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Review of The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain

Thomas A. Green
University of Michigan Law School

of our knowledge of the children's book trade in the century after John Newbury. It adds a few names to a familiar list, but partakes of the same antiquarianism as earlier scholarship. Jackson does usually avoid the anachronistic standards of judgment and the limited sympathies that warped former histories. One can hope that the work will inspire interest in this amazing subject, even if it does not ask very searching questions about authors or readers.

University of Florida C. JOHN SOMMERVILLE

David Lieberman. *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain.* New York: Cambridge University Press. 1989. Pp. xiv, 312. $44.50.

David Lieberman's lucid and sure-footed reinterpretation of late-eighteenth- and early-nineteenth-century jurisprudence is original, thoughtful, analytically acute, and a pleasure to read. Lieberman argues that Bentham's law reform ideas must be viewed in relation to earlier (and contemporary) reform traditions. Bentham's views were more complex than the long-held myth would have it, partly because they were more derivative, at least in his early enterprises, combining as they did a reception of earlier notions with the novelty for which he is usually credited. Blackstone and Mansfield, on this account, were not the match stick figures they are sometimes made out to be; the former was not the complacent jurist oblivious to the need for reform, and the latter was not the purely instrumentalist, piece meal reformer who lacked a sense of system that embraced the most fundamental ideas of common law and equity. As Lieberman shows, both Blackstone and Mansfield sought to create a system of common law and legislation in which fundamental principles dominated, and wherein what was fundamental rested upon a principled melding of custom and reason. Both sought to simplify and to prune the law, to make it more widely accessible and acceptable, not only for its usefulness, but also for its appeal to an ethically-based and rational embodiment of tradition. And both shared the widespread impression that, as things stood, Parliament not only lacked the ability to undertake such reform, but was in fact engaged in a legislative spree that threatened to obscure – or even destroy – whatever coherence the common law still possessed. Neither succeeded in constructing a truly new, "scientific" form of legislation; therein lay Bentham's originality, but even Bentham could not have achieved his breakthrough without having worked toward it on the basis of the principles (including a kind of "science of legislation") of the earlier reform traditions.

In his analysis of the *Commentaries* Lieberman argues convincingly that Blackstone's passages on parliamentary sovereignty did not render his discussion elsewhere of natural law mere "lip-service." We are left, as Lieberman shows, having to reconstruct Blackstone's understanding of the dilemma posed by Parliament's *de jure* sovereignty in a world in which truly "good" law had to meet certain ultimate standards. And that reconstruction requires an understanding of the role of natural law in Blackstone's "account of common law legitimacy." Of course, the problem of sovereignty melts away if one accepts the will of Parliament as *necessarily* reflecting the ultimate judgment on the true ("natural") principles of English law. Blackstone surely understood that point, but he found it difficult to conceive of Parliament in that way. Lieberman might have said more on this matter, for which he has well laid the foundations. If Blackstone – among many others – thought Parliament incapable of creating a coherent system of law, he surely found it difficult to believe that statute was of necessity an expression of the very natural law principles upon which he thought

such a system must ultimately be based. In the end, Blackstone, as Lieberman states, recognized the "evasiveness" of his position (p. 55), and left us an account that we ought neither to make more coherent than it was (by not taking his natural law language seriously) nor to make less coherent than it was (by losing sight of Blackstone's principled approach to distinguishing good from bad common law). Lieberman's analysis of Blackstone's "science of legislation" must be read together with the brief but insightful ensuing chapter on "Equity, Principle and Precedent." Blackstone saw the common law as both principle and precedent; the common law contained its own equitable side, and equity, like the common law, was bound by precedent for reasons of stability and expectations. The natural-law element of common law is now seen as uniting with equity, which Blackstone did not consider an entirely separate system. Judicial "reform" of the law, which (relative to Parliament) could amount to a preemptive strike, becomes a model for what legislative reform ought to be.

There was a tension, of course, between Blackstone's adherence to precedent (in common-law opinions) for reasons of stability and certainty and his insistence that Parliament remove excrescences upon the law that were the unfortunate result of ad hoc historical developments. Parliament is adjured to prune away rules that a common law court might feel bound to follow in a given case. Too little is said, perhaps, about the difference between adjudication of a case at hand in a common law court and alteration of the law, in the abstract (as it were), by legislative decree. Nonetheless, taken together, the first three chapters of Lieberman's book constitute a remarkable reconstruction of a Blackstonean system of jurisprudence that embodied reformist principles, natural law boundaries, and a theory of precedent that was in constant tension with both.

Toward the close of Chapter 3, Lieberman remarks that Mansfield "took precedents to be illustrations of those rational principles which were the essence of common law," and he argues that "if common law was principle, then the law resembled equity" (pp. 86–87). This, Lieberman concludes, was a theory that gave the common law considerable flexibility. Subsequent chapters then reveal Mansfield at his most flexible, while making a convincing case for his adherence to what he took to be settled common-law principles, or "natural principles" upon which the common law ought to be settled. Mansfield's contemporaries quite understandably exaggerated the degree to which he departed from the common law or – more to Lieberman's point – failed to understand that Mansfield himself believed he was remaining within the appropriate bounds of the common law. It should be pointed out that if Mansfield's English contemporaries misunderstood what he was attempting to do, so, too, did those who viewed him from afar. Jefferson, among others, saw Mansfield as dangerous because arbitrary, as a threat to the natural-law (and so, presumably, to the immutable) quality of the common law. Lieberman would have much to offer should he turn in future work to the American assessment of Mansfield or, for that matter, to the relationship between Joseph Story's science of the law (developed in part as a defense against those who favored legislative codification) and Mansfield's own (as Lieberman subtly places it) anti-legislative theory of common-law reasoning.

Finally, Lieberman's discussion of Blackstone's more "conservative" approach to precedent (i.e., more conservative than Mansfield's), is effectively reintroduced. Lieberman shows how Bentham seized on this difference in the *Fragment*, reviling Blackstone for his conservatism, and siding with Mansfield, despite the fact that the latter had wanted to scuttle precedent to achieve judicial, as opposed to legislative, reform of the common law. The

counterpoint among the major characters has by this point become one of the central devices of Lieberman's book.

Lord Kames is a welcome addition to the cast of characters, and to our attempts to understand the transition from Blackstone to Bentham. Lieberman's detour northward involves a masterly and economical placing of Kames, whose general principles of moral and legal development are smoothly set forth; the ironies of the Scottish situation, both domestically and in relation to the Westminster-based Parliament, are artfully sketched. Kames prefigured Benthamite principles of utility but, quite naturally, looked to the *bench* – not the legislature – as the obvious institution for reform. Lieberman points out that Kames practically turned the court of equity into a mini-legislature and shared his contemporaries' misreading of Mansfield. This establishes, it seems to me, yet a further irony: Mansfield was, in fact, a principled judicial common-law reformer, not a quasi-legislator (i.e., not a purely instrumentalist reformer of common law); Kames saw him largely as the latter, and so was well disposed toward the process of judge-based reform. Had Kames known the true Mansfield, he might – but for the "accidental" reasons that made parliamentary reform of Scottish law most unlikely – have tilted in the other (legislative) direction. Having brought the varieties of common-law reform to light – and life – Lieberman turns to legislative reform. Here the common lawyers' doubts about legislative tinkering with the common law (and about creation of new legal rules generally) reappear, this time through the eyes of Daines Barrington. Consolidation and classification ("Baconian" reform) was invoked in the period, but little more. Even in penal law the reformist impulse was limited to revision of the law of sanctions. Once again, contemporaries' misunderstandings are central to the story: Bentham saw in Barrington a real ally and a contrast to Blackstone; in fact, Barrington and Blackstone had much in common – Bentham failed to see that Blackstone, too, had a prescription for some kind of legislative reform.

Because Lieberman's concluding chapters on Bentham succeed in placing Bentham in relation to those who went before, he is able to characterize and analyze a great deal of Bentham's jurisprudence in short compass – truly a tour de force. The transition from Bentham's modest science of consolidation and classification to his true science of legislation is effectively handled and gains its interest largely from the long-range perspective Lieberman has provided. Bentham's critique of common law (really, non-law) is familiar, but against the background of all that has gone before, it takes on welcome freshness. It must be recalled that Bentham caricatured Blackstone, but, as Lieberman shows, Bentham well understood his predecessors' complex and varied arguments regarding the nature of the common law (if not always their attitudes toward legislation). Thus, Bentham's (eventual) radical anti-common-law position can not be passed off as a reaction against a simplistic identification of common law with natural law. It was, this fine book argues, a conscious rejection of the far more sophisticated notion of the "reason" of the law that Mansfield and others, as well as Blackstone, had set forth.

University of Michigan THOMAS A. GREEN