Extension of Empire: English Law in Colonial Maryland

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I

The study of English colonization in America is in part the study of what culture and institutions settlers brought with them and what emerged new from their experience and that of their descendants. One of the fundamental underpinnings of the process was the system of law within which colonization took place. Property rights, family systems and relationships, economic development, the very structure of society is deeply affected by the laws accepted and enforced in particular societies. What English law was transferred, and how, and what local laws were found needful varied from colony to colony, especially in the early stages. In Maryland under a proprietary charter the process differed from what it was in colonies founded under company charters, such as Massachusetts, or through English conquest, as in Jamaica. In the end many results were similar. Everywhere elected assemblies emerged with rights to enact statutes, and courts adapted from English models enforced English as well as local laws. But the roads taken to achieve this result were not the same, nor was the mix of English and colony-made law.

Throughout the British empire in the seventeenth and eighteenth centuries, the legal status of English law in plantations settled by Englishmen presented problems for both the colonies and English administrators. Did transplanted Englishmen carry their law with them? If not, did the king create their laws or with his consent could they create their own? If they carried with them English law, could they alter it to suit their new condition? And if under either circumstance they could make laws of their own, what was the status of an act of Parliament passed after their law-making powers had come into being? These questions arose in every English colony. Neither English courts nor

English administrators had fully settled these issues by the time that the American Revolution put Americans in full control of what English law they would receive and what they would reject.[1]

The problems of transfer need to be looked at from several perspectives. What was the thinking of the king's administrators and judges? What were the views and practice of the American settlers? Where there conflicting opinions in England and the colonies, and if so, how were such differences settled? And what effect did such questions of transfer have on actual legal process and substantive law in the English colonies? This essay can not answer all of these questions even for a single colony. It will concentrate on the Province of Maryland and in particular on what was a political issue in Maryland over most of its pre-revolutionary history: who should decide what English law should be received?

This problem presented a profound constitutional dilemma everywhere in the expanding British empire. What was the status of inhabitants of the British dominions not part of the realm of England? Did the limitations on royal prerogatives embodied in the Great Charter and later declarations of rights extend to the crown's subjects in the colonies? Crown officers favored the prerogative powers of the king; colonists fought for their rights as Englishmen. The very earliest assemblies in Maryland made claims to the rights of the Great Charter, lest their prince ignore them, and eventually similar stands were taken in all the English colonies. The basic issue was the right of consent to the laws under which Englishmen, where ever they resided, were to live.

Issues of the status of English law in dominions not part of the realm of England came to the fore just as England's earliest overseas colonies were

coming into being. In 1608 Sir Edward Coke and others fabricated a case, called Calvin's Case, to settle the status of the Scots with respect to English law. Coke reported the case and later incorporated it into his famous Institutes, which all 17th-century lawyers studied. The case distinguished between the king's possessions by descent and those taken by conquest. No notion of acquisition by settlement was included. When the conquered were infidels, their laws were immediately abrogated and the king ruled according to natural equity until he chose to introduce laws. When the conquered were Christian, local law prevailed until the king chose to introduce English law, whether in part or in full. Once the king had introduced any English law, it could not be changed without Parliament; but otherwise by these rulings the King's prerogatives in his dominions outside the realm of England were extensive.[2]

The latitude that Calvin's Case gave crown prerogative was of crucial importance in the development of an imperial system. The king could establish what laws he pleased in dominions taken by conquest, and English administrators and lawyers generally assumed that the colonies were conquered from the Indians. Since Englishmen occupied these territories, the crown allowed them elected assemblies and local courts that could have a share in deciding what these laws should be, but how much power assemblies and courts were to exercise was, in the eyes of the crown, at least, dependent on royal will. Over the first half of the seventeenth century the crown delegated its powers via charters to various developers; but after the restoration of Charles II, royal authorities began to require a greater measure of control.

This process began in earnest with the conquest of Jamaica from the Spanish in 1655. The crown ruled Jamaica directly and here made its most

extreme effort to push the prerogative powers inherent in the rulings of Calvin's Case. The governor was a captain-general with powers to impose martial law as he found necessary. The English settlers of Jamaica were allowed an elected Assembly and no laws could be made without its consent, but the king and his council tried to limit Assembly powers to accepting or rejecting, without power to amend, laws sent from England. In the end the Jamaican Assembly retained the right to initiate laws, subject to crown acceptance or disallowance, in return supplying revenue to pay for the civil and military establishment. In addition, residents of Jamaica gained the right to appeal from local courts to the king in council in causes in which substantial sums were at stake. Stephen Webb has recently argued that this arrangement, worked out by 1681, became from the crown's point of view, the basis for the government of all the royal colonies and constituted the foundation generally for the imperial system over most of another century.[3]

However, Calvin's Case did not so easily fit English colonies that in the eyes of their settlers had been acquired through colonization or treaty with Indian peoples; and nowhere, including Jamaica, did English settlers accept the idea that English conquest had lost them their rights as Englishmen. After all, they were the conquerors, not the conquered. Questions kept arising. Did the Great Charter, which limited the king's prerogative powers in the realm, apply to the dominion outside it? If so, then the existence of colonial assemblies was not dependent on the will of the king. Did colonial assemblies have to adopt English Common Law and statutes explicitly? If so, as the crown began to exercise power to disallow local laws, it could veto extension of the desirable laws of England. Or were the colonists entitled by right to the benefits of English laws in so far as these suited local conditions? Over the

late 17th-century and most of the 18th-century, decisions of English legal officers, English courts and especially of the king in council on such points affected the transfer of English laws, and not always in consistent ways.[4] Colonist varied over place and time in their views of what the conditions of transfer should be, but underlying every position was the belief that as Englishmen they had a right to consent to the laws that governed them. Consent could be based on usage as well as local legislative enactment, but consent there must be. This view eventually led to a more extreme position. Some colonial inhabitants began to question the right of the king in Parliament to pass any laws that bound the colonies in the absence of direct representation there. This was an issue that led to revolution.[5]

II

In Maryland, the proprietary charter -- granted in 1632, but based on Lord Baltimore's charter for Avalon of 1623 -- provided the envelope within which issues of transfer of English law arose. Both charters were the work of George Calvert, first Lord Baltimore and the chances are excellent that he had the precepts of Calvin's Case in mind. He had done extensive legal research to find precedents for the powers he wanted the crown to confer upon him as proprietor and he is not likely to have missed the significance of the rulings in Calvin's Case. Furthermore, he must have been familiar with the charter and accompanying instructions given the Virginia Company for its Jamestown venture. As Joseph H. Smith has pointed out, these assumed that English law would not automatically apply to a Virginia settlement and ordered arrangements for holding and transferring property and maintaining law and order that would not have been necessary otherwise.[6]

Lord Baltimore's charter was politically astute. It delegated to him the

king's prerogative to appoint civil and military officers, to defend his territory and rights by force if necessary, and to decide what laws should be in effect. However, it also offered assurances to English settlers that they would not be the subjects of a tyrant. The proprietor could make laws only with the consent of an assembly of freemen, and this was a clause that the Maryland colonists quickly turned into a right to make their own laws with proprietary consent. Such laws, furthermore, were not to be repugnant to those of England, and every settler and his descendants were to be considered Englishmen with "all privileges, franchises and liberties of this our kingdom of England." Thus English law was to be the standard by which local laws should be judged and English colonists were guaranteed English liberties, whatever that might prove to mean.[7]

Within this envelope of charter rights was ample room for confusion. Who was to decide what laws were repugnant to those of England? As in all early charters, that of Maryland provided no one in the English government ~~had~~ with power to review Maryland legislation. Who was to decide whether acts of the proprietary government were depriving Maryland settlers of their liberties? Again, the charter contained no right to ~~There was no~~ appeal from Maryland to the English courts. Who was to decide what laws of England would suit conditions in the colony: the proprietor or his governor, his courts, or the Assembly?[8] ~~This was easily a~~ All These were thorny problems where a proprietor had charter powers to establish what courts he chose and could accept or reject laws passed by his Assembly. Calvin's Case may have created further complications, since its provisions could be interpreted as requiring that Lord Baltimore, acting for the king, was responsible for introducing English law

For good reason anxiety about the reception of English law began to appear very early in Maryland history. The underlying difficulty lay in the penal laws in England that deprived Catholics of civil and political rights and made the presence of Catholic priests illegal. Lord Baltimore needed to ensure that

no one could argue that these laws extended. At the same time, he needed to offer his settlers the reassurances of laws and institutions to which they were accustomed and that they believed to be rightfully theirs.

Lord Baltimore's commission to Leonard Calvert reflected this problem. In some respects the commission showed the intention that English law and procedure should provide the foundation for law in Maryland where local laws were silent. The governor was to hear and determine all criminal offenses for which the penalty did not extend to loss of life or member and all civil causes according ". . . to the Order Laws and Statutes of that of our Said Province already made and established or hereafter to be made or Established And in default of such Laws according to the Laws and Statutes of the Realm of England as near as he may or can Judge or determine thereof." But the governor's jurisdiction over major felonies -- which he shared with the council -- was confined to enforcement of the laws of the province.[9] The penal laws of England were not to extend.

Clearly Lord Baltimore expected that the Assembly would pass the necessary laws, and he also expected to write these laws himself. A struggle followed that in some ways anticipated that between the crown and the assembly in Jamaica in the 1670s. Much about the struggle is obscure because no certain text of Lord Baltimore's laws survives. However, I believe that ~~the struggle~~ conflict revolved around two main issues: Whether the proprietor or the colonists should write Maryland laws and how English law, especially the criminal law, should be transferred.

The first session of Assembly for which records survive met in March of 1638. Lord Baltimore had sent over laws which he assumed the Assembly would pass. We know only that one or more concerned major criminal offenses. Leonard Calvert had to submit his commission to the Assembly to prove that

without a law for defining and punishing major crimes, they could not be punished in Maryland. The Assembly members refused to rubberstamp Lord Baltimore's laws but passed others instead that Leonard Calvert described to his brother as providing "both for your honor and proffitt as much as those you sent us did." Only the titles of these acts remain, but one did cover major offenses. Since no more is heard about these laws, they probably expired with the next session of the Assembly.[10]

Lord Baltimore's acceptance of the Assembly's action established the right of his freemen or their representatives to initiate legislation, a right the Assembly never relinquished; nevertheless, the struggle over passage of Lord Baltimore's laws did not thereby end. The following year he tried once more. At the assembly of March 1639, thirty-six acts, which passed second reading but failed of enactment, probably included those that had failed the preceding year. Among them were acts to establish various courts, all of which were to follow procedures of equivalent English courts, except in so far as Maryland law provided otherwise. Other acts defined crimes and punishments and established procedures for collecting debts. In all it appears that the proprietor was endeavoring to establish a code of laws and enforcement procedures settled by Maryland statute but founded on English institutions and practice.[11]

The Assembly again would have none of the code. Instead it passed a single "Act ordeining certain Laws for the Government of this Province." This act, which was to last only until the next session, gave the governor -- or the council if he were a party to the case -- the power to adjudicate civil causes "according to the laws or laudable usuage of England;" but the governor and council together were to hold trial of all offenders "with any punishment as

they shall think the offence to deserve," except that if the penalty extended to life or member, the offender "shall be first indicted and afterward tried by twelve freemen at the least." Thus in criminal cases, English law once more went unmentioned. However a separate clause guaranteed to the inhabitants "all their rights and liberties according to the great Charter of England." Evidently this was a sticking point.[12]

The next Assembly met in October of 1640 and was the scene of a major battle over Lord Baltimore's laws. Although the 1639 act expired at the end of the session, no acts whatever passed that concerned courts or jurisdictions or that established crimes or punishments, nor was English law in any form extended. The same held true of the Assembly called in March 1641. Finally in March of 1642 the Assembly revived most of the 1639 Act with its rules for judicature and confirmed all judicial proceedings that had taken place during the year and a half that the act had not been in effect.[13]

At the bottom of this struggle was the concern of the Maryland colonists, including most of the leaders, that their rights should not depend entirely on the will of the Proprietor. These men did not want to pass a code of laws -- no matter how enlightened -- written by Lord Baltimore. They wanted to establish their right to make their own laws. But once successful in asserting this right, they were still reluctant to pass laws that put in jeopardy the right of anyone to life, liberty or property. It is my speculation that Maryland settlers assumed that they carried English law with them as their birthright and wished their judges to rely on it without an act of Assembly to authorize it. Local acts, they may have argued, put the colonists too much at the mercy of an absentee proprietor, who had the power to disallow such acts. Lord Baltimore, on the other hand, may have believed on the basis of Calvin's

Case that English law could not be in force in Maryland unless he, as surrogate for the king, introduced it, and this, under his charter, he could only do by an act of Assembly. However, both sides recognized the danger of a general extension that would include the penal laws against Catholics.[14]

In July of 1642 the two sides reached a compromise. The Assembly passed an act of judicature. This said that in civil causes judges were to follow the laws and usage of the province and that in the absence of these they should use "equity & good conscience, not neglecting" follow English laws and usage as applied in similar cases. But in criminal cases, no one should suffer loss of life, member, or freehold without "Law certain of the Province." Acts then were also passed ~~which specified that~~ that listed capital offenses, and their punishments, to be determined by the Judge as near as may be to ~~punishments for specified felonies were to be established by~~ the laws of England. By this means ~~the Assembly~~ assured the settlers of English laws and procedure without creating a loophole for the transfer of the penal laws.[15] The proprietor won recognition from the Assembly that Maryland law was needed to bring English law to the colony an

Nothing in the court records suggests that these quarrels affected the actual administration of justice. Governor Calvert had regularly issued commissions to magistrates that gave them the powers and jurisdiction of the justices of the peace in England and it seems unlikely that anyone thought that the basic powers and procedures of peace keeping and adjudication of disputes were not to be those of English law unless local convenience required otherwise.[16] Studies are needed to determine just what precedents were being followed and what adaptations were being made in this tiny settlement of three or four hundred people. From Lord Baltimore's point of view it was of course expedient to foster familiar institutions and procedures in establishing law and order in a new land. Neither the proprietor or his opponents were trying to prevent this outcome. The issues as fought in the Assembly were constitutional and political and did not revolve around actual judicial

practice.

Although in 1642 these issues may have been settled in Maryland for the moment, there is some evidence to suggest that in England Lord Baltimore began to be increasingly anxious with the advent of the English Civil War. In 1643 Leonard Calvert returned to England to consult with his brother and on his return in 1644 he brought with him a new commission. Unlike his earlier commission, this one made no mention of English law or precedent for any judicial proceeding. His jurisdiction in civil and criminal causes was to be exercised according to the laws of the province and in their absence according to his best discretion.[17] Possibly this wording simply reflected a reliance on the laws of 1642, but this interpretation seems to me doubtful. The laws were temporary and would expire in 1645. Lord Baltimore may have intended then to try for an act that would carry the same provision.

In February of 1645 Lord Baltimore's worst fears were realized. Richard Ingle, a Protestant sea captain and supporter of Parliament, who had been trading for some years to Maryland, used letters of marque issued to him by Parliament to justify raiding the St. Mary's settlements and taking Catholic leaders and priests as prisoners back to England. Ingle later argued not only that the Maryland Catholics supported the King but -- with the implication that English laws against Papists extended to Maryland -- that he was rescuing the Protestant inhabitants from illegal rule.[18]

When Leonard Calvert reestablished his authority late in 1646, he at once convened the Assembly. Doubtless at his behest this assembly passed an Act Touching Judicature that eliminated all reference to English law. All justice, civil and criminal, was to be "administered by the Governor or other Chiefe Judge in Court according to the Lawes of the Province and in defect of Lawe,

then according to the sound discretion of the said Governor or other Chiefe Judge and such of the Councell as shall bee present in Court or the Major parte of them." With this act in hand, Lord Baltimore's officers had no obligation to enforce any law of England that in their discretion they considered unsuitable to Maryland.[19]

Such a law probably never could have passed in the years before 1645. Catholics as well as Protestants would have opposed authorizing such power to proprietary judges by act of Assembly, although they could do nothing to prevent the proprietor from commissioning his governor in such terms. But the experience of Ingle's Rebellion put Catholics on notice of danger. The depleted population left in Maryland after the rebellion -- perhaps fewer than had come on Ark and Dove -- ~~were~~ was for the moment primarily Catholic. Most Protestants had departed for the northern neck in Virginia, just across the Potomac River. The settlers who had remained accepted the need for the act.[20]

This act remained in effect until 1678. After the experiences of 1645-46, probably no Catholic wanted to repeal it, and during the troubles of the mid 1650s the radical Protestants who were in control also must have thought it useful. It is not listed among the acts they repealed. But neither under the proprietor or the Puritans was the act accompanied by acts to establish major criminal offenses in Maryland law.[21] Over the whole colonial period such laws were never passed again after those of 1642 expired, with one exception, the Act for Religion of 1649, which called for the death penalty for denying the Trinity. Given this fact, what happens, you will ask, to the notion that the Calverts believed that local laws defining all felonies and punishments were ~~them~~ necessary for law enforcement, given the rule in Calvin's Case?

One possibility, of course, is that I am mistaken in supposing that this notion underlay the Proprietor's earlier insistence that such acts be passed. Another possibility lies in a change in Lord Baltimore's perception of the

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importance of establishing all law by Maryland act. With the triumph of Parliament in the Civil War he was of necessity revising all his strategies: actively recruiting Protestants, turning to a Protestant governor, giving up his connections to the king for connections with Protestant tobacco merchants.[22] The need to give Maryland its own legal code may have receded in his consciousness. Furthermore, he had before him the precedent of Virginia since its charter had been rescinded in 1624. There under crown rule all major offenses were prosecuted at Common Law without any act of Assembly to authorize it.[23] The Maryland act of 1646 allowed extension of English law to Maryland law via discretion of Lord Baltimore's judges, and such extension was not a threat so long as his judges determined what laws were to be received.

After Ingle's Rebellion the proprietor's commissions to his governors skillfully begged the question of what reliance should be placed on English law. The commission he issued in 1648 to his first Protestant governor, William Stone, provided the model for all others until the revolution of 1689 brought a royal governor to Maryland. It authorized Stone with his council "to enquire hear & finally to Judge of and upon all Causes Criminall and Civill whatsoever . . . according to the Laws from time to time in force of and in the said Province and in default thereof according to his and their best discretion."[24] "Laws from time to time in force" was an ambiguous phrase that could cover whatever Common Law or statute law the judges of his courts saw fit to accept. Thus both by legislative act and proprietary commission, the transfer of English law was about to depend on usage in the absence of acts of Assembly. Ultimately, as we shall see, the legal officers of the king were to adopt a somewhat similar view.

III

The constitutional problems that transfer raised did not die with the Act for Judicature and the new commissions, although the political turmoil of the 1640s and 1650s ceased for Maryland with the restoration of Charles II in 1660. Rather, the conflict changed its character. Before 1646, the colonists had shown reluctance to depend on act of Assembly to establish the conditions of transfer; but after 1660 Assembly delegates began attempts to establish Assembly control.

The reasons for this shift reflect differences in the size of the colony and in its institutional arrangements. Maryland was a fragile frontier outpost in the earlier period. In 1638 there were probably little more than a hundred free men in Maryland, and in 1642 there were only about 215 in a total population of about 500 people. Most had once been indentured servants, although those who actually attended meetings of the Assembly, whether by election or by the summoning of all freemen, usually had arrived as free immigrants. The councillors and major investors summoned by special writ sat together with the humbler members and undoubtedly dominated the proceedings. Such men were either already judges or might soon expect to be so. If reception of English law was left open to court ruling they would have a chance to control it. However in the 1660s and thereafter conditions had changed. The Assembly had become a two-house legislative body. The Lower House represented a population that in 1660 was probably ten times larger and by 1689 was fifty times larger than in the early 1640s. In the Lower House of the 1660s most delegates were middling planters with a basic literacy, but an increasing number of well-educated and well-capitalized men began to appear as time went on. Some were able and ambitious leaders capable of challenging the

Upper House, who were his Lordship's councillors and as councillors were the judges of his Provincial Court. These councillor-judges, furthermore, were increasingly restricted to his Lordship's relatives by blood or by marriage.[25] The Lower House began to think that the power of his Lordship's Provincial Court to determine what the law should be required a check.

As the Assembly began to seek such checks, constitutional questions arose about the relationship of the Assembly to the proprietor. The Maryland charter authorized the Assembly, and the proprietary position was summed by in 1669 in the words of Chancellor Philip Calvert: "They [the delegates] have no power to meet but by Virtue of my Lords Charter . . . if no charter there is no Assembly." [26] The occasion for these words was a set of grievances the Lower House had presented in response to the second Lord Baltimore's veto of several laws five years after Charles Calvert, his governor, had signed them, putting them into effect. The Upper House interpreted the protest as a challenge to the proprietor's charter rights and in the end the Lower House backed down. But as time went on it became more aggressive. In 1676, Charles Calvert, who had just become the Third Lord Baltimore, aroused bitter opposition when he made an effort to exert more control of the Assembly by calling only two of the four delegates elected from each county. He won his point for the moment, but two years later, while he was absent in England, the Assembly passed an act that gave legislative authority to election procedures and ensured four delegates per county. On his return the Proprietor at once undid this challenge to his prerogative power, but he was now dealing with a more sophisticated body than earlier and one that was more militantly claiming the privileges of the English Parliament.[27] Implied was a claim that the Assembly existed, not just by right of Lord Baltimore's charter, but by the right of

Englishmen to consent to the laws under which they lived. Posed this way, the question of Assembly rights raised an issue that was to plague the crown as well as the proprietor, and not just in the Province of Maryland.[28]

In this context of growing Lower House challenge, the question of whether the proprietor's judges or the proprietor in his Assembly should determine what laws of England were to be transferred became an increasing source of political conflict. The issue came to the fore in 1662. The Lower House asked for a temporary act to make proceedings at law subject to the laws of England if those of Maryland were silent. Only civil proceedings were intended. The Upper House raised objections that were answered with an amendment that said "all Courts to judge of the right pleadeing and inconsistancy of the said Lawes with the good of this Province according to the best of their Judgements, Skill and Cunning." In the view of the Upper House "by this means of leaveing all at the Breast of the Courts, all is againe left to discrecon and soe the Act unnecessary," but in the end the bill passed. The act allowed nothing not already in effect under the permanent act of 1646, except that in referring to all courts it gave justices in the now developing system of county courts discretion similar to that of the Provincial Court, although within a much more limited jurisdiction.[29]

As a temporary act, this act needed to be revived at each succeeding session of Assembly. Consequently in the assembly of September 1663, which was prorogued to September 1664, the issue arose once more. Not only was the Act of 1662 revived but two new temporary acts for proceedings at law were enacted, one with a phrase allowing discretion to judges in applying English law and one without. What the assembly thought it was doing is hard to imagine and no debate is recorded to assist our understanding. But the passage of these two

acts had future political importance.[30]

There were now three temporary acts for proceedings at law on the books and the assemblies of 1664 and 1666 revived them all![31] In 1669 Lord Baltimore disallowed the act of 1663 that had omitted the discretionary clause. The assembly of 1669 had to deal with a very angry Lower House, which found the disallowance of this and seven other laws that had been in effect for at least five years a very bitter grievance. However, the debate did not focus on the acts themselves but on the absence of anyone in the province with authority to fully approve laws.[32]

With the disallowance of one of the Acts for Proceedings at Law of 1663, only the act of 1662 was revived until in 1674 a new debate arose. This time the Upper House initiated it with a request that the Lower House cooperate in preparing a list of English laws "touching criminal cases" considered applicable to Maryland and in drafting a bill for criminal proceedings. The Lower House agreed, but when the act was put before the members, they rejected it on the grounds that "the Lawes of England ought to be esteemed & Adjudged of full force & Power within this Province." They asked that the Act for Proceedings at Law of 1662 be amended to include criminal as well as civil matters. Such a general extension of the criminal law probably seemed to Governor Charles Calvert and his council too dangerous to the position of Catholics and Protestant dissenters. The only result, after further discussion, was that the law of 1662 was not revived, leaving only the law of 1646 in effect.[33]

Finally in 1678, when Charles Calvert was out of the province, Lower House advocates of reliance on English law without judicial discretion temporarily got their way in part. They repealed the Act Touching Judicature of 1646 and

the Act for Proceedings at Law of 1662. To replace these they revived the Act for Proceedings at Law of 1663 in the version that Lord Baltimore had not disallowed, but with the proviso that the clause allowing discretion of judges was not to be included. Such a revival must have been illegal because the Assembly of 1676 had repealed both acts of 1663, but no one ever raised this issue.[34] In this form the law remained in effect through revival until 1684. However, nothing was done to give legislative authority for introducing the criminal laws of England. Catholics and Quakers in the Assembly doubtless persuaded their colleagues that unlimited extension of criminal statutes would be too dangerous to their position.[35]

It might be argued that these quarrels over an act of judicature were not very important, since the Proprietor at first ignored the Assembly's action of 1678. He was more immediately concerned about the Act for Elections, which in giving election procedures a statutory basis directly attacked his charter prerogatives. However, the events of 1684 suggest otherwise. That year the Proprietor was about to leave the province to defend his charter in England, under attack as too strong a delegation of royal power. A revision of the laws attempted in anticipation of his departure led to bitter conflict over a rule for judicature. Both houses agreed that an act of judicature should be drawn. No drafts remain, but the issues were clear. The Proprietor insisted that his charter granted him the right, with the consent of the freemen, to make laws consonant with reason and not repugnant to the laws of England; why, then, should he "oblige and tye vp the freemen of this province to be Concluded by such of the Lawes of England, as may Ruin them or att least be greatly Injurious to them in severall respects?" He refused to put his hand to a law that did not include the phrases "If the governr or Chiefe Judge and Justices

of my court, shall find (such) Lawes Consistent with the Condiccon of the province." To the Lower House, on the other hand, this very discretion of the judges was "the Inconvenience to bee prevented."[36]

The Proprietor won his battle. No new act passed, nor was the act of 1663 revived; instead by proclamation he disallowed all the acts passed in his absence in 1678 that he had not already rejected or accepted. Thereby he disallowed the Act of Repeal of 1678 and hence the repeal of the Act of Judicature of 1646 and the Act Concerning Proceedings at Law of 1662. Since the act of 1646 was a permanent act, he thus put it back into effect. Although the act of 1662 needed to be revived to be in operation, he did not need it. Until 1689, the judges of the Provincial Court -- in effect, his deputy governors -- were the final authority as to what English law extended.[37]

The third Lord Baltimore, like his fathers, must have feared that English law would not extend to Maryland without an act of judicature,[38] for he risked a costly solution. He used his power of proclamation to reinstate indirectly the act of 1646. One of the accusations brought against him in 1689, when a Protestant-led rebellion overthrew his government, was that he had illegally used proclamations to bypass his Assembly. In so doing he had violated the requirement in his charter to pass laws only with Assembly consent.[39]

These political struggles had no discernible effect on judicial developments. Both the Provincial Court and the county courts relied on the forms of action at Common Law and other usual procedures in hearing and determining civil and criminal cases. Acts of Parliament were occasionally pleaded, without raising any question as to the power of the courts to consider them, and the county courts were ordered to acquire digests of English statutes as well as handbooks written for English justices of the peace.[40]

Modifications of English court procedure appeared, but these were not subject to complaint.[41] The leaders of the Revolution of 1689 sent the crown a highly legalistic set of grievances against Lord Baltimore's rule and these included accusations of judicial misconduct; but the rebel leaders made no general accusation that Maryland courts had not followed English law.[42] Indeed, it is likely that political tensions over a rule of judicature kept all sides alert to follow English law as closely as knowledge and real convenience permitted.

The assemblies of 1686 and 1688 made no further efforts to obtain a new act for judicature, but with the overthrow of proprietary government in 1689, the revolutionary convention at once ordered a general extension of English law. The ordinance of September 4, 1689, enjoined all civil officers to enforce the laws of England as well as Maryland, and in at least one county, the judge's oath was altered to commit the magistrates to "doe equall right . . . according to the laws of England" as well as acts of Assembly. The same phrase occurs in the oaths of the early royal period.[43]

Was the transfer issue a major element in the Revolution of 1689? Like efforts of the Lower House to obtain privileges of Parliament, control election procedures, and otherwise check proprietary prerogatives, the conflict over transfer revolved around the claims of Maryland inhabitants to the right of Englishmen. David Jordan and I have argued elsewhere at length that while these issues contributed to unrest and while the rebels made good use of them in defending the uprising, these were not the basic causes of rebellion against the proprietor. Maryland colonists were not facing down a tyrant. Indeed, the majority of Protestants still alive in 1689 who as members of the Lower House had fought the constitutional battles of the early 1680s refused to participate in the revolution. Its causes were political and religious and were

exacerbated by the absence of the third Lord Baltimore in England and poor leadership in Maryland.[44] But if the issues of English law and the rights of Englishmen did not precipitate revolution, they also did not die down. They remained a subject of contention under royal government in Maryland and into the second proprietary period that began in 1715.

IV

With the overthrow of the proprietary, the crown took over the government of Maryland, but Lord Baltimore retained his rights to Maryland as a property and to the revenues therefrom. His charter was not rescinded, despite the fact that under James II proceedings to vacate it had begun as part of a general effort to centralize imperial authority and provide more consistent administration. In the end English devotion to property rights was stronger than these considerations of imperial policy. Lord Baltimore had a patent and under this patent the Calverts had invested their personal fortune in expansion of the crown's dominions. No act of disloyalty to the crown of England could be proved against the Calverts. The most that royal officers felt justified in doing was to declare an emergency that demanded a Protestant government under direct supervision of the crown.[45]

The constitutional position of Maryland government changed with the arrival of a royal governor in 1692, but not as much as one might have supposed. Lord Baltimore's charter had delegated to him and he to his governors the powers that the crown now gave its royal governor. These were basically modeled on those that had been finally settled for Jamaica in 1681. Like the proprietary governors, the royal governor was a military commander with powers to impose martial law and raise whatever forces were necessary to quell enemies from abroad or rebellion at home. He was to execute his powers

according to his commission and instructions "and according to such reasonable Laws and Statutes as now are in Force or hereafter shall be made and agreed upon by you with the Advice and Consent of the Councill and Assembly of our said Province." As with proprietary commissions, beginning with that granted to Stone, the phrase laws "in Force" allowed leeway for introduction of English law via usage if no act of Assembly prevented. The main changes were three: The crown appointed the governor and council; laws of the province were to be subject to royal instead of proprietary confirmation or disallowance; and for the first time civil causes entailing disputes over amounts that came to L300 sterling or more could be appealed to the king in council.[46]

That so little change was required in the structure of Maryland government is a tribute both to the foresight of George Calvert, who wrote the charter, and to the governing skills of his son Cecil and grandson Charles, the two 17th-century Maryland proprietors. George Calvert had foreseen what powers a ruler would require, and Cecil and to a lesser extent Charles had understood what rights for settlers were necessary to retain their allegiance and support. The result was a colony in which, by 1692, arrival of a royal governor had meant little institutional derangement. By contrast royal intervention over the last quarter of the 17th century in Virginia, New York, and Massachusetts, also long-established English settlements, brought basic restructuring of the government.[47]

The actual power relationships that royal governments created brought more change to Maryland than did institutional arrangements. Although the crown sent no garrison with its Maryland governors, as it did for a while in Jamaica and in neighboring Virginia after Bacon's Rebellion, it had the resources to do so, resources that Lord Baltimore could not have commanded. Furthermore, the

claims of crown prerogative were much stronger than proprietary claims. Maryland settlers could complain that proprietary prerogatives were illegal or unjust but such arguments were more difficult to make about the king himself or his representative.

Indeed with Lord Baltimore's governing rights in suspension, it was no longer certain that Maryland colonists enjoyed the protections of charter provisions that guaranteed them an elected Assembly, or in fact, any rights of Englishmen. From the crown's point of view, Maryland, like Jamaica, Virginia, and New York, was now entirely subject to the prerogative rights of the king and enjoyed the power to make laws in an assembly only through royal instructions to the governor.[48] This was not the point of view of Maryland inhabitants, of course, nor of those in any English colony. In their eyes, as Englishmen they had inherited a right to an assembly, a right they saw as embodied in Magna Carta. Reliance on the generosity of the king did not seem entirely safe after James II's experiment with government without an elected Lower House of Assembly in the Dominion of New England.

While crown officers emphasized the dependency of colonial inhabitants on the prerogative, there was after James II's departure no intention to govern the colonies without an assembly; indeed, over the period of crown rule the Lower House in Maryland greatly strengthened its power and procedural sophistication. The royal governors were more willing than the proprietors had been to assume that it was a body comparable in many ways to Parliament. They allowed the speaker to issue writs for by-elections, a Parliamentary procedure previously fought for without success. Governor Francis Nicholson let the Triennial Act be a precedent for Maryland triennial elections. In this climate the Lower House developed standing committees and achieved more open

recognition of Parliamentary privileges. And its members improved their political skills in dealing with the governor and council.[49]

In these circumstances, the thinking of Maryland leaders about the transfer of English law underwent a gradual change. They began under royal rule with an effort, borrowed from the past, to pass acts that would transfer English law in general. But as these men acquired more confidence, they changed course. They began to argue that acts of Parliament that did not specifically apply to the colonies could not be transferred without an explicit local act.

The first royal assembly addressed the issue of transfer as part of a general revision of Maryland laws. It repealed the Act Touching Judicature of 1646 and passed an Act Concerning Proceedings at Law without a clause giving any judges discretion in applying English law in civil cases where those of Maryland were silent. But the delegates did not add to this act a general extension of the criminal law. Instead, they inserted in an act to establish the Church of England a clause that required "The Great Charter of England to be observed in all points," thereby ensuring due process in criminal procedure.[50] Probably all assumed that the Common Law extended without need for a local act, but if the Assembly intended to eliminate all judicial discretion in extending statutes, the thinking was muddled.

Evidently something else was uppermost in the minds of the delegates. David Lovejoy has suggested that more than the old battles over extension were at stake, that leaders in the Maryland Assembly recognized what the suspension of Lord Baltimore's charter rights to govern them might mean. He argues that the insertion into the act for church establishment of a claim to the protections of the Great Charter was an attempt to confirm the rights of

Maryland colonists as Englishmen by enacting these rights into Maryland law.[51] What followed supports his idea. The attorney general for the crown, Thomas Trevor, saw this extension of the Great Charter as in conflict with the royal prerogative and recommended disallowance of the act precisely because it contained this clause. When word of the disallowance arrived in 1696, the Lower House made a second effort. It inserted into a new Act for Religion wording that claimed for the colonists the right to the "fundamental laws" of England, avoiding specific mention of the Great Charter. Governor Francis Nicholson objected that disallowance of the act was likely if the delegates insisted on including in an act for church establishment a clause that concerned temporal matters. (His instructions were not to allow laws to mix topics of different natures.) He suggested that if the Lower House would draw up a separate bill stating what liberties it thought needed protection, he would endeavor to get it confirmed. The delegates argued in reply that the Great Charter itself had contained clauses on both ecclesiastical and temporal affairs and so had Lord Baltimore's charter. The delegates referred almost wistfully to the "liberties and Priviledges of English free born Subjects . . . Granted to this Province by his Majestys Royal Predecessor Charles the first King of England."[52] Clearly Maryland leaders were aware that Lord Baltimore's charter had had some advantages that might now be lost.

The Lower House finally changed the wording of the clause to read that "His Maties Subjects of this Province shall enjoy all their Rights and Libertys according to the Laws and Statutes of the Kingdom of England in all Matters and Causes where the Laws of the Province are silent." Nicholson tried to persuade the delegates to follow instead the precedent of the Irish Parliament and pass an act listing the English statutes to be considered in force. He worried that

a general and unspecified extension would force Marylanders to take civil pleas to Westminster and entail other useless complications. However, he finally recognized that no act for religion would pass that did not include some kind of statement confirming English liberties. He signed the bill.[53]

One might have thought that under crown rule, Maryland leaders would have welcomed judicial discretion for the reception of English law. They no longer had reason to fear that a proprietor's judges might refuse them its protection. Evidently Lower House leaders of the 1690s equally distrusted the king's judges so long as basic rights were not guaranteed. The Act for Religion of 1696 included the broadest claims to English law and Englishmen's rights ever enacted in the Maryland Assembly.

Maryland was not the only colony to seek guarantees of Englishmen's rights as imperial administrators set about to strengthen crown control of dominions beyond the realm. New York, also without a charter, attempted to enact a law based on the Charter of Libertyes of 1683, under which the colony had briefly enjoyed representative government. The Privy Council disallowed this act in 1696, leaving New Yorkers' liberties in the hands of the crown. Massachusetts had somewhat better luck. Increase Mather procured a charter in 1691 that, despite its failure to keep some of the independence enjoyed under the charter of 1629, did retain a statement granting its colonists the liberties and immunities enjoyed by Englishmen in the realm of England. But the charter granted to Virginia after Bacon's Rebellion in 1676 contained no such guarantees.[54] The direction of crown policy was to try to put all rights of colonial Englishmen at the mercy of the king.

Maryland's efforts came to the same end as those of New York. Quite apart from the difficulty that the Act for Religion mixed matters of different

natures, the attorney general saw its general extension of English law as an infringement on the rights of the crown to decide what laws should be enacted. He recommended that if the Maryland delegates "wish to enact any particular acts of England . . . they had better send over a list of them, that the King may declare whether such acts are fit to be made laws or not."[55] The royal dissent that followed in effect returned to the king's courts in Maryland the power to determine what criminal statutes would extend.[56] The attorney general may have intended that these courts should have discretion over extension of all English statutes, but if so, he did not know of the Act for Proceedings at Law. Nor did he address the question that had concerned the third Lord Baltimore, whether a local act that would authorize Maryland courts to exercise discretion was necessary. Indeed, he and the Board of Trade, which had asked for his opinion, probably gave little thought to the fact that English statutes were being pleaded in Maryland courts and that many aspects of procedure depended on acts of Parliament. Their main concern, in Maryland as elsewhere, was protection of the crown prerogative in England's overseas possessions.

By the late 17th century, there was disarray generally in the English legal world over the extension of English law in the North American colonies. Calvin's Case asserted that English law did not extend automatically to a conquered country. But nowhere did English colonists regard themselves as conquered people. At the end of the 17th century, English jurists began to face reality and modify Calvin's Case, but not with great clarity. In 1693 in Blankard v. Galdy, Chief Justice Holt of the King's Bench ruled that Englishmen taking over uninhabited countries -- here he ignored American Indians -- took their laws with them as their natural birthright. From this ruling, in such colonies the Common Law and pre-settlement statutes could be regarded as

transferred automatically, although subject to alteration by local law with the crown's consent. However a few months later the appeal in Dutton v. Howell, argued in the House of Lords on just those grounds, was lost. Furthermore, while authorities agreed that post-settlement statutes that specifically named the colonies -- the Navigation Acts, for example -- were everywhere in force, there was disagreement over the status of acts not explicitly confined to the realm of England, but also not explicitly extended to its dominions, for example, the Statute of Frauds or the Habeas Corpus Act. Blankard v. Galdy had ruled that in Jamaica, a colony taken from the Spanish by conquest, the local legislature had to pass such statutes and get crown approval thereof before they could be received; but in colonies like Maryland, where there had never even been an Indian war at settlement, the situation was more ambiguous.[57]

The general sense of confusion that had arisen by this time was well expressed in a Virginia pamphlet printed in 1701:

> It is a great Unhappiness that no one can tell what is Law and what is not, in the Plantations; some hold that the Law of England is cheifly to be respected and where that is deficient, the Laws of the several Colonies are to take place; others are of the Opinion, that the Law of the Colonies are to take first place, and that the Law of England is of force only where they are silent; others there are, who contend for the Laws of the Colonies in Conjunction with those that are in force in England at the first settlement of the Colony, and lay down that as the measure of our Obedience, alleging that we are not bound to observe any late Acts of Parliament made in England except such only where the Reason is the same here, that it is in England; but this leaving to great a latitude to the Judge, some others hold that no late Acts of Parliament of England do bind the Plantations, but only those wherein the Plantations are particularly named. Thus we are left in the dark in one of the most considerable Points of our Rights, and the Case being so doubtful, we are too often obliged to depend upon the Crooked Cord of a Judge's Discretion in matters of the greatest moment and value.[58]

Work is needed to determine what effect these controversies may have had on the actual administration of justice in Maryland under royal government. Beginning in 1693, the royal commissions to the justices of the Provincial

Court for the first time required these judges to do justice according to the laws and statutes of England as well as the Province, but until 1704 the county commissions continued to refer only to the laws of the Province.[59] In all courts some English statutes were evidently in force and others not, and some modifications of the Common Law were in use without sanction by act of Assembly.[60] It is hard to believe that the Assembly meant that this should not be so, regardless of its long-continued efforts to enact a general extension of English law where Maryland law was silent. Governor Nicholson's doubt that the delegates really understood what strict enforcement of such a law would mean is probably correct, not only in 1696 but in 1684 and 1678. For example, county courts allowed defendants both in civil and some kinds of minor criminal cases to put themselves upon the court, thereby avoiding the costs of a jury. Strict application of the English law would have prevented this procedure. In the middle 1690s some cases were reversed on appeal in the Provincial Court, by this time sworn to uphold the laws of England in the absence of local law, because a jury had not determined matters of fact in the court below. In 1697 the Assembly passed a temporary act that implicitly authorized such summary procedure by making assent of the plaintiff to trial by the court sufficient grounds to deny reversal on appeal. However, the act expired a year later, while trial of fact by the courts continued.[61] There was no real objections to such local adaptations if they met the needs of all concerned.

Early in the 18th century influential groups in Maryland began to change their thinking about how to extend English statutes. The Assembly made no further effort to enact a general extension and in 1700 repealed the act of 1692 that covered civil proceedings only.[62] In 1704 the council advised Governor John Seymour not to bring to trial in the Provincial Court two Roman

Catholic priests accused of holding public mass, for fear "it might be disputed how far any penal statute of England not expressly naming the Plantations would extend hither"; and to take care of the future, Seymour thought it best to obtain the passage of a local law. If Seymour did not exaggerate in his letters to England, these doubts about the extension of Parliamentary statutes had raised questions in the Provincial Court about enforcing long-accepted presettlement acts such as those on rape and bigamy. Rape, which had a common law history as a felony diminished to a misdemeanor, had been made by Elizabethan statute felony not subject to benefit of clergy, and executions for rape in Maryland had taken place in the past grounded upon this act. Likewise a statute of 1603 had made bigamy an offense punishable in a lay court, and as recently as 1696 Governor Nicolson had enjoined the courts to enforce it. Yet in 1706 the Assembly thought it necessary to pass a specific act extending the statute on bigamy. By then, members of the Assembly were supporting the idea that Maryland adopt the expedient of the Irish Parliament and enumerate by act such laws of England as were thought suitable to the needs of the province. Governor Seymour, however, opposed the plan with open regret for the passing of the views that at least pre-settlement English laws automatically extended to Maryland. No such act of enumeration was passed.[63]

In 1706, Seymour's complaints to the Board of Trade brought an opinion from Edward Northey, the English attorney general. Said Northey, the statutes in being at the planting of the colony by English subjects became the laws of the colony "by virtue of the Generall Consent appearing by their being put in use there" until the Maryland Assembly changed them; and the criminal statutes of England already in use in Maryland should apply whether or not they had been passed before the founding until the Assembly saw fit to change them. This

opinion had the virtue of emphasizing the right of the colonists to determine for themselves what laws extended. Its doctrine that long usage implied consent parried an argument, noted by Nicholson as current in New England, that English statutes should not extend to people not represented in the English Parliament.[64] However, the opinion set no clear rule for the adoption of all post-settlement English statutes, nor in Maryland did it in fact lay the question of pre-settlement statutes to rest. In 1712 there was new agitation in the Assembly to enact a list of the English statutes deemed applicable to Maryland.[65]

From hindsight, the view that individual English statutes needed local authorization by act had some dangers. Since the king could disallow any act of extension, the colony would be at the mercy of the king for its rights to English law. Jamaica and New York, both conquered colonies, where local acts were necessary to extend any statutes, suffered mightily from the insensitivity of the king-in-council to local needs.[66] Evidently these dangers were not foreseen in Maryland.

It is my speculation that two, possibly three, other issues were at stake instead. The first arose from a bitter conflict between the royal governor John Seymour and the Assembly over Seymour's efforts to create a strong professional Provincial Court that would go on circuit and hence deprive the county courts of much of their jurisdiction.[67] Maryland leaders may have felt that they could keep better control of the law via acts of Assembly than via the decisions of judges who soon might no longer reflect local interests. Second, was the growing desire of lawyers for certainty. Maryland lawyers were becoming quite sophisticated. Some sat in the Assembly and others advised the men who were judges.[68] Lawyers were observing that courts were not consistent

in their decisions as to what English statutes applied to Maryland and in what circumstances. In 1712 a grievance voiced in the Assembly stated that no act declared what laws of England were in force, "it being now left to the Discretion of the Justices of the several Courts to admit or deny them whereby it comes to pass that an Act of Parliament in one Court is denied in the next."[69]

The third possibility I find the most attractive, but least grounded in evidence. Maryland leaders may have begun to think that a right of English subjects to consent to their laws required that the Maryland Assembly, rather than Maryland judges, determine what statutes should be received. Nothing survives in the proceedings of the Assembly to suggest that these were the terms of the debate.[70] Nevertheless, such ideas were being aired in other colonies, including neighboring Pennsylvania, and their circulation in Maryland would help explain the reversal of thinking about the extension of English statutes.[71]

These agitations produced no change before the restoration of the Calvert government in 1715. Seymour's plans for court reform came to nothing and no lists of English laws were enacted. The status of English law was in effect as it had been in 1646, when the first Proprietor had abandoned his efforts to establish a Maryland code. The Common Law was in force, except in so far as the Maryland Assembly or courts had modified it. Extension of English statutes, whether passed in pre- or post-settlement times, was at the discretion of Maryland judges.[72] Nevertheless, the position of the colonists in Maryland, and elsewhere as well, was still ambiguous.

V

How did it happen that the English crown let the Calvert family resume its

charter in the face of efforts to establish greater crown control of its plantations in North America? Once again the answer probably lies in English respect for property rights. The crown rescinded proprietary charters in the Jerseys and the Carolinas in the same period, but it did so through negotiations with proprietors willing to give up their rights to govern and willing either to let the crown purchase their property rights or to accept some arrangement for retaining revenues from the land.[73] However, the Calverts were not content with their revenues. They wanted their charter rights in full, the better to protect their family investment. To achieve this end, Benedict Leonard Calvert, heir at law of the third Lord Baltimore, gave up the Catholic religion. One of the major rationales for suspension of the charter was gone. Good at political maneuvering -- evidently always a Calvert gift -- Benedict Leonard arranged that at his Catholic father's death, he could resume control of the Maryland government. He himself died shortly after succeeding to the title, but the guardian of his son Charles, the fifth Lord Baltimore, quickly obtained restoration of full charter rights.[74]

The reestablishment of proprietary government changed the status of Maryland within the empire once more. There were some differences from the seventeenth century. The proprietor had to obtain crown approval of his choice of governor and the governor had to swear to enforce the Navigation Acts and other acts of Parliament that specifically applied to the plantations. The inhabitants of Maryland retained the privilege gained during the royal period to appeal to the Privy Council in causes that involved amounts of L300 or more.[75] But otherwise the charter powers of the proprietor were restored. The proprietor, not the crown, had the power to raise an army in Maryland; it was the proprietor or his governor, not the crown governor, who could impose

martial law if necessary; the proprietor, not the crown, could disallow Maryland laws.[76] The return of these powers to the proprietor did not make his independent of crown control, and he would soon have lost his charter had he proved uncooperative or tyrannical. But the result was to make the courts and Assembly responsible to him, not to officers of the crown.

Given this change, the debate over extension of English law took another turn. St. George Leakin Sioussat long ago gave a full description of this stage of the controversy. During the 1720s the Lord Proprietor adopted the views expressed in the Assembly during the previous two decades and ordered that English statutes thought desireable be enacted in Maryland. However, they were to be passed one at a time and were to be sent to him for their approval. In Maryland all talk of the need for Assembly authorization of acts of Parliament disappeared. The Assembly produced persuasive documentation for the position that English statutes had long been in use without such enactment and made no effort to enact the statutes by then received. They worked instead to enact a version of the judges' oath that would require them to enforce the laws of Maryland, and where these were silent, such laws of England as were used and practiced in the province. The Proprietor finally approved such an act in 1732.[77] Over the rest of the colonial period the proprietors maintained the position, expressed from 1753 in standing instructions to the governor, that the Assembly should not be allowed to pass acts of Parliament "in the gross."[78] On the other hand, Maryland judges retained the power to determine what English law should be in force. Maryland leaders gave up certainty, preferring that the decisions of their judges, not the decisions of an absentee proprietor, should in most cases determine what English laws were suitable for their condition. This form of consent, based on local custom and usage, seemed to

them safer than reliance on local enactment that was subject to proprietary disallowance.

After the early 1730s, agitation for securing by local act a statement of the right to English law died down in all the British colonies. Jack Greene has suggested that by then usage had produced "what they had, except in a few cases, been unable to obtain by statute traditional legal guarantees of life, liberty, and property." Still as he points out, unease lingered. In 1768, the Lower House of Maryland passed resolutions to assert that Maryland was not "under the circumstance of a conquered country" and that it had always "had the common law, and such general statutes of England as are securitative of the rights and liberties of the subject." Such unease fed anxiety about the other constitutional issues that continued to engage colonial energies and ultimately led to revolution.[79]

VI

From the beginning, Maryland colonists looked to English law and procedures as a protection against possible proprietary tyranny. Yet English laws were a threat to a prominent, if not numerically large, portion of the population, the Roman Catholics. During the seventeenth century, these two elements created tensions that made transfer an internal political issue. At first Lord Baltimore tried to establish his own code, but eventually, after obtaining passage of the Act for Toleration, he accepted general usage in Maryland courts as the criteria for acceptance of English laws. But as his Lower House of Assembly attained greater independence it fought for wholesale transfer of the laws of England, excepting those that the Assembly saw fit to change, and while the issue was not a basic cause of rebellion in 1689, it was a grievance when leaders came to defend their actions. During the period of

royal government, 1692-1715, colonists assumed transfer of the Common Law (except as modified by usage or act of Assembly) but began to see advantages in accepting acts of Parliament only by individual local enactment. However, the return of proprietary government ended all such discussion and brought back the claim in Maryland to the automatic protection of English laws, unless the Maryland Assembly saw fit to change them. In the end the solution as established by Cecil Calvert in the mid-seventeenth century -- transfer by usage in Maryland courts in the absence of local acts of Assembly -- continued to prevail. Men appointed by the proprietary governor made the decisions, but they were local men attuned to local needs. If judges went astray, the Assembly could act, although subject to proprietary veto. This solution was not settled explicitly in law, but was sufficiently grounded in consent to be in practice satisfactory to all.

In 1776 English laws received in Maryland were so important a part of Maryland law that the first Maryland Bill of Rights claimed them for the new State of Maryland. The present Maryland constitution, written in 1867, does the same. The Maryland people are to have the "benefit of such English statutes as existed on the fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used, and practiced by the Courts of Law and Equity."[80] English law, Maryland's legacy from the British Empire, is still a basic part of the Maryland heritage.[81]

ENDNOTES

I would like to thank John M. Murrin and Jack P. Greene for helpful comments on earlier drafts of this paper. They are in no way responsible for its errors.

1. An excellent discussion of the problems and theories of transfer generally in the empire is provided in Joseph Henry Smith, Appeals to the Privy Council from the American Plantations (New York, 1950), chapter 8.

2. Ibid., 467-469. Barbara Black, "The Constitution of Empire: The Case for the Colonies," University of Pennsylvania Law Review 124 (1976): 1174-1191, argues that Coke intended that once the king introduced English law, it could not be changed without a parliament, that is, a local assembly, not the Parliament of England. However, 17th- and 18-century English jurists did not adopt this interpretation, nor does Black show that 18th-century opponents of Parliament's power to legislate for the colonies argue that this was Coke's meaning.

3. Stephen Saunders Webb, The Governors-General: The English Army and the Definition of Empire, 1569-1681 (Chapel Hill, N.C., 1979), 151-326. Jamaica did not supply a permanent revenue for civil and military administration until 1723. Smith, Appeals to the Privy Council, 478-79. A valuable discussion of imperial development is John M. Murrin, "Political Development" in Jack P. Greene and J. R. Pole, eds., Colonial British America: Essays in the New History of the Early Modern Era (Baltimore, Md., 1984), 424-432, 446-447.

4. Smith, Appeals to the Privy Council, passim.

5. Bernard Bailyn, Ideological Origins of the American Revolution (Cambridge, Mass., 1967), 77-78, 161-174; Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788 (Athens, Ga., 1986), passim.

6. Smith, Appeals to the Privy Council, 468; David B. Quinn, "Introduction: Prelude to Maryland" in David B. Quinn , ed., Early Maryland in a Wider World (Detroit, Mich., 1982), 22-23. See also George Calvert's statement in the House of Commons, in connection with the opposition there in 1621 to the King's grant of a fishing monopoly to Sir Fernando Georges, "That if the Regall Prerogative have power in any thinge it is in this: Newe Conquests are to be ordered by the Will of the Conquerour, Virginia is not an ex't to the Crowne of England and therefore not subject to the Lawes of this Howse." Quoted in Black, "The Constitution of Empire," 1188-1189.

7. For recent discussion of how the Maryland Charter came into being, see Quinn, "Introduction: Prelude to Maryland" and Russell R. Menard and Lois Green Carr, "The Lords Baltimore and the Colonization of Maryland" in David B. Quinn, ed., Early Maryland in a Wider World, 23, 175-176; and Lois Green Carr and Edward C. Papenfuse, "The Charter of Maryland" In A Declaration of the Lord Baltemore's Plantation in Maryland, The Maryland Hall of Records 350th Anniversary Document Series, No. 2 (Annapolis, Md., 1983), vii-xxv.

8. On the lack of provisions for appeal and failure to exercise powers of disallowance in any early English colony, see Smith, Appeals to the Privy Council, 52-54; Webb, The Governors-General, 380.

9. William Hand Brown, et al., eds., Archives of Maryland, 72 v. (Baltimore, Md., 1883-1972) 3: 53, 113 (hereafter cited as Archives).

10. Ibid., 1: 6-9, 22; Leonard Calvert to Lord Baltimore, April 25, 1638, The Calvert Papers, Number One, Maryland Historical Society, Fund Publication, No. 28 (Baltimore, Md., 1889), 189-190. Edward C. Papenfuse has pointed out to me that Thomas Bacon, The Laws of Maryland with Proper Indexes . . . . . (Annapolis, Md., 1763) states that Lord Baltimore disallowed the acts of 1638, but we find no evidence that he did so. On the contrary, his letter to Leonard Calvert, dated August 21, 1638, and probably an answer to the Governor's letter of April 25, cited above, implies consent. Archives, 1: 31.

11. Ibid., 27-82. I am indebted to Edward C. Papenfuse for this suggestion. Given the clear wording and organization of these rejected acts, I find the idea persuasive.

12. Ibid., 83.

13. Ibid., 87-99, 103-110, 122.

14. For discussions of the political environment in which these conflicts occurred, see John Leeds Bozman, The History of Maryland from its First Settlement, in 1633 to the Restoration in 1660, 2 v. (Baltimore, Md., 1837) 1, the earliest treatment and in many ways still interesting; Russell R. Menard, Economy and Society in Early Colonial Maryland (Ph.D. diss., University of Iowa, 1975), chapter 3, and idem, "Maryland's Time of Troubles: Sources of Political Disorder in Early St. Mary's" Maryland Historical Magazine 76 (1981): 124-140 (hereafter cited as MHM), which present new insights into political conflicts. Susan Rosenfield Falb, Advice and Ascent: The Development of the Maryland Assembly, 1635-1689 (Ph.D. diss., Georgetown University, 1976) and David W. Jordan, Foundations of Representative Government in Maryland, 1635-1715 (New York, 1987) discusses the development of the Assembly over the 17th century but does not discuss the legislation of the assemblies of the 1630s and 1640s from the standpoint taken here.

15. Archives 1; Ibid., 147 (quote), 158-159, 184, 192-193.

16. Archives 3: 59, 60-61, 70, 80-81, 88-90. Several changes from common law procedure were enacted, for example the procedure of attachment. Ibid., 1: 195.

17. Ibid., 156-157, 187.

18. Menard, "Maryland's 'Time of Troubles,'" MHM 76 (1981): 124-140; Archives 3: 165.

19. Ibid., 1: 210.

(Probably they did. This effort may have been a last attempt of the Proprietor to confine English law to enactment by his Assembly.

20. There was some agitation in the Assembly of January 1648 about the acts passed in 1646 on the grounds that Leonard Calvert had not called for new elections but had reconvened an assembly called during the period of rebellion. Lord Baltimore argued that so long as his governors had recognized this assembly it was legal. However, he offered to rescind all laws passed in that or any earlier assemblies if the present one would pass, without any changes, the sixteen laws he now submitted for ~~their~~ approval. Since ~~they~~ it did not do so, the earlier laws were not repealed and the Act Touching Judicature stayed in force. What Lord Baltimore's laws were and whether they encompassed a rule for judicature is unknown. See ibid., 220-221, 240-242, 244-255, 266; 3: 220-221.

21. Ibid., ~~&~~ 232-255, 286-323, 342-377. For acts repealed under the Protestant government, see 351-352.

22. For a brief account of these shifts, see Lois Green Carr, "Sources of Political Stability and Upheaval in Seventeenth-Century Maryland," MHM 79 (1984): 56-57.

23. ~~No acts are listed in William Waller Hening, ed., The Statutes at Large; Being a Collection of All the Laws of Virginia, 12 v. (New York, 1823) 1.~~ Warren M. Billings, "The Transfer of English Law to Virginia, 1606-1650" in K.R. Andrews, N.P. Canny, and P.E.H. Hair, eds., The Westward Enterprise: English Activities in Ireland, the Atlantic, and America, 1480-1650 (Detroit, Mich., 1979), 228.

24. Archives 3: 206-207 (quote), 323, 391, 439.

25. In 1638, freemen either attended or were represented by proxy in Assembly, but the freemen of Kent Island were not named. See Falb, Advice and Ascent, 40-43. In September 1642, 215 freemen, including those of Kent Island, are named as attending in person or by proxy. Archives 1: 166-170. For population estimates across the 17th century, see Russell R. Menard, "Immigrants and their Increase: The Process of Population Growth in Early Colonial Maryland" in Aubrey C. Land, Lois Green Carr, and Edward C. Papenfuse, eds., Law, Society and Politics in Early Maryland (Baltimore, Md., 1977), figure 4.1. On the organization of the Assembly and the social origins of members, I have relied on Susan Falb, Advice and Ascent, 46-59, and Tables 4, 6, 7, 8 and on ~~David~~ Jordan, ~~in a book in preparation on the Maryland Assembly to 1715~~: Foundations of Representative Government in Maryland, 17-33, 69-82, and Tables 1-4.

26. Archives 2: 178.

27. Lois Green Carr and David W. Jordan, Maryland's Revolution of Government, 1689-1692 (Ithaca, N.Y., 1974), chapter 1.

28. On consent, see Green, Peripheries and Center, chapter 2; Bailyn, Ideological Origins, 77-78; Michael Kammen, Deputys & Liberties: The Origins of Representative Government in Colonial America (New York, 1969), 58-61.

29. Archives 1: 433, 435, 448.

30. Ibid., 468, 472, 487, 504, 537.

31. Ibid., 537-538; 2: 150.

32. Ibid., 157, 168-169, 173-182, 216.

33. Ibid., 291, 337, 347-348, 357, 374-375, 412, 465.

34. Ibid., 548-549; 7: 85-86. Newton D. Mereness, Maryland as a Proprietary Province (New York, 1901, reprinted, Cos Cob, Conn., 1968), 261-263, ignores the subsequent history of the act of 1662, the passage and history of the acts of 1663, and the Act of Repeal of 1678; he therefore assumes that from 1674 the Act of Judicature was in effect to the end of the first proprietary period.

35. Archives 7: 214, 245, 327, 436. In 1683 the Assembly and the Proprietor could not agree on an act of revival, and Calvert thereupon adjourned rather than prorogued the Assembly so that the act of revival of 1682 would remain in effect. Ibid., 604-605.

36. Ibid., 13: 65, 81, 94, 99.

37. Thomas Bacon in his Laws of Maryland does not list this act of repeal of 1678 as repealed; he may have regarded the Proprietor's disallowance of one part of it in 1681 as implicit confirmation of the rest of it. I interpret Calvert's proclamation of 1684 as repealing all but those temporary acts of 1678 that he had since accepted by assenting to their revival in later assemblies where he was present. His main intention must have been to repeal the Act of Repeal, thereby single-handedly reinstating a law allocating discretion to his judges. For a more detailed discussion, see Carr and Jordan, Maryland's Revolution of Government, 27-29. However, a repeal of the Act of Repeal did create uncertainty by putting a number of other laws back into effect, some of which were obsolete. If I am mistaken in this interpretation, then from 1684 there was no enacted rule for judicature in Maryland for the rest of the proprietary period. This state of affairs would have left the Maryland courts free to exercise discretion in receiving English law where Maryland law was silent, but only if the rule of Calvin's Case were not applied. Joseph Smith concludes that the first proprietary period closed with the view ascendant that English law should be accepted without any modification at the discretion of judges. "The Foundations of Law in Maryland: 1634-1715," in George Billias, ed., Selected Essays: Law and Authority in Colonial America (Barre, Mass., 1965), 99. I see no way to so interpret the debates and acts of 1684. St. George Leakin Sioussat suggests that the complaint that Lord Baltimore made laws without consent of the Assembly referred to his insistence that the application of English statutes be at the discretion of him or his judges. English Statutes in Maryland, Johns Hopkins University Studies in Historical and Political Science, series xxi, nos. 11-12 (Baltimore, Md., 1903), 14-15.

38. That Calvin's Case was in his mind is suggested in one of the confrontations between him and the Lower House in 1681, where he reminded its members that "His Majesty hath the Sole Power to Dispose of his Conquests as he Pleases, is not tyed to take the Parliaments Consent in his Disposall of Them." Archives 7: 124, Sioussat, English Statutes, 24.

39. Archives 8: 215-216.

40. Smith, "The Foundations of Law in Maryland," in Billias, ed., Law and Authority, 97-108; Archives 7: 70. A form book for the Provincial Court, dating to 1679, is in the Calvert Papers at the Maryland Historical Society, Baltimore, Md. and shows complete reliance on the procedures described in [Henry Twyford] The Office of the Clerk of Assize . . . (London, 1681-82).

41. See below, for an example.

42. Archives 8: 214-220. For a discussion of the charges and degree to which evidence for them appears in the records, see Carr and Jordan, Maryland's Revolution of Government, 211-212.

43. Archives 8: 245; Somerset County Judicial Records, 1687-1689: 3; 1693-1694: frontleaf, mss., Hall of Records, Annapolis, Md.

44. Carr and Jordan, Maryland's Revolution of Government, chapter 6, esp. 187-191. For an opposing view, see David S. Lovejoy, The Glorious Revolution in America (New York, 1972), 70-97, 257-274.

45. Carr and Jordan, Maryland's Revolution of Government, 146-161; Charles McLean Andrews, The Colonial Period of American History, 4v. (New Haven, Conn., 1936; reprinted, 1964) 2: 356-359.

46. Archives 8; 264-266. See also Nicholson's commission in ibid., 20: 84-87. The proprietary governors had been styled Lieutenant General. The royal governor was Captain General.

47. On Virginia, see Webb, The Governors General, 344-349; on New York and Massachusetts, see Lovejoy, Glorious Revolution in America, 106-120, 122-125, 264-277, 347-350, 358. In all three colonies, the resulting government became closer to that of Maryland and Jamaica.

48. Ibid., 368-369.

49. Carr and Jordan, Maryland's Revolution of Government, 206-207.

50. Archives 13: 426, 483.

51. Lovejoy, Glorious Revolution in America, 369. I am in disagreement with Professor Lovejoy on several points about developments in Maryland after the revolution, but not on this one.

52. Richard A. Gleissner, "Religious Causes of the Glorious Revolution in Maryland," MHM 64 (1969): 335-339; Archives 19: 390-397 (quote, 395).

53. Ibid., and 426 (quote).

54. Lovejoy, Glorious Revolution in America, 51, 347-348, 358-363.

55. Quoted in Gleissner, "Religious Causes of the Glorious Revolution in Maryland," MHM 64 (1969): 340. Gleissner discusses these events only in the context of the religious settlement.

56. Archives 25: 82.

57. For an instructive discussion of the developing theory of extension in England, see Smith, Appeals to the Privy Council, 467-477. On Blankard v. Glady and Dutton v. Howell, see 470-472.

58. Quoted in ibid., 473-474.

59. The first Provincial Court commission in the form of a commission of peace, issued by Sir Edmund Andros, Oct. 3, 1693, made this change. Provincial Court Judgments DSC: 323-325, ms., Hall of Records, Annapolis, Md. The county court commissions read in this respect as they had under the proprietor until in 1704 Governor John Seymour inserted "the laws and customs of England" into the clause enjoining the justices to do "what therin to justice appertaineth." See Charles County Court and Land Records A no. 2: 449-450, ms., Hall of Records, Annapolis, Md.

60. Smith, "The Foundations of Law in Maryland" in Billias, ed., Law and Authority, 97-108; Lois Green Carr, County Government in Maryland, 1689-1709 (Ph.D diss., Harvard University, 1968) Text, 160-165. Joseph Smith comments on various English statutes received in the footnotes to his "Introduction" in Joseph H. Smith and Philip A. Crowl, eds., Court Records of Prince George's County, Maryland, 1696-1699, American Legal Records IX (Washington, D.C., 1964): xv, liii, lxxv, lxxix, lxxxiii, lxxxv, xc, xcviii, ciii, cxi, cxii.

61. Carr, County Government, Text, 262-271, 289; Bacon, The Laws of Maryland; Archives 38: 103; Smith and Crowl, eds., Court Records of Prince George's County, xcvii-xcviii.

62. Archives 24: 104-107. The act had in fact been repealed in 1699 by an act that declared all laws repealed not passed that session or listed in the act. The news of the dissent to the Act for Religion of 1696 had not yet reached the colony, so the act of 1692 may have been repealed as redundant. Archives 22: 558-562. The disallowance of the Act for Religion made necessary disallowance also of the 1699 act of repeal, which listed the Act for Religion as in force. The act of repeal passed in 1700 to remedy this problem did not list the Act for Proceedings at Law as in force, despite the fact that the clause extending English law in the Act for Religion was no longer law.

63. W. N. Sainsbury, et. al., eds., Calendar of State Papers, Colonial Series, America and West Indies (London: 1860--), 1704-1705, No. 585, hereafter cited as Cal. State Papers, A and WI; ibid., 1706-1708, Nos. 160, 444, 470; Archives

19: 396; 20: 518; 26: 540-541, 545-546, 599-601. The English statutes on rape were Westminster II and 18 Eliz I, c. 7; on bigamy, I Jac. I, c. 11.

In May 1706 a nolle prosequi was entered in the Maryland Provincial Court against two women indicted for bigamy because their bigamous marriages antedated the act that extended the English statute. Provincial Court Judgments TB no. 2: 195-197, ms., Hall of Records, Annapolis, Md. How much earlier the courts had begun to doubt their ability to punish bigamy under the English statute alone is not certain; as recently as September 1703, Richard James had been indicted for bigamy "against the form of the Statute"; he was acquitted. Ibid., TL no. 3: 152-153.

64. Cal. State Papers, A and WI, 1706-1708, no. 444; Archives 23: 494.

65. Archives 29: 159-160.

66. Smith, Appeals to the Privy Council, 486-487.

67. For accounts of these struggles, see C. Ashley Ellefson, The County Courts and Provincial Court of Maryland, 1733-1763 (Ph.D. diss., University of Maryland, 1963), 131-134; Mereness, Maryland as a Proprietary Province, 236-237.

68. Alan F. Day, "Lawyers in Colonial Maryland, 1660-1715," The American Journal of Legal History 17 (1973): 159, 162; Joseph H. Smith, "The Provincial Court and the Laws of Maryland, 1675-1715" in Morton Forkosch, ed., Essays in Legal History in Honor of Felix Franfurter (Indianapolis, Ind., 1966), 387-402.

69. Archives 29: 159-160.

70. Archives 26, 27, 29. St. George Leakin Sioussat found such an argument in the unpublished writings of the Reverend John Eversfield of Prince George's County, who opposed on these grounds Daniel Dulaney's arguments of the 1720s for the automatic transfer of English law not confined to the realm, where Maryland law was silent. But Eversfield did not arrive in Maryland until 1727. Sioussat, English Statutes in Maryland, 56-57.

71. See above, p. 30 and Sioussat, English Statutes in Maryland, 26-27.

72. For citations of examples of exercise of discretion, see ibid., 15.

73. Andrews, Colonial Period of American History 3: 177-179, 246, 266-267.

74. J. Thomas Scharf, History of Maryland from the Earliest Period to the Present Day, 3 v. (Baltimore, Md., 1879; reprinted Hatboro, Pa., 1967) 1: 379-381.

75. Mereness, Maryland as a Proprietary Province, 464; Smith, Appeals to the Privy Council, 166-167; Carroll T. Bond, ed., Proceedings of the Maryland Court of Appeals, 1695-1729, American Legal Records 1 (Washington, D.C., 1933): vi-vii, 436-438.

76. For a discussion of disallowance in the second proprietary period, see Charles Albro Barker, The Background of the Revolution in Maryland (New Haven, Conn., 1940; reprinted, 1967), 190-191.

77. Sioussat, English Statutes in Maryland, 21 (quote), 31-69. The battle began in the assembly of 1722, which proposed resolutions declaring that English statutes had always extended, except as restrained by words of local limitation or by acts of the Maryland Assembly. At the same time the Assembly passed an act that overturned an interpretation of the Provincial Court in 1712 by declaring that actions in ejectment should be considered covered by a pre-settlement statute of James I (21 Jac. I, c. 16) for limiting actions at law. The Maryland act clearly implied that all English statutes extended as declared in the proposed resolutions. Lord Baltimore disallowed this act the following year and sent accompanying instructions that declared English statutes to be in force in Maryland only if enacted into law by the Assembly. In this he followed in part the opinion of Attorney General Richard West, given in 1720 in a case not connected with Maryland. However, West's opinion declared that presettlement statutes did extend without a local act. In 1729 Attorney General Sir Phillip Yorke upheld the opinion of Attorney General Northey given in 1706 (see above). "Such general statutes as have been made since the settlement of Maryland, and are not by express words located either to the plantations in general or to this Province in particular are not in force there, unless they have been introduced and declared to be Laws by some Acts of Assembly of the Province, or have been received there by a long uninterrupted usage or practice which may impart a tacit consent of the Lord Proprietor and of the people of the colony that they should have the force of a law there." Ibid., 21 (italics the author's). Smith, Appeals to the Privy Council, 483n, notes that in 1724 two law officers of the crown, Yorke and Clement Wearg, stated that acts of Parliament might extend even in conquered Jamaica by "long usage, and general acquiescence."

78. Archives 31: 11; 32: 303.

79. Greene, Peripheries and Center, 28; Archives 61: 331.

80. Sioussat, English Statutes in Maryland, 40-42.

81. This has recently created a problem. Maryland is the only state not to incorporate the Common Law by Act. A case ~~now~~ recently brought to the Court of Appeals argues that the Common Law as of July 4, 1776 did not allow a court to imprison a man for ~~failing to pay child support~~ a delinquent parent. Therefore the penalty is illegal! ~~Should~~ If the defendant win this case, ~~presumably, he will not~~ the State ~~will~~ would have to release hundreds of prisoners and pay damages to thousands previously unlawfully imprisoned. Personal communication from Judge John F. McAuliffe.