Doing No Wrong: Law, Liberty, and the Constraint of Kings

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The challenge Charles I prepared to fling at his accusers on 22 January 1649 has conditioned the thinking of generations of historians. "No earthly power can justly call me, who am your king, in question as a delinquent," he proclaimed. He reminded those who presumed to judge him that they had been "born his subjects and born subjects to those laws, which determined, 'that the king can do no wrong,'" a maxim that "guards every English monarch, even the least deserving."[1] Indeed, there was no established legal process that could hold Charles personally accountable for his actions, even if, as charged, he meant to overthrow the rights and liberties of his people. The tenet the king can do no wrong shifted responsibility onto those who carried out royal orders. Proponents of royal supremacy had seen in that maxim proof that kings were not only legally unaccountable but actually above the law.

However, an equally venerable English maxim explained that although "the king was under no man, he was under God and the law; for the law maketh the king."[2] To modern historians the two maxims

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[1] John Kenyon, *The Stuart Constitution,* 2d ed. (Cambridge, 1986), p. 292; David Hume, *The History of England: From the Invasion of Julius Caesar to the Abdication of James the Second, 1688,* rev. ed., 6 vols. (New York, 1880), 5:373.

[2] Sir Edward Coke, *The Reports of Sir Edward Coke* (hereafter cited as *Reports*), 6 vols. (London, 1826), 6:63–65. According to Clayton Roberts the maxim the king can do no wrong, rarely, if ever, heard in the twelfth and thirteenth centuries, appeared in modern guise in the fifteenth century. See Clayton Roberts, *Growth of Responsible Government* (Cambridge, 1966), p. 4. The statement that the king was under God and the law was usually cited from Bracton. For a history of the growing respect for and reliance on Bracton, see David E. C. Yale, "Of No Mean Authority: Some Later Uses of Brac-

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seem contradictory. And the dramatic failure of the law in Charles's case has induced scholars to doubt the efficacy of this second maxim, to accept Charles's interpretation of its counterpart—that the king could do no wrong—and to shrug off as fine-sounding but unrealistic the strategies early modern Englishmen relied on to control kings. Both maxims, the one Charles sheltered under and the one he rejected, were designed to control his behavior. These legal and customary constraints were not only grand in conception but serious in purpose and taken seriously by contemporaries. Like the slender cords with which the Lilliputians bound Gulliver, their combined impact gave them credibility. Despite their failure in Charles's case, they had currency and efficacy in this era. Both the constraints and their enforcement strategy merit our attention and our respect. The maxim that apparently freed the king by asserting he could do no wrong was paradoxically one of the major constraints that kept him within the law. Indeed, when the evidence is examined, the claim that the king could do no wrong can be seen to have dovetailed neatly with that other maxim that the king was "under God and the law; for the law maketh the king."

It is surprising that the maxim the king can do no wrong has seldom excited more than passing attention from constitutional historians, and that attention has usually emphasized the maxim's undoubted importance in the development of ministerial responsibility.[3] Thus, Clayton Roberts maintains that the signposts along the pathway to constitutional monarchy "bore the maxim: the King can do no wrong." He finds that this tenet incorporates three principles: the king cannot act himself, he must act through a servant; a servant of the king should refuse to execute an unlawful command; and a servant cannot plead the king's command to justify an illegal act.[4] Yet, if one considers Roberts's three principles for their impact on the king rather than on his servants, it is clear they tied the king's hands even as they freed him.

Janelle Greenberg did scrutinize this "Grand Maxim of State" in an essay that examines royal, rather than ministerial, accountability. Greenberg endorses Charles I's interpretation of its meaning and goes on to argue that Tudor and early Stuart lawyers interpreted the maxim "as guaranteeing royal immunity from legal process and punishment and

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ton," in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne,* ed. Morris S. Arnold, Thomas A. Green, et al. (Chapel Hill, N.C., 1981), pp. 383–96.

[3] One exception is David Ogg, who provides a thoughtful, if brief, assessment of the place of the maxim in early modern English constitutional history. See David Ogg, *England in the Reign of Charles II,* 2d ed. (Oxford, 1967), pp. 452–54.

[4] Roberts, *Growth of Responsible Government,* p. 4.

as reinforcing doctrines of nonresistance.''[5] Any other interpretations were, according to Greenberg, ''fashioned expressly to justify opposition to Charles Stuart.''[6] She regards the notion kings could do only what was lawful as the exclusive opinion of extremist Whigs late in the seventeenth century, ''an aberration that neither reflected past practices nor presaged future usages.''[7]

But although the maxim that kings could do no wrong has received little sustained attention, it intrudes on topics that have benefited from considerable scholarly notice. The issue of whether the king was above the law and the right of subjects to resist a lawless ruler figured centrally in the literature of the early modern period. The origin of judicial review is, moreover, of great constitutional significance. And although analysis of this subject has tended to focus on review of parliamentary statutes, its link to control of royal powers is less well understood. A firmer grasp of the tenet that the king can do no wrong can inform all these subjects. Since a brief essay can only begin to examine its central place in the English constitutional scheme, this discussion will be confined to the legal limits the maxim imposed on the monarch up to 1710, not the precedent it may have set for more general resistance.

I

On its face, the maxim that the king can do no wrong appears to place the king above the law. What evidence is there, then, that Whigs such as Bishop Gilbert Burnet, who argued that the maxim was meant to bind, not loose kings, were correct? Let us begin with Burnet. Writing in 1689, he insisted that the maxim's intent was to ensure that the king could do only what was lawful. ''The meaning of it is only this,'' he explained, ''that the King's Power cannot go so far as to support him in the doing of any Injustice or Wrong to any, according to that Chapter in Magna charta, by which all Commissions granted against Law, are declared to be null and void: for this is the true meaning of that Maxim.''[8]

[5] Janelle Greenberg, ''Our Grand Maxim of State, 'The King Can Do No Wrong,' '' *History of Political Thought* 2, no. 12 (1991): 216.

[6] Ibid., p. 217.

[7] Ibid., pp. 227–28.

[8] Gilbert Burnet, *An Enquiry into the Present State of Affairs* (London, 1689), p. 11. A somewhat different slant on the meaning was given in 1642 by the parliamentarian, Charles Herle, who saw the king intrinsically bound with Parliament and unable to do no wrong because together they made law. [Charles Herle], *A Fuller Answer to a Treatise Written by Doctor Ferne, Entitled the Resolving of Conscience upon This Question,* 2d ed. (London, 1642), p. 16.

But Burnet was neither original nor extreme in his definition. The virulent royalist, Sir Roger L'Estrange, in his plea for the return of limited monarchy on the eve of the Restoration, described the English king's powers in this way:

> Certain it is that our King in his personall capacity, made no Laws, so neither did he, by himself, execute or interpret any: No Judge took notice of his single Command, to justifie any Trespass; no, not so much, as the breaking of an Hedge; his Power limited by his Justice, he was (equally with the meanest of his Subjects) concerned in that honest Maxime, *We may do just so much and no more, than we have right to do;* And it was most properly said, *He could do no wrong;* because if it were wrong, he did it not, he could not do it; It was void in the act, punishable in his agent.[9]

It may be difficult to recognize James I or Charles I in L'Estrange's characterization, nevertheless his explanation is especially clear. That the king can do no wrong because "if it were wrong" it was "punishable in his agent," we already know. But he also "could not do it" because "It was void in the act"; he could "do just so much and no more" than he had a "right to do." Judges would ignore illegal orders; the orders would be "void in the act." In 1676 Denzil Holles, a former parliamentarian later privy councillor to Charles II, explained that while the king's "omissions to fulfil a Law, or his personal Offences, can never be drawn into question Judicially," all acts of the king "contrary to law, are adjudged to be in deceit of the king, and the law voids and nullifies all such Acts."[10] L'Estrange maintained that the maxim made the king "very safe, in the consequent, for (being [by the danger, threatning his corrupt Ministers] in all probability, stript of Agents) his personall impunity might, well, signifie somewhat to himself," but added, it signified "nothing to the People."[11] In like vein, the great jurist, Sir Matthew Hale, wrote that "the Laws also in many cases bindes ye Kinges Acts, and make them void if they are against Lawe."[12]

It is clear, then, that the radical Whigs of the late seventeenth cen-

[9] Sir Roger L'Estrange, *A Plea for a Limited Monarchy, as It Was Established in This Nation before the Late War; in a Humble Address to . . . General Monk* (London, 1660), p. 8.

[10] [Denzil Holles], *Some Considerations upon the Question Whether the Parliament Is Dissolved by Its Prorogation for 15 Months?* (London, 1676), p. 5.

[11] L'Estrange, *Plea for Limited Monarchy,* p. 7.

[12] Sir Matthew Hale, "Reflections by the Lord Chiefe Justice Hale on Mr. Hobbes His Dialogue of the Laws," reprinted in Sir William Holdsworth, *A History of English Law,* 2d ed., 12 vols. (London, 1938), 5:508.

tury did not create this interpretation of the maxim. Neither was the idea that kings could do only what was lawful devised by opponents of Charles I only after 1642. Attorneys defending Sir John Hampden in the Ship Money case of 1637 repeatedly plead in this way. For example, Sir Robert Holborne argued, "the Law did see that it was possible that Kings, as Men, might err, and therefore did make Provision, that their Acts, if against Law, should be void." He found "the books . . . full of such Cases."[13] This provision was "not a Disability in the King, but a Prerogative, to make him come the nearer to the Divinity in the Attribute."[14] The Parliament of 1628 had made the same point. Edward Littleton, member of a Commons committee sent to persuade the lords to help protect the rights of subjects, cited several acts of Edward III proclaiming that no man could be ousted from his freehold or deprived of life or limb except by the law of the land; failing that "If anything be done against the same it shall be redressed and holden for none."[15] Sir Edward Coke, who accompanied Littleton, quoted Plowden, that "the common law hath so admeasured the King's prerogative, as he cannot prejudice any man in his inheritance; and the greatest inheritance a man hath is the liberty of his person, for all others are accessory to it."[16] Coke then cited the statute of 25 Edward I, *Confirmatio Cartarum,* that "all judgments given against Magna Carta are void." Sir Dudley Digges had made this point two years earlier, arguing that English kings "cannot command ill, or unlawful things. When they speak, though by Letters Patent, if the thing be evil, those Letters Patent are void."[17] Earlier still, in a treatise written in 1613, Sir Henry Finch found the king's prerogative "stretcheth not to the doing of any wrong: for it groweth wholly from the reason of the Common Law."[18] To illustrate this point, Finch explained that the king's grant of an office "to an ignorant man that hath

[13] *A Complete Collection of State-Trials, and Proceedings upon High-Treason, and Other Crimes and Misdemeanours,* 5 vols. (London, 1730), 5:154, 159.

[14] Ibid., p. 152.

[15] Robert C. Johnson and Maija Jansson Cole, eds., *Commons Debates: 1628,* vol. 2 (New Haven, Conn., 1977), p. 336. Also see 25 Edw. III, 4 stat. 5, "None shall be outed of his Franchises or Free-hold, but by the way of Law: and if anything be done against the same, it shall be redressed, and holden for none"; 42 Edw. III, cap. 3, "None shall be put to answer an accusation to the King without presentment, or some matter of Record; and what is done otherwise shall be void, and holden for errour." Edmund Wingate, *An Exact Abridgment of All Statutes in Force and Use, from the Beginning of Magna Charta, until 1641* (London, 1684), pp. 3, 4.

[16] For this and the following comment, see Johnson and Cole, eds., *Commons Debates,* 2:358.

[17] Cited by J. P. Sommerville, *Politics and Ideology in England, 1603–1640* (London, 1986), p. 101.

[18] Sir Henry Finch, trans., *Law, or, a Discourse Thereof, in Foure Books* (London, 1627), bk. 2, p. 85.

no skill at all is merely void.''[19] And in 1606 Coke's great rival, Sir Francis Bacon, wrote, ''the King's acts that grieve the subject are either against law, and so void; or according to strictness of law, and yet grievous.''[20]

Young lawyers seem to have been schooled in the legal bounds of royal prerogative, for a commonplace book found in Lincoln's Inn contains a list of ''cannots'' and ''shall nots'' that leave no room for a monarch to act above the law.[21] To be sure, not all lawyers argued in this vein. At times justices of the royal courts and the crown's attorneys pleaded that the monarch's prerogatives could not be questioned. Sir Robert Berkeley, one of the justices in Hampden's Case, argued that the maxim ''the King cannot do wrong'' together with the maxim that ''the King is a person trusted with the state of the commonwealth'' meant he alone could ''meddle'' in areas such as war and peace, coinage, and, in an emergency, the raising of provisions for defense of the realm.[22]

Established well before the Civil War, the precept that the king could only do what was legal was not merely invoked by seventeenth-century lawyers such as Coke to enhance law and Parliament at the expense of the crown. Thus in 1563 Justice Anthony Brown argued in a legal opinion that an act wrong for another person would also be wrong for the king, ''therefore he could not do it: for the king cannot do any wrong, nor will his prerogative be any warrant to him to do an injury to another.'' Brown considered it ''a difficult argument to prove that a statute, which restrains men generally from doing wrong, leaves the king at liberty to do wrong.''[23] The Church of England's greatest theologian, Richard Hooker, defined the king's relationship to the law in similar terms in his landmark work, *The Laws of Ecclesiastical Polity,* composed about 1590 and admired by both James I and Charles I. Hooker had the highest praise for the founders of the commonwealth because ''though no manner, person, or cause be unsubject to the king's power, yet so is the power of the king over all and in all limited that unto all his proceedings the law itself is a rule . . . the king's grant of any favour made

[19] Cited by Margaret Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England, 1603–1645* (New Brunswick, N.J., 1949), p. 37.

[20] Cited by Charles H. McIlwain, *Constitutionalism: Ancient and Modern,* rev. ed. (Ithaca, N.Y., 1958), p. 125.

[21] See Judson, *Crisis of the Constitution,* p. 38.

[22] See S. R. Gardiner, ed., *The Constitutional Documents of the Puritan Revolution, 1625–1660,* 3d ed. rev. (Oxford, 1906), p. 122.

[23] Anthony Brown J. in *Willion v. Berkeley* (1563); Geoffrey Elton, ed., *The Tudor Constitution: Documents and Commentary,* 2d ed. (Cambridge, 1982), p. 17.

contrary to the law is void.''[24] In short, at least eighty years before the Civil War many constitutional experts believed that the king could do no wrong because any illegal order of his would be void.

II

To determine whether the tenet that the king could do no wrong was a serious constitutional stratagem to constrain kings or merely a device to shunt responsibility onto royal officials requires that one track this tenet to its origins. This analysis of origins reveals not one taproot but several—rich, various, and exceptionally deep. Far from originating in the seventeenth century, indeed, this investigation of the maxim's early history exposes its medieval origins.

In medieval society, where a man's word was his bond, the king—like other men—was obliged to bind himself by public oaths. These oaths included pledges of fealty between king and subjects which had a mutual aspect, fealty being owed only as long as each party kept faith. ''The fundamental idea,'' Friz Kern wrote, ''is rather that ruler and ruled alike are bound to the law; the fealty of both parties is in reality fealty to the law. . . . If therefore, the king breaks the law, he automatically forfeits any claim to the obedience of his subjects.''[25] At times magnates did homage to the king with an explicit reservation of the right to disobey him if he did not act rightly.[26] While this limitation might only mean that an illegal royal act would be ignored, it could also imply that a king who behaved badly forfeited all claim to obedience, a theory that finds some support in the laws of Edward the Confessor.[27] In his coronation oath the king had to swear to preserve ''the Statutes Laws and Customs'' of the realm and the inhabitants in ''their Spirituall and civill rights and Properties,'' vague wording that was repeatedly manipulated to afford more specific protection to subjects.[28]

[24] Richard Hooker, *Laws of Ecclesiastical Polity,* in *The Works of That Learned and Judicious Divine, Mr. Richard Hooker: With an Account of His Life and Death by Isaac Walton,* ed. Rev. John Keble, 3d ed., 3 vols. (Oxford, 1845), vol. 3, Hooker's bk. 8, cap. 2, p. 13; Elton, ed., *Tudor Constitution,* p. 17.

[25] Fritz Kern, *Kingship and Law in the Middle Ages,* trans. S. B. Chrimes (1956; reprint, New York, 1970), p. 87.

[26] Ibid., pp. 91–92.

[27] Corinne C. Weston, ''England: Ancient Constitution and Common Law,'' in *The Cambridge History of Political Thought: 1450–1700,* ed. J. H. Burns and Mark Goldie (Cambridge, 1991), p. 386.

[28] See the discussion below on the coronation oath devised for William and Mary in 1689.

Magna Carta, moreover, obliged the king to acknowledge and respect the primacy of law.[29] Its drafters placed an article at the end of the 1215 charter to ensure that the entire document did not become what a later generation would brand a "parchment barrier." Article 61 laid out an elaborate scheme for policing royal behavior through a committee of barons, and at the very end of that very last article stood a royal pledge: "we will procure nothing from anyone, either personally or through another, by which any of these concessions and liberties shall be revoked or diminished; and if any such thing is procured, it shall be null and void, and we will never use it either ourselves or through another."[30] The committee of barons proved unworkable, but the king's acknowledgement that his violations of the charter would be legally null and void proved more enduring.

It was one thing to pronounce illegal acts null and another to guarantee they were treated that way. The numerous complaints of chroniclers about violations of Magna Carta and the repeated confirmations of the charter by John's heirs reveal how difficult a task it was to maintain these principles. In 1253, during the reign of John's son Henry III, a legal tactic was hit on to threaten with punishment anyone who assisted in a violation of Magna Carta. A statute was enacted in which, as Pollock and Maitland put it, "the anathema was launched, not merely against all who should break the charter, but also against all who should take any part whatever, even the humble part of mere transcribers, in making or promulgating or enforcing any statutes contrary to the sacred text."[31] Although the king could not be held responsible, everyone else could.

In the ensuing decades repeated attempts were made to bolster Magna Carta's protections, particularly by statutes that relied on the "null and void" technique. Two key areas were addressed in these efforts: one focused on the king's own acts, the other on the professional behavior of royal judges, the chief guardians of the law. A statute of Edward I's reign made it illegal for the king to refuse to redress wrongs when a subject submitted a petition of right.[32] Another statute made clear

[29] Magna Carta was considered a confirmation of ancient rights and customs, particularly those known as the laws of Edward the Confessor. See Janelle Greenberg, "The Confessor's Laws and the Radical Face of the Ancient Constitution," *English Historical Review* 104 (July, 1989):614.

[30] Magna Carta, 1215, in James C. Holt, *Magna Carta and the Idea of Liberty* (New York, 1972), p. 183.

[31] T. E. Tomlins et al., eds., *Statutes of the Realm* [to 1713], 11 vols. (London, 1810–28), 1:6. The quotation is from Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I,* 2d ed., 2 vols. (1898; reprint, Cambridge, 1968), 1:179.

[32] Holdsworth, *History of English Law,* 2d ed., 9:8. Holdsworth also points out that while ordinary writs did not lie against the king in his court, he was "morally bound to

that if judges neglected their obligation to uphold Magna Carta, any such judgment was "to be undone and holden for naught."[33] Although the king pledged in Magna Carta not to interfere with the process of the law and judges, from at least the time of Edward III the judges' oath of office also required them to ignore even direct orders from the king, to "deny no man common Right by the King's Letters."[34] As an anonymous pamphlet of 1643 pointed out, "the King can doe no wrong, because his juridicall power and authority is allwayes to controle his personal miscarriages."[35] The parliamentarian stalwart, Sir Henry Vane, at his trial in 1662, argued in a similar vein: "The Common law then, or Liberties of England, comprised in the Magna Charta . . . are rendred as secure, as authentick words can set them, from all Judgments or Precedents to the contrary in any courts, all corrupting advice or evil counsel of any Judges, all Letters or Countermands from the Kings Person, under the Great or Privy Seals."[36] Even if the judges yielded to royal pressure, there was added insurance in the rule that any judgment contrary to law should never be drawn on as a precedent. "It was the dominant view of medieval statesmen and thinkers," William Holdsworth points out, "that the law should reign supreme; and lead the judges, in ordinary cases, to regard the exposition of the law as emanating from the court rather than as emanating from the king."[37]

All these devices to bind the king within legal limits were embodied in the very maxim that Charles cited as proof he could not be held accountable, the maxim that the king could do no wrong. Its best recognized aspect, as Roberts rightly points out, was the transfer of responsibility from the king to his officials. The perennial plea of subordinates charged with wrongdoing, that they were merely obeying orders, would not protect them in an English court of law. While ostensibly protecting the monarch from personal accountability, the maxim had the salutary effect of ensuring that someone was accountable for carrying out illegal royal actions.

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do the same justice to his subjects as they could be compelled to do to one another" (9:10).

[33] 25 Edw. I, cap. 2.

[34] 18 Edw. III, cap. 7. And see [David Jenkins], *The Kings Prerogative and the Subjects Priviledges Asserted according to Law and Reason* (London, 1645; reprint, 1680), p. 8. Medieval judges were still very much the king's servants, according to Ralph V. Turner, *Judges, Administrators and the Common Law in Angevin England* (Rio Grande, Ohio, 1994), p. 113.

[35] *Touching the Fundamental Laws* (London, 1643), p. 11.

[36] Sir Henry Vane, *The Tryal of Sir Henry Vane, Kt* (London, 1662), p. 10.

[37] William Holdsworth, *History of English Law,* 4th ed., 11 vols. (London, 1936), 2:196.

Yet, on closer inspection it is apparent that the shifting of responsibility from king to servant evolved in such a way that it actually tied the king's hands. William Anson agrees that the pivotal date for the theory, if not the language, of the maxim the king can do no wrong, derives from the reign of Henry III, when ministers were responsible for acts done in the name of an infant king who was literally irresponsible.[38] Two developments, he notes, worked over the years to extend its impact in ways that constrained the monarch. First, as government bureaucracy grew, offices were taken out of the king's household, and the king's seals were transfered to the hands of royal servants who "were bound to consider the rules of their office as well as the king's wishes."[39] Second, the use of countersignatures and seals meant the king could not act alone. The requirement that the irresponsible king be joined in every action by an accountable individual or council had the beneficial effect, as Anson put it, of "crippling his independent action."[40]

It is important to note that the rule that the king was irresponsible helped to protect the monarch from the taint of sin, wrongdoing, and injustice. He was shielded from his own weakness, a protecting father to his people. Yet, as Lois Schwoerer points out, in an instance such as Parliament's "impeachment frenzy" against Charles II's judges, attacks against men who carried out royal policy could also afford a means to criticize and embarrass the king.[41]

III

Efforts to contain the power of the crown through the maxim that the king could do no wrong were neither exclusively secular nor exclusively English in origin. Rather, they had vigorous roots in religious custom and thought. Indeed, two of the maxim's roots grew out of the Roman Catholic tradition. First, there was the example of the pope, as head and governor of the Catholic Church holding a mirror, as it were, to secular authority; second, there was the church's religious teaching on Christian obedience to secular authorities.

[38] William Anson, *The Law and Custom of the Constitution,* 2 vols. (Oxford, 1892), 1:15.

[39] J. E. A. Jolliffe, *The Constitutional History of Medieval England: From the English Settlement to 1485,* 4th ed. (London, 1961), p. 393.

[40] Anson, *Law and Custom,* 2:41. The Thirty Articles of 1410 required the king to govern by advice of a permanent council.

[41] Lois Schwoerer, "The Attempted Impeachment of Sir William Scroggs, Lord Chief Justice of the Court of King's Bench, November 1680–March 1681," *Historical Journal* 39, no. 4 (1995): 848–49. Ogg makes a similar point. Ogg, *Charles II,* p. 453.

Because the pope was the monarch of an international institution, his dealings with the clergy and the laity had all the complexity of a secular monarch's relations with his officers and subjects. Church doctrine made special claims for the pontiff's unique character. The church distinguished between the pope, who was said to be infallible and therefore by definition could do no wrong, and kings. The law was said to be in the pope's bosom: he alone among mortals was worthy of unconditional obedience.[42] In practice there were challenges to these ideas. It is interesting that individuals who objected to particular papal commands tended to draw on arguments similar to those that were used against kings and pointed out that both had the power to do good but none to do evil.

But if there was disagreement about whether a pope could do wrong, there was complete agreement, as far as Catholic teachings went, that no king was to be obeyed unconditionally.[43] The godly source of royal authority was the precise reason the king's power must be conditional. As to who ought to determine when obedience must cease, the church assumed the power to judge kings and the authority to release from their obedience the subjects of any ruler it excommunicated.[44] Centuries later the English royalists would rail against these dangerous papist claims, but the basic theory that power must be conditional appears to have seeped into English consciousness.

Although seventeenth-century Anglican clergy were among the strongest advocates of a divine right, absolutist monarchy, the installation of the king as head of the Church of England failed to endow him with the sacred, infallible characteristics attributed to the pope. As Howard Nenner reminds us, even when the Church of England seemed most insistent on obedience to the monarch, its teaching distinguished between lawful and unlawful commands.[45] Nenner argues that clergy of the later Stuart age continued to return to early Reformation thought and to emphasize that "obedience was not due to the ungodly command, but [only] to the duty to suffer the tyrannical prince's wrath."[46] One has to seek

[42] See R. H. C. Davis, *A History of Medieval Europe: From Constantine to Saint Louis* (London, 1957), p. 244; Skinner, *Foundations of Modern Political Thought,* 2:144–45.

[43] Kern, *Kingship and Law,* p. 89. This concept can be traced back to the New Testament, 2 Cor. 13:10.

[44] See Davis, *A History of Medieval Europe,* p. 244, and Skinner, *Foundations of Modern Political Thought,* pp. 144–45.

[45] Howard Nenner, "The Later Stuart Age," in *The Varieties of British Political Thought, 1500–1800,* ed. J. G. A. Pocock, Gordon J. Schochet, and Lois G. Schwoerer (Cambridge, 1993), p. 205.

[46] Ibid. Nenner concludes, "As the divinely appointed guarantor of the faith, the church was effectively denying that God's truth was alterable by the king alone or even by the king-in-parliament." And see Mark Goldie, "The Political Thought of the Anglican

no further than the all-important homily on obedience of Edward VI to discover this teaching. The homily insisted on obedience, but continued: "Yet let us believe undoubtedly, good Christian people, that we may not obey kings, magistrates or any other . . . if they would command us to do anything contrary to God's commandments. In such a case we ought to say with the Apostles; we must rather obey God than man."[47] The Anglican Church, particularly during the Restoration, often tended to pursue a policy apart from, and occasionally at odds with, that of its head. But even when it departed from the king's will, the Anglican Church—like other Protestant churches—taught that only godly commands, that is, those not prohibited by God, must be obeyed.[48]

In sum, the writers and thinkers who relied on their understanding of the maxim the king can do no wrong to justify opposition to acts of Charles I were merely restating traditional interpretations. In elaborating on this doctrine, critics of the monarch's actions at once acknowledged and undercut his legal powers. As the anonymous author of a parliamentarian tract published in 1643 wrote: "according to the constitution of this kingdome, he [the king] can no more suspend [the laws] for the good of his people, then the Courts can theirs; or if he doe to the publique hazard, then have the Courts this advantage, that for publique preservation they may and must provide upon that principle, The King can doe no wrong, neither in withholding justice, nor protection from his people."[49] Thus the tenet the king can do no wrong was construed to keep the king within, not above, the law—free of legal liability in theory but circumscribed in practice. This interpretation was not an invention of seventeenth-century Englishmen, let alone of radical Whigs. Its roots were deep in the English past.

IV

The realists and skeptics among us will find this an engaging but unrealistic method of curbing monarchs. It expected a great deal of individuals, royal officials, officeholders, and subjects. In this interpretation, if the king's orders were illegal, it was the subject's duty to disobey them. Questionable commands could be contested in court. A tract written in

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Revolution," in *The Revolutions of 1688: The Andrew Browning Lectures, 1988,* ed. Robert Beddard (Oxford, 1991), p. 107.

[47] "A Homily on Obedience," from *Certain Sermons or Homilies* . . . (London, 1547), in Elton, ed., *Tudor Constitution,* p. 15.

[48] See Nenner, "The Later Stuart Age," p. 205; Goldie, "Political Thought," pp. 114, 116.

[49] *Touching the Fundamental Laws,* pp. 6–7.

1689, for example, "The Case of Allegiance in Our Present Circumstances Considered," underscored what was required of ordinary individuals in defense of the English system of government: "Altho . . . a King may require things not inconsistent with the Law of God, yet if they are beyond that Authority which the Constitutions of England have assigned to him, his Subjects are not bound in conscience to obey those Commands, and tho in some cases they may comply by a voluntary Concession, yet they are obliged to condemn and withstand such proceedings if they increase so far as to threaten a fatal subversion of the Government."[50] Readers were advised that any officials "appointed by the King to oppress his Subjects contrary to Law their Commissions being illegal, must be without authority; and therefore the Subject is not bound in Conscience to submit to them."[51] The same obligation had been set out in 1643 by Philip Hunton, a moderate parliamentarian. "It is not only lawful to deny obedience and submission to illegal proceedings (as private men may)," Hunton wrote, "but it is their duty; and by the foundation of the government they are bound to prevent the dissolution of the established frame."[52] David Ogg points out the ironic result of this doctrine. What he labels this "more academic interpretation" of the maxim imposed on the subject the necessity of testing the legality of doubtful commands, while freeing the king from the need to ascertain the legality of his orders before enunciating them. The consequence, in Ogg's opinion, was that "everyone except the king, is supposed to know the whole law of England."[53] If so, then the House of Commons must have been relieved that, as one of their members put it, "Every Englishman is born a common lawyer."[54]

The test of how seriously such requirements were taken was whether royal judges, Parliament, and individual subjects treated as null a monarch's unlawful commands. What follows is a preliminary exploration of such behavior. Though the record is spotty, it is impressive. There were many instances in which judges nullified acts that they considered to have overstepped the royal prerogative. Take, for example, two cases from the early seventeenth century. In 1602 the royal power to create monopolies was circumscribed when the judges declared that a grant

[50] [Samuel Masters], *The Case of Allegiance in Our Present Circumstances Considered: In a Letter from a Minister in the City, to a Minister in the Country* (London, 1689), p. 12.

[51] Ibid., p. 14.

[52] Philip Hunton, *A Treatise of Monarchy* (London, 1643), reprinted in *Divine Right and Democracy,* ed. David Wootton (London, 1986), p. 195.

[53] Ogg, *Charles II,* p. 453.

[54] Ibid.

made by Queen Elizabeth of a monopoly on the production of playing cards was void. Their verdict was that "every grant made in grievance or prejudice of the subject is void."[55] Coke's report of the case cites a precedent, some three years earlier, that found the powers granted by a royal charter to the Merchant Tailors of London too broad. The charter authorized them to make ordinances for the "better rule and government" of the company. Their ordinance that restricted cloth dressing to members of the society was found to be "against the common law, because it was against the liberty of the subject," since it created a monopoly. "Such ordinance, by colour of a charter, or any grant by charter to such effect, would be void."[56] This opinion found royal powers to grant monopolies questionable, as was the monarch's freedom to transfer royal powers to private persons.

Judges were usually reluctant to challenge a monarch, however. James I is rightly famous for his high claims for monarchy and personal irritation at the customary limits on the royal prerogative.[57] And although he bragged in 1621, "I have made the best judges that I knew . . . I did neither move them either directly or indirectly to do otherwise than was agreeable to right and equity," when a case arose questioning his right to grant a clergyman an additional benefice, he insisted the judges postpone their verdict until they had heard his views.[58] Coke regarded this demand as dangerous interference with the process of the law, which would cause an improper delay of justice. James angrily reminded the judges how careful he had been of judicial process and that this hearing would not unduly delay proceedings. He then summoned them to appear before him so he could state his case. In a dramatic scene the judges complied and listened at length to James's views. Then "all the judges fell down upon their knees and acknowledged their error for matter of form, humbly craving His Majesty's gracious favour and pardon for the

[55] *Darcy v. Allein,* Trin. 44 Eliz., in Coke, *Reports,* pt. 11, 87e. And see David Harris Sacks, "The Paradox of Taxation: Fiscal Crises, Parliament and Liberty in England, 1450–1640," in *Fiscal Crises, Liberty, and Representative Government, 1450–1789,* ed. Philip T. Hoffman and Kathryn Norberg (Stanford, Calif., 1994), pp. 61–63.

[56] *Davenant and Hurdis,* Trin. 41 Eliz. rot. 92, in Coke, *Reports,* pt. 11, 86b.

[57] For differing opinions on this point, see Johann P. Sommerville, "James I and the Divine Right of Kings: English Politics and Continental Theory," who argues that there was no place in James's "political outlook for the idea of an ancient constitution underlying the rights of both sovereign and subject," while Paul Christianson, "Royal and Parliamentary Voices on the Ancient Constitution, c. 1604–1621," believes James meant to create "a model of 'constitutional monarchy created by Kings' in which monarchs limited their own powers by creating laws and the institutions of governance." Both articles are found in Linda Levy Peck, ed., *The Mental World of the Jacobean Court* (Cambridge, 1991), pp. 65, 72.

[58] Cited by Lockyer, *The Early Stuarts,* p. 52.

same.''[59] Their actions are a vivid reminder that many judges disagreed with Coke or were unwilling to question the powers of the crown. The monarch's relation to the law was clearly open to interpretation and intimidation. James's son and heir was equally impatient of limits on his prerogatives but less prudent. Long before his trial in 1649 the issue of whether Charles could do wrong arose in Parliament. The Parliament of 1628 engaged in an extensive debate on the subject, finding precedents going back to the reign of Edward IV. Edward, members of Parliament were informed, had been told ''he could not command one to carry any to prison; . . . it was a rule in law that the King can do no wrong; but, if he should command one to be arrested without cause, then he might be author of wrong and therefore that is denied him.''[60] Charles I's own counsel acknowledged this point: ''It cannot be imagined of the King that he will at any time, or in any case, do injustice to his subject. It is a maxim in our law that the King can do no wrong . . . he is *pater patriae,* therefore he cannot want the affections of a father towards his children.''[61] Nor, Coke hastened to add, was the king to be held accountable for wrongs done by his administration: ''I do clear my gracious Sovereign, for he sees with other men's eyes, and works with other men's hands; so if there be a fault in the judges, it is not the King's; if the Treasurer offend, the King is not to blame.''[62] Glanville neatly summed up the constitutional situation: ''We allow him [the king] a liberty to confer grace [pardon], but not (without cause) to infer punishments; and indeed, he cannot do injury. For, if he command to do a man wrong, the command is void.''[63]

Charles seemed to resent deeply the implications in the maxim and insisted on taking personal responsibility for the actions of his servants. A response Archbishop Laud prepared for the king in reply to grievances presented on June 17 argued that Parliament's complaints against evil councillors really cast ''the greatest aspersion'' on Charles and his government: ''it proclaims that we can be led up and down by Buckingham, or any man living, to do what he or they please? Does it mean to persuade our people we have lost our judgment, or have none to lose? . . . howsoever the intention might be, yet we do much scorn this should be thus

[59] Ibid., p. 57. Coke, though on his knees, continued to insist that what the king asked was against his judicial oath.

[60] Johnson and Cole, eds., *Commons Debates,* 19 April 1628, 5:287.

[61] Ibid., 19 April 1628, p. 280. For proponents of the theory that subjects must obey even illegal orders, see, e.g., Richard Cust, *The Forced Loan, 1626–1628* (Oxford, 1987), pp. 62–67.

[62] Johnson and Cole, eds., *Commons Debates,* 11 June 1628, 4:276.

[63] Robert C. Johnson and Maija Jansson Cole, eds., *Lords Debates,* 19 April 1628, 5:291.

unworthily turned upon us.''[64] As this reply was penned the Commons were busy investigating allegations that Sir Edmund Sawyer, a member of the Commons, and Abraham Dawes, a customs farmer, had suggested to Charles that he might double rates for tonnage and poundage, levies the king had continued to collect without parliamentary approval. When the two men were examined by the House, Sawyer insisted he had acted on the king's commands. Members refused to credit this claim. ''I see every projector fathers himself upon the King's command,'' Sir Henry Mildmay observed. ''We know the King cannot think of these things himself, but he must be informed by such as these.''[65] Sir Thomas Wentworth, who would later be executed for his overzealous obedience to the king, found Sawyer's assertion outrageous: ''This cannot be. I cannot believe that answer . . . that the King should direct this.''[66] Glanville pointed out that even if it were true, ''Our law says that the King's command contrary to law is void, and the actor stands single. If there were a command, it was upon misinformation.''[67] The king rushed to dispute this claim. The very next day the house was advised that Charles had summoned Sawyer and Dawes to inform him about the book of rates. ''They desired to be pardoned and excused lest they should seem projectors,'' members were told, ''yet he required them to take consideration thereof, and so what they did was by his Majesty's command.''[68] Charles failed to appreciate the benefits of allowing servants to stand accountable for questionable acts and tried to extend his immunity to them.

Not surprisingly, the Commons concluded that the king did not intend to keep within legal limits. On 25 June 1628, four days after Charles's message on Sawyer and Dawes, they issued a remonstrance, ''That the receiving of Tonnage and Poundage and other impositions not granted by Parliament, is a break of the fundamental liberties of this kingdom, and contrary to your Majesty's royal answer to the . . . Petition of Right.'' Members beseeched the king ''to forbear further collecting of tonnage and poundage'' and ''not to take it in ill part from those . . . subjects, who shall refuse to make payment of any such charges, without warrant of law demanded.''[69] The king accepted the maxim's guarantee that he was not accountable for violations of law and cited it at his trial,

[64] Robert C. Johnson and Maija Jansson Cole, eds., *Proceedings in Parliament,* 17 June 1628, 6:55.

[65] Johnson and Cole, eds., *Commons Debates,* 20 June 1628, 4:393.

[66] Ibid.

[67] Ibid.

[68] Ibid., 21 June 1628, p. 406.

[69] Gardiner, ed., *Constitutional Documents,* pp. 70–73.

but his disregard for its legal constraints had helped to bring him to that tribunal. And the maxim's most radical interpretation, that a king who does great wrong is no longer king, that the crown is forfeitable at law, provided the philosophical buttress for his trial and conviction.[70]

Charles's heir, Charles II, in his turn, learned the many uses of the maxim for himself. After the constitutional uncertainties of the Interregnum the euphoria and relief of the Restoration produced an emphatic reassertion that the king could do no wrong in its less radical senses. It is ironic that the trial of the regicides in 1660 coupled insistence on royal immunity and even passive resistance with a forcible reminder of the peril of obeying an illegal command. The act for the attainder of the regicides asserted: ''neither the Peers of this Realm, nor the Commons, nor both together, in Parliament, or out of Parliament, nor the People, collectively, or representatively, nor any other Persons whatsoever, ever had, have, hath, or ought to have, any coercive Power over the Kings of this Realm.''[71] But when Colonel Francis Hacker, a regicide, pleaded at his trial that he had acted under orders, the lord chief baron sharply informed him:

> then, Colonel Hacker, for that which you say for yourself, that you did it by command, you must understand that no power on earth could authorize such a thing, no command in such a case can excuse you. There is a two-fold obedience, a passive obedience, to suffer rather than do things unlawful; and an active obedience, to do that only which is lawful; and therefore this will not excuse your obedience to those unlawful commands.[72]

In time, Charles II would find himself curbed by Parliament's insistence that he do no wrong. The provocation for this restraint was his Declaration of Indulgence of March 1672, which unilaterally granted religious toleration to Protestant dissenters and Catholics by suspending all penal laws against them. The king hoped Parliament would embody the declaration in a statute when it met in February 1673. Instead, the Commons drew up a petition which roundly denied that he could suspend religious legislation: ''We find ourselves bound in Duty to inform Your Majesty, that penal Statutes, in Matters Ecclesiastical, cannot be sus-

[70] Nenner, ''The Later Stuart Age,'' p. 196.

[71] 12 Car. 2, cap. 30.

[72] William Cobbett and T. B. Howell, eds., *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783,* 21 vols. (London, 1816), 5:1184.

pended, but by Act of Parliament. We therefore . . . do most humbly beseech Your Majesty, that the said Laws may have their free Course, until it shall be otherwise provided for by Act of Parliament.''[73] Chastened, Charles complied with what one biographer describes as ''his natural theatricality,'' personally ripping the seal from the offending declaration and breaking it.[74]

V

Judges and Parliament were not alone in treating illegal royal actions as void: during the seventeenth century a series of legal challenges was based on this interpretation of the maxim that the king could do no wrong. In 1614, for instance, James I decided to raise funds through a benevolence, a form of taxation abandoned in 1546. There was widespread opposition from J.P.s, especially in Devon, Somerset, Warwickshire, Kent, and Wiltshire, because he had not obtained parliamentary approval. One Somerset J.P. confessed, ''we are constrayned to refuse to render unto His majesty such satisfaction as in our harts wee desyer.''[75] Sir Walter Raleigh advised James to accept the ''common answer of all the sherrifs in England when the benevolence was commanded . . . that his loving subjects in general are willing to supply him if it please him to call a Parliament.''[76] Charles I's request for a benevolence in 1626 provoked a similar response. Local constables ''made some question whether this course now holden were not agaynst law.''[77] Richard Cust notes that the objections of these ordinary taxpayers to the benevolence ''were based on much more than simple obstructionism . . . they were also aware of the dubious legal status of the benevolences.''[78] A year later the lawyers of men who refused to pay the Forced Loan of 1627 pleaded that the loan was illegal and refusers had committed no offense.[79] Moreover, since illegal royal actions were invalid, they claimed there was no need for the king to annul the loan or to pardon the refusers. Sir William Coryton, a Cornish knight, used this defense to justify his

[73] *Journals of the House of Commons, 1547–1714,* 17 vols. (London, 1742), 9:252.

[74] Ronald Hutton, *Charles II: King of England, Scotland, and Ireland* (Oxford, 1989), pp. 297–98.

[75] Cust, *Forced Loan,* p. 154. See Cust on opposition to the benevolences of 1614 and 1622 and the forced loan.

[76] Ibid., p. 156.

[77] Ibid., pp. 161–62.

[78] Ibid., p. 162.

[79] Sommerville, *Politics and Ideology,* p. 42.

refusal to pay. He assured county commissioners that while he would gladly serve the king, he could not disobey the law and cited statutes from the reign of Edward I that no aids or taxes should be levied without consent. Hauled before the privy council, Coryton again explained that the loan was illegal, whereupon the council, in his words, "gave me leave to depart with fair respect."[80]

In 1629 the same defense was used by those who refused to pay tonnage and poundage, which Charles collected without parliamentary approval and in direct violation of the Petition of Right. Customs officers had confiscated the goods of refusers, including John Rolle, a member of the Commons. The Commons took up Rolle's cause. They found the king's orders illegal and announced that anyone who obeyed them would be punishable at law. This controversy led to the infamous scene in which the speaker of the Commons was held in his seat when he tried to adjourn the house, while a declaration was read which condemned as enemies of the commonwealth anyone who paid or advised payment "of the subsidies of Tonnage and Poundage, not being granted by Parliament."[81]

Many individuals refused to pay ship money on the plea the levy was illegal. It was often necessary to distrain to collect it, and there were episodes of violent resistance to the imposition.[82] Attorneys for John Hampden in the famous Ship Money case pleaded the levy was null and void. The governing classes agreed the king had special fundraising powers when a sudden emergency made it impractical to summon Parliament. But seven of the twelve justices in the case pronounced the king the sole judge of when such a threat existed. Among those indignant at the verdict was Clarendon, defender of the ancient constitution and future royalist, whose reaction was to affirm it as a civic responsibility to resist illegal acts, even acts royal justices had pronounced legal: "when they heard this demanded in a court of law as a right, and found it by sworn judges of the law adjudged so, upon such grounds and reasons as every standerby was able to swear was not law . . . and by a logic that left no man anything which he might call his own . . . they thought themselves bound in conscience to the public justice not to submit."[83]

[80] Kevin Sharpe, *The Personal Rule of Charles I* (New Haven, Conn., 1992), pp. 19–20. And see Cust, *Forced Loan,* pp. 165–70. Coryton's comment is cited by Sharpe, *Personal Rule,* p. 20.

[81] Protestation of 2 March 1628/9 in Gardiner, ed., *Constitutional Documents,* pp. 82–83.

[82] Rather than refuse, a group of Northamptonshire freeholders petitioned quarter sessions to dissuade the privy council from proceeding with the levy. Sharpe, *Personal Rule,* p. 718.

[83] Edward, Earl of Clarendon, *The History of the Rebellion and Civil Wars in England,* ed. W. Dunn Macray, 6 vols. (Oxford, 1888), 1:150.

Attention to the history of the doctrine that the king could do no wrong, indeed, serves to illuminate the significance of the ship money crisis. The doctrine's importance is evident from the disparate interpretations of, for example, Glenn Burgess and J. P. Sommerville. Burgess has argued that there were no clashing theories of government before 1641, but, rather, in the wake of the Ship Money decision a grave crisis of the common law was produced by the "almost universal fear that the king had a different interpretation of the relationship of law and prerogative from his subjects, and that the law was powerless to hold him to . . . the right interpretation."[84] Burgess seems to overlook the general understanding that the king's illegal actions were to be treated as void, however, and believes the law relied on the crown voluntarily using prerogative in a sensible way.[85] Certainly, many Englishmen felt the courts had failed them, but the maxim, as Clarendon explained, went beyond the courts and encouraged individuals to engage in civil disobedience. Sommerville's assessment of Ship Money, in contrast, takes account of the maxim that the king could do no wrong and regards the differences about the king's relationship to the law as indicative of broader philosophical divisions. Some men, he argues, believed a king's powers could not be circumscribed, others that the king could do no wrong, which lawyers interpreted to mean that the king could only command things that were lawful.[86] Thus both scholars reveal the maxim's significance for understanding the impending civic upheaval.

The reliance on the maxim to constrain kings came to the fore again after the Restoration. One of the most impressive indications that Englishmen of all ranks and professions appreciated the hazard of obedience to illegal commands emerged at Blackheath in 1673, among Charles II's professional soldiers, a group widely regarded as more likely to enhance than to limit royal power. A letter sent to Sir Joseph Williamson, secretary to the Privy Council, informed him that the soldiers were nearly ready to mutiny because the articles of war included an exceptionally broad oath of obedience. "They scruple the oath in it, and say that to swear at large to obey the King's commands is strange; for then he may command things for which the persons that do them shall afterwards be hanged."[87] Ogg found "that English paid soldiers should have objected

[84] Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (London, 1992), pp. 210–11. Also see pp. 205, 209.

[85] Ibid., p. 205.

[86] Sommerville, *Politics and Ideology,* pp. 101–2.

[87] Henry Ball to Williamson, 18 July 1673, quoted in Ogg, *Charles II,* p. 505. Ogg includes the text of the oath.

to this 'horrid' oath . . . one of the most striking tributes to the pre-eminence of common-law traditions; for in some general way, these men on Blackheath believed that, unlike foreigners, they had over them the protection of Magna Carta and the Petition of Right.''[88] Of course this protection against a lawless king meant they would be held accountable because ''The king can do no wrong.''

English clergy reflected the same understanding of the maxim as did Charles II's soldiers and used it to support their refusal to obey other sorts of royal orders. Henry Compton, bishop of London, for example, was arraigned in 1688 for refusing to suspend John Sharpe, rector of St. Giles in the Fields, for two antipopery sermons Sharpe had delivered in defiance of James II's warning against polemical preaching.[89] At his trial Compton's lawyers maintained that he could not have suspended Sharpe without a citation and trial for ''a citation is *jure gentium* and can never be taken away by any positive command or law whatsoever . . . no man can be obliged to do an unlawful act . . . this rule obliges all men in the world, in all places, and at all times.''[90]

Of course, the most famous case involving Anglican clergy using this plea was the Seven Bishops case. In 1688, James II ordered the bishops to have his Declaration of Indulgence of April read from every pulpit on two successive Sundays. This document extended toleration to Catholics and dissenting Protestants by unilaterally dispensing with the penal acts. Instead of obeying, six bishops and the archbishop of Canterbury petitioned the king, pleading that they were obliged to preserve the Act of Uniformity and challenging the king's power to suspend the penal acts.[91] The bishops were then arrested and charged with ''preferring, composing, making, and publishing, and causing to be published, a seditious libel.'' They pleaded that what was asked of them was against the law. At their trial the solicitor general insisted that they had no right to petition the king outside of Parliament, whereupon Justice Holloway demanded what they could do if they might not petition. ''They should have acquiesced,'' he was told, ''till the meeting of the parliament.''[92] Justice Powell argued that the case turned on the legality of the king's dispensing power, especially his power to dispense with laws for ecclesiastical affairs: ''if there be no such dispensing power in the king, then

[88] Ibid.

[89] J. R. Jones, *The Revolution of 1688 in England* (London, 1972), pp. 67–73.

[90] Mark Goldie, ''Political Thought,'' p. 120.

[91] W. C. Costin and J. Steven Watson, *The Law and Working of the Constitution,* 2 vols. (London, 1952), 1:258–71.

[92] Ibid., p. 265.

that can be no libel . . . which says, that the declaration, being founded upon such a pretended power, is illegal.''[93] Other judges felt that any contradiction of a royal order was a libel. But the case was decided by a jury, and the jury found the bishops not guilty. When the Convention Parliament met after James's flight from the realm, it promptly passed a resolution commending the bishops ''for the great Services they had done their Religion and Country, by the Opposition they had made to the Execution of the Ecclesiastical Commission, and their refusing to read the King's Declaration for a Toleration, which was then founded upon the Dispensing Power.''[94]

There was thus remarkable faith, or at least hope, that the tenet that the king could do no wrong could be relied on and insistence that precedents to the contrary should not stand.[95] Yet clearly the effectiveness of judicial and community review was problematic. When royal judges supported questionable royal practices, the community was left to accede or resort to greater resistance. The desire for order in the first years of the Restoration produced what John Kenyon labels the ''vogue for passive obedience.''[96] But the limitations of the maxim had been evident even before the civil war.

The most serious weakness of the maxim was the refusal of royal judges to accept the heroic role fashioned for them. A member of the Parliament of 1610 expressed a melancholy truth when he remarked: ''judges are but men, and their places doth not so sanctify their persons but that sometimes there happens evil as well as good. Judges and judgments may sometimes savour of partiality, sometime of human infirmity.''[97] Judges who found against the king could be dismissed. Coke was relieved of his duties by James I, and Charles I altered judges' patents so they no longer sat during good behavior but rather at the king's pleasure, ''the better,'' the Grand Remonstrance charged, ''to hold a rod over

[93] Ibid., p. 268.

[94] The resolution was passed 1 February 1688/89. See *The Tryal of Dr. Henry Sacheverell, before the House of Peers, for High Crimes and Misdemeanors; Upon an Impeachment* (London, 1710), p. 28.

[95] As doubts increased about the legality of Charles I's policies, many of his subjects pondered what their response should be to illegal royal orders. The Temple family of Stowe left the following analysis: ''As the law has set the King's person and private actions above the censure and reach of any but God Almighty so has it excellently provided that none of his public acts in his public capacity are valid but what are legal and the execution thereof (is) committed to those who are sworn neither to counsel nor act but according to law and are answerable for the same if they do otherwise.'' Cited in Sharpe, *Personal Rule,* p. 716.

[96] John P. Kenyon, *Revolution Principles: The Politics of Party, 1689–1720* (Cambridge, 1977), p. 201.

[97] See Lockyer, *Early Stuarts,* p. 49.

them.''[98] This innovation of Charles I was revived after the Restoration.[99] Charles II removed eleven judges in the eight years to 1683; James II dismissed those judges who argued against him in the Seven Bishops case and some twelve altogether in his four years on the throne.[100] While such dismissals show a level of independence on the part of the judiciary, S. R. Gardiner found ''tacit renunciation by the Judges of that high authority which the Commons thrust upon them in 1628'' with passage of the Petition of Right.[101] W. J. Jones agreed that judges in the reign of Charles I submissively legitimated the king's use of obsolete customs and fees until, ''in the end, judicial approval and political absurdity walked hand in hand.''[102] During the reigns of Charles II and James II royal judges upheld the Crown's right to rescind city charters and liberties and remodel them, to punish the authors and printers of newssheets, and to dispense with penal statutes in a particular case.[103] When Sir William Scroggs was elevated to King's Bench by James II, he allegedly asserted ''that loyalty to the king was the 'Heart and Life' of the legal profession . . . and that in his court lawyers could expect favour to be 'measured to them by their Loyalty.' ''[104] As Howard Nenner argued, ''Instead of the law being sovereign, it was a sovereign king who was in control of the law.''[105] The Restoration ban on all resistance to the king made the expedient of nullifying illegal commands more pivotal. When James's judges failed to protect such a customary liberty, a vital means to ensure peaceful control of royal power had failed.

VI

Judicial and community review of royal actions was emphatically reconfirmed after the Glorious Revolution; indeed, it was essential to justify that event. Just as in the case of Charles I, the more radical version of the maxim—that a king who does wrong effectively unkings him-

[98] Grand Remonstrance, clause 38. Coke was dismissed in 1616.

[99] Whether judges bent before that rod or not, Lois Schwoerer points out that the very nature of such judicial tenure opened the judges to charges of royal influence. Schwoerer, ''Attempted Impeachment,'' pp. 848–49.

[100] Jennifer Carter, ''Law, Courts and Constitution,'' in *The Restored Monarchy: 1660–1688,* ed. J. R. Jones (Totowa, N.J., 1979), p. 87.

[101] S. R. Gardiner, *A History of England, 1628–1637,* 2 vols. (London, 1877), 1:153.

[102] W. J. Jones, *Politics and the Bench: The Judges and the Origins of the English Civil War* (London, 1971), p. 89.

[103] See ''Quo Warranto: To the Charters of the City of London, 1681–1683,'' ''The Case of Benjamin Harris, Guildhall, London,'' ''*Godden v. Hales,* 1686,'' all in Costin and Watson, *Law and Working,* 1:252–58.

[104] Schwoerer, ''Attempted Impeachment,'' p. 849.

[105] Nenner, ''The Later Stuart Age,'' p. 182.

self—helped persuade the community in 1688 that they were acting according to law.[106] The Declaration of Rights asserted that James had "abdicated the Government."[107] Holdsworth reminds us that "as late as the end of the seventeenth century the English common law was the only body of law in Europe which had effected a reconciliation between the dogma of the personal superiority of the king to the law, and the dogma that the royal prerogative is subject to the law."[108] In that reconciliation and the eventual triumph of law over royal will the maxim we have discussed played no small part.

The Revolution produced a series of measures to fortify the maxim that the king could do no wrong. First, a new coronation oath clarified what was lawful. The former oath had merely obliged the king to keep the laws and customs granted by his predecessors, but William and Mary had to swear to govern "according to the statutes in Parliament agreed on," a formulation which was more precise and gave Parliament greater control over the monarchy. Second, the tenure under which judges served was changed. The 1701 Act of Settlement stipulated that judges should once more hold office during good behavior and could only be removed "upon the Address of both Houses of Parliament."[109] The claims of judicial freedom from monarchical authority were warmly defended in these years. In 1709 and 1710, for example, grand juries such as those at Norfolk were instructed that "to talk of unlimited obedience under a limited Monarchy is to betray ye freedom of our Country and to talk nonsense," and again, " 'tis a rule yt ye Law makes ye King . . . The power of ye King is ye power of ye Law, a power of right, not of wrong. If ye King does injustice, He is not King."[110]

To be sure, the new insistence that the king must govern according to law, that his illegal orders were void, failed to dislodge entirely the claims of passive obedience with their implicit criticism of the revolution. The pulpits of royal supremacists rang with calls that subjects must not resist kings under any pretext.[111] Some even insisted that passive obedi-

[106] Ibid., p. 208.

[107] Thomas P. Slaughter, " 'Abdicate' and 'Contract' in the Glorious Revolution," *Historical Journal* 24, no. 2 (1981): 323–37.

[108] Holdsworth, *History of English Law,* 4th ed., 2:256.

[109] "Act of Settlement," 1701, 12 & 13 Will. III, cap. 2, in Costin and Watson, *Law and Working,* 1:95. And see Harold J. Berman and Charles J. Reid, Jr., "The Transformation of English Legal Science: From Hale to Blackstone," *Emory Law Journal* 45, no. 2 (Spring 1996): 506–7 and 506, n. 143.

[110] Georges Lamoine, ed., *Charges to the Grand Jury: 1689–1803,* Camden 4th ser., vol. 43 (London, 1992), pp. 68, 71.

[111] See Kenyon, *Revolution Principles,* chap. 5.

ence to illegal commands was unacceptable—all commands of the king must be actively obeyed.

The clash between the high Tory position on obedience and the Whig and legal view came to a head in the 1710 trial of Dr. Henry Sacheverell, whose outspoken insistence on nonresistance incited the Commons to demand his impeachment. Sacheverell was accused of affirming "the utter Illegality of Resistance, on any Pretence whatsoever, to be a Fundamental" of the English constitution.[112] The attorney general argued that subjects had "not only a power and right in themselves" to make resistance, "but lay under an indispensable obligation to do it."[113] Nicholas Lechmere added, "the Laws and Statutes of the Realm, and the Order and Peace of Government, necessarily enjoyn it as a Duty on all private Subjects, to represent their Sense of the nation's Grievances in a Course of Law and Justice . . . and whenever the Oppressions become National and Publick, They [the Commons] claim it as the peculiar Right of their own Body, to pursue the Evil Instruments of them, 'till Publick Vengeance be done."[114] Sacheverell's defenders tended to blur the distinction between armed resistance and legal challenge and condemned both, citing Restoration legislation and the University of Oxford decrees that damned resistance and allowed only passive obedience.[115] Since Sacheverell never actually condemned the Glorious Revolution, the lords merely banned him from preaching for three years and ordered two of his published sermons burned by the common hangman. The Commons were disappointed, but the duty to treat illegal royal commands as null and void had been reaffirmed.

Even as the Glorious Revolution strengthened judicial review of royal orders, it marked the beginning of the end for judicial review of parliamentary statutes, that aspect of the subject which has received the lion's share of attention. A recent study found that while judicial review of statutes reached "its final expression" in Dr. Bonham's Case, the Revolution marked "the abandonment of the doctrine" that legislation must not violate either right or reason.[116] In this interpretation, the only check remaining was that it ought to be rational.[117] The different fates

[112] *Tryal of Sacheverell,* p. 33.

[113] Ibid., pp. 33–34.

[114] Ibid., p. 39.

[115] Among those cited were the act of 12 Car. II for the attainder of the regicides, the Militia Act, the Corporation Act, and the Act of Uniformity; see the *Tryal of Sacheverell,* p. 191.

[116] See T. F. T. Plucknett, "Dr. Bonham's Case and Judicial Review," *Studies in English Legal History* 14 (London, 1983): 34, 53.

[117] Ibid., pp. 53–54.

of judicial review of statutes and of royal behavior are plain in William Blackstone's *Commentaries on the Laws of England,* published nearly a century later. The first eight editions explain only "acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences void."[118] But if Parliament were clear about its intent, however unreasonable, "no court has power to defeat the legislature." He modified this judgment in the ninth edition to read: "But if parliament will positively enact a thing to be done which is unreasonable, I know of no power *in the ordinary forms of the constitution* that is vested with authority to control it."[119] As for review of royal orders Blackstone wrote: "the prerogative of the crown extends not to any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice."[120] If the crown should grant any franchise or privilege to a subject "contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares the king was deceived in his grant; and thereupon such grant is rendered void."[121]

From 1689 judicial review of royal orders became more certain. Howard Nenner maintains that in the revolution settlement, "The maxim that the king *can* do no wrong was turned to mean that the king *should not be allowed* to do wrong."[122] This essay has suggested that the origins of this interpretation of the king's limited powers were established long before 1689. The revolution settlement thus gave Parliament and the nation more effective means to ensure that wrong could not be done by the crown. In so doing, far from establishing new precedents, they drew on established and venerable traditions.

[118] William Blackstone, *Commentaries on the Laws of England,* 4 vols. (1765–69; reprint, Chicago, 1979), 1:91.

[119] Plucknett, "Judicial Review," p. 60. My emphasis.

[120] Blackstone, *Commentaries,* 1:238–39.

[121] Ibid., p. 239.

[122] Howard Nenner, "Liberty, Law, and Property: The Constitution in Retrospect from 1689," in *Liberty Secured? Britain before and after 1688,* ed. J. R. Jones (Stanford, Calif., 1992), p. 107.