



Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders

THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

James Oldham

IN THE SUPREME COURT'S recent decision striking down under the Eighth Amendment the imposition of the death penalty on juveniles, Justice Kennedy claimed that for nearly half a century, "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"¹ This claim was supported by extensive citations to previous Supreme Court decisions; international conventions and covenants; and amicus briefs by the European Union, former diplomats, and the Human Rights Committee of the Bar of England and Wales, among others. Justice Kennedy declared: "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights

within our own heritage of freedom."

Dissenting Justice Scalia called the majority opinion a mockery of Alexander Hamilton's belief in "a traditional judiciary bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Justice Scalia then admonished: "I do not believe that the meaning of our Eighth Amendment, any more than other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners."

In eighteenth-century England, the dominant common law court was the Court of King's Bench, and for most of the second half of the century (1756–88) its Chief Justice was the powerful, influential Lord Mansfield. Because of his unwillingness "to be bound down by strict rules and precedents," Mansfield fell under the acerbic criticism of the

James Oldham is the St. Thomas More Professor of Law and Legal History at the Georgetown University Law Center, Washington, D.C. An earlier version of this essay was given in February 2005 to the DC Lawyers Chapter of the American Constitution Society.

1 Roper v. Simmons, 125 S. Ct. 1183, 1198 (2005).

anonymous newspaper polemicist who styled himself “Junius.” Among other things, Junius charged Mansfield as follows: “In contempt or ignorance of the common law of England, you have made it your study to introduce into the court where you preside maxims of jurisprudence unknown to Englishmen.”² He then added: “The Roman Code, the law of nations, and the opinion of foreign civilians, are your perpetual theme.”

What Junius and Justice Scalia complain about is generally called “judicial activism.” This cry of outrage is heard today on both ends of the political spectrum, and it is directed at judges who are said to take the law into their own hands, wresting it away from where it belongs, for example with the jury,³ or the legislature.⁴ Often the impression is given that judicial activism is a recent phenomenon, but this is demonstrably untrue. The object of the present essay is to make that demonstration through (mainly) the

eighteenth-century decisions of Lord Mansfield, whose judicial career I have studied for many years.⁵ This is not an essay about theories of governance or separation of powers; it is merely descriptive by example of the extent to which Mansfield and his fellow common law judges engaged in “activist” behavior in the late eighteenth century.⁶

A Scotsman by birth, Mansfield (William Murray before his peerage) traveled by horseback at age 14 from Perth, Scotland to London and never looked back. He is the man about whom Dr. Johnson quipped, “Much can be made of a Scot if caught young.” Mansfield did indeed make much of himself. Chiefly from sheer ability – though aided somewhat in early days by Scottish connections – Mansfield forged a brilliant career as one of England’s leading barristers, including 12 years as Solicitor General and two years as Attorney General. In 1756 George II appointed him Chief Justice of the Court of

2 Letters of the Celebrated Junius, rev. ed., 2 vols. (London, 1797), 2: 45.

3 See, for example, the website of the Fully Informed Jury Association, which advocates legislative declarations that the jury is entitled to decide the law as well as the facts.

4 There is a large literature on judicial activism. This essay is not the place to recite it; see generally my colleague Mike Seidman’s entry on the subject in *The Encyclopedia of the American Constitution*. To illustrate how internationally active scholarly writing about judicial activism has become, and leaving aside altogether the countless articles that have appeared, here is a selection of *books* on the subject that have been published since 2000: P.O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago, 2003); M. Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (London, 2004); D.G. Morgan, *A Judgment Too Far?: Judicial Activism and the Constitution* (Cork, Ireland, 2001); S.P. Powers and S. Rothman, *The Least Dangerous Branch?: Consequences of Judicial Activism* (Westport, Conn., 2002); S.P. Sathe, *Judicial Activism in India* (Delhi, Oxford, and New York, 2002); H. Schwartz, ed., *The Rehnquist Court: Judicial Activism on the Right* (New York, 2002); K. Zannah, *Judicial Activism in an Emerging Democracy: Beyond the Sound and Fury* (Washington, D.C., 2001).

5 See J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols. (Chapel Hill and London, 1992); J. Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill and London, 2004).

6 There is, to be sure, a significant difference between judicial activism in construing a written constitution and judicial activism in the routine decision-making of a common law judge. Constitutional change by political means is infrequent and laborious, so that activist constitutional interpretations may be weightier and longer-lasting (and thus to some more offensive) than activist behavior or statutory interpretation in the common law. Also, England’s parliamentary democracy in the 18th century may have been less responsive to the will of the people than is true of American democracy today. I opened this essay with the constitutional issue in the *Roper* case because of the striking similarity between Justice Scalia’s criticism of the majority opinion and Junius’s criticism of Lord Mansfield, but the debate about judicial activism in modern America (in most of the variations discussed below) is by no means limited to constitutional questions.

King's Bench, simultaneously bestowing the Mansfield peerage.

In his 32 years as Chief Justice, Mansfield achieved many things that reverberate still in Anglo-American law. Often referred to as the founder of English commercial law, Mansfield understood the business world and, with the help of merchant juries, managed to absorb mercantile customs into the common law – customs that comprised the fundamentals of insurance law, and that contributed substantially to the development of the law of negotiable instruments and contracts. Mansfield was one of Karl Llewellyn's heroes,

and many of the commercial principles articulated by Mansfield survive today as provisions of the Uniform Commercial Code. Mansfield's fame – perhaps notoriety – is not limited to commercial law. Also well known, for example, are his decision in the *Somerset* case, a major contribution to the abolition of slavery in England; his conservative views about freedom of the press as exhibited in seditious libel cases involving the flamboyant John Wilkes; and his role as a close advisor to George III in opposition to the American Revolution.

But to return to the subject of this essay, it is useful first to consider what is meant by "judicial activism." I propose seven variants, six of which I will illustrate with decisions



Lord Mansfield

by Lord Mansfield, and the seventh by the views of Lord Mansfield's successor as Chief Justice of King's Bench, Lloyd Kenyon. The seven variants are as follows:

1. Reaching extraterritorially for guiding principles of international or foreign law.
2. Insisting on individualized justice by acting as the voice of equity, as a lord chancellor in common law clothing.
3. Making new law.
4. Disregarding or manipulating precedents, thus paying little heed to the doctrine of *stare decisis*.
5. Expansive statutory interpretation.
6. Restrictive statutory interpretation.
7. Enforcing a statute after its expiration or repeal.

The indignation expressed above by Justice Scalia and Junius about the importation of foreign law will serve to illustrate the first of these seven variants. On the second – acting as a lord chancellor in the guise of a common law judge – Junius was even more sharply critical of Mansfield. He wrote: “Instead of those certain, positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice.”⁷ He noted that the public had not become alarmed about this since each decision did not reveal a general tendency, but, “In the mean time the practice gains ground; the court of king’s bench becomes a court of equity, and the judge, instead of consulting the law of the land, refers only to the wisdom of the court, and to the purity of his own conscience.”

In this criticism, Junius was undoubtedly correct. Surely influenced by his many years of Chancery practice while at the bar and his deep admiration for Lord Chancellor Hardwicke, Mansfield did indeed try to accomplish individual justice in cases that came before him. In a case in his trial notes from 1781, for example, the plaintiff had recovered a jury verdict against an insurance underwriter after which counsel for the underwriter objected that the insurance had been obtained by the plaintiffs, British merchants, on goods to come in a Dutch ship from Cadiz, which was trading with the enemy and therefore an illegal contract. Mansfield wrote the following comment after noting the objection in his trial notes: “I thought the Point very unfavourable in the mouth of Defendant *ϑ* quite new. I refused

to make a Case or save the Point but left them to move for a new Trial as they could. Plaintiffs are Dyers. The goods are materials absolutely necessary for dying *ϑ* can only be had from Spain.”⁸

Mansfield’s readiness to do equity was nevertheless checked in some cases by what he regarded as higher values. In commercial cases, he thought certainty was important, sufficiently so at times to produce inequitable results. In November 1776, for example, a London newspaper, the *Gazetteer*, described a decision by Lord Mansfield as one that, “however consonant with the strict rules of law, can never be considered as agreeable to the principles of reason, equity, or justice.”⁹ Elphinstone was captain of a ship and part of his cargo was a quantity of butter consigned by one Ricketts, but before the ship sailed, a commission of bankruptcy issued against Ricketts and bankruptcy messengers “came on board and took away every firkin of the butter.” The invoice for the butter had been endorsed over by Ricketts to Carter, and obviously Elphinstone could not deliver the butter to Carter when the ship arrived at London. But Mansfield said that “it was not clearer law than that the eldest son was the heir to the estate of his father, than that the Defendant, and he alone, was responsible to Carter,” and that the defendant (Elphinstone) “should not have parted with the goods without the invoice.”¹⁰

In seditious libel cases, Mansfield was unbending in instructing juries to bring in guilty verdicts despite strong equitable claims by defendant booksellers and publishers. And in forgery cases, Mansfield showed no mercy because of what he viewed as the overriding

7 Letters of Junius, 2: 47.

8 *Farmer v. Parkinson*, London, 13 December 1781, Mansfield Manuscripts I: 566.

9 *Carter v. Elphinstone*, *Gazetteer* and *London Daily Advertiser*, 9 Nov. 1776.

10 Elphinstone’s counsel observed that as far as paying the judgment was concerned, Elphinstone “could have as easily discharged the national debt.”

importance of instruments of paper credit to the nation's burgeoning economy.

Apart from these "higher value" situations, Mansfield stood ready to intervene on equitable grounds. Another way that this form of judicial activism could be described is by the expression, "judicial discretion." Mansfield considered himself invested with a large share of it. Other judges and voices of the day disagreed. Junius, of course, was among them, but most vigorously in opposition to Mansfield on this subject was Lord Camden, Lord Chancellor during the 1760s. Camden, dissenting in a case involving the Statute of Frauds, would have rejected a witness because the witness had a nominal interest in the subject of the suit, thus disqualifying him. In a prior case, Mansfield had ignored a comparable nominal interest in a witness. In the Statute of Frauds case, Lord Camden criticized and rejected Mansfield's earlier ruling, even though Camden 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." In Camden's view, "the discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; 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."¹¹

Blackstone in his *Commentaries* took a different view. According to William 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."¹²

Many illustrations could be given of the third variant of judicial activism, making new law. This can happen when a common law court declares a new basis for liability that protects the individual from some form of invasive, exploitative, or overbearing behavior. In twentieth-century American law, this could be illustrated by the new torts of the negligent infliction of emotional distress¹³ and the abusive discharge of an employee.¹⁴ These examples would be cited as improper by those who think that judicial activism has produced undesirable fetters on the business community. Lord Mansfield, however, made much new law that was welcomed by the business community. As noted earlier, Mansfield and his merchant juries folded into the common law many of the prevailing mercantile practices of the day. Although this probably would not be called an inappropriate exercise of judicial discretion, it surely was judicial activism.

There were times, it must be acknowledged, when Mansfield went too far. A well-known example is the case of *Pillans and Rose v. Van Mierop*,¹⁵ involving an international sales transaction on paper credit. Suit was brought by a Rotterdam bank against a London bank on the basis of a written assurance from the London bank that it

11 Lord Camden's Argument in *Doe on the Demise of Hindson, et Ux. et al. v. Kersey*. Wherein Lord Mansfield's Argument in *Wyndham v. Chetwind* is Considered and Answered (1766) 50, 88.

12 W. Holdsworth, "Some Aspects of Blackstone and His Commentaries," 4 Cambridge L.J. 261, 272 (1932). See also W. Holdsworth, "Blackstone's Treatment of Equity," 43 Harv. L. Rev. 1 (1929).

13 See in general D.B. Dobbs, *The Law of Torts* (St. Paul, Minn., 2000) 835-52.

14 See *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). Dissenting Justice Grimes protested: "I cannot subscribe to the broad new unprecedented law laid down in this case." *Id.* at 135.

15 3 Burrow 1663, 97 English Reports 1035 (1765).

would extend credit to one of its depositors, but by the time the Rotterdam bank sought to collect, the depositor had gone bankrupt and the London bank refused to back him up. The London bank had received nothing for its written assurance to the Rotterdam bank, but Mansfield thought this unimportant, stating, "I take it, that the ancient notion about the want of consideration was for the sake of evidence only," adding that, "In commercial cases amongst merchants, the want of consideration is not an objection." Dispensing with the doctrine of consideration in mercantile cases was a dramatic example of making new law, but Mansfield was prepared to go even farther. In an unreported case in 1775, an uncle had written out a promise, based on his love and affection for his niece, that his executor would make a designated bequest to the niece. The uncle had the document attested by two witnesses, but it was not included in his will, and after he died, the executor would not honor it. The niece brought suit, and the executor defendant argued that the uncle's promise was unenforceable "because it was nudum pactum and without consideration." Mansfield held that the uncle's promise "was binding in conscience and in law," explaining that "the doctrine as to nuda pacta was borrowed from the civil law, intended only to guard against rash promises and such as were given inconsiderately or made in consequence of surprize ... and he could not find one case in which it had been determined that a gift or a promise to give, in writing attested by witnesses, had been set aside as a nudum pactum."¹⁶ Lord Mansfield's assault on the doctrine of consideration stood for a dozen years, but it was overturned by the

House of Lords in 1778 in the case of *Rann v. Hughes*.¹⁷

My fourth variant of judicial activism is when judges manipulate precedent to reach a desired result, playing fast and loose with *stare decisis*. If Lord Mansfield agreed with a principle established in prior cases that appeared to be applicable to the facts of the case before him, he might find it convenient to declare those cases controlling. If he disagreed, however, there were several ways around adverse precedents. Declarations in prior cases could be dismissed as "mere dicta." The accuracy of the printed report of a prior case could be questioned, which was an especially attractive method if a reporter was not well respected. And regardless of a reporter's reputation, it was frequently possible to produce a manuscript version of a prior case with content that varied from the printed report. Or close analysis of a report could almost always produce factual differences that would permit a prior case to be distinguished.

No official court reporting existed in England until well into the nineteenth century. For the most part in earlier times, judicial decisions were brought into print only when enterprising individuals (often young barristers or attorneys) attended court, took notes of the cases, and arranged for their publication. Thus it was possible to discount a printed case report because the reporter was young, inexperienced, or incompetent, or because the notes of cases had never been intended for publication. In a case decided during his first term on the bench,¹⁸ Mansfield was urged to follow a decision by Chief Justice Holt that was reported by Lord Raymond, to which Mansfield responded: "These

16 Losh's Case, Eldon MSS, Notes of Cases 1775, fol. 53, Georgetown University Law Library, Washington DC, discussed at English Common Law in the Age of Mansfield, 85–86.

17 7 Term Reports 350 n[a], 101 English Reports 1014 n[a], 4 Brown's Parliamentary Cases 27, 2 English Reports 18 (1778).

18 Cooper v. Chitty, 1 Burrow 20, 97 English Reports 166 (1756).

Notes were taken in 10 W.3 [1698] when Lord Raymond was young, as short Hints for his own Use: But they are too incorrect and inaccurate, to be relied on as Authorities.”¹⁹

The truth is that Lord Mansfield was much more interested in establishing and applying sensible, fundamental principles than he was in adhering to past decisions. At times he “talked the talk” of *stare decisis*, but at other times, he was more candid. In *Jones v. Randall*,²⁰ for example, suit was brought on a wagering promise that a decree given in the Court of Chancery would be reversed in the House of Lords. Lord Mansfield said that there was no applicable positive law, nor was there any case in the books on point, and then observed: “The law would be a strange science if it rested solely upon cases: and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Richard I to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty’s sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself, much less the whole of the law.”²¹

The fifth, sixth and seventh variants of judicial activism relate to statutes. The fifth is expansive statutory interpretation, and of this a lively example can be given in cases

that came before Lord Mansfield during the 1770s. The French Ambassador to England at the time was the Chevalier d’Eon. To all appearances in London the Chevalier was male, but reports began to circulate that in France, he dressed as a female. This excited the gentlemen of the coffee houses in London, and wagers began to be placed on whether the Chevalier d’Eon was male or female. According to the London Chronicle of 5 May 1777, “upwards of £120,000 have been under-written at various times, on this mysterious event.” Eventually the parties to these wagering contracts began to claim sufficient evidence to demand collection and several such disputes ended up in litigation. Three cases came before Lord Mansfield. Mansfield was disgusted by the nature of the evidence presented – testimony by physicians, apothecaries, chambermaids and the like – and wished “it had been in his power, in concurrence with the Jury, to have made both parties lose,” but the Jury returned a verdict for the plaintiff for £700.²² In the second case, plaintiff also recovered the verdict, but, after argument, the judgment was arrested by the Court of King’s Bench on the basis that the court would not countenance the introduction of indecent evidence affecting third persons who were not parties to the litigation.²³ In the third case, again the plaintiff recovered the verdict,²⁴ but it was

19 1 Burrow at 36.

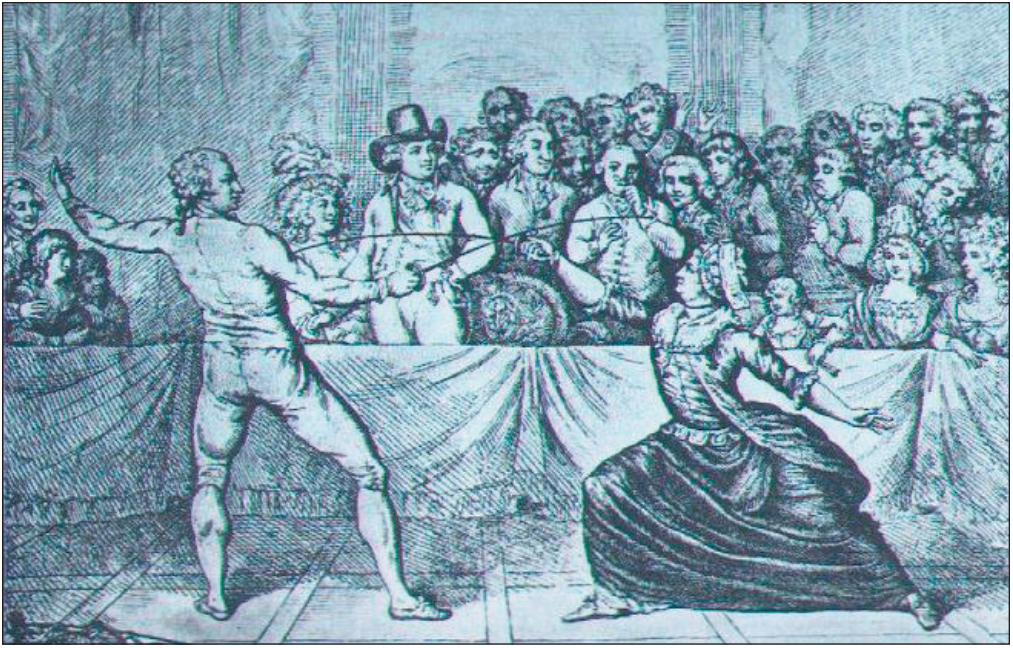
20 1 Cowper 17, 37, 98 English Reports 944, 954, Lofft 383, 98 English Reports 706 (1774).

21 Lofft at 385.

22 *Hayes v. Jacques*, reported in the Morning Chronicle, 2 July 1777, discussed at Mansfield Manuscripts I: 536.

23 *Da Costa v. Jones*, 2 Cowper 1729, 98 English Reports 1331 (1777); Mansfield Manuscripts, I: 534.

24 In the lawsuits, the plaintiffs all claimed that d’Eon was female and introduced evidence sufficient to convince the juries. D’Eon lived to be 81, dying in 1810, and for the last 14 years lived in the companionable company of another woman of the same age. When d’Eon died, the widow companion, in dressing d’Eon’s body for the funeral, discovered what was to her a shocking truth – d’Eon had been entirely male all along. Doctors were summoned to verify, and they even explicitly rejected the hermaphrodite possibility. See Gary Kates, *Monsieur d’Eon is a Woman*, Basic Books (New York, 1995) xi-xiii. The notoriety of the d’Eon business is illustrated by Kates’s “Bibliography of Works By and About d’Eon,” which occupies five printed pages. *Id.* at 349–53.



The Chevalier d'Eon.

thrown out by the Court of King's Bench on the basis of a statute enacted in 1774.²⁵ The wagering bargains in the first two cases had been entered into before 1774, but in the third case, the contract was made after the statute became effective. The statute was entitled, "An Act for regulation of Insurances upon Lives, and for prohibiting all such Insurances, except in Cases where the Persons insuring shall have an Interest in the Life or Death of the Persons insured." This principle – that one must have an insurable interest in order to purchase a valid life insurance policy

– remains a familiar feature of insurance law. The text of the 1774 statute, however, invited expansion beyond the standard life insurance policies, providing that "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering."²⁶ In the third d'Eon case to come before Mansfield, the court seized upon the

25 14 George III c. 48.

26 *Id.*, emphasis added. The final phrase – "or by way of gaming or wagering" – might seem to cover the d'Eon situation, but it is unlikely that this language would have been so viewed when the statute was enacted. The 1774 life insurance statute was adapted from a more lengthy 1746 statute entitled, "An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and the Merchandizes or Effects laden thereon." 19 George II, c. 37. Although there were some exceptions, the earlier statute basically invalidated insurance contracts on ships or cargo that provided for payment in case of loss, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering." In the prefatory language, these contracts were described as "a mischievous kind of gaming or wagering, under the pretence of assuring the risque on shipping." Thus it was unsurprising to see the expression "or by way of gaming or wagering" repeated in the 1774 life insurance statute. The 1746 statute applied only to insurance contracts on ships and cargo, and it was at first supposed that the 1774 statute was comparably addressed only to insurance contracts on lives. The 1774 statute, however, had a potent internal expansion joint – the expression "or on any other event or events whatsoever."

italicized language and disposed of the case in an opinion covering only one page in the printed reports.²⁷

Statutes can, of course, be read strictly as well as expansively, and this brings us to the sixth variant of judicial activism. In Lord Mansfield's court, this variant is dramatically illustrated by cases involving restrictions on Catholics and upon those who observed Protestant religions other than the Church of England ("Dissenters"). Mansfield's famous intervention on behalf of the Dissenters occurred in the House of Lords when the case of *Chamberlain v. Evans*²⁸ landed there after 13 years of litigation. The Corporation Act of 1661 required that anyone holding government office or municipal membership must take the sacrament under Church of England rites, and in 1748, the Corporation of the City of London concocted a scheme (through a bylaw) that imposed a whopping fine (£400–600) on anyone who refused to stand for or serve as Sheriff. Then for six years, the Corporation chose non-conformists for Sheriff, and used the fines that resulted to finance the building of the Mayor's residence, the new Mansion House. In 1754, three dissenters who had been nominated for Sheriff refused to pay or conform, thus producing the *Chamberlain v. Evans* case. Lord Mansfield's speech in the House of Lords supporting the non-conformists was printed in full by John Holliday, Mansfield's first biographer. Among other things, Mansfield stated that "there is no usage or custom, independent of positive law, which makes non-conformity a crime." He then declared, in language that would

later infuriate Thomas Jefferson, that "The eternal principles of natural religion are part of the common law. The essential principles of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them, may be prosecuted at common law. But it cannot be shewn, from the principles of natural or revealed religion, that, independent of positive law, temporal punishments ought to be inflicted by mere opinions with respect to particular modes of worship."²⁹

In the 1770s, Mansfield presided over several prosecutions of Catholics under Elizabethan and Jacobean statutory restrictions. He stated his general views about these statutes in the case of *Foone v. Blount*³⁰ as follows: "The statutes against Papists were thought when they passed, necessary to the safety of the state: Upon no other ground can they be defended. Whether the policy be sound or not, so long as they continue in force, they must be executed by courts of justice according to their true intent and meaning. The legislature only can vary or alter the law: But 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."

Earlier, after a successful prosecution at the Surrey Assizes in the summer of 1767 against an Irish priest, John Baptiste Maloney, for "unlawfully exercising the functions of a Popish Priest," the conviction provoked Mansfield and the other common law judges to take a stand. A meeting of all twelve judges was called, and according to one scholar in a study of the anti-Catholic prosecutions,

27 *Roebuck v. Hammerton*, 2 Cowper 737, 98 English Reports 1335 (1778); see also Mansfield Manuscripts I: 539 for Mansfield's trial notes of the case and for additional information from the pleadings.

28 Reported in P. Furneaux, *Letters to the Honourable Mr. Justice Blackstone Concerning His Exposition of the Act of Toleration*, 2d ed. (London, 1771) 251–84.

29 J. Holliday, *The Life of William Late Earl of Mansfield* (London, 1797) 255.

30 2 Cowper 464, 98 English Reports 1188 (1776).

“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.”³¹ The strategy worked. During the next decade, no prosecution of a Catholic for saying mass or for refusing to take oaths was successful, and in 1778 Parliament enacted the Catholic Relief Act.³²

It is worth noting in passing that Mansfield paid a heavy price for his outspoken stance in favor of religious toleration. In 1780, anti-Catholic riots erupted in London, led by the agitation of the Protestant Association, headed by a minor member of the Scottish nobility, Lord George Gordon. Although the mob pillaged and burned indiscriminately, the leaders also sought out specific targets, one of which was Lord Mansfield’s house in Bloomsbury Square. Mansfield and his wife narrowly escaped out the back door, but the mob then invaded the house and heaved all of the books and papers in Mansfield’s splendid private library into the street and into a bonfire. The full story of the Gordon riots is accurately told in one of Charles Dickens’ lesser novels, *Barnaby Rudge*.

My final example of judicial activism – refusing to abandon a statutory proscription after its repeal – may have no modern application, but we can see an interesting example of this practice in the hands of Mansfield’s successor as Chief Justice of the Court of King’s Bench, Lloyd Kenyon. In the sixteenth century, statutes were enacted to restrict “cornering-the-market” practices with regard to corn, other agricultural produce, and livestock. The statutes persisted until

the late eighteenth century, but they were repealed in 1772, Parliament having concluded that the statutes in fact prevented free trade and artificially inflated prices. Chief Justice Kenyon disagreed, and when opportune cases came before him after he took office in 1788, he continued to prohibit the practices by simply invoking his authority as a common law judge. His efforts, however, were short-lived, as Kenyon’s successor, Lord Ellenborough, refused to continue to enforce “these obsolete laws which the legislature had expressly repealed.”³³



Views will differ about whether the various forms of judicial activism that have been discussed are a good thing or a bad thing. In my view, reasonable judicial discretion and whatever activism that produces are essential parts of our common law system, especially since law and equity have long ago been merged. Admittedly I may be influenced by my immersion in the career of Lord Mansfield and his extraordinarily constructive contributions to our common law heritage. With regard to statutes, I think that Bill Eskridge is exactly right in his recent historical study describing judges’ inherent power to discern “the equity of the statute,” to supply omitted cases, and to supplement.³⁴

Finally, for those who disapprove of judicial activism or would prefer to constrain it, what are the possibilities? One is to endorse textualism or originalism – the strict interpretation favored by Justice Scalia. Another would be to revive the process of codi-

31 J. Innes, “William Payne of Bell Yard, Carpenter 1718–1782: The Life and Times of a London Informing Constable,” unpublished paper [1980], quoted with permission.

32 18 George 3, c. 60. For details, see Mansfield Manuscripts II: 870–881.

33 See discussion at *English Common Law in the Age of Mansfield*, 265–66.

34 See W. Eskridge, “All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776–1806,” 101 *Colum. L. Rev.* 990 (2001).

fiction, attempting to anticipate as much as possible the aspects of social interaction in need of regulation, and to prescribe rules as appropriate. This would, of course, return us to the nineteenth-century world of David Dudley Field³⁵ in the United States and Jeremy Bentham in England. Bentham famously remarked that the common law ought to be called “dog law,” since it operated in the same way as kicking one’s dog after it misbehaved. But as David Lieberman has explained, Bentham was hopelessly idealistic about codification. According to Lieberman, Bentham proposed that codes of behavior were 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.”³⁶ Examples Lieberman quotes (from the Bentham manuscripts at University College, London) include: “Laws relative to Parochial Affairs should be hung up ... in every Vestry;” “Laws relative to Commercial Contracts in general in the [stock] exchange,” and “Laws relative to the internal economy of Houses to be stuck up in Houses.”³⁷

Codification seemed to have a resurgence in the United States in the twentieth century in Karl Llewellyn’s inspired leadership that produced the Uniform Commercial Code. But as Richard Danzig pointed out, the UCC is sharply different from the codes envisioned by Bentham and Field, in that

the UCC, despite its superficial appearance of certainty, is riddled with indeterminacy and requires the frequent intervention of judge and jury for resolution of particular cases.³⁸

A third possible method of constraint will serve to conclude these reflections on judicial activism, and I will leave it to the reader to decide what to make of it. In a recent article in the *Harvard Law Review*, Nicholas Rosenkranz proposes that Congress should enact the “Federal Rules of Statutory Interpretation.”³⁹ After working through what he views as the advantages of such a scheme, Rosenkranz makes three proposals. “First, Congress could provide: ‘When Courts have recourse to a dictionary in interpreting any federal statute enacted after this one, it shall be the Oxford English Dictionary, second edition, and no other.’”⁴⁰ Second, the indeterminacy of canons of interpretation should be eliminated by having Congress scroll down a list of canons and choose which ones to enact, favoring clear-statement rules over vague presumptions. Third, Congress could end the quarreling about whether judges should or should not rely on legislative history by enacting a one-sentence statute: “The United States Code shall [or shall not] be interpreted with deference to pre-enactment legislative history.” Rosenkranz calls the second and third of these suggestions a “Canons Enabling Act”

35 For a useful compilation about Field and his philosophy, see David Dudley Field: Centenary Essays Celebrating One Hundred Years of Legal Reform, A. Reppy, ed. (New York, 1949). See also S.N. Subrin, “David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,” 6 *Law & History Rev.* 311 (1988); S. Herman, “The Fate and the Future of Codification in America,” *XL American Journal of Legal History* 407 (1996).

36 D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (New York, 1989) 250–51. See also my review of Lieberman’s book, “From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth-Century Britain,” 89 *Mich. L. Rev.* 1637 (1991).

37 D. Lieberman, *The Province of Legislation Determined*, 250.

38 R. Danzig, “A Comment on the Jurisprudence of the Uniform Commercial Code,” 27 *Stan. L. Rev.* 621 (1975).

39 N. Rosenkranz, “Federal Rules of Statutory Interpretation,” 115 *Harv. L. Rev.* 2085 (2002).

40 Perhaps Justice Scalia would prefer Webster’s, so as to avoid a *foreign* dictionary.

and an “Acts Interpretation Act,” respectively. He views his first proposal – the Dictionary Act – as “entirely unobjectionable,” and he argues that all three suggestions are desirable, feasible, and inoffensive to Article III of the Constitution.⁴¹ *GB*

⁴¹ For the full treatment of the three proposals, see 115 Harv. L. Rev. 2147–57.