In This Issue

This issue of the *Law and History Review* presents four articles. Each critically addresses a moment or instance of legal change. Each reveals—both in the very process of change, and in the different contexts in which change occurs—the dynamic composition and effects of what we might term "law rule."

Our first article, by Marc Stein, analyzes a U.S. Supreme Court decision, *Boutilier v. the Immigration and Naturalization Service* (1967), against the wider backdrop of the Court's contemporaneous "sexual revolution." In the late 1960s and early 1970s, Stein shows, conventionally liberal Supreme Court decisions in a set of cases concerning abortion, birth control, gay immigration, interracial marriage, and obscenity developed a heteronormative doctrine that was neither broadly libertarian nor egalitarian but rather manifested the supremacy of adult, heterosexual, monogamous, marital, familial, domestic, private, and procreative forms of sexual expression. In *Boutilier* and cases like it, liberal activists and advocates working within and against the constraints of the legal system—the Homosexual Law Reform Society, the radical immigration lawyer Blanch Freedman—actually contributed to the development of this conservative doctrine. Stein's article draws attention to the broad range of opportunities for empirical research at the intersection of legal history and the history of sexuality, not least judicial biography. Stein also revises our impression of the norms animating the Court during the era of the rights revolution, and hence the composition of the rules that the law proclaimed.

Our second article, by Russell Smandych, takes us to the nineteenth century, where it examines an instance of profound, if protracted, socio-legal change—early nineteenth-century British campaigns to abolish slavery in the Empire. It too illustrates in some detail the singular power of biography in legal-historical research. Examining British colonial law officers' reports for 1813 to 1833, Russell Smandych investigates how one reporter, James Stephen, Jr., used his role as civil servant to further the aims of the British anti-slavery movement in general and to pursue a personal campaign to provide better legal protection to slaves in the West Indies in particular by invoking fundamental principles of English law and criminal procedure. During the first twenty years of his lengthy career in the Colonial Office,

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Stephen spent much of his time scrutinizing the slave laws passed by Colonial Assemblies in the West Indies. His criticisms often caused either the formal disapproval of the laws by the Colonial Office or the drafting of recommendations on how they should be revised. The effects of Stephen's critical scrutiny of West Indies law is revealed in particular in the attention he gave to criminal slave laws, and specifically to those touching on questions of the rule of law, the treatment of runaway slaves, the criminal trial and punishment of slaves, and the issue of the admissibility of slave evidence in criminal trials. In each instance, Stephen employed a metanarrative of law in the name of evangelical conscience to undermine the particular laws that sustained the institution to whose abolition he was committed. That same conscience would later lead Stephen to take up the cause of attempting to protect the legal rights of indigenous peoples in the evolving common law legal systems of nineteenth-century British settler colonies. Smandych reminds us of the human origins of legal change and also of both meanings of law's *constructive* capacity. His study also points to the opportunities awaiting researchers in the field of colonial and comparative legal history.

The subtleties of motivation and idealization of law that we encounter in Smandych's study of James Stephen Jr., as well as the proliferation of opportunities for research into the legal history of colonizing, are all put firmly on display in the two articles that comprise this issue's forum—which, in addition to offering further variations on our general theme, also establishes the legal history of subcontinental India as manifestly within the *Law and History*'s purview. In the first forum article, Mithi Mukherjee undertakes an extended historical inquiry into the 1788 impeachment trial of Warren Hastings, the former governor-general of India for the East India Company, for "high crime and misdemeanours" during his tenure in India. Analyzing the discourses of sovereignty, justice, and governance in the speeches for the prosecution and the defense, Mukherjee argues that the trial became the site for the articulation of two radically opposed visions of empire: one, based on ideas of power, conquest, and subjugation of the colonized in pursuit of the exclusive national interests of the colonizer; the other, represented in the words of Edmund Burke, embracing a deterritorialized supranational juridical discourse of imperial sovereignty based on a recognition of the a priori rights of the colonized. Mukherjee contends that these two opposing discourses and visions, as they came to be articulated in the trial, had decisive implications for both the nature and evolution of the British empire and its institutions, and that of Indian legal and political discourse and institutions in the nineteenth and twentieth centuries. Mukherjee's study of the trial opens up a fresh and important perspective

on Burke's political, legal, and social thought. More generally, she shows how engagement with the discourses occasioned by the Hastings trial adds to our understanding of the nature and evolution of the abiding conflict between discourses of national power and international law, and its implications for the discourse of what has come to be known as human rights.

Our second forum article, by Elizabeth Kolsky, provides a profoundly interesting counterpoint to Mukherjee's retrieval of a conflict between power and a supranational discourse of sovereignty and also, at another level, to Russell Smandych's idealistic law officer. In 1833, the British colonial government committed itself to the codification of law in India. Historians have tended to attribute the decision to the rising power of liberal colonial administrators espousing the improvement of Indian society through the establishment of English education, free trade, and a rule of law. But Kolsky argues that codification was not simply an abstract component of the liberal vision of empire. Instead, codification was a very practical response to the growing problem of European criminality in India. In the early nineteenth century, "non-official" Europeans who did not work for the East India Company violated the law with impunity, terrorizing local Indian inhabitants and challenging both the practical authority of the colonial government and the image of the morally superior Englishman. By establishing one set of laws and law courts, colonial administrators sought to establish uniform control over all citizens and subjects in India. Contrary to Benthamite principles of universalism and science, however, the codification of law in India was deeply marked by the culture of colonialism and its ideology of difference. Tracing fifty years of debates over the Code of Criminal Procedure, Kolsky demonstrates how legal codification in India was shaped by ideas about Indian difference, or as one administrator put it, by "Indian human nature." A commentary by Kunal Parker, of the Cleveland-Marshall College of Law, discusses both forum articles. The forum concludes with the authors' responses.

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. Finally, at the newly established ASLH web site,

www.aslh.net, readers will discover all they could want to know about the world of legal history and the many opportunities—conferences, awards, fellowships, publications—that it offers.

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