In This Issue

Law is formed in an arena of debate and disagreement, but who are the participants—the possessors of mandarin expertise, common folk, both?—and what resources do they command? In this issue four articles deal predominantly with the question of what guides legal change. One article also asks whether religious observances have impeded access to law.

In our first article, Eric Reiter dwells on the modalities of cross-cultural jurisprudential influence. Legal ideas traveled easily in the nineteenth century, Reiter tells us, but they were always modified and shaped in transmission and reception. His article uses the material evidence of mid-nineteenth-century Quebec legal culture—the periodicals, books, and libraries that brought ideas and individual readers together—in order to understand the complex roles that foreign jurisprudence played in the law reform debates that accompanied private law codification. Quebec lawyers were keen consumers of exotic European jurisprudence, such as the debates in Germany on codification by Savigny and Thibaut translated (both literally and intellectually) in contemporary French legal periodicals. Though these ideas had little direct influence on the course of debate in Quebec (despite parallel issues of the relative merits of codification and fidelity to the old law being raised), they did help both supporters and critics of codification to clarify the terms of debate. In the search for intellectual models that is a part of any law reform process, the dialogue between ideas, the intermediaries who shape them in passing them along, and the expectations and assumptions of the audience are crucial aspects of the formation of legal identity. In Quebec, this encounter with imported ideas, and particularly imported ideas as polemicized in the legal periodicals of the day, helped bring out the nationalist implications of the undertaking to reform the private law.

In our second article, Duncan Kelly offers an account of influence in legal culture that also dwells upon the intellectual. In mainstream American and European legal historical scholarship, Georg Jellinek is best known for the theory of the "two-sided" and "self-binding" character of the state offered in his *Allgemeine Staatslehre* (1900). Among other historians, however, he is probably best known for his slim volume, *The Declaration of the Rights of Man and the Citizen,* and in particular for the sharp reply that his essay provoked from Émile Boutmy. Boutmy challenged Jellinek's central assertion that the French *Déclaration* of 1789 built upon the arguments of the

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American bills of rights. He also criticized the related argument that the sources of these bills could be traced to a combination of the individualism engendered by the Reformation, to modifications in traditional Teutonic conceptions of right and the state, and to various natural rights discourses. But Kelly finds the intellectual debate between Boutmy and Jellinek insufficient in one crucial aspect, namely that it tells us little about why Jellinek favored the arguments he put forward in the first place. His essay suggests the importance of an intellectual context for debate broadened beyond the particular arena of disagreement between Jellinek and Boutmy. The best way to understand Jellinek's account of the "origins" of the rights of man is to locate it within the wider framework of his own legal-historical researches. By focusing on the interrelationship between his discussion of rights and the state, contemporary debates about the nature of the American founding and international law, as well as the broader development of *Staatsrechtslehre* in Wilhelmine Germany, a more complete picture of Jellinek's political and legal-historical thought emerges.

Our third article broadens the context of legal formation to include the social. Astrid Cubano-Iguina studies violence against women under Spanish colonial rule as recorded in the court records of a judicial region of northern Puerto Rico. Her emphasis is thus on the day-to-day workings of Spanish criminal law enforcement, but her interest is as much in the material's legal-historical as its social-historical significance, for she pursues two interconnected arguments. First, she points out that, considered as legal categories, rape and domestic violence were undergoing alteration under the influence of changing and disputed notions of the masculine and the feminine in contemporary social behavior. Second, she shows how nineteenth-century judicial narratives were permeated by a modernizing impulse that attempted to deal with violence against women by domesticating male behavior, but that did not surrender a basic belief in male privilege. Modernizing judicial narratives, in other words, refined patriarchy rather than confronting it. Women meanwhile participated in the process of legal change by introducing their own narratives into the general arena of debates and definitions. The law, however, fell consistently short of their expectations. By observing the dynamics of juridical debate and dissension, Cubano-Iguina contributes to and builds upon the idea that the criminal law is a terrain of negotiations. But she also touches upon our understanding of the nature of legal change and the precise manner in which this was manifested on a daily basis. The particular Spanish colonial setting explored was immersed in the process of developing a competitive export agrarian economy and in need of a disciplined labor force organized with rationally distributed gender roles. Importantly, however, analysis of the process reveals no single-minded pursuit of goals inspired by higher au-

thorities wielding an expertise. Rather, what appears to take place is a negotiated process in which jurists, the police personnel, and common men and women all participate.

Our fourth essay, by Michael Lobban, is the second part of a two-part article discussing the reform of the English Court of Chancery. The first part appeared in our Summer 2004 issue (*LHR* 22.2), and the article as a whole is the subject of this issue's forum feature. By the early nineteenth century, the Court of Chancery was perceived to be in crisis: slow and costly, it bore all the hallmarks of a corrupt *ancien régime* institution. Lobban's article examines the process of reforming the court in the sixty years before the Judicature Acts of 1873–75 and, in so doing, provides further insight into the relative importance of different arenas of debate and different resources brought to bear on the process of effecting legal change. Debates over reform before 1852 were dominated by two issues. The first (which was explored in Part I) was the question of whether the court's allotment of judicial personnel was adequate to cope with the demands of litigation. Although this question attracted the most attention in contemporary political debate, it was not satisfactorily resolved. Politicians remained uncertain about the nature of Chancery's arrears and cautious about appointing new judges or altering the functions of the Chancellor. Political reform thus failed. The second issue (explored here, in Part II) was the technical question of how to simplify Chancery's complex procedures and reform its inefficient offices. The legal profession was the driving force behind major reforms in these areas, which were achieved by 1852. Professional expertise succeeded. With many of the old faults of the Chancery addressed, after the mid-nineteenth century reformers turned their minds toward a larger question of principle—the fusion of the courts of law and equity into a single judicature. Lobban's article is here made the subject of commentaries by Joshua Getzler and James Oldham. The forum concludes with Lobban's response.

Our final article, by Susanne Jenks, takes the form of an extended research note and commentary on the observance of Sundays and major religious festivals in the medieval Court of King'sBench. Secular moderns are of course used to the closure of public institutions on Sundays and holidays. But not inhabitants of the church-saturated fifteenth century. While Sundays were considered to be *dies non juridici,* they had a place within the legal system, especially within the mesne process. Moreover, Jenks's extended study of King's Bench's fifteenth-century plea rolls shows that all three kinds of bills accepted in the court could be proffered not only on Sundays but on major festivals as well. Indeed, she argues that the court was actually in session on those days. The initiative to open the court *coram rege* for litigation on a *dies non juridicus* was taken by the plaintiffs, not the court it-

self, which did not deliberately arrange to do legal business on those days. But amazingly (to us) nobody objected—not the members of the medieval church, not the judges, not even the defendants. Jenks chose bills for her study because the plea rolls provide exact days, not just return days, allowing study of the court's activities in detail. The various steps taken by bill litigants to get their cases submitted are illustrated for all three kinds of bills, namely Bills of Middlesex, Bills of Privilege, and Bills of Custody.

As always, the issue concludes with a comprehensive selection of book reviews. As always, too, we encourage readers to explore and contribute to the American Society for Legal History's electronic discussion list, H-Law. Readers are also encouraged to investigate the *LHR* on the web, at *www.historycooperative.org*, where they may read and search every issue published since January 1999 (Volume 17, No.1), including this one. In addition, the *LHR*'s own web site, at *www.press.uillinois.edu/journals/lhr.html*, enables readers to browse the contents of forthcoming issues, including abstracts and full-text PDF "pre-prints" of articles.

During the coming months, David Tanenhaus of the Department of History, University of Nevada, Las Vegas, will be assuming the editorship of the *Law and History Review.* His name duly appears on the masthead of the journal as "Editor-elect" and he stands ready to receive new manuscript submissions (see the Notes to Contributors). David will be editor *in situ* as of November 2004. Because of the lead-time necessary for the preparation of each issue of the journal, however, the content of all issues for volume 23 (2005) remains my responsibility as outgoing editor. Al Brophy will continue to occupy the position of Associate Editor (Book Reviews).

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