In This Issue

This issue of *Law and History Review* presents three articles on North America. The authors are all interested in the emergence of legalities, especially the role that ideas and ideologies play in their creation and maintenance. Collectively, they investigate the problem of slavery for the development of nineteenth-century American statecraft, the enduring tensions between protective labor law and corporate capitalism in modern Canada, and the elusive question of individual responsibility in nineteenth-century American jurisprudence.

Our first article, by Gautham Rao, examines the federal *posse comitatus* doctrine (i.e., the federal government's power to compel the service of free individuals) to investigate how the problem of slavery redefined the relationship between individuals and the federal state in mid-nineteenth-century America. In theory and practice, this doctrine underscored the massive expansion of government power during the Civil War and Reconstruction. Without adequate capacity to enforce the Fugitive Slave Law of 1850, the federal government "commanded" American citizens to assist law enforcement as a *posse comitatus.* But the doctrine's foundational relations with slavery proved problematic. For those subjected to its power—abolitionists, union and confederate conscripts, and defeated southerners—the *posse comitatus* itself appeared as a category of servitude. The Posse Comitatus Act of 1878 conveniently repudiated an era of federal power that was inextricably connected to slavery and servitude. Once freed from the image of slavery, the federal *posse comitatus* doctrine quietly entered the mainstream of the American state.

In our second article, Eric Tucker examines what has happened in Canada when protective labor law has conflicted with the norms of capitalist legality. As he explains, shareholder liability for unpaid workers' wages was first enacted in mid-nineteenth-century New York State as a condition of providing investors with easy access to the corporate form at a time when there was deep disquiet about its legitimacy. Although the Canadian debate was more muted, prominent reform politicians expressed similar concerns about the corporation, leading them to impose first shareholder and then director liability for unpaid workers' wages. In the latter part of the nineteenth century, as the norms of separate legal personality and the limited liability of the makers and managers of corporations hardened

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into legal bedrock, the understanding of director liability as a condition of incorporation was inverted by the judiciary and treated as an exceptional privilege to be enjoyed only by the most vulnerable workers. In the late twentieth century, the Supreme Court of Canada adopted a similar line of reasoning to justify its holding that workers were not entitled to recover unpaid termination and severance pay from directors when their corporate employers defaulted.

Our third article, by Susanna Blumenthal, serves as the foundation for this issue's forum, "Consciousness and Culpability on Trial." As she notes, scholars have often depicted nineteenth-century American lawyers as resolute guardians of traditional ideas about freedom and responsibility, dogmatically opposing the deterministic doctrines of medical science. By focusing on the works of those who forged the interdisciplinary field of medical jurisprudence in the antebellum period, she reconsiders the problem of responsibility as it was conceived by doctors and lawyers. She reveals that both professions subscribed to the same basic model of moral agency—one reflecting the influence of the optimistic Common Sense philosophy of the Scottish Enlightenment. This model encouraged the identification of freedom with conventional rationality and morality, pointing toward the paradoxical conclusion that the only fully responsible persons were those who would never deviate from the laws of God and man. As they grappled with this attributive dilemma, medico-legal commentators came to see the wisdom of the alienists' hypothesis of insanity, endorsing substantial revisions of the common law of *non compos mentis.* However, most of these commentators—doctors as well as lawyers—drew the line at the doctrine of "moral insanity" and continued to insist that "self-neglect" was the root cause of most forms of depravity. This remained the case to the end of the century, even as a rising generation of medical scientists offered new reasons for doubting the autonomy of the will. Yet it is difficult to discern whether those who held to this model of moral agency did so as a matter of principle, practicality, or sheer habit. Sarah A. Seo and John Fabian Witt, and John Mikhail, offer comments on Blumenthal's essay. Her response concludes the issue's exploration of the emergence of enduring North American legalities.

Professor Alfred Brophy and I are delighted to announce that Amalia D. Kessler of Stanford Law School has agreed to serve as Associate Editor of *Law and History Review.* Professor Kessler will be responsible for book reviews on the non-Americas. Her research focuses on the evolution of commercial law and civil procedure and explores the roots of modern market culture and of present-day due process norms. The American Society for Legal History (ASLH) awarded her "Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court," the 2005 Surrency Prize for the best article published in *LHR* in 2004. Professor Brophy will

continue his excellent service as *LHR*'s Associate Editor responsible for book reviews on the Americas.

As always, this issue concludes with a comprehensive selection of book reviews. We also encourage readers to explore and contribute to the ASLH's electronic discussion list, H-Law, and visit the society's website at http://www.hnet.msu.edu/~law/ASLH/aslh.htm. 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 web site, at www.press.uillinois.edu/journals/lhr.html, enables readers to browse the contents of forthcoming issues, including abstracts and, in almost all cases, full-text PDF "pre-prints" of articles. Finally, I invite all of our readers to examine our administration system at http://lhr.law.unlv.edu/, which facilitates the submission, refereeing, and editorial management of manuscripts.

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