In This Issue

This issue of the *Law and History Review* delves into the historical analysis of legal processes and outcomes. The three articles that comprise the bulk of the issue not only provide fine examples of the originality that legal historians are bringing to the conceptualization of their research, but also demonstrate the breadth of method and analytic technique available to scholars in the field, whatever their period (here ranging from the thirteenth to the twentieth century). As such, this issue helps us continue and broaden the discussion of substantive research and methodological possibilities in legal history (also a feature of our last issue) by offering three extended examples of the practice of exposition in our trade—one quantitative, one more traditionally narrative, and one explicitly interpretive.

In our first article, Daniel Klerman investigates in considerable detail the prosecution of crime in premodern societies. Modern societies generally entrust enforcement of the criminal law to public prosecutors, but most crimes in premodern societies were prosecuted privately by the victim or a relative. Focusing on thirteenth-century England, Klerman offers us a rigorously quantitative analysis of private prosecution, employing statistical techniques such as regression analysis to chart and explain prosecution rates. He finds that the rate of private prosecution fell by fifty percent between 1200 and the 1220s, returned to turn-of-the-century levels by the 1240s, then swiftly dropped by two-thirds and remained at a low level through the end of the century. The most plausible explanation for such wide fluctuations, he argues, is change in the judicial treatment of private settlements. One of the victim's motives for bringing a private prosecution was the utility of suit in facilitating monetary settlement. Settlement was attractive to the accused, however, only if it provided protection from further prosecution. In the late twelfth and early thirteenth centuries, settlement almost always protected the defendant. At various times during the thirteenth century, however, judges sent defendants to trial even though the prosecutor was no longer interested in the case. The implementation and relaxation of this antisettlement policy can account for most of the changing frequency with which private prosecutions were brought.

Our second article, by Eric Kades, addresses anew the "great case" of *Johnson v. M'Intosh* (1823), familiar to Americanists as one of the earliest and most important statements of the Supreme Court on the rights and status of indigenous peoples confronted by an aggressively expansive white

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republic. In *M'Intosh* the Marshall Court declared that only the federal government could buy land from the Indians. Kades's article presents a detailed history of the case, from its roots in early American land law through litigation in the federal courts. Most important for its assessment of the social and economic significance of the decision, the article along the way fills significant gaps in the historical background to the case and in analysis of its basis in doctrine. For example, in attempting to pin down the contested acreage in which the dispute giving rise to the case was ostensibly grounded, Kades shows that it is almost certain there was no real dispute between the parties, suggesting that the case was "arranged." On the doctrinal front, Kades offers a detailed analysis of Chief Justice Marshall's opinion for a unanimous court that leads him, after first addressing existing confusions and misreadings, to the novel and intriguing conclusion that the only possible legal basis for the holding was custom. Kades ends with an exposition of his theory of the case's long-term significance: the single-buyer market for Indian land created by the rule of *Johnson v. M'Intosh* was part and parcel of a larger economic, legal, and political process of obtaining Indian lands at the least cost.

Our third article, by Leora Bilsky, is the subject of this issue's forum, the second of three successive forums to be devoted to presentation and discussion of recent work in the burgeoning field of Israeli legal history (the first appeared in our Fall 2000 issue). Bilsky's article focuses on the Gruenvald-Kastner trial of the 1950s, which also featured in the article by Asher Maoz that opened our first Israeli legal history forum. The trial dealt with Malkhiel Gruenvald's libelous accusations against Rudolph Kastner for alleged collaboration with the Nazis during the Holocaust. The trial caused political turmoil in the young state of Israel, generating heated public debate about Jewish collaboration with the Nazis and about the abortive efforts of Zionist leaders in Palestine to save the remaining Jews of Hungary. Kastner's libel charges were dismissed by Judge Benjamin Halevi of the Jerusalem district court, who harshly condemned Kastner for his "Faustian" contract with the Nazis. Kastner himself was assassinated soon after. Bilsky examines the trial with the tools of discourse theory in order to shed new light on debates over the representation of the Holocaust in law and literature. Against the common view that compares the relative strengths and weaknesses of each field in providing a responsible memory of the past, Bilsky argues that we should study the interrelationship and complementarity of the two fields. She demonstrates how, in judging Kastner, literature provided stock stories that helped attribute responsibility to him, while law provided a set of assumptions about human relations that made the messy reality fit the literary expectation. Literary allusions to the Faust and Trojan myths underline Judge Halevi's perception of the affair

but at the same time flatten the characters and distort the complexity of the historical circumstances of their actions. The failure of judgment of the district court is then compared to the opinion of the appellate court that reversed the judgment while resisting the temptation to narrate the Kastner affair according to the strictures of a morality play. This offered the first serious effort by the Israeli legal system to judge the gray area of Jewish cooperation with the Nazis and to develop new legal tools to deal with the previously unimagined reality of Nazi totalitarianism. Bilsky's article is accompanied by commentaries from David Luban and Lawrence Douglas. The forum is completed by the author's response.

This issue also presents our normal complement of book reviews and the last in our series of electronic resource pages. The feature has appeared continuously throughout four years of momentous, exponential development in the availability of information on-line, concentrating on three main areas of substance—(1) where legal historians should look to find essential resources, (2) how information is being organized, and (3) what the implications of the medium are for our field. In this final episode, I report on the *Law and History Review*'s own move to full on-line availability and on some of the possibilities that the medium offers for further development of the journal. It seems fitting that the journal conclude a series on electronic resources for legal historians by becoming one.

As always, we encourage readers of the *Law and History Review* 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*.

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