In This Issue

The five articles published in this issue of the *Law and History Review* examine fundamental questions of legal history and historiography. In our first article, Ian Holloway addresses the resurgence in Australia, including among the courts, of fascination with Australian and colonial legal history. But he notes an important absence in this resurgence: with respect to public law, there has been little, if any, interest in how English traditions of judicial control of the executive took root in Australia, and what impact this may have had on the development of the present-day system of public law. Holloway's article responds to that gap in scholarship by exploring and analyzing the earliest cases of record, in which the Supreme Court of New South Wales began to enforce the rule of law against public authorities. As Holloway points out, access to these cases has been made possible for the first time by Bruce Kercher's internet-based project to publish annotated copies of the earliest records of the Supreme Courts of New South Wales and Van Diemen's Land (Tasmania), described by Kercher in "Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project," *Law and History Review* 18.3 (Fall 2000): 659–65. Readers who access Holloway's article in our electronic edition will be able to view the cases he discusses through live links to the Macquarie project database.

Our second article, by Ernest Metzger, has important implications both for the contemporary study of Roman law and for understanding how Roman law has, in the past, been studied. As such it is simultaneously an exercise in writing legal history and an examination of the production of legal history, particularly in the research of the nineteenth century's German Historical School. As Metzger notes, Roman law has been admired for a long time. But its admirers, in their enthusiasm, have sometimes borrowed ideas from their own time and attributed them to the Romans, thereby filling some gap or fixing some anomaly. Roman private law is a well-known victim of this. Roman civil procedure has been a victim as well, and the way Roman judges are treated in the older literature provides an example. For a long time it has been accepted, and rightly so, that the decision of a Roman judge did not make law. But the related, empirical question, whether Roman judges ever relied on the decisions of other judges, has been largely ignored. The common opinion, which today correctly rejects "case law," passes over "precedent" without comment. It does so because for many years an anachronistic view of the Roman judge was in fashion. According to this, a Roman judge's decision expressed the peo-

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ple's sense of right about a specific set of facts. Thus, a decision is simply a piece of information for an expert to examine; it has no value to another judge. With the passing of this view, however, the common opinion could accept the existence of precedent in Roman law.

In our third article, by Bruce Kimball, we move even more explicitly to the question of how central tropes of legal history—in this case U.S. legal history—emerge. Since his death in 1906, Christopher Columbus Langdell—arguably the most influential figure in the history of legal education in the United States—has been the subject of ceaseless examination by members of the legal profession and academe. Despite the enormous influence of his reforms, this discussion has generally presented a depreciating, even disparaging, view of Langdell. Moreover, this has prevailed even though the majority of Langdell's writings have never been studied. These two paradoxes constitute the "Langdell Problem" in the historiography of the last century. Kimball's article addresses and explains the Langdell problem by demonstrating that commentary on Langdell throughout the twentieth century has drawn primarily from published studies without considering whether these are validated by evidence from original sources. The result has been the accumulation of an imposing, deeply sedimented, mound of scholarship obscuring the neglect of original sources. This sedimentation has grown because the received view of Langdell has, in a variety of ways over the past century, served the purposes of legal scholars.

By historicizing the historiography, Kimball discloses the irony that the law professor who taught his profession to scrutinize every general proposition in light of the original sources about specific cases has had his story told and his legacy shaped by many who flouted his most fundamental principle. He concludes that the received view of Langdell rests on a relatively insubstantial evidentiary base and that a fuller, more complex understanding of Langdell and his legacy to modern legal education is needed.

Our fourth article continues this issue's historiographical theme and is the subject of its forum. Alejandro de la Fuente reviews literature focusing on slavery and the law in Spanish America and analyzes the use made by slaves of traditional Spanish law and legal customs to claim rights before authorities and the courts. Using Cuba as a case study, de la Fuente argues that slaves who became familiar with the dominant culture—typically through their participation in urban market relations—learned that under Spanish law they had some rights, including the right to appeal to authorities. Even in the nineteenth century, when Cuba became a prosperous slave-based plantation society and a leading producer of sugar, urban slaves continued to invoke these laws to ameliorate their position. De la Fuente notes that the importance of this legal order was recognized by Frank Tannenbaum in his influential 1946 essay *Slave and Citizen.* But unlike Tannenbaum, who assumed that positive laws endowed slaves with a "moral" personality, de la

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Fuente argues that it was the slaves themselves who gave concrete social meaning to the abstract rights regulated in the positive laws by making claims and pressing for benefits. Tannebaum, however, was correct to note the persistent relevance of the traditional statutes of Castile in the colonies, for as late as the nineteenth century Cuban courts continued to invoke the thirteenth-century code Siete Partidas in their verdicts concerning slaves. De la Fuente's position is debated by María Elena Díaz and Christopher Schmidt-Nowara. The forum concludes with de la Fuente's response.

This issue of the *Law and History Review* is unique in that, in addition to the forum just described, it also presents the first part of a two-part forum that will conclude in our next, Fall 2004, issue. Here we present the opening of Michael Lobban's treatment of the reform of the English Court of Chancery. By the early nineteenth century, Lobban tells us, the Court of Chancery was perceived to be in crisis: slow and costly, it bore all the hallmarks of a corrupt ancien régime institution. His two-part article examines the process of reforming the court in the sixty years before the Judicature Acts of 1873–75. Debates over reform before 1852 were dominated by two issues. The first (explored here) 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 political attention—notably in Lord Eldon's era—it was not satisfactorily resolved, for politicians remained uncertain about the nature of Chancery's arrears and cautious about appointing new judges or altering the functions of the Chancellor. The second issue (explored 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. 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. Comments on Lobban's article, with his response, will appear in the next issue.

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, in almost all cases, full-text PDF "pre-prints" of articles.

Christopher Tomlins
American Bar Foundation

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