In This Issue

This issue approaches legal history from multiple perspectives. It first views the process of directed legal change through the eyes of Karl Loewenstein, a senior expert adviser to the Legal Division of American Military Government in Berlin. By January 1946, Lowenstein had concluded that the democratization and eradication of fascist law and legal institutions in his homeland had already failed. The issue next examines the international consequences for sovereignty and aggressive warfare produced by Japan's unexpected military victory over Russia in 1905. Moving from the international stage in the twentieth century to the local level in late medieval Italy, the issue examines why criminal defendants would choose not to appear in court. It then accompanies Henry Marchant, an eighteenth-century Rhode Island lawyer, on his tour of the courts of London that included witnessing the famous case of *Somerset v. Stewart*. Continuing with England, this issue's forum focuses on the operation of judicial review in criminal cases during the eighteenth and nineteenth centuries, well before the creation of the Court of Criminal Appeal in the early twentieth century. Alhough the articles are disparate, their authors all share a commitment to understanding how legal systems were constructed and operated, and how they facilitated (or resisted) change.

Our first article, by Rande Kostal, introduces Karl Loewenstein, who began his work as senior expert adviser to the American military government in August 1945. An eminent German-born and German-educated political scientist and jurisprudent, Loewenstein had come to assist in de-Nazification. He soon realized that the American legal mission in Germany was in disarray. In its crucial first phase, the development and implementation of American law reform policy was being undercut by ill-prepared leadership, poor planning, and scarcity of learning about the Germans and their laws, lawyers, and legal history. As Kostal demonstrates, during Loewenstein's thirteen-month deployment with Legal Division–Berlin, and then in the subsequent two years, Loewenstein created (in the form of a detailed diary, in more than three score of official memoranda, a series of scholarly articles, and a book manuscript) the

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single most detailed and revealing "insider" account of *any* aspect of the American military administration in postwar Germany. Kostal uses the Loewenstein archive to reconstruct and critically evaluate a world-historical experiment in directed legal change. He argues that Loewenstein was broadly correct in his bleak assessment of the first American efforts in the demolition and reconstruction of Germany's fascist legal system. These efforts were poorly planned, feebly implemented, and largely ineffective. But the evidence also shows that Loewenstein's formidable erudition in German political and legal history actually proved antithetical to his work with the American-born lawyers and soldiers who ran the American Military Government in Germany. An idealistic and uncompromising intellectual, Loewenstein was more interested in theoretical truth than in pragmatic compromise.

In our second article, Douglas Howland reveals that Japan used two venues of state sovereignty, its "civilized" status and its reason of state, to prosecute the Russo–Japanese War. He argues that Japan, with the support of international publicists, was able to articulate its sovereignty by demonstrating a mastery of the laws of war. Moreover, Japan's aggressive exercise of state sovereignty informed the new rules negotiated at the Second Hague Peace Conference in 1907, including requiring declarations of war prior to hostilities and the rights and duties of neutral powers. Japan's success at achieving sovereign equality with the West, he contends, explains how sovereignty, international law, and state alliances combined to legitimize aggressive warfare at the start of the twentieth century.

Our third article, by Joanna Carraway, examines records of the criminal court of late fourteenth-century Reggio Emilia to explore the role of contumacy in late medieval justice. Failure to appear in a criminal case resulted in a ban, and this criminal ban could have serious consequences that included outlawry and the confiscation of property. Yet nearly half of all cited defendants failed to appear to answer the charges made against them. She explores contumacy from the perspective of the government, the law, and the parties in conflict to explain its use as a defense strategy, and also to examine the criminal ban as an instrument of crime control. She notes that the criminal ban was a severe punishment for noncompliance, but it also had elements of flexibility. Families could use their own legal protections to shield the property of a banned felon, and there was also potential for a banned felon to negotiate a return to the commune. Contumacy and the criminal ban ultimately could make room for peace negotiations that could reinstate a felon in the community. She concludes that contumacy was part of the fabric of late medieval justice and that it could serve as an important aid for dispute resolution, whereas governments' efforts against contumacy reflect a focus on justice as a matter of public utility.

Our fourth article, by Sally Hadden and Patricia Hagler Minter, introduces Henry Marchant, who was one of the few lawyers to observe law as it was practiced in London, Edinburgh, and the colonies in the eighteenth century. Although Marchant practiced law in Rhode Island, the authors examine how he became a legal tourist, sitting as an observer, when he went abroad. His professional activities took him to Great Britain for eleven months during 1771 and 1772, where he watched cases as they were tried at Westminster, Guildhall, Admiralty, and elsewhere. His views on lawyers, judges, and specific cases provide a firsthand account of law as it was practiced in the 1770s. His courtroom record of the seminal case, *Somerset v. Stewart*, makes his legal travels that much more worthwhile to explore.

Continuing the theme of observing lawmaking, this issue's forum begins with James Oldham's revealing article on the twelve judges. As Oldham explains, from the 1600s to the mid-1800s, an informal, off-the-record procedure allowed questions of law or procedure to be put before the twelve common law judges for collective deliberation. The questions arose in both civil and criminal cases, although the great majority came from the Old Bailey or the assizes. The reasons for reserving questions were varied. The deliberations by the judges were informal and private. Arguments of counsel were at times permitted or invited, but prior to the last decade of the eighteenth century the results of the judges' deliberations were not regularly made public. Yet these informal deliberations, the author shows, made substantial contributions to the growth of the law by establishing controlling precedents, interpreting statutes, fixing rules of evidence, and resolving differences of views among the judges or between common law courts. The procedure was also advantageous to criminal defendants at the Old Bailey or on assize, as no central court of appeal for them existed. The twelve judges therefore became to some extent a de facto court of appeal, even though the decision to refer or not to refer a case to the twelve judges was entirely at the discretion of the trial judges.

In his contribution to the forum, Randall McGowen points out that the process of judicial review by the twelve judges in criminal cases underwent rapid change in the second half of the eighteenth century. The number of cases reserved increased dramatically, and the decisions of the judges secured ever wider publicity. Much of this development, he explains, was associated with the prosecution of the crime of forgery, and it was linked to the ability of forgers, in a significant proportion of cases, to employ counsel to manage their defenses. His essay examines the timing and nature of the legal objections offered at forgery trials, as well as what the pattern of judicial determinations tells us about the intentions of the judges when the lives of convicted offenders were at stake.

Although the presence of defense counsel goes a considerable way toward explaining the increase in the number of reserved cases, one still has to explain why judges so often treated these objections with special care. It was the social status of the accused that helps to explain the appearance of counsel in the first place. And the anxiety aroused by the crime contributed to the extra consideration the judges gave to the legal points raised during the trials.

In his forum essay, Phil Handler evaluates judicial attitudes toward the English criminal law in the second half of the nineteenth century through a study of the Court for Crown Cases Reserved (CCCR). The establishment of the CCCR in 1848 placed the old common law method of the trial judge reserving points of law for the consideration of all the common law judges on a formal, statutory footing. The new court sat in public and had power to quash convictions. It did not satisfy reformers, however, whose repeated demands for a full right of appeal on any question of law or fact through the nineteenth century formed part of a much wider effort to institute more certainty and consistency into the English criminal law. The failure to meet these demands until 1908 and the restricted role of the CCCR in the interim, the author contends, owed much to the judges. Their arguments were usually dismissed as reactionary and self interested, but Handler argues that they were based upon a coherent understanding of the criminal law that centered on the primacy of the trial. He argues that this understanding informed the judges' approach to the CCCR and placed substantial limits on the systematizing projects of Victorian law reformers. The forum concludes with comments on the three articles by Allyson May and Benjamin Berger.

As always, this issue includes a comprehensive selection of book reviews. We also invite readers to explore and contribute to the ASLH's electronic discussion list, H-Law, and visit the society's website at http://www.legalhistorian.org/. Readers are also encouraged to investigate *LHR* on the web, at http://journals.cambridge.org/LHR, where they may read and search issues, including this one.

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