In This Issue

This issue of the *Law and History Review* includes five articles, each a sophisticated and careful deployment of historical research in the investigation of legal practice, practices and ideologies, and their development over time. These articles' appearance together also attests to the richness of research currently being undertaken by young, or younger, scholars, in legal history. The article by David Tanenhaus has additional significance in that it serves to introduce the new editor of the journal to its readership. (Propriety requires me to emphasize, however, that Tanenhaus's article was firmly on the road to publication long before he had given any thought to pursuing the position of editor!)

Our first article is by Angela Fernandez, recently appointed assistant professor at the University of Toronto Law School. Fernandez addresses the role of the first practicing lawyer in the English colony of Massachusetts Bay, Thomas Lechford. Lechford is well known to scholars as a troublemaker, having become embroiled again and again in religious controversy and various legal and political entanglements during his three years in the colony (1638–1641). But scholars have given less attention to the various ways in which Lechford was useful to New England colonists. Usefulness, Fernandez argues, helps explain why the troublesome Lechford was tolerated, despite generally intolerant times in the Bay Colony. According to Fernandez, Lechford's usefulness rose beyond the day-to-day legal documents he drafted for colonists to what is here termed a "higher-order usefulness": for Lechford's formulation of law reform proposals, when adopted, created an appearance of greater adherence to English institutions than in fact existed. Fernandez offers us two examples of this phenomenon—a petition on the need to keep better court records and an intervention on the wording of a proposed rule on church formation. Lechford wanted a common-law precedent-centered style of legal reasoning to help restrain what he saw as arbitrary rule at the heart of a Puritan jurisprudence. He also advocated an open approach to church membership more in keeping with Reformation England. Both reform proposals grew out of copying work Lechford had been commissioned to carry out by colony authorities, work that belongs firmly to the lowest "scrivener" order of the legal profession. Probably that explains why scholars have paid scant attention

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to this category of Lechford's activities. However, the copying of legal documents by hand was an important lawyerly activity in the seventeenth century. This is true in a general sense and, as the two law reform proposals show, in a specific way in Lechford's case. The picture that emerges when we attend to this overlooked aspect of Lechford's activities is of a colonist who combined the roles of an "outsider" dissenter and "insider" with useful legal knowledge, whose common-law approach to justice presented a challenge to the rule of the colony's magistrates that was ultimately absorbed and neutralized by a Puritan jurisprudence.

Our second article is by Andrea McKenzie, newly appointed assistant professor in the Department of History, University of Victoria, British Columbia. Mackenzie's research examines the practice of *peine forte et dure*. Traditionally dismissed as a barbaric legal anachronism, peine forte et dure, or the "pressing" of mute defendants, has been explained primarily in terms of the prisoner's determination to avoid criminal conviction and forfeiture of estates. McKenzie offers us a cultural history of the practice, situating it within a larger contemporary discourse of suffering, courage, and masculinity. Specifically, her article explores both persistent popular resistance to jury trial and the degree to which those seventeenth- and eighteenth-century men who subjected themselves to the press implicitly challenged the legitimacy of the tribunal.

In our third article, James D. Schmidt, associate professor of history at Northern Illinois University, places a well-known movement for reform in American law in long historical context, the better to examine both the assumptions that motivated reformers and the processes of legal construction that helped to sustain the social and economic practices they criticized. Schmidt's subject is the legal history of child labor in the United States, a history that has tended to focus principally on Progressive Era campaigns to limit or abolish the practice. Less attention has been paid to how the law constructed and legitimated children's wage work outside the household. Schmidt's exploration of judicial discourse about apprenticeship, contracts, and industrial accidents involving minors in Massachusetts enables him to argue in detail that the law shaped the contours of child labor in the nineteenth-century United States. Courts preserved apprenticeship as a formal relationship, consigning the rest of children's wage work to the realm of contract. Rules about implied parental assent and at-will hiring legitimated children's wage agreements. Industrial accident litigation answered questions about children's capacity for judgment. More important, the courts provided a key location for the discursive construction of childhood itself, exploring deeply the capacities and incapacities of young people in a capitalist society. Overall, legal discourse eroded eighteenth-century constructs of minors' subordination and incapacity, endowing children with legal and

social agency. By the early twentieth century, however, the law once again imagined young people as naturally unable to perceive and pursue their own interests, setting the stage for the Progressive Era's campaigns.

Our fourth article is by David S. Tanenhaus, associate professor of history, and also of history and law, at the University of Nevada, Las Vegas. Tanenhaus's article, which pursues his long-standing research interest in juvenile justice, complements Schmidt's in attesting to the vigor of recent legal-historical research on childhood. Like Schmidt, Tanenhaus sets out to revise the prevailing wisdom that has until now organized the thrust of research. Readers will also note an important substantive interaction between the two essays on the question of the child as a rights-bearing individual.

According to Tanenhaus, legal scholars often assume that the history of children's rights in the United States did not begin until the mid-twentieth century. Tanenhaus argues that this assumption is faulty: a sophisticated conception of children's rights existed a century earlier. His article analyzes how lawmakers articulated that conception through their attempts to define the "rights" of "dependent children." How to handle the case of the dependent child raised fundamental questions about whether children were autonomous beings or property—of their parents and/or of the state. If the child lacked autonomy, what were the limits of parental authority and/or the power of the state acting as a parent? Tanenhaus conducts a focused investigation of the issue by examining how the Illinois Supreme Court confronted the conundrum of children's rights in the Gilded Age. He reconstructs how lawmakers established a viable system for guaranteeing at-risk children due process protections as well as the positive rights of social citizenship. Significantly, Tanenhaus shows, this creative moment occurred at a transitional point in American legal history, when lawmakers began developing liberal constitutionalism. Given the subsequent difficulties that liberal constitutionalism has had in protecting children's due process rights, providing for their basic needs, and giving them a voice in the legal process, his essay contends that this earlier history has considerable relevance and is worth engaging.

Our fifth article, the subject of this issue's forum, is by Michele Landis Dauber, assistant professor of law at Stanford Law School. Dauber's research addresses the fundamental question of the nature of the American state. Whether written by historians, lawyers, or sociologists, American history has largely reinforced the image of an "exceptionally" weak American state prior at least to the New Deal. Dauber calls into question this weak state thesis through an examination of actual deployments of the state's most potent authority—the power to redistribute wealth and resources—in the form of disaster relief. The near-universal scholarly agreement on

the absence of federal redistribution during the late nineteenth and early twentieth centuries (except for Civil War pensions) notwithstanding, the frequency and generosity of federal disaster relief appropriations actually escalated during this period. Appropriations included such measures as the Freedmen's Bureau and other Southern war relief, and relief of floods, fires, and earthquakes. They were seen as constitutionally unproblematic and indeed mandated by precedent. Not surprisingly, Dauber shows, members of Congress and other advocates for the poor pointed to disaster appropriations, albeit unsuccessfully, as a precedent for spending policy innovations. For example, Congressional Populists argued during the Depression of 1893 that unemployment relief was analogous to disaster relief. Proponents of Henry Blair's bill for federal aid to common schools in the 1880s made a similar case, also fruitlessly. Similarly, disaster relief precedents figured prominently in Supreme Court litigation, including the Sugar Bounty cases in the 1890s. The efforts by claimants in all of these instances to expand the definition of what could legitimately count as a "disaster" that could be relieved with federal funds foreshadowed the similar, though more successful, efforts by New Dealers during the 1930s on behalf of the unemployed, tenant farmers, and the elderly. A commentary by Howard Gillman, professor of political science at the University of Southern California, discusses Dauber's article. The forum concludes with Dauber's response.

As always, this issue of the *Law and History Review* contains 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. Access to the *LHR*'s electronic edition is free to subscribers. In addition we encourage all readers to visit the *LHR*'s own web site, at *www.press.uillinois.edu/journals/lhr.html*, where they may browse the contents of forthcoming issues, including abstracts and full-text PDF "pre-prints" of articles.

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