

In This Issue

This issue begins with questions of executive power and constitutional order in the United States Supreme Court, and ends with the problem of what happened (and what truth is) at the Ardeatine Caves outside of Rome in 1944. Two of the articles in between consider questions of national sovereignty, one from the perspective of revolutionary France, the other from that of interwar Ireland. The fourth article in the issue continues our exploration of Irish legal history, by looking at the problem of infanticide in Ireland in the first half of the twentieth century.

The first article, by Edward Purcell, reconsiders the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.* Moving beyond treatment of the case as a discussion of executive power, Purcell argues that the conventional understanding that the executive power language in the opinion was written by Justice Sutherland is probably wrong. Instead, he asserts, it is far more likely the language was written by Chief Justice Hughes, and reflected his policy views and the complex policy interests of the other justices in the majority. The importance of the case, he provocatively concludes, is not so much the precedent it set, as what it tells us about the importance of the individuals who served on the court and the Court's "de facto power to act on essentially pragmatic grounds and to intervene at critical times in national controversies."

If Purcell's study is an effort to enable readers to reframe their understanding of the familiar to make them confront a different sort of constitutional problem, the next two articles try to reframe constitutional discussions using unfamiliar materials. Edward Kolla's study moves the reader back in time to the era of the French Revolution. There, he argues, efforts to unite Avignon and France revealed the conflict between the ideal of national self-determination and the constitutional concept of popular sovereignty. As he writes, "contemporaries encountered terrible difficulty,

both materially and theoretically, in determining the sovereign will of the people in Avignon.” The result, Kolla argues, was a quagmire that not only gave rise to theories that could be used to justify annexations, but also revealed the complexities of balancing nationality, sovereignty, and territory, that continue to plague international law today.

Thomas Mohr’s article continues the theme of national sovereignty begun in Kolla’s work, exploring the role of Ireland in the Statute of Westminster of 1931, which devolved greater formal power on the various self-governing Dominions of the British Empire, effectively giving them the status of sovereigns. Where Kolla’s article moves discussions of the history of national self-determination back in time, Mohr’s study is an example of applied legal history. In unpacking the role of the Irish Free State in debates over the Statute of Westminster of 1931, and showing the Statute’s impact on the Irish Free State, he uncovers a lost element of the constitutional history of Ireland that, he notes, Irish courts consistently have ignored.

The fourth article, by Karen Brennan, keeps the focus on Ireland, but shifts the discussion away from constitutional and international law, to criminal law. Brennan’s study looks at the decades before the passage of the Irish Infanticide Act of 1949, to show how courts and judges dealt with infanticide before passage of the Act and how that treatment, in turn, shaped the Act itself. But although her focus is on legal responses to the problem of infanticide and infanticide reform in Ireland, she grounds her discussion in a comparative perspective. She shows that, as was the case with similar reforms in England and Canada, Irish efforts were influenced by practical considerations about administering justice in cases of infanticide. But the factors that held sway in those reform efforts in Ireland were not identical to those at play in England and Canada. In Ireland, she argues, the reform efforts were justified by humanitarian concerns that were shaped in particular by a very explicit and powerful sympathy for women who killed their infants.

The last article, by Giorgio Resta and Vincenzo Zeno-Zencovich, picks up the issue of morality that Brennan’s judges wrestled with, and moves them to another sphere. Their study begins with the Anateine Massacre, a mass execution of members of the Italian Resistance and Jews at a quarry outside of Rome by Nazi troops in March 1944. A few years after the war’s end, the Italian government prosecuted several people involved in that massacre at the quarry for war crimes. A second trial of two SS officers for their involvement in the massacre was then conducted in the late 1990s. There were also civil and criminal charges brought in the late 1940s and again in the 1990s against members of the commando troop whose attack prompted the Nazi reprisals.

In their article, Resta and Zeno-Zencovich look at the complex intersection of these different trials, using them to explore the fraught relations between law and history, and the judge and the historian. In the process of exploring how judges in the various trials wrestled with trying to strike a proper balance between the legal from the historical, Resta and Zeno-Zencovich raise questions about the relationship between legal and historical truth, and the value of the familiar argument that legal and historical practices have much in common. “If,” they conclude, “the proper role of responsible historical research is to understand and explain, the proper role of a court is to judge the responsible use of history, and not the history itself.” While their concern is with history in the context of human rights and war crimes trials, the question they pose has far larger application.

This issue concludes with a selection of book reviews. We invite readers to also consider American Society for Legal History’s electronic discussion list, H-Law, and to visit the Society’s website at <http://www.legalhistorian.org/>. Readers may also be interested in viewing the journal online, at <http://journals.cambridge.org/LHR>, where they may read and search issues of the journal.

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