In This Issue

As 1999 winds to a close, and with it (give or take a year) both the twentieth century and the second millennium, it is perhaps appropriate that in this issue of the *Law and History Review* we pay our respects to the roots of our discipline, with articles and essays that explore issues of fundamental importance in the broad continuum of Anglo-American legal history, reaching from the nineteenth century back to the ninth.

Our first article, by Howard Schweber, reexamines the conception of science and scientific method to which nineteenth-century American legal educators had resort in developing their own idea of law as a science. Far from modern ideas of scientific method, Schweber argues, the conception of science that was appropriated by antebellum legal educators was that dominant in contemporaneous public discussion of natural science, as evidenced in lyceums, surveys, and journals. Public scientific discourse employed a language grounded in the same religious commitments and the same normative conception of nature that drove the ideology of laissez-faire. Legal scientific writers from the 1820s onward used that discourse to replace the historical jurisprudence of Hale and Blackstone and the moral legal science of Kent and Story, treating "law" as a species of natural object. Described here as "Protestant Baconianism," the approach was characterized by commitments to four elements: natural theology; a constrained version of Baconian inductivism; a belief in grand synthesis and proof by analogy; and claims of moral improvement. In the natural sciences, respect for the Protestant Baconian conception of science did not survive the Civil War. In law, Schweber argues, the story is a little different. Attempting to continue to invoke the powerful idea of "legal science," Christopher Columbus Langdell assembled the remnants of the Protestant Baconian approach into his case method. In the 1870s, that is, crucial elements of the discredited antebellum approach to natural science were given new life in Langdell's "new" model of legal science. These surviving elements of an earlier natural scientific tradition have continued to influence legal education to this day.

In our second article, Martin Wiener undertakes a close inspection of English trial and post-trial proceedings in cases of murder during the nineteenth century, resulting in an elucidation of several developments of considerable importance to the history of English criminal law. Wiener finds significant tension between judges increasingly determined to repress in-

terpersonal violence and juries increasingly receptive to defense arguments for mitigation. He further finds that, in conjunction with a wider contemporaneous reconception of notions of personhood and responsibility in the general culture, this tension had an impact upon the law of criminal responsibility. Judge-jury conflict both exhibited and contributed to movement in the effective meanings of legal terms such as provocation, intention, and insanity. Judges propagated, and juries gradually accepted, the idea of the "ordinary reasonable man," who was expected not to be easily provoked, nor to become dangerously intoxicated. On the other hand, juries (and the home office) were increasingly receptive to insanity defenses scorned by judges. By 1900, Wiener shows, the scope of provocation and lack of intention defenses had narrowed, while that of insanity had broadened.

Our third article, by Norma Landau, maintains our focus on English court proceedings while removing us from the nineteenth century to the eighteenth, and from murder trials to the more prosaic stuff of Quarter Sessions. Based on research on the general releases in the papers of Middlesex's Quarter Sessions, Landau argues that the overwhelming majority of eighteenth-century indictments at Quarter Sessions for such offenses as assault, riot, and other nonfelonious offenses against the person were actually brought by prosecutors using indictment as a means to extract compensation in some form from defendants. Releases, she tells us, have not been analyzed in discussions of early modern English courts. Research on the Middlesex releases shows that, for a very large proportion of indictments found at Quarter Sessions, defendants satisfied their prosecutors, who then signed releases that rendered them unable to prosecute the indicted defendants. The court of Quarter Sessions facilitated such settlements and even adopted procedures designed to encourage defendants to satisfy their prosecutors. This finding raises important questions about the assumptions defining categories basic to current discussion of early modern crime and the courts. Quarter Sessions has been categorized as a "criminal" court, indictments as "criminal procedures," and defendants to these indictments as putative "criminals." But in these indictments both the court's procedures and the protagonists' behavior actually bear considerable resemblance to proceedings on civil suits.

Our fourth article, by Mike Macnair, also offers a remarkably interesting reassessment of an institution fundamental to received notions of the meaning of legal proceedings, and provides us with our "forum" for this issue. In his article, Macnair lays out a new approach to the venerable question of the origins of trial by jury. The traditional approach, Macnair tells us, investigated the character of the jury as a system of lay judgment. In contrast the "Brunner thesis," dominant until recently, focused on early juries as forms of royal inquiry. In recent years scholars have favored ap-

proaching the jury as a survival of early medieval practices in which collective testimony and judgment were indistinct. Macnair departs from all three of these tendencies, concentrating on the requirement that the jury come "*de visneto,*" that is, from the locality. The use of groups of "*vicini*" to establish local reputation to prove "local" facts, he argues, had antecedents in late Roman and early medieval normative sources; the uses of special panels of locals in Anglo-Norman England are most consistent with the ideas of these sources. Local reputation was probably an acceptable form of evidence at least in these "local" matters in eleventh-century canon law. The extension of the use of panels of locals under Henry II may therefore represent a compromise solution to conflicts of jurisdiction and procedure between the royal and church courts. This would explain the tendency to see jurors as a type of witnesses that persisted in later medieval common law doctrine; and this, in turn, in its own politico-legal context, may help explain the persistence of jury trial in the common law. Charles Donahue and Patrick Wormald comment on the significance of Macnair's argument and conclusions. The forum concludes with Macnair's response.

As usual the issue is rounded off by our book reviews and by another in our continuing series of electronic resource pages. In this issue's page, Terence Halliday of the National Institute for Social Science Information (NISSI) describes the potential of the Internet as a site for the dynamic organization of knowledge. As always, readers of the *Law and History Review* are encouraged to explore and contribute to the American Society for Legal History's electronic discussion list, H-Law, which offers a convenient forum for, among other matters, discussion of the scholarship on display in the *Review.* Readers will also find the address of the *Review*'s own web page displayed on the issue's contents page.

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