

1991

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Recommended Citation

James Oldham, *From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth-Century Britain*, 89 MICH. L. REV. 1637 (1991).

Available at: <https://repository.law.umich.edu/mlr/vol89/iss6/26>

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FROM BLACKSTONE TO BENTHAM: COMMON LAW VERSUS LEGISLATION IN EIGHTEENTH-CENTURY BRITAIN

James Oldham*

THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH CENTURY BRITAIN. By *David Lieberman*. New York: Cambridge University Press. 1989. Pp xiii, 312. \$44.50.

In his *History of English Law*, Sir William Holdsworth writes: The fact that during the eighteenth century, the courts were able to consolidate and to settle the principles of the modern law; and the fact that they were able to settle the relations of common law and equity . . . were due largely to the freedom with which they were able to develop their principles unimpeded by legislative interferences.¹

David Lieberman's excellent book, *The Province of Legislation Determined*, gives us a basis for understanding and evaluating Holdsworth's proposition. Lieberman thoughtfully analyzes major eighteenth-century legal personalities in order to illuminate the world in which Jeremy Bentham became a strident spokesman for the legislative process. This is a recapture mission, accomplished not through documentary foraging, but through the content of printed sources, some of which had slipped into the fog of distant time. Although Lieberman displays an impressive array of scarce sources, the writings of his main objects of study — Blackstone, Mansfield, Kames, and Bentham — are readily accessible.² It is mainly the ideas and theories of these leaders of the legal world of the eighteenth century that Lieberman reviews and resuscitates, especially as they related to the question of law revision that Bentham later pursued with such astonishing vigor.

The first half of Lieberman's book is devoted to Blackstone's *Commentaries on the Laws of England*,³ and to Lord Mansfield in his capacity as Chief Justice of the Court of King's Bench.⁴ Then, as

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1. 11 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 630 (1938) (footnotes omitted).

2. The same is true of the second tier of personalities treated by Lieberman: Bacon, Barrington, Beccaria, Burn, Eden, Hargrave, and Madan.

3. W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765-1769).

4. Mansfield held this office from 1756 to 1788. Holdsworth characterized him as "not only the greatest lawyer of the century, but also a legal statesman, who was fully cognizant of the need to infuse new ideas into the administration and principles of the common law, if it was to remain

bridges to Bentham, Lieberman presents a two-chapter exposition of the writings and philosophy of an influential Scottish judge, Lord Kames, and a two-chapter section entitled "Parliamentary Statute" (pp. 179-215). Lieberman's final three chapters and his conclusion are devoted to the years of Bentham's early maturity, in particular, the laborious analytical evolution culminating in the *Pannomion*, Bentham's brief for the intrinsic superiority of legislation over other forms of lawmaking and law governance.

In his introduction (pp. 1-28), Lieberman describes his work as "a study of eighteenth-century intellectual history" that has as its first objective

to recover an important contemporary discussion of the rival claims of common law and legislation within the English legal system, to suggest how this discussion illuminates more general and familiar themes in the political thought of the period, and especially to indicate the way in which questions regarding legal change and law reform came to be framed in terms of this discussion. [p. 2]

This goal leads naturally to another major objective — "to advance a new account of Jeremy Bentham's earliest explorations in jurisprudence" and to establish "that Bentham's legislative science should be regarded not as the definitive ideology of law reform produced in eighteenth-century England, but rather as one among several approaches to legislation and legal improvement elaborated at this time" (p. 3).

According to Holdsworth, the process of legislation in the eighteenth century, "so far as concerns the enactment of public and general statutes, was in essentials the procedure of the seventeenth century,"⁵ that is, a stagnant process lacking comprehensiveness. Changes did take place in the private bill procedure, however, so that, through experimentation, "it was possible to introduce wholly new ideas into English law."⁶ Thus, Holdsworth concluded that "the number and variety of the private Acts of Parliament, which were passed in the eighteenth century, went far to supplement the comparatively small number and limited range of the public and general Acts."⁷

Lieberman, however, introduces the work of P.D.G. Thomas⁸ on the eighteenth-century House of Commons, which reveals that the output of public statutes during the reign of George III (1760-1820) was sharply higher than the output of a century previous (p. 13). Indeed, throughout the reigns of the first three Georges, 1714-1820, the

adequate to solve the new problems which changing commercial and industrial conditions were setting to it" 11 W. HOLDSWORTH, *supra* note 1, at 463.

5. *Id.* at 323.

6. *Id.* at 323-24.

7. *Id.* at 324.

8. P. 13 (citing P. THOMAS, *THE HOUSE OF COMMONS IN THE EIGHTEENTH CENTURY* 61 (1971)).

number of public acts of Parliament exceeded the number of private bills (p. 13). Nonetheless, this accelerated legislative output was, by all accounts, undisciplined and uncoordinated, perhaps even incoherent.⁹

While *legislation* may have been incoherent during this period, not everyone viewed *law* as chaotic. Early in the reign of George III, William Blackstone completed his influential *Commentaries*. Here, Blackstone displayed the law of England in a disciplined, coordinated, coherent way not previously thought possible. The *Commentaries* were a blockbuster. They became standard reading for young lawyers and educated gentlemen,¹⁰ and, as is well-known, the *Commentaries* were extraordinarily influential in the formative era of the American republic.¹¹

Richard Posner asserts that “[h]istory has not dealt kindly with Blackstone. Bentham’s denunciation of the *Commentaries* placed Blackstone’s admirers on the defensive ever after.”¹² Bentham’s attack, published in 1776 in *A Fragment on Government* made, according to Posner, two fundamental criticisms of the *Commentaries*: “that Blackstone was a shameless apologist for the status quo,” and that “Blackstone’s analysis of the nature and sources of legal obligation was shallow, amateurish, and contradictory.”¹³ In his article, Posner may overstate the extent to which Bentham undermined Blackstone; Posner himself characterizes Bentham’s attack as “fundamentally misconceived.”¹⁴ Posner argues that

Bentham’s hostility to Blackstone seems to have been rooted less in disagreements over substantive policies than in Blackstone’s forensically effective defense of a gradualist approach to legal reform that preferred common law interstitial lawmaking to sweeping statutory change and that emphasized both the capacity of the common law to reform and the high incidence of legislative miscarriage.¹⁵

Bentham thought the “high incidence of legislative miscarriage” avoidable, and because he believed an all-encompassing legislative code to be feasible, its construction was imperative; a prescriptive code built around principles of utility would be vastly more efficient and effective than sporadic punishments meted out by common law courts against defendants who did wrong.

9. See, e.g., *infra* text accompanying note 98.

10. Lieberman quotes, for example, Lord Mansfield’s praise of the *Commentaries* as a text for legal education, where the student “will find analytical reasoning diffused in a pleased and perspicuous style” laying out “the first principles on which our excellent laws are founded.” P. 35 (quoting J. HOLLIDAY, *THE LIFE OF WILLIAM LATE EARL OF MANSFIELD* 89 (1797)).

11. See, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 88-89 (1973).

12. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 570 (1976).

13. *Id.*

14. *Id.* at 569.

15. *Id.* at 596.

Lieberman presents a lucid description of Bentham's critique of common law (ch. 11). According to Lieberman, Bentham thought statute law was superior because it "produced obedience 'by command,' " while common law, producing obedience by punishment, was "unacceptable" as "a system of legal management" (pp. 232-33). From this premise, Bentham reasoned himself into an absolute conviction that every country could "exhibit a complete collection of the laws in force: in a word, a complete body of law; a *pannomion*, if so it might be termed."¹⁶ This conviction was not achieved easily; along the way, Bentham acknowledged that he had "found himself unexpectedly entangled in an unsuspected corner of the metaphysical maze."¹⁷ But once the conviction was gained, it was locked in for good. Posner characterizes Bentham's belief in a fully capable, indeed infallible legislature as a blind spot — Bentham "worried about all monopolies except the most dangerous, the monopoly of political power."¹⁸

Lieberman, by contrast, does not directly criticize Bentham's views. Rather, he brings the reader to an understanding of Bentham's belief in the *Pannomion* and he leaves Bentham and the reader there, concluding his study. But along the way, Bentham, as Lieberman presents him, self-destructs. That is, Bentham's beliefs, as laid out by Lieberman, strike the modern reader as hopelessly naive and impracticable. Surely most modern readers, especially those attentive to twentieth-century politics, would reject Bentham's belief in the possibility of an infallible legislature, preferring the Blackstonian assumptions, "which alleged the inherent incapacity of human legislators to create satisfactory systems of comprehensive legal rules" (p. 282). The modern mind recoils from the notion that " 'such a degree of comprehension and steadiness' might be achieved by the legislator, 'as to render the allowance of liberal or discretionary interpretation on the part of the judge no longer necessary.' "¹⁹

A fascinating illustration of the impracticability of Bentham's ideas is provided by Lieberman in Chapter Twelve on Bentham's "Digest" (pp. 241-56). Lieberman wrests this little known plan for a digest of the law out of Bentham manuscripts. The full notion is amazing, although it begins with the simple, appealing proposition that all law be first digested, and second, promulgated in a manner easily understood by the people. The "digestion" phase required a thoroughgoing review and condensation of existing statutory law in

16. P. 274 (quoting J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 305 (Collected Works of Jeremy Bentham, J. Burns ed. 1970)).

17. P. 257. This wonderful expression appears in J. BENTHAM, *supra* note 16, at 1.

18. Posner, *supra* note 12, at 606.

19. P. 278 (quoting J. BENTHAM, OF LAWS IN GENERAL 240 (H. Hart ed. 1970)). Bentham believed that judicial discretion could be dispensed with, although he acknowledged that "new cases would emerge which would lead the legislator to alter his enactments." P. 282.

order to squeeze out prolixity and perplexity. The next step was to encapsulate all of the common law into *The Digest* and to have all of these digested principles endorsed by Parliament so that they would become legislation. Then *The Digest* was to be promulgated by being broken down “‘into codes or parcels, as many as there are classes of persons distinguishably concerned in it,’ and by ‘introducing to the notice and possession of every person his respective code.’”²⁰

Bentham apparently believed that practical difficulties with such a formidable project “would simply vanish once Parliament was shown the way. All that Parliament required was a single specimen of legislative perfection” (p. 254). As Lieberman explains: “These codes were then to be printed in the form of synoptic ‘tables’ and ‘charts,’ and ‘hung up at places wherever the respective Transactions to which they relate’ occur” (pp. 250-51). Thus, in a manner that strikes the modern reader as a system of disclosures and warnings gone amok, Lieberman extracts from Bentham manuscripts the following “cluttered vision of daily life decorated by the utilitarian promulgator”:

Laws relative to Parochial Affairs should be hung up . . . in every Vestry. Laws relative to Commercial Contracts in general in the [stock] Exchange . . . in the Halls of the several Companies, and [in] the Compting Housing or shop of every Trader . . . Laws relating to Travelling in general at every Turnpike House and every room of entertainment in every House of entertainment . . . Laws relative to the internal economy of Houses to be stuck up in Houses. . . .²¹

Admittedly the world of late eighteenth-century England *might* be so encompassed, but even this is dubious. It is no wonder that Bentham’s notions for *The Digest* never came into completed or published form, much less to fruition. The ideas of codifying the common law into statutory form and promulgating statutory regulations in easily comprehensible form, however, were not foolish; indeed, echoes of these ideas continue to be heard in modern law or in the voices of modern lawmakers.

But I have jumped ahead of the story. Lieberman’s foil to Bentham is Blackstone. I earlier referred to Posner’s remark that “history has not dealt kindly with Blackstone,”²² and while history may not have been as hard on Blackstone as Posner suggests, nevertheless Lieberman is at his best in his rehabilitation of Blackstone by careful theoretical interpretation. Especially impressive is his reading of Blackstone on natural law and on equity. Lieberman emphasizes that Blackstone’s historical approach to common law relied upon natural law principles, and later critics who thought that “what Blackstone

20. P. 250 (quoting J. BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 499 (J. Burns ed. 1977)).

21. P. 251 (quoting Bentham manuscripts at University College, London).

22. See *supra* note 12 and accompanying text.

wrote about the law of nature was unnecessary or inconsistent or even unintended" were simply wrong (p. 38). Blackstone embraced the principle that nothing " 'contrary to reason' would be allowed as law" (p. 45). This principle provided the basis for distinguishing the good customs and judicial opinions from the bad. The question of whether or not the principle that "what is not reason is not law" should apply to statutes was, however, more delicate. The notion that such statutes "were void in themselves and, as such, could be rejected by the common law judges . . . received its most famous airing in Coke's decision in *Bonham's case*" (p. 53). But Blackstone believed in the supremacy of Parliament, and, consequently, he did not accept the proposition that judges were at liberty to reject unreasonable statutes. He glossed *Bonham's case* by acknowledging that the judges were at liberty to regard as void any collateral consequences that were "manifestly contradictory to common reason" (p. 54).

This analysis connects naturally to Lieberman's treatment of Blackstone on equity. For Blackstone, equity was "synonymous to justice," and "*all* the English courts enjoyed an equitable authority" (p. 84). Here again Blackstone thought that "what is not reason is not law," so that adjudged cases were to be considered as binding precedents only "so far as they are accordant with the spirit of equity" (p. 85). And, just as Bacon had said in the previous century, novel cases were to be adjudicated "on the basis of reason and principles of natural justice, and without recourse to legislation" (p. 86). Thus, Blackstone believed "that precedents and rules must be followed, unless flatly absurd or unjust," but not otherwise (p. 86).

The best place to explore the Blackstonian structure, as applied, is in the decisions of "the leading protagonist" — Lord Mansfield. To this task, Lieberman devotes three chapters. His justification for this attention to Mansfield is that "[t]he decisions of Mansfield's court greatly enrich our understanding of common law orthodoxy, particularly in regard to the place of natural jurisprudence in common law theory" (p. 3). Lieberman disagrees with those who claim that Mansfield was not an innovator; he characterizes "Mansfield's 'founding' of the commercial law as an inspired and instructive instance of legal innovation" (p. 124). Further, Lieberman emphasizes the many instances in which natural law or equitable principles animated Mansfield's decisions, causing Mansfield to be excoriated by Lord Camden, in the writings of Junius, and by others. This ground is fairly well traveled in works by Holliday, Lord Campbell, Fifoot, and Heward,²³ but no one has shown as carefully as does Lieberman the extent to which Mansfield's opinions reflect Blackstone's conception of equity.

23. 2 J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 302-587 (1849); C. FIFOOT, *LORD MANSFIELD* (1936); E. HEWARD, *LORD MANSFIELD* (1979); J. HOLLIDAY, *THE LIFE OF WILLIAM LATE EARL OF MANSFIELD* (1797).

Mansfield admired the *Commentaries*.²⁴ Perhaps this admiration was due in part to the role Mansfield played in helping to shape the section on equity, and in editing the first edition. According to Holdsworth,

Blackstone's treatment of equity in his lectures is wholly different from his treatment of equity in the *Commentaries*; . . . this difference is due to the fact that he had accepted Mansfield's views as to the essential unity of the rules of law and equity. His treatment of equity in his *Commentaries* is, in substance, a literary summary of Mansfield's views.²⁵

Moreover, Blackstone, writing to Wilmot, attested to Mansfield's help: "Sir, Lord Mansfield did me the honour to inform me, that both you and himself had been so obliging as to mark out a few of the many errors, which I am sensible are to be met with in the Book which I lately published."²⁶ Nevertheless, when Blackstone was on the Court of King's Bench with Mansfield, Mansfield refused to allow counsel to cite the *Commentaries*:

A few days ago, as Sir William Blackstone was on the Bench, in the Court of King's Bench, Counsellor Impey availed himself of applying to that Gentleman's *Commentaries* on the Laws of England, and was entering into some observations upon that head, when Lord Chief Justice Mansfield stopped him short, and said, "he would suffer no such references in that Court; for though the work alluded to was of much utility to the public, and would be remembered and applied to when the Author was no more, yet, while living, he thought it unnecessary, as well as improper."²⁷

While at the bar, much of Lord Mansfield's law practice had been in Chancery before Lord Hardwicke, whom Mansfield (then William Murray) greatly admired. This may have contributed to Lord Mansfield's inclination to accomplish individual justice — to do equity — whenever possible without harming other valuable principles or interests, such as the importance in commercial law of certainty.

This inclination to achieve substantial justice is evident in Lord

24. See *supra* note 10.

25. Holdsworth, *Some Aspects of Blackstone and His Commentaries*, 4 CAMBRIDGE L.J. 261, 272 (1932). This topic is treated more extensively in Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1 (1929); see also Waterman, *Mansfield and Blackstone's Commentaries*, 1 U. CHI. L. REV. 549 (1934).

26. J. WILMOT, MEMOIRS OF THE LIFE OF THE RIGHT HONORABLE SIR JOHN EARDLEY WILMOT, KNT., 71 (1802).

27. Lloyd's Evening Post, May 18, 1770.

Mansfield's trial notes.²⁸ In *Delaval v. Lord Mixbrough*,²⁹ plaintiff sued to collect on a £450 promissory note given to him by Lady Mixbrough with Lord Mixbrough's full awareness and apparent approval. The note was a second payment on top of a previous £600 advance by Lady Mixbrough. Both payments were designed to permit the plaintiff to buy a military commission, but plaintiff had squandered the £600, and in view of that fact, defendant refused to honor the £450 note, claiming that the note had been given by his wife without his privity. The evidence clearly established that defendant was fully privy to the note, and the jury gave plaintiff the verdict, for £450. Mansfield was uncomfortable with the verdict. In an unusually explicit comment, he spelled out his thoughts and his intervention:

I saw Lord M had rashly & unguardedly swore that his Lady gave the Note without his privity. I saw the young Man had done very wrong in spending the 600£ & trying to deceive her by falsehood that the Money lay in the Agent's hands to buy a Commission. I exceedingly condemned the Plaintiff's having arrested Lord M.

I doubted whether Plaintiff, having broke the Condition of the Gift relative to the purchase of a Commission in the front Regiment [of] the Duke of Glosters, & having otherwise misbehaved, had a right to recover upon a voluntary promise of generosity.

Therefore to avoid altercasion & animosity, to pass over the Question whether the Note [was] given with Lord Mixbrough's privity, I piqued the generosity of the Defendant & supposed Lord M only meant the Money should be applied for the Advancement of Plaintiff, who was stated to have gone a Volunteer to America. The Counsel for Defendant came into the Proposition. We could not immediately fix upon a Trustee & therefore I directed Plaintiff to enter into a Rule not to take out Execution without Leave of the Court. The Meaning of which is that the Court will see the Money is placed out for Plaintiff's Advancement.

28. With the cooperation of the current (eighth) Earl of Mansfield, I have for some years been preparing a work that includes selected case transcriptions from the first Earl's trial notes. The transcriptions are grouped by topic, with each topic introduced by an essay describing both the state of English law on that subject, circa 1750, and the contributions made by Lord Mansfield as evidenced in the trial notes. This two-volume work is in press and will appear early next year as *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, a title in the STUDIES IN LEGAL HISTORY series sponsored by the American Society for Legal History (University of North Carolina Press).

In referring hereafter to cases in the trial notes, the citation form is my own. The first number refers to the volume of the trial notes as designated by the National Register of Archives (Scotland), the "nb" stands for "notebook," and the second number is the page number within that notebook on which the case in question appears. At present, the trial notes are inaccessible other than by permission of the eighth Earl at Scone Palace, Perth, Scotland. (The trial notes are unpublished. In some cases, accounts of further proceedings appear in the printed reports, but the vast majority are unreported. Most of the cases referred to in this essay, however, will become available in my forthcoming book.) In the citations, there ordinarily will be a reference either to "Middlesex" or to "London." This indicates whether the nisi prius sitting was being conducted for the City of Westminster and County of Middlesex in Westminster Hall, or for the City of London in the Guildhall, located in the financial district of London.

29. 478 nb 147 (Middlesex: 31 May 1776).

Plaintiff is to have the Costs in consequence of his verdict.³⁰

At other times, Mansfield wielded or withheld the prospect of a new trial in order to achieve a just result. In *Forbes v. Wale*, Mansfield wrote:

The Defendant's hand was proved by a Witness, but no Interest having ever been paid nor acknowledgement nor demand though the Plaintiff said he account[s] for that from the Satisfaction of the Defendant. One of the Witnesses was dead. The Plaintiff owned the other was alive, & remembered the transaction, but they trusted the Bond would prove itself from its Antiquity. I thought under these Circumstances & this Disclosure I could not let the Bond prove itself, but I called upon the Defendant's Council & Attorney, as the Defendant was himself the Party to the Bond, whether he would dispute the authenticity of it, & if he did contrary to his own knowledge, the Plaintiff should be at liberty to move for a new Tryal & that the Defendant should pay the costs.³¹

And in *Farmer v. Parkinson*, plaintiff recovered a verdict against an insurance underwriter, and Mansfield explained:

Objection [was made] that this [is] an Insurance by Plaintiffs, British Merchants, of goods to come in a Dutch ship from Cadiz — which is trading with the Enemy & therefore an illegal contract. I thought the Point very unfavourable in the Mouth of Defendant & quite new. I refused to make a Case or save the Point but left them to move for a new Tryal as they could.

Plaintiffs are Dyers. The goods are materials absolutely necessary for dying & can only be had from Spain.³²

Not infrequently, Lord Mansfield encouraged the jury to take equitable considerations into account in reaching its verdict. Thus, in *Gul-liver v. Cozens*, a trespass action, Lord Mansfield noted, "I directed the Jury to take into Consideration all the Circumstances and upon them to allow the whole or part they thought equitable and just for Repairs."³³ Similarly, in the insurance case of *Green v. Butler*, Mansfield wrote: "I told the jury that in estimating the Damages they ought equitably to consider what the Case would have been in respect of the Plaintiff if the Defendant had done his Duty and made a true Representation for He ought not to gain by the Agent's mistake but be

30. 478 nb 147.

31. 462 nb 146 (London: 26 Nov. 1764).

32. 492 nb 174 (London: 13 Dec. 1781). Mansfield's refusal "to make a Case" — *i.e.*, to reserve the legal question for argument before the full Court of King's Bench at Westminster Hall — was against his usual inclination and was clearly due to the strength of the equities in the plaintiffs' favor. Compare Burrow's description of Lord Mansfield's well-known statement in *Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617-18 (K.B. 1759):

He said, he always leaned (even where he had himself no doubt) to make cases for the opinion of the Court; not only for the greater satisfaction of the parties in the particular cause, but to prevent other disputes, by making the rules of law and the ground upon which they are established *certain* and *notorious*.

33. 465 nb 92 (Middlesex: 24 June 1766).

indemnified."³⁴

In addition to overt jury instructions, Mansfield could (as could any trial judge) allow his summation to be shaped by equitable considerations. In *Rex v. Goodall*, the defendant was found guilty of perjury, and Mansfield wrote in his notebook: "I summed up very tenderly and as favourably as Truth would permit for the Defendant from his general good Character and his Figure in Life . . . but am thoroughly satisfied with the Verdict."³⁵ And in *Rex v. Filewood*, after defendant was convicted of a public nuisance for placing rubbish in the street even though one of the witnesses admitted that it was his duty to carry away the rubbish, Lord Mansfield wrote: "I directed the Defendant to prosecute Lassels and bring his conviction before the Court, as a Reason in Mitigation of his [Defendant's] punishment."³⁶

Lord Mansfield's tendency toward individualized justice can be observed in two additional contexts. They are the handling of precedent, and statutory interpretation. Fifoot observed that, although Mansfield found it difficult to "preserve the equilibrium" between principle and precedent, he nevertheless "observed the accepted canons of judicial dialectic."³⁷ The system of common law was sufficiently resilient to allow Mansfield considerable operating room, but he acknowledged the importance of precedent, often urging barristers to search more thoroughly for authorities, or doing so himself. If the authorities were unequivocally against his inclination, Mansfield would yield.

In *Rex v. Pedley*,³⁸ for example, Mansfield was constrained to apply a rule that he later described as "based on wretched reasoning."³⁹ The rule was "that it is not felony either at common-law or by the statute in a tenant for a year, a month, or a day, to set fire to a house of which he is in possession."⁴⁰ Mansfield complained that

a man may do what he pleases with what is properly his own: but that a man, who has an interest no larger than that which I have stated, may annihilate the property of his landlord, is a doctrine, which, if the point were now originally before the court, I could hardly have assented to. But the question has been submitted to the consideration of the judges, and nine of them (all who attended) were unanimous; though *Nares, J.* at one time differed. The legislature alone can therefore now apply the remedy.⁴¹

The occasions when the authorities mandated a decision that Mansfield thought inequitable were comparatively few. More often,

34. 458 nb 51 (London: 23 Feb. 1762).

35. 449 nb 2 (15 Feb. 1757).

36. 457 nb 162 (London: 15 Feb. 1762).

37. C. FIFOOT, *supra* note 23, at 201, 229.

38. Cald. 218 (K.B. 1782).

39. *Rex v. Scofield*, Cald. 397, 399 (K.B. 1784).

40. Cald. at 227.

41. Cald. at 227.

Mansfield would be able to shrug off a disagreeable precedent by a close factual distinction, or by questioning the accuracy of the report.⁴²

Sometimes, however, a case was directly governed by statute. In eighteenth-century litigation, questions of statutory interpretation were relatively uncomplicated. Formal legislative history, to the extent it existed, would not have been brought out. Nevertheless, questions of legislative intent did arise.

When Lord Mansfield (then William Murray) became Solicitor General in 1742, he also became a member of the House of Commons. He remained in that House until shifting to the House of Lords on his peerage in 1756. Thus any statute enacted after 1742 stood a good chance of falling within Mansfield's personal experience as a legislator. Mansfield, then, would have retained a clear view of the legislative intent, which he would articulate in later litigation. Thus, in one case decided in 1780, "the question was, whether the officers and horses of artillery were capable of being billeted in the same manner, as the dragoons and light-horse within the meaning of the 19th of the King, called the Mutiny Act," and "[t]he Court were clearly of opinion that they were, and argued; that though the act only mentioned dragoons, yet it implied the horse and man to be billeted; and, said Lord Mansfield, man and horse are one person within the meaning of the act."⁴³

Occasionally, Mansfield's awareness of the legislative intent prevented him from reaching what he regarded as the just result. An example occurred in *Crigan v. Maddock*, a settlement case reported in 1781.⁴⁴ Two paupers had been married at a chapel in Northfield in 1765 after the publication of banns,⁴⁵ and were therefore declared at the quarter sessions to be legally settled in Northfield. It was argued at King's Bench, however, that because the chapel had been constructed after the passage of the Marriage Act, the marriage in question would not qualify. The Marriage Act recognized only marriages

42. I do not here take up the problems caused by the lack of official reports of cases or of compilations of statutes. These problems were nevertheless real and large, as Lieberman notes. Pp. 89, 236-37; see also 11 W. HOLDSWORTH, *supra* note 1, at 303-15; 12 W. HOLDSWORTH, *supra* note 1, at 101-62.

43. Case of Willan, London Courant, June 3, 1780, at 3, col. 4 (K.B. 1780). The author of the newspaper report dryly added, "According to this argument the centaur is not longer fabulous and comes within the meaning of the Act." London Courant, June 3, 1780, at 3, col. 4.

44. Morning Chronicle, May 24, 1781, at 3, col. 3 (K.B. 1781). Brief notes of arguments of counsel and of Mansfield's opinion are in the Dampier MSS, Lincoln's Inn Library, BPB Bundle 113-42.

45. The term "banns" refers to "banns of marriage," that is, "a proclamation in church of an intended marriage." 1 J. BURKE, JOWITT'S DICTIONARY OF ENGLISH LAW 185 (1977). The tradition required publication in church on three successive Sundays or Holy Days. According to Lord Hardwicke's Act, commonly referred to as "the Marriage Act," publication was to occur "during the . . . morning service, or . . . evening service [if there [was] no morning service . . . immediately after the second lesson. . . ." An act for the better preventing of clandestine marriages, 1753, 26 Geo. 2, c. 33.

solemnized at places where banns had usually been published, which could not be true of a chapel constructed after the Act was passed. Lord Mansfield, after musing about one of the abuses during the time he had been Attorney General that had given rise to the Act (the Minister of the Savoy “who used to marry about 1400 couple in a year, 900 of whom were generally women with child”), said that the Act could not apply to new chapels, and therefore the marriage in question was void. Mansfield “hinted at the propriety of a parliamentary interposition, to rectify the many marriages, which have been had, in chapels so circumstanced.”⁴⁶

When construing statutes passed before he was a legislator, Mansfield was not constrained by personal recollection of legislative intent. Mansfield was, on occasion, prepared to endorse a meticulous, literal construction requiring stringent proof to establish a violation, when he concluded that a statute or collection of statutes was inappropriately mean-spirited and worked fundamental injustice.⁴⁷

Critics of Lord Mansfield thought his chancellor-like behavior inappropriate for a common law judge, especially where novel questions were presented. As Lieberman points out (pp. 97-98), Lord Camden, in parliamentary debate concerning the famous copyright decision of *Millar v. Taylor*, observed:

Who has a right to decide these new cases, if there is no other rule to measure by, but moral fitness and equitable right? Not the judges of the common law, I am sure. Their business is to tell the suitor how the law stands, not how it ought to be; otherwise each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind. As it is, we find that they do not always agree; but what would it be, where the rule of right would always be the private opinion of the judge as to the moral fitness and convenience of the claim?⁴⁸

Whether or not he practiced it, Mansfield understood the point. In *Rex v. Harborton*, he wrote:

If the justices of the peace at their sessions, or even out of sessions, are to be erected into chancellors, it cannot but happen but that on the same facts very different decisions must be made. Honest and good men, when left to decide *secundum discretionem boni viri*, must and will vary in their sentiments. Such a rule therefore would be highly inconvenient, and indeed would amount to say that there was no rule at all.⁴⁹

46. Morning Chronicle, May 24, 1781, at 3, col. 3. Parliament responded to Mansfield's hint in An act to render valid certain Marriages, solemnized in certain churches and publick chapels in which banns had not usually been published before or at the time of passing an act, made in the twenty-sixth year of King George the Second, entitled, *An act for the better preventing of clandestine marriages*, 1781, 21 Geo. 3, c. 53.

47. See *infra* text accompanying notes 84-89.

48. C. FIFoot, *supra* note 23, at 226 (quoting 17 Cobb. Parl. Hist. 998).

49. *R. v. Harborton*, 1 T.R. 139, 140, 99 Eng. Rep. 1017, 1018 (K.B. 1786).

Although Mansfield preferred an equitable approach, he also believed that there were more important concerns than doing justice in particular cases: one of these was the need for certainty in specific contexts. One context in which certainty was an overriding necessity was that of the poor laws — laws that Mansfield considered “a disgrace to the country”⁵⁰ and which were involved in *Rex v. Harborton*. As Fifoot noted, “[t]he sacrifice of discretion was the more tolerable, when it could be urged to support the claims of common sense and humanity.”⁵¹

When Mansfield did exercise discretion, he was occasionally reversed by higher authority. A notorious example was the case of *Perrin v. Blake*, an episode that Lieberman effectively recounts and analyzes (pp. 137-42). The case was a *cause célèbre*. In 1849, Lord Campbell wrote:

I tremble when I think how stupid my account of the affair may appear; but the *lay gents* should know, that it was not only intensely interesting when it arose, but that now, when conversation flags among us lawyers, one of us, to cause certain excitement and loquacity, will say, — “Do you think that *Perrin v. Blake* was well decided in the Court of King’s Bench?” or, “Do you believe that Lord Mansfield really gave the opinion, in 1747, which *Fearne* imputes to him?”⁵²

Mansfield sought in *Perrin* to give effect to what he viewed as the clear intent of the instrumental party, in this case the testator. But to do so, Mansfield was required to tread upon

the celebrated rule in *Shelley’s Case*, established in the reign of Elizabeth on feudal principles and on prior authorities, “where an estate of freehold is given to an ancestor, and in the same gift or conveyance an estate is given either mediately or immediately to his heirs, these are construed words of limitation, not of purchase, and he himself takes an estate tail.”⁵³

In *Perrin*, the testator, William Williams, could hardly have been plainer in his will about what he meant; he said, “It is my intent and meaning, that none of my children should sell or dispose of my estate

50. 1 T.R. at 140, 99 Eng. Rep. at 1018.

51. C. FIFOOT, *supra* note 23, at 206.

52. 2 J. CAMPBELL, *supra* note 23, at 437 n.*. *Perrin v. Blake* was reported, in its various phases, at 1 Bl. W. 672, 96 Eng. Rep. 392, 4 Burr. 2579, 98 Eng. Rep. 355 (K.B. 1770); 1 F. HARGRAVE, COLLECTANEA JURIDICA 283 (1791); F. HARGRAVE, LAW TRACTS 487 (1787). Campbell’s reference to *Fearne* alluded to the assertion in J. FEARNE, ESSAY ON CONTINGENT REMAINDERS (1772) that Mansfield, while Solicitor General in 1747, had published an opinion on the very will later litigated in *Perrin v. Blake* contrary to that which he himself subsequently delivered from the King’s Bench. See C. FIFOOT, *supra* note 23, at 179-80. Fifoot describes *Fearne*’s work as “remarkable” both for its “invective” and for its “erudition which defied the contamination of reality.” *Id.* at 177. On *Perrin v. Blake*, see also 1 W. EVANS, A GENERAL VIEW OF THE DECISIONS OF LORD MANSFIELD, IN CIVIL CAUSES 329-53 (1803); J. HOLLIDAY, *supra* note 23, at 190-209.

53. 2 J. CAMPBELL, *supra* note 23, at 431 (citing *Shelley’s Case*, 1 Co. Rep. 93b, 76 Eng. Rep. 206, 208 (Q.B. 1581)).

for longer term than his life.”⁵⁴ But because Williams went on to give the residue of his estate to his son John for life, with remainders, ultimately, to John’s heirs and to the heirs of William’s daughters, the rule in *Shelley’s Case* came into play. This meant that John could (and did) consider himself to have an estate tail instead of merely a life estate, which he could (and did) sell, leaving the heirs with nothing. Mansfield responded to this as follows:

[A]s the law had allowed a free communication of intention to the testator, it would be strange law to say, “Now you have communicated that intention so as everybody understands what you mean, yet because you have used a certain expression of art, we will cross your intention, and give your will a different construction; though what you mean to have done is perfectly legal, and the only reason for contravening you is, because you have not expressed yourself as a lawyer.” My examination of this question always has, and, I believe, ever will convince me, that the legal intention, when clearly explained, is to control the legal sense of a term of art unwarily used by the testator.⁵⁵

According to Campbell, “[t]he universal opinion of lawyers now is, that *Perrin v. Blake* should at once have been determined in conformity to this rule [in *Shelley’s Case*], which had long been acquiesced in and acted upon,” but Mansfield, misled, perhaps, by “an excessive desire of preferring what he considered principle to authority,” ruled otherwise.⁵⁶ This decision was reversed by Exchequer Chamber, with Mr. Justice Blackstone playing a leading part.⁵⁷

The case was prolonged and divisive, both on the Court of King’s Bench and in the public press, the latter because of the name-calling that erupted between Mansfield and conveyancer Charles Fearné.⁵⁸ At the end of the near-seven years of Mansfield’s personal involvement with the case,⁵⁹ he must have been left by it exhausted and dispirited. According to Fifoot, “Lord Mansfield’s repulse in *Perrin v. Blake* was decisive. Submission on so cardinal an issue involved retreat upon the whole front of real property.”⁶⁰

As *Perrin* itself demonstrated, however, Mansfield was ready to ap-

54. *Id.* at 305 (quoting will by William Williams).

55. 1 F. HARGRAVE, *COLLECTANEA JURIDICA*, *supra* note 52, at 318.

56. 2 J. CAMPBELL, *supra* note 23, at 432.

57. Astonishingly, Campbell asserted that “Mr. Justice Blackstone’s argument on this occasion was so inimitably exquisite, that his reputation as a lawyer depends upon it still more than upon his *Commentaries*.” 2 J. CAMPBELL, *supra* note 23, at 433 n.†.

58. Fearné accused Mansfield of having given in 1747, while Mansfield (then Murray) was Solicitor General, advice to Williams that was exactly the opposite of Mansfield’s opinion in *Perrin*. See *supra* note 52. Mansfield denied this, and after his death, his biographer Holliday produced new evidence on Mansfield’s side of the argument. See J. HOLLIDAY, *supra* note 23, at 200-04.

59. Overall, the case lasted twenty years, from 1758 to 1777. Mansfield’s role extended from 1765 to 1772.

60. C. FIFOOT, *supra* note 23, at 181.

ply his revisionist hand even to the sacred law of real property, notwithstanding Blackstone's admonition that "[t]he law of real property in this country is now formed into a fine artificial system, full of unseen connections and nice dependencies, and he that breaks one link of the chain endangers the dissolution of the whole."⁶¹ Mansfield once acknowledged that he formed his system of "the general law of property" around the work of Lord Hardwicke,⁶² who believed that "[i]n the administration of trusts the language of the testator should receive a liberal interpretation and the rule in *Shelley's Case* be applied with discretion."⁶³

Mansfield's desire to give effect to the evident intent of the testator was not limited to the rule in *Shelley's Case*; he also was prepared to relax the formal prerequisites for validating wills where rigid observance of them would frustrate the obvious intent of the testator. In the same year as Mansfield's first encounter with *Perrin v. Blake* (1765), he decided *Bond v. Seawell*.⁶⁴ In *Bond*, the issue was whether or not a will was properly witnessed when only the last page may have been in the room with the witnesses. Mansfield declared that "[e]very presumption ought to be made by a jury, in favour of such a will, when there is no doubt of the testator's intention."⁶⁵

Another well-known example of Mansfield's wish to give effect to a testator's clear intention in the face of formal irregularities was the 1757 case *Wyndham v. Chetwynd*,⁶⁶ a decision that brought Mansfield into conflict with Lord Camden while Camden was Chief Justice of the Court of Common Pleas. In *Wyndham*, the question presented was the degree of disinterestedness required by the Statute of Frauds of witnesses to a will. The Statute required attestation by two credible witnesses. Mansfield held that the word "credible" was not synonymous with "competent," and that if the subscribing witnesses became disinterested before the time of the testator's death, their attestations

61. *Id.* at 159 n.2 (quoting Justice Blackstone, in *Perrin v. Blake* in the Exchequer Chamber (1772), quoted in F. HARGRAVE, LAW TRACTS, *supra* note 52, at 487).

62. Letter from Mansfield to Hardwicke, Dec. 10, 1758. British Library, Add. MSS 35,595, f. 312.

63. C. FIFOOT, *supra* note 23, at 168 (noting Lord Hardwicke, in *Bagshaw v. Spencer*, 1 Ves. Sen. 142, 2 Atk. 246, 570, 26 Eng. Rep. 552, 741 (Ch. 1748)).

64. 460 nb 102, 3 Burr. 1773, 96 Eng. Rep. 1092 (K.B. 1765).

65. 3 Burr. at 1775, 97 Eng. Rep. at 1093 (emphasis omitted). The trial notes reveal the testimony of three witnesses, Harvey, Vaughan, and Leland, who testified that the testator declared the contents of the will to contain his intention; moreover, two of the witnesses (Vaughan and Leland) indicated that both sheets of the will were present when they witnessed. In the reported opinion by Burrow, however, Mansfield observed that "upon a special verdict, nothing can be presumed." A new trial was ordered, in which the jury was to be instructed to "presume, from the circumstances proved, 'that the will was in the room.'" 3 Burr. at 1776, 97 Eng. Rep. at 1093 (emphasis omitted).

66. 1 Burr. 414, 96 Eng. Rep. 53 (K.B. 1757). Other reports of the case appear at 1 Bl. W. 95 and 2 Keny. 121.

were valid.⁶⁷

The conflict between Lord Camden and Mansfield about Mansfield's opinion in *Wyndham* came in 1765 in *Doe & Hindson v. Kersey*.⁶⁸ Alone in dissent, Camden delivered a lengthy opinion criticizing Mansfield's views. Camden's opinion was scholarly, exhaustive, and although tinged with pedantry and antagonism to Mansfield, undeniably forceful in its attack upon judicial discretion and Roman Law. Camden wrote that "it is not my Business to decide Cases by my own Rule of Justice, but to declare the Law as I find it laid down, if the Statute of Frauds has enjoined this Determination, it is not my own Opinion but the Judgment of the Legislature."⁶⁹ He acknowledged that "I am very sensible that I am destroying an honest Will upon a nominal Objection, for the Interest here which I must treat as a serious Incapacity, is too slight even to disparage the Witness's Credit, if he could be sworn," but in his view, "[t]he Discretion of a Judge is the Law of Tyrants . . . it is casual, and depends upon Constitution, Temper, and Passion. In the best it is often times Caprice, in the worst it is every Vice, Folly, and Passion to which Human Nature is liable."⁷⁰ And as to Roman law:

I am not wise enough to determine which of the two Laws is most perfect, the Roman or the English. This I know . . . that although almost every Country in Europe hath received that Body of Laws, yet they have been with a most stubborn Constancy at all Times disclaimed and rejected by England. For which Reason, (and not through any Disrespect to the Argument [Mansfield's] I have been endeavouring to answer) I choose to lay aside all that Learning as not being relevant in Westminster-hall.⁷¹

67. Mansfield's opinion occupies more than 16 pages in *Burrow's Reports*. Two of the 16 pages are devoted to the disposition of the issue under Roman law authorities, ranging from the 12 Tables to Justinian. See 1 Burr. at 425-26.

68. The case was reported in full in pamphlet form in LORD CAMDEN'S ARGUMENT IN *Doe on the Demise of Hindson, & Ux. & al. v. Kersey*. Wherein Lord Mansfield's Argument in *Wyndham v. Chetwind*, is Considered and Answered 39-91 (1766) (C.P. 1765). The case is also reported in 4 Burn, Ecc. Law 97 (1809).

69. LORD CAMDEN'S ARGUMENT, *supra* note 68, at 50 (footnote omitted).

70. *Id.* at 50, 83 (emphasis omitted).

71. *Id.* at 91 (emphasis omitted). This view was shared by Mansfield's friend and fellow judge, Michael Foster, according to Foster's nephew, Michael Dodson. In his brief biography of his uncle, Dodson reported that Foster told Mansfield immediately after the opinion in *Wyndham* was delivered that "[a]lthough I concur in the judgment of the court, yet I cannot concur in the reasons given by your lordship." M. DODSON, *THE LIFE OF SIR MICHAEL FOSTER, KNT.* 37 n.p (1811). No separate opinions of the junior judges were reported by Burrow, Blackstone, or Kenyon, but Dodson quoted from Foster's notes his reasons for his concurrence. Foster believed that the objection to the competency of witnesses based upon their being creditors by simple contract was novel, contrary to the spirit of recent legislation (See An act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils, concerning real estates in that part of Great Britain called England, and his Majesty's colonies and plantations in America, 1752, 25 Geo. 2, c. 6), and inapplicable to the circumstances of the witnesses in question. But on the question of Roman Law, Foster wrote,

When we are upon the construction of a modern act of parliament, and endeavouring to find the true legal sense of the terms which it useth, I cannot think it extremely material to

Undoubtedly Mansfield was unfazed by Camden's broadside in *Doe v. Kersey*. After *Perrin v. Blake*, however, the fight went out of Mansfield on property questions. As noted by Fifoot, Mansfield "found it ever more difficult to uphold the claims of intention against the authority of rules, which had escaped from their original context and had assumed an independent and formidable validity."⁷²

While in *Perrin v. Blake*, Mansfield faced the problem of achieving a just result in the face of an entrenched, outmoded common law rule, courts also had to deal with another type of entrenched rule: the anachronistic or outmoded statute. Mansfield would undoubtedly have endorsed Blackstone's belief in the supremacy of Parliament. This is suggested by Mansfield's remark in *Rex v. Pedley*, above, that when precedents were too strong, "the legislature alone can . . . now apply the remedy."⁷³ Thus, Mansfield would not have thought his court empowered flatly to ignore or to "overrule" a statute. But as earlier discussed,⁷⁴ Mansfield often chose statutory interpretations that would promote an equitable or just result. Indeed Mansfield thought that the courts were, in the right circumstances, empowered to nullify outmoded statutes by strict construction. He also believed that there were constitutional limits on parliamentary interference with the courts.

The constitutional point is illustrated by the case of William Parker, printer of the *General Advertiser*, who was convicted of seditious libel in 1779 for having printed a letter signed "a South Briton."⁷⁵ Lord Effingham presented a petition in the House of Lords for the reduction of Parker's sentence, claiming that it was much more severe than sentences previously imposed on other printers.⁷⁶ In his speech supporting his petition, Effingham emphasized the tyranny of unbridled discretion, illustrating his argument with references to the history of Informations, as laid out in Blackstone.⁷⁷ After debate, including a strong speech by Lord Mansfield in opposition to the reduction of Parker's sentence, Effingham's petition was unanimously voted down. Mansfield described the petition as "the first attempt of its

inquire, what restraints the old Roman law laid on testators, at what time, and upon what principles, and to what degree, the ancient rigour was abated, or what rendered the attesting witnesses competent or incompetent, or how far interest was or was not an objection to their competency.

Id. at 40-41.

72. C. FIFOOT, *supra* note 23, at 181. *See generally id.* at 158-97.

73. *See supra* text accompanying note 41.

74. *See supra* text accompanying note 47.

75. R. v. Parker, Morning Chronicle, Dec. 22, 1779, at 2, col. 3; Feb 16, 1780, at 2, col. 1 (K.B. 1779).

76. *See* Morning Chronicle, Dec. 22, 1779, at 2, col. 3; Feb. 16, 1780, at 2, col. 1 (for reports about the petition); *see also* Morning Chronicle, Feb. 18, 1780, at 3, col. 1 (for part of Lord Mansfield's reaction to the petition).

77. *Id.*, Feb. 16, 1780, at 2, col. 1 (citing 4 W. BLACKSTONE, *supra* note 3, at *308-312).

kind, the first call upon their Lordships to exercise an arbitrary jurisdiction over the Courts of Law."⁷⁸ He distinguished the case from the normal process of appeal to the House of Lords by the Writ of Error, observing that "[i]n the present case there was no record, no proceedings, no party, no opportunity of examining witnesses; in short, no fact sufficient to warrant their Lordships to take any one step whatever."⁷⁹ He pointed out that a petition for mercy was a prerogative of the Crown, and that if Lord Effingham's petition succeeded, "[a]ll the convicts in Newgate, might just as well petition that House to interfere and procure them pardons, as William Parker."⁸⁰

To be sure, the *Parker* case relates more to the functioning of the House of Lords as a judicial body⁸¹ than as a legislative body. Yet it seems clear that Mansfield would also have opposed any after-the-fact attempt at interference with a judicially imposed sentence by the non-judicial branch of the legislature, the House of Commons.⁸²

Mansfield's belief in the power of courts to nullify outmoded statutes⁸³ is best illustrated by the way the Court of King's Bench dealt with statutes restricting religious observance by Catholics. Lieberman quotes from Mansfield's opinion in *Foone v. Blount*⁸⁴ in which Mansfield argues that these statutes could be justified only because, when enacted, they were thought necessary to the safety of the state. Nevertheless, " 'whether the policy be sound or not,' these statutes had to be applied 'according to their true intent and meaning, [for] [t]he legislature only can vary or alter the law.' "⁸⁵ Thus Lieberman presents Mansfield's opinion to illustrate the proposition that "[e]ven the most zealous and effective defenders of the judiciary's proper powers to adapt and refine the common law as demanded by new social circumstances were careful to dissociate this capacity from an unconstitutional authority to challenge directly parliament's legislative will" (p. 54).

78. *Id.*

79. *Id.*

80. *Id.*

81. Effingham denied Lord Mansfield's claim that the petition was a call upon the Lords to exercise an arbitrary jurisdiction over the courts of law, observing: "He did not call upon their Lordships in their judicial capacity . . . He merely appealed to their humanity." *Id.*

82. In his speech on the Parker petition, Lord Effingham cited the Titus Oates case as a precedent. *See R. v. Oates*, 2 Show. K.B. 420, 89 Eng. Rep. 1017 (K.B. 1685). Lord Mansfield acknowledged that after the perjury conviction and sentencing in the Court of King's Bench, Oates had petitioned both the House of Lords and the House of Commons praying the interposition of both to allay his unjust punishment, but, as the House of Lords "alone were the supreme court of judicature," it was improper "to appeal to the other House of Parliament who had no power to interfere in such a case." *Id.* And, ultimately, Oates took the only step open to him — to appeal for a pardon to the King, who held exclusively the prerogative of mercy. *Id.*

83. *See supra* text accompanying note 47.

84. Cowp. 464, 98 Eng. Rep. 1188 (K.B. 1776).

85. P. 54 (quoting *Foone*, Cowp. at 466, 98 Eng. Rep. at 1190).

Mansfield's ruling in *Foone v. Blount*, however, was a refusal to extend a statutory prohibition against Catholics' taking land by devise. Mansfield rejected an interpretation of the statute that would prohibit the payment of debts by devise to Catholic creditors. He argued that even though only the legislature can vary or alter the law, "from the nature of these laws, they are not to be carried by inference, beyond what the political reasons, which gave rise to them, require."⁸⁶ Further, the propriety of strict construction of these statutes was affirmed by a consensus of the judges reached years earlier. In 1767, an Irish priest, John Baptiste Maloney, was successfully prosecuted at the Surrey assizes and was sentenced to life imprisonment for "unlawfully exercising the functions of a Popish Priest."⁸⁷ This conviction galvanized Mansfield into what appears to the modern eye to be extraordinary judicial activism. A meeting of all the judges sitting in the three courts — King's Bench, Common Pleas, and Exchequer — was called, and in the words of Innes, "The fruit of this conference was an agreement that all henceforth would insist on so rigorous an interpretation of the law that convictions would be impossible to secure."⁸⁸ Mansfield described this conference himself, stating:

[A]s for the meaning of those statutes, I own before that affair happened in Surrey I had not thoroughly examined them. But since that time, all the twelve Judges have consulted upon them, and we have all agreed in opinion that the Statutes are so worded that in order to convict a man upon those Statutes, it is necessary that he first be proved to be a priest: and secondly that it be proved he has said Mass.⁸⁹

Obviously not all statutes could be nullified by strict construction, and therefore Mansfield at times resorted to a call for legislative correction or repeal. Referring to the Statute of Apprentices, Mansfield once stated:

In the infancy of trade, the Act of Queen Elizabeth might be well calculated for public weal, but now when it [trade] is grown to that perfection we see it, it might perhaps be of utility to have those laws repealed, as tending to cramp and tie down that knowledge it was first necessary to

86. Cowp. at 466, 98 Eng. Rep. at 1190.

87. P. HUGHES, *THE CATHOLIC QUESTION 1688-1829*, at 137 (1929). On 19 June 1771, Maloney was pardoned, conditioned upon his undertaking to transport himself for life (PRO/KB 21/40, f.250; SP 46/151, f.63). It would appear from the warrant of Secretary of State Rochford that Maloney was tried before Mansfield at Croydon on 19 Aug. 1767 (SP 44/90, f.293). Mansfield's surviving trial notes for the 1767 Croydon assizes begin on 20 August. Interestingly, Maloney was not among the prisoners listed on Mansfield's certificate for the Croydon assizes as recommended for conditional pardons (SP 44/90, f.16).

88. J. Innes, *William Payne of Bell Yard, Carpenter 1718-1782: The Life and Times of a London Informing Constable 61* (unpublished manuscript) (no date (ca. 1980)) (cited with permission).

89. 2 E. BURTON, *THE LIFE AND TIMES OF BISHOP CHALLONER 94* (1909) (quoting J. BARNARD, *THE LIFE OF THE VENERABLE AND RIGHT REVEREND RICHARD CHALLONER 167-68* (1784)).

obtain by rule.⁹⁰

Similarly, Mansfield once observed "that, in his opinion, the bankrupt laws had done more harm than good, but that, such as they were, we are bound by them, and were obliged to submit to them, and in all probability ever will."⁹¹ Later, Mansfield complained of the bankruptcy laws: "It is a pity that the Legislature should be silent, and should force the Courts, in order to attain the ends of justice, to invent legal subtleties, which do not come up to the common understanding of mankind."⁹²

Another technique that Mansfield may have used was to delay a trial until after an unwelcome statute expired. A statute of 5 and 6 Edw. VI outlawed "forestalling," that is

the buying or bargaining for any corn, cattle, or other merchandize, by the way as they come to the markets to be sold before they are brought, to the intent to sell the same again at an advanced price, or buying or selling the same again in the same market.⁹³

This offended Mansfield's belief in free trade principles. Mansfield was said to have "revolted so much at the judgment which, under the statute, he was obliged to pronounce; that he . . . let the matter stand over, postponing his judgment from term to term, until the statute itself . . . had been repealed."⁹⁴

Of course, simply because a statute expired did not necessarily mean that its life was over. Mansfield's successor, Kenyon, was a firm believer in the regulatory ideas behind the statutes formerly outlawing forestalling and like practices, and he single-handedly resumed the enforcement of those expired laws.⁹⁵

* * *

90. G. DANIELS, *THE EARLY ENGLISH COTTON INDUSTRY* 52 (1920) (quoting Manchester Mercury, April 3, 1759); see also Mansfield's opinion in his very first reported case, *Raynard v. Chase*, 1 Burr. 2, 6-7, 97 Eng. Rep. 155, 157-58 (K.B. 1756).

91. Report of argument on a motion to discharge a bankrupt from prison, Lloyd's Evening Post, Nov. 22-24, 1773, at 498, col. 1. Another version of this argument appears in E. GREEN, *THE SPIRIT OF THE BANKRUPT LAWS* 275 (3d ed. 1776). The case in question is briefly reported anonymously at Lofft 341.

92. *Wyllie v. Wilkes*, 2 Doug. 519, 522, 99 Eng. Rep. 333 (K.B. 1780).

93. J. MONTEFIORE, *A COMMERCIAL DICTIONARY: CONTAINING THE PRESENT STATE OF MERCANTILE LAW, PRACTICE, AND CUSTOM* (1803).

94. *THE PROCEEDINGS AT LARGE IN THE CAUSE THE KING V. WADDINGTON, FOR PURCHASING HOPS, IN KENT* 63 (1801). This story was told by counsel appearing before Mansfield's successor, Lord Kenyon, about a case before Mansfield in 1772, the year of the statute's repeal. I am grateful to Douglas Hay for this reference.

95. Printed reports of some of these cases are contained in a bound volume at the Harvard Law Library, *Cases of Forestalling, Regrating, Engrossing, 1800*. See generally Hay, *The State and the Market: Lord Kenyon and Mr. Waddington*, in *PAST AND PRESENT* (forthcoming). In the case of the statutes against forestalling and like practices it was possible to discern the date of repeal. Frequently, however, the duration of a statute was unclear, and courts coped as best they could with the uncertainty. For an example of some of the perplexities in determining the duration of statutes, see the tabular presentation of statutes on jury qualifications in the appendix to Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 211-21 (1983).

Lord Mansfield was easily the dominant judicial personality in England in the eighteenth century. His accomplishments and his innovations were many and they established the foundation upon which much of contemporary Anglo-American private law rests. Mansfield's approach was not broadly theoretical, yet he was a life-long student, and he was well versed in continental and civil law traditions.⁹⁶ He would also have been familiar with the writings of the group that came to represent the Scottish enlightenment. But, perhaps because of his political circumspection, Mansfield never allied himself with a reformist school of thought. Lieberman recognizes this, and he turns to the Scottish enlightenment as a potentially fruitful way to connect Mansfield and the Blackstonian structure with the radically different views advanced by Bentham. The Scot who best serves Lieberman's purpose is Henry Home, Lord Kames. Kames anticipated Bentham on utilitarianism but believed that the judges should be the instruments of change, not the legislators.

Indeed, Kames fits into Lieberman's exposition remarkably well. Kames insisted "that law had to be studied as an historical subject," and he "marshalled his historical understanding of the law to the cause of legal improvement" (pp. 148-51). Further, "Kames approached the matter of legal improvement . . . armed with two main philosophical doctrines. He was equipped with an ethical theory which indicated the need to promote the general welfare, and a theory of historical development which enabled him to evaluate the relative suitability of legal practices for a particular society" (p. 154).

Kames' notions of equity fascinate Lieberman and provide the most interesting connections between Blackstone, Mansfield, and Bentham. Kames embraced both "the principle of justice" and "the principle of utility," but when the two principles conflicted, Kames believed that "equity . . . when it regards the interest of a few individuals only, ought to yield to utility when it regards the whole society."⁹⁷ Lieberman observes that Kames' commitment to the dictates of utility led to a notion of equity that

was extraordinary, if not simply bizarre. By so introducing "the principle of utility" into equity jurisprudence, Kames had eliminated precisely that legal function which orthodox theories of equity served to explain. This was the judicial authority to grant exceptions to legal rules in those particular situations where their application would result in injustice. [p. 170]

Thus, "the Kamesian system of equity ceased to resemble equity at all. Instead his conception of equity as a separate body of the general rules

96. See Rodgers, *Continental Literature and the Development of the Common Law by the King's Bench: c. 1750-1800*, in *THE COURTS AND THE DEVELOPMENT OF COMMERCIAL LAW* 161 (Comparative Studies in Continental and Anglo-American Legal History, 2, V. Piergiorganni ed. 1987).

97. P. 168 (quoting H. KAMES, *PRINCIPLES OF EQUITY* 44, 47 (1767)).

of law which corrected by supplementing the historic common law came to appear remarkably like a program of legislative law reform" (p. 171). But "the reformers to whom Kames directed the principle were enlightened judges and not scientific legislators" (p. 175). And the prime example of such a judge, whom Kames credits as the inspiration of his work on equity, was Lord Mansfield (p. 175).

* * *

After presenting Kames, Lieberman inserts a final section before reaching Bentham. This section — Part III, "Parliamentary statute" — does not fully meet the promise of its title. It is comprised of two chapters, one on statute consolidation, the other on penal law reform. Both chapters are interesting, but they mainly serve as more stage-setting for Bentham. Lieberman identifies eighteenth-century statute consolidation efforts as extensions of a comparable idea advanced by Bacon a century before. The notion was one of housecleaning — clarifying, sloughing off obsolescence, condensing. But "parliament was not to meddle with the common law" (p. 189). Moreover, "the program was entirely backward-looking. Law reform was to be secured by having parliament correct by contracting and ordering the results of its previous legislative practice, not by enlarging its legislative ambitions" (p. 197). And, similar to the notions of Kames, the judges were in the best position to be the statute consolidators. This point was stated plainly by Hale in the seventeenth century and, to the eighteenth-century writers, it had not lost its force (pp. 197-98).

Here, Lieberman would have done well to reconnect to Lord Hardwicke's speech to the House of Lords in 1756. Lieberman cites the speech three times (pp. 14, 17, 28), but does not give details. Holdsworth sets out almost the entire speech, revealing that one of Hardwicke's chief points was the role once played by the judges in legislative drafting. Hardwicke stated:

In old times almost all the laws which were designed to be public Acts, and to continue as the standing laws of this kingdom, were first moved for, drawn up, and passed, in this House, where we have the learned judges always attending, and ready to give us their advice and assistance. From their knowledge and experiences they must be allowed to be the best able to tell, whether any grievance complained of proceeds from a non-execution of the laws in being, and whether it be of such a nature as may be redressed by a new law. In the former case, a new law must always be unnecessary, and in the latter it must be ridiculous. . . . But this method seems now to be quite altered: every member of the other House takes upon him to be a legislator, and almost every new law is first drawn up and passed in the other House, so that we have little else to do, especially towards the end of the session, but to read over and consent to the new laws they have made: nay some of them are sent up so late in the session that we have hardly time to read them over, and consider whether we shall consent or not, which is remarkably the case

with respect to the Bill now under consideration (the militia bill) But this is far from being the only inconvenience: the other House by their being so numerous, and by their being destitute of the advice and assistance of the judges, are too apt to pass laws, which are either unnecessary or ridiculous, and almost every law they pass stands in need of some new law for explaining and amending it: and we in this House either through complaisance, or through want of time, are but too apt to give our consent, often without any amendment.⁹⁸

In 1758, Hardwicke "induced the House of Lords to act upon his views," and the judges were consulted on a proposed Habeas Corpus bill.⁹⁹ The responses of the judges led to the rejection of the bill.

Although there were other instances of consultation of the judges, Holdsworth was probably correct in observing that "the periods to which Hardwicke was looking back were gone beyond recall. Neither the executive government, nor *a fortiori* the judges, could then hope to resume that control over legislation, and therefore over the drafting of legislation, which they had once had."¹⁰⁰ Thus, "[m]atters were allowed to drift" — to await the brilliant, vitriolic pen of Jeremy Bentham.¹⁰¹

The remainder of Lieberman's book is devoted to the years during which Bentham formulated his theories about legislation. These I have already discussed.¹⁰²

* * *

David Lieberman has performed a valuable service by publishing his study of eighteenth-century legislative theory in Britain. Yet the work has some sense of being cobbled together in order to make a set of fresh and interesting points, so that it is not as broadly explanatory as one might like. As I have noted, for example, Kames' views fit neatly into the span from Blackstone to Bentham because Kames favored a utilitarian view of justice that was to be articulated and applied by the judges.¹⁰³ But we are told little about how typical, unique, or influential Kames' views were among the Scottish enlightenment figures or among their admirers in England.

Lieberman has, however, linked important eighteenth-century

98. 11 W. HOLDSWORTH, *supra* note 1, at 374 (quoting 15 Cobb. Parl. Hist. 727-30, 735-40 (1813)).

99. 11 W. HOLDSWORTH, *supra* note 1, at 375.

100. *Id.*

101. *Id.*

102. See *supra* text accompanying notes 12-21.

103. Compare, incidentally, Holdsworth's description of Beccaria, in 11 W. HOLDSWORTH, *supra* note 1, at 575-76. According to Holdsworth, Beccaria's famous *Essay on Crimes and Punishment* (first published in French in 1764, followed in 1767 by the first English translation) not only influenced Blackstone but also anticipated Bentham. Beccaria, however, thought that utilitarianism, instead of serving as a beacon for the judges, "should be the guiding principle of the legislator." *Id.* at 576.

figures in a way not previously attempted, and he has done so through the unifying theme of legislation, a subject that was, before Lieberman, sorely in need of attention. Lieberman's book is part of a series called "Ideas in Context," and this phrase is an apt description of the strength of his work.