In This Issue

In this issue of the *Law and History Review,* we find ourselves exposed to history's insistent "will to explain," to the rich array of methodological resources and opportunities available to legal historians thus engaged, and to some of the pitfalls that accompany the exercise.

Our first article, by Maria Ågren, explores the status of "immemorial prescription" *(urminnes hävd)* in early modern Swedish property law—that is, the claim of exclusive ownership in the absence of title deeds based on local recognition of immemorial usage—and discusses how best to explain the doctrine's decline. Immemorial prescription was treated as a very strong legal argument in Sweden until around 1700, when the legitimacy and even legality of this mode of acquiring property began to be questioned. By the beginning of the nineteenth century, legislators had become explicitly hostile to immemorial prescription. Ågren tests three means of explaining the change of attitude. First, she considers the effect of important historical transformations in the political environment brought about by the nobility's loss of much of its power vis-à-vis the Crown. Second, building on the conceptual work of Bruce Lenman and Geoffrey Parker, she considers changes in Swedish legal culture during the period, amounting to a relative decline in the influence of notions of "community law" and the ascendancy of "state law." Finally, Ågren mobilizes ongoing debates within institutional economics. More than likely, the Swedish property system reflected the economic principle of land/user ratio. When population was stagnant or falling and the risk of land desertion high, occupants who lacked legal title nevertheless enjoyed both protection of their occupancy and means to acquire legitimate possession. When population started rising and the risk of land desertion diminished, there was no longer a need in society to protect possessors who lacked documents proving their title.

Our second article addresses the terms of debate that enveloped the French Revolution in the immediate aftermath of the bloody uprising known as the Champ de Mars Massacre (1791). Historians have emphasized the uprising's political repercussions, seeing it as ushering in a leftward political turn and eventually the Terror. Here, Janine Lanza maintains that these outcomes were not evident in the extensive debates that immediately followed the event. What stood at the forefront were questions of sovereignty, of the nature of the revolutionary government, and of the extent and legitimacy of popular participation in the revolution. Concentrat-

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ing on the language used by various political factions to justify their interpretation of the massacre and to attack their political foes, Lanza shows that language about who had the right to make law, rather than about violence, was dominant. Methodologically, this article recommends joining attention to legal discourse—that is, to the text of debate—to analysis of the social and political context of the Champ de Mars massacre in the service of working out the meaning of the journée and explaining its implications for the course of the revolution.

Our third article, by David Parker, offers a similar recommendation. Like Lanza, Parker raises the "role of law" question but in distinct circumstances—debates over dueling in nineteenth- and early twentieth-century Spanish America. Parker explores the tensions introduced into legal discourse by the encounter of modernist liberal legality with the discourse of "honor." Throughout the second half of the nineteenth century and into the early twentieth, Parker tells us, dueling was on the rise in Spanish America. At the same time, liberal elites were pursuing an aggressive program of legal codification, seeking to extend state power and the rule of law. The practical impunity of dueling belied those efforts and highlighted a tension between abstract ideals and the prevailing culture of politics. Parker analyzes the juridical arguments employed by advocates and opponents of the duel, noting that all sides were troubled by the contradiction between criminal law and the so-called "laws of honor." Advocates of decriminalization stressed the quasi-legal character of the dueling codes and argued that an unenforced prohibition undermined public respect for the law in general. Opponents of legalization preferred the empty prohibition to a de jure legitimation of the duel. Contrasting the debate in Uruguay, where decriminalization was approved in 1920, with those in other countries where it was not, Parker argues that the primary disagreement among lawmakers was not about dueling but about the proper role for law itself—either as a reflection of existing societal values or as an instrument for social improvement.

In our fourth article, Carolyn Strange invites us to engage more deeply in the exploration of political debate as text. Strange's subject is punishment of the body in twentieth-century Canada. In their respective examinations of the rise of welfare-oriented correctional strategies in the nineteenth and twentieth centuries, Strange points out, neither liberal nor Foucauldian histories consider why corporal and capital punishment in fact *persisted.* Historical studies of physical sanctions in the twentieth century have focused instead on the campaigns leading to *abolition.* Here, Strange focuses on the discursive conditions of persistence. Closely examining two Parliamentary inquiries, the first (1937) created to consider possible changes to execution techniques, the second (1954) to investigate corpo-

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ral and capital punishment practices, Strange analyzes Canadian penal mentalities and sensibilities as distinct moments rather than as "motion" toward an outcome. She uses Norbert Elias's concept of "the civilizing process" to illuminate how supporters and opponents of bodily punishment both drew on notions of civility to support their positions. In each inquiry, committee members expressed characteristically modern, secular concerns about humaneness and fairness even as they maintained quite distinct cultural and political postures. In contrast to witnesses and commissioners participating in the Depression-era inquiry into the death penalty, however, participants in the mid-1950s commission, imagining a future of expansive civility, found it considerably more difficult to reconcile physicial penalties with ideals of reformative justice.

This issue's "forum" is the last in a series of three intended to introduce readers to current developments in Israeli legal history. It offers a single essay assessing the field, written by one of the most eminent legal historians of Israel, Pnina Lahav. Lahav's analysis of the state of the field, as represented in our pages and more broadly as it exists in Israel, underscores the recency of the field's development, the excellence of the scholarship already produced, the range of the terrain properly within its sights, and the profound significance of the impact its proponents are likely to have both within and beyond the academy. Lahav's essay leaves us in little doubt that legal historians are poised to engage the most fundamental questions of Israeli history. It also suggests, to this reader, the enormity of the political and moral task that they face in so doing. Lahav draws our Israeli series to a conclusion but, in so doing, leads us to expect that this "conclusion" will be but the briefest pause for breath in an endeavor of the first importance.

Finally, this issue features a review essay in which Ralph Lerner reflects on the first two volumes of J. G. A. Pocock's monumental study of Edward Gibbon's *Decline and Fall of the Roman Empire,* and, by extrusion as it were, on the nature and success of the "contextual" method in the history of ideas, to the development of which Pocock has so mightily contributed, and which has had so formidable an impact on legal and historical scholarship. In these first volumes, Lerner tells us, we will encounter a mighty proscenium, built at once to honor genius and to accommodate it in the stream of history. But the honoree has proven elusive: seven hundred pages have crowded the stage with characters, but Gibbon himself has been elsewhere all the while, frying other fish. The result of Pocock's great labor of construction, Lerner gently suggests, is a monument to another genius—his own. So might we judge the contextual history of ideas.

In addition to Ralph Lerner's review essay, this issue presents our normal complement of book reviews. As always, we encourage readers of the

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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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