In This Issue

This issue of the *Law and History Review* focuses on the historical relationship between law and governance and pushes into the territory of what has come to be called "governmentality." Five articles and two commentaries explore different aspects of this relationship, the forms both institutional and ideological in which it has been expressed, and its effects, on three continents throughout the nineteenth and twentieth century.

Our first article, by Charles Hale, addresses the relationship of law and government in post-revolutionary Mexico through a study of the political and juridical thought of Emilio Rabasa (1856–1930), Mexico's recognized master of constitutional law. Hale criticizes the common tendency to speak simply of the "success" of constitutionalism in the United States and its "failure" in Mexico and argues instead for recognition of distinct cultures of law and governance. He points to Mexico's "civil-law tradition," derived from Rome and continental Europe, as the key to understanding the problem of constitutionalism and judicial review in the country's public law. Two key elements of that tradition are a depreciation of judges and a resistance to judge-made law, along with the theoretical corollary that law emanates from the Legislator. On both matters, study of Rabasa provides fruitful insight. Rabasa advocated a powerful supreme court on the North American pattern and yet resisted the "*legislación de los jueces*" (legislation by judges) he observed in practice while he was in exile in the United States during the revolutionary years 1913 to 1920. He also called for a court of cassation on the French model in order to free the Supreme Court from the burden of reviewing ordinary legislation. The article argues further that, despite Rabasa's ambivalence toward the North American legal model, the essence of his juridical thought was critically historical and comparative, a characteristic that declined in post-revolutionary Mexico, resulting in a divergence between law and history.

Our second article, by Eli Nathans, a graduate student in history at Johns Hopkins, continues to explore the relationship of law and governance in a very distinct historical setting—that of Nazi Germany. That almost all German judges, prosecutors, and other Justice Ministry officials loyally carried out the policies of the Nazi regime is one of the many sobering aspects of the regime's history. Explanations have varied. Some students of the period have stressed German traditions of legal positivism: German jurists had been taught to apply the law and not to consider moral issues.

Others have taken the opposite tack, suggesting that in fact the German administration of justice was only too willing to bend the letter of the law to achieve the results desired by the regime. Nathans seeks purchase on this debate through an examination of the conduct of a leading figure in the administration of justice, Franz Schlegelberger, who from 1931 to 1942 was state secretary in the Reich Justice Ministry, and in 1941 and 1942 was acting justice minister. The article shows the dominant role played by the ideology of authoritarian legal order in Schlegelberger's thinking. It also demonstrates the extent to which this ideology could be manipulated and, in extremis, discarded. The ideology at different moments both guided, and masked the true nature of, Schlegelberger's behavior.

Our third and fourth articles mark something of a departure from the ideological and biographical emphases of the first two. Each is a study of the law-government relationship refracted through an examination of political and cultural factors influencing the administration of "law and order." The third article, by Victor Bailey, examines attempts to abolish capital punishment in Britain after the Second World War and the failure of these efforts. In 1945, when a Labour government was elected with a large parliamentary majority, hopes were high in abolitionist circles for an end to the death penalty in English criminal law. Three years later, all that abolitionists had achieved was the appointment of a Royal Commission (1949–53) to investigate capital punishment. Why did the government, despite a longstanding commitment to abolition on the part of the Labour Party, fail to get rid of the death penalty? Bailey attributes failure in good part to lack of courage—on so controversial an issue the government preferred not to exercise leadership, leaving the decision to the private conscience of individual MPs in an unpredictable free vote in the House of Commons. But Bailey points in addition to the political role played by senior judges, the lord chancellor, and the House of Lords, who exploited both the postwar rise in crime (real and imagined) and strong public sentiment favoring retribution to turn back the abolitionist thrust. The postwar years, Bailey concludes, are an instructive moment in British penal and legal history, illustrating the concatenation of political, judicial, and popular factors influencing the reception of a reforming governmental ethos in punishment and law.

Our fourth article remains in the realm of criminal law and its administration but takes us further afield, to early nineteenth-century Australia. Stefan Petrow examines the policing system of the penal colony of Van Diemen's Land as an instance of government. When George Arthur became governor of the colony in 1824, he entered an environment in which colonists faced many challenges to their safety and security. Convict discipline was lax; bushrangers and Aboriginals terrorized free settlers. Between 1826

and 1828 Arthur remodeled and strengthened the colony's policing system to make it a "more powerful engine" for suppressing these threats and restoring government control over the island. Arthur described his police as "the pivot" on which successful management of the colony turned, enabling him to exercise close supervision over both the convict and the free population. The "more active and inquisitorial" force that he created, made up largely of serving convicts, achieved Arthur's objectives. Free colonists, outside the cities, appreciated the security and reduction in serious crime that Arthur's police reforms achieved. But urban residents detested the convict police for their abuse of their wide powers and their arrests on flimsy pretexts. Urban demands that the principles of the rule of law be upheld brought them into conflict with the governor and his management of the colony. Petrow's article contributes to police history by closely examining the powers and duties of a police force staffed largely with serving convicts in an autocratically governed penal colony; it also illustrates the tensions between popular conceptions of law and resort to criminal law as an instrument of government.

Our fifth article, which is the subject of this issue's forum, serves as something of a capstone to themes and subjects explored in the first four articles. Conventional accounts of the history of the criminal law, Lindsay Farmer tells us, posit an inextricable link between the reform of the penal law and the formation of the modern nation-state. Whether told as a narrative of humanitarian reform or as the transformation of the nature of repression, these accounts postulate the limiting of the severity of punishment, the reconstitution of the relationship between the state and individual, and the appearance of a novel restraint in the form of legal expression. The figure of the code is taken to be central, standing at the juncture of law and modernity. The case of England poses a problem for such narratives, for the modern period there is marked by the continuing failure of the movement for the codification of the law. Notwithstanding this apparent failure, Farmer argues, the impact of codification on the modern English criminal law has been profound. Yet it has also been profoundly misunderstood. To address the matter properly it is necessary to rethink conventional theoretical and historical understandings of the relationship between codification and the modern law. Farmer holds that the Criminal Law Commissioners of 1833–45 systematized the law, specifically the relationship between civil and penal law, in such a way as to transform the understanding of criminal law in its relation to government. Commentaries by Michael Lobban and Markus Dirk Dubber debate Farmer's argument. The forum is completed by the author's response.

The issue also presents our normal complement of book reviews and the next in our continuing series of electronic resource pages. Writing on be-

half of "Ozcan," a group of Australian and Canadian scholars, John Mclaren describes the use of the Internet to create and teach an intercontinental program in legal history. 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.*

Christopher Tomlins
American Bar Foundation

https://doi.org/10.1017/S0738248000012165 Published online by Cambridge University Press