In This Issue

This issue of the *Law and History Review* presents four extremely interesting and original explorations of Anglophone legal history. Each takes as its subject an event or issue or concept already familiar and extensively researched—an admired case (*MacPherson v. Buick*), a well-known issue (segregation of public accommodations), an infamous concept (*terra nullius*), a familiar doctrinal principle (presumption of innocence)—and shows how new research, or perspective, or conceptual analysis can highlight the subject in new ways, even alter quite fundamentally our received understanding. One of the main excitements of scholarship is to experience the familiar rendered anew as difference. The articles in this issue do not disappoint.

Our first article, by Sally Clarke, sets Benjamin Cardozo's famous New York Court of Appeals decision, *MacPherson v. Buick Motor Co.,* in the context of the legal-economic history of the U.S. automobile industry, in particular the history of innovation and the organizational history of the firm. Clarke's analysis is premised on the idea that social costs are inherent in the process of innovation. Early automakers were able to innovate in a market context but unable to perfect or control the technology. Hence automakers initially sold highly imperfect or defective vehicles. Who bore the costs of innovation depended in part on how managers structured the modern firm. Given the particular legal context, by defining mass distribution as a system of franchises, or what Friedrich Kessler called "vertical integration by contract," automakers took advantage of the requirement of privity of contract and imposed many costs born out of a rudimentary technology on car buyers. Cardozo's ruling in *MacPherson* was intended to change the allocation of costs, and it became part of a broad network of market and non-market factors that shaped managers' approach to product quality. During the 1920s, automakers invested in R&D, making greater reliability and safety part of their effort to secure consumers' repeat purchases in a mass market. Managers further incorporated (to varying degrees) the demands of public and private oversight entities, such as insurance underwriters, engineering associations, and state regulators. Even with this broad oversight network, the goal of sustaining consumers' loyalty subsumed conflicting

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objectives. As managers persisted in making choices that resulted in defects, they also took the step of obtaining products liability insurance.

In our second article, Andrew Sandoval-Strausz explores the legal ideology of spatial segregation in public accommodations in the century following the American Civil War. Public accommodations were crucial sites in struggles for racial equality in America, yet, Sandoval-Strausz argues, our legal-historical understanding of this category of space remains incomplete. Scholars have focused almost exclusively on common carrier law, yet the law of innkeepers played a vital role in ending segregation in public places. The imbalance of attention has obscured the legal context of both common law regimes. Both were manifestations of a quiet but powerful strand of Anglo-American law that provided for the protection of travelers. Traveler protections formed a key basis for antidiscrimination law, but only after their distinctly situational duties and privileges had been transformed into individually held rights. That transformation was a critical episode in the prehistory of civil rights law, allowing common law protections of travelers to become the entering wedge of demands for equality, a strategy that was intentionally and explicitly deployed from the age of Reconstruction through to the twentieth-century civil rights movement. Sandoval-Strausz's interpretation requires reexamination of traditional narratives of the rise of rights and the trajectory of liberalism. The advent of equality in public places was not simply the product of Enlightenment-inspired rights claims, but also a reconfiguration of corporative and communitarian privileges. However much modern civil society owes to liberalism and possessive individualism, it also rests upon a definitively premodern vision of the public good.

Our third article, by Stuart Banner, addresses the conceptual genealogy and jurisdictional implications of *terra nullius*—a key term, and claim, in the history of English colonizing. Banner's article suggests that *terra nullius* has been used too loosely in accounts of English colonizing. He argues instead for a specific association of the claim with the late eighteenth-century British colonization of Australia. Under British colonial law, aboriginal Australians had no property rights in the land, and colonization accordingly vested ownership of the entire continent in the British government. *Terra nullius,* however, was *not* standard colonial policy. In North America and New Zealand, despite much trespassing by settlers, the British recognized indigenous people as possessors of property rights in their land as a formal matter and in practice often acquired land in transactions structured as purchases. Why was Australia different in this respect? Why, despite years of protest from well-placed insiders, did *terra nullius* remain in effect throughout the entire colonial period, and indeed right up to the 1990s? Banner's answer is that *terra nullius* was in part a product of the earliest British perceptions of aboriginal Australians as people more primitive than the indigenous peoples they had encountered

in other parts of the world and in part a product of the character of initial British settlement—a well-armed government expedition rather than the haphazard endeavors of scattered private groups, as in North America and New Zealand. Early British perceptions of the Aborigines were soon proven wrong in many respects, but *terra nullius* nevertheless persisted, because once implemented it could be abandoned only at the cost of upsetting every white person's title to land.

This issue's forum focuses on a keystone principle of the Anglophone legal tradition, the so-called "presumption of innocence." As Bruce Smith indicates, presumption of innocence is considered a fundamental doctrine of Anglo-American criminal law. Smith's research rebuts the presumption's status. Relying on eighteenth- and early nineteenth-century archival records previously unexplored by legal historians, Smith demonstrates that in London courts many criminal defendants suspected of committing petty thefts did not enjoy a presumption of innocence, but instead labored under a statutory presumption of guilt. Under various acts adopted by Parliament, criminal defendants who failed to "account" satisfactorily for their possession of certain types of goods could be convicted and sentenced by magistrates without the procedural safeguards of indictment and trial by jury and without certain important evidentiary protections that applied in cases of larceny tried in the higher courts. Smith thus qualifies, in important respects, existing legal-historical scholarship claiming that English criminal defendants during the "long eighteenth century" benefited from a series of evidentiary protections, including the presumption of innocence and the "beyond-reasonable-doubt" standard of proof. Although defendants in London tried at the Old Bailey increasingly benefited from these and other evidentiary safeguards, defendants tried in summary proceedings were intentionally and routinely denied such protections. Smith's findings and conclusions are discussed in a comment by Norma Landau. The author's response concludes the forum.

As always, this issue of the *Law and History Review* contains 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 full-text PDF "pre-prints" of articles.

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