In This Issue

Beginning with this issue, *Law and History Review* enters its twenty-eighth year of publication, and it does so as a quarterly. Our new partnership with Cambridge University Press enables the journal to expand from 720 pages a year to more than 1,000 pages. This expansion reflects the vibrancy of the field of legal history and the central role that *LHR* plays in its development and internationalization. We now have the space to introduce our readership to the most innovative scholarship in the field, wherever that work is done.

Publishing original legal historical scholarship remains our core mission, including periodically running special issues to address topics of broad interest. We will also continue to feature forums, including one later this year on family law, religion, and the "personal law system" in Colonial India. We will commission field review essays, legal history dialogues, and review more non-English language books. Finally, as the memorial to John Hope Franklin at the end of this issue attests, *LHR* will publish reflections on scholars who have made lasting contributions to legal history.

The beginning of this new partnership is also an opportunity to thank our prior editors, past and present members of our editorial board, our splendid referees, and our readers. We also owe special thanks to the University of Illinois Press for its long and successful stewardship of *LHR*. It is now time to work with Cambridge University Press to expand our coverage and to engage more readers in the United States and abroad.

Our first article, by Lauren Benton and Benjamin Straumann, is a fitting and proper beginning to this new era. It examines the extent to which the Roman law concept of "unowned things" (*res nullius*) was used to support early modern European claims to territory outside Europe. After reviewing sometimes contradictory approaches to *res nullius* in recent scholarship, the authors argue that a fuller understanding of the Roman law background of *res nullius* is necessary and provides the basis for a clarifying distinction between early modern political thought and imperial practice. When early

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modern writers and thinkers on the law of nations used *res nullius* in the debates surrounding European expansion, the concept often served to criticize and undermine the legitimacy of imperialism. Perhaps its most consequential use in early modern writings was to help establish the doctrine of the freedom of the high seas. Imperial agents applied the concept much more vaguely in their pronouncements and actions "on the ground," and they tended to combine mainly indirect references to *res nullius* with symbolic acts linked to a broader set of ideas and practices, including the acquisition of sovereignty by consent. Another Roman doctrine, the doctrine of possession, according to Benton and Straumann, appears to have been more prominent than *res nullius* in defending claims against competing empires.

Our second article, by Ian Williams, examines the impact of printing on English common law. Through an analysis of common lawyers' attitudes towards the use of printed material in legal argument during a period in which the printing of common law books was subject to a monopoly patent before the English Civil War, he shows an emerging preference for printed material in legal argument. Manuscript material was never excluded from legal argument, he notes, although some attempts were made to do so, especially by the Crown. Such attempts were motivated by tactical concerns in individual disputes and show that in this period lawyers could use legal printing as a device for legal conservatism, seeking to prevent change in legal doctrine. Techniques were developed to assess the "credit" of texts, just as occurred in other areas, but with certain uniquely common-law justifications for the role of print also enunciated. In the legal context, lawyers generally applied those techniques to both print and manuscript, but it had the effect of elevating the role of printed sources. Williams concludes that arguments asserting an exclusive role for print tended to rely upon appeals to medieval language and ideas.

Our next two articles focus on nineteenth-century efforts in the United States and England to make a decisive break with past practices. Cynthia Nicoletti argues that in the aftermath of the Civil War, Americans struggled to come to grips with the realization that military conflict rather than the legal process had settled the long-standing debate over the constitutionality of secession. In so doing, many thinkers likened the Civil War to the medieval legal practice of trial by battle, in which a violent struggle between two litigants determined the outcome of a legal dispute. Employing this language allowed unreconstructed southerners to console themselves with the knowledge that the logical rationale for the right of secession had not been repudiated, even though the war had made exercise of the right impossible. Simultaneously, triumphant northerners used this metaphor in an effort to lend the imprimatur of a legal action to the violent

turmoil of war. But Americans who analogized the war to a trial by battle also faced the uncomfortable realization that their society, which prided itself on its enlightened rationalism and adherence to the rule of law, had invoked a repudiated medieval superstition in confronting the most contentious legal issue of their time. Thus, Nicoletti calls into question the often unspoken but universally accepted historical wisdom that secession died an easy death at Appomattox, and she highlights the difficulty with which many Americans came to accept the notion that a legal question could be resolved through violent means.

Like Nicoletti, Krista Kesselring also explores the persistence of legal ideals and practices. Until 1870, English felons risked forfeiting their property as a consequence of conviction. She explores both why the ancient sanction of felony forfeiture persisted as long as it did—and why it ultimately disappeared. Records of the operation of forfeiture show its use in allowing discretionary decision making. Records of the debates about forfeiture show how this discretion, lauded by some, became evidence for others of forfeiture's inconsistencies, injustice, and violation of "the spirit of the times." Its justification as a deterrent eroded. By the late nineteenth century, she demonstrates, changed cultures of punishment and of property introduced practical difficulties in forfeiture's operation and new reasons to oppose it, thus ensuring its demise.

Our fifth article, by Mark Finnane and Fiona Paisely, takes us to the colonial frontier in Australia during the 1930s. As Finnane and Paisely explain, the dependence of colonization on police was a core feature both of settler colonies and of colonial dependencies, from the middle of the nineteenth century to the postwar decline of the British Empire. After playing a key role in securing settlement against indigenous resistance, police agencies in most jurisdictions settled into a more domesticated management of social order. On still remote frontiers in northern Australia, evidence of violent policing could still provoke inquiry and even prosecution of individual cases, though with limited effect. Finnane and Paisley's article examines one such event, the death in 1933 of an Aboriginal woman at Borroloola in the Gulf Country of Australia's Northern Territory, and the subsequent (and rare) prosecution of a policeman over her death. Against a background of changing practices in the policing of late colonial frontiers, they analyze the factors shaping a decision to prosecute such a case, and those limiting the achievement of a measure of justice.

This issue's forum on "World War I and the Making of the Modern American Fiscal State" reveals how legal history serves as a window into the interconnections among economics, political development, and the rise of professionalism. The forum also contributes to the historiographical debate about whether World War I ended a long nineteenth century

for the United States of America. In his article, Ajay Mehrotra shows that World War I was a pivotal event for U.S. political and economic development, particularly in the realm of public finance. For it was during the war that the federal government ended its traditional reliance on regressive import duties and excise taxes as principal sources of revenue and began a modern era of fiscal governance, one based primarily on the direct and progressive taxation of personal and corporate income. Like other aspects of war mobilization, this fiscal revolution required an enormous infusion of national administrative resources. Nowhere was this more evident than within the corridors of the U.S. Treasury Department, the executive agency responsible for creating, managing, and defending wartime fiscal policies. Mehrotra examines the vital role that a particular group of Treasury department lawyers played in constructing, administering, and defending the fiscal polity during the Great War. He contends that these attorneys relied on their social and professional networks, technical legal skills, and practical experiences as social and economic intermediaries to shape the administrative foundation of the rising modern American fiscal state—a state that contained significant limits and achievements. Comments by Christopher A. Capozzola and Michael A. Bernstein, and a response by Mehrotra, round out the forum.

As always, this issue includes a comprehensive selection of book reviews. We also encourage readers to explore and contribute to the ASLH's electronic discussion list, H-Law, and visit the society's Web site at http://www.legalhistorian.org/. Readers are also encouraged to investigate *LHR* on the Web, at http://journals.cambridge.org/lhr, where they may read and search issues, including this one.

Finally, this issue concludes with Loren Schweninger's reflections on the late John Hope Franklin's contributions as a trailblazing scholar and beloved teacher of legal history. Thus, this issue showcases scholarship from three continents, analyzes legal history from ancient to modern times, and ends with the remembrance of a scholar whose life bent the arc of history.

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