conform to critical social and political values in the population it intends to govern. Sometimes, however, a core value in such a society is the value of legality itself. When that is the case we can expect the kind of paradoxical appeal to legality illustrated by the Revolution of 1688-89.

In 1688 Britain, the political nation was law-saturated. Howard Nenner has shown how the psychology of the common law dominated political debate in the seventeenth century:

The law was the one constant in an era otherwise marked by constitutional uncertainty and political disarray. It afforded the one structure, both institutional and intellectual, which rendered the issues intelligible and which provided a forum for political debate. Never in question were the existence and utility of a rule of law . . . As the century progressed, the place of law in politics became even more important. Force as a lever of political control no longer seemed to be a creditable option. It had been supremely difficult to lay two civil wars to rest, and to restore a legitimate king to his rightful throne. A repetition of that process and of the mistakes that would make it necessary was almost unthinkable. It was thus that the fear of anarchy and the spectral horror of regicide were more than sufficient after 1660 to deter men from any course that might impel them once more to inconsiderate action.102

How, in such an environment, can one make a revolution? The answer, as the remarkably successful results of 1688-89 testify, is very carefully. At every point the departures from law were minimized and disguised. William III, as much as any of his subjects, understood the necessity for this approach. He was, as his biographer notes, "no Cromwell, no Napoleon, no Lenin . . . . It is not possible to make him into anything resembling a true revolutionary."103 In this he was faithful to his own disposition but he was also adapting himself to the dominant culture of the kingdom he aspired to rule.

102. NENNER, supra note 44, at ix-x.
103. BAXTER, supra note 5, at 244.