ASLH Newsletter

Winter 2001

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2001 Annual Meeting, Chicago

The Society's thirty-first annual meeting will be held November 8-10, in Chicago. The host hotel will be the Allegro,180 West Randolph St. Vicky Woeste of the American Bar Foundation vswoeste@nwu.edu is chair of the Local Arrangements Committee. Bill Novak, History, University of Chicago, American Bar Foundation, is chair of the Program Committee nov9@midway.uchicago.edu. Additional information about the meeting is available on the web at http://www2.h-net.msu.edu/~law/chicago.html.

Edward M. Wise Chair in Comparative Legal History

The Wayne State University Law School has established a named chair in memory of Edward M. Wise, who died on October 27, 2000. Edward was a life member of the Society. The chair will be in comparative legal history. The Law School has secured funding for about half the amount required for an endowed chair. Additional gifts are welcome. Please send all contributions (made payable to the Edward M. Wise Memorial Fund) to the attention of Dean Joan Mahoney, Wayne State University Law School, Ferry Mall, Detroit, MI 48202

2000 Annual Meeting, Princeton

The Society held its thirtieth annual meeting in Princeton, N.J., October 19-21, 2000. Special thanks go to CHARLES McCURDY, University of Virginia, and his program committee of ARIELA DUBLER, Yale University, JAMES GORDLEY, University of California, Berkeley, WILLLY FORBATH, University of Texas, JANET LOEGARD, Moravian College, JOYCE MALCOLM, Bentley College, RANDY McGOWEN, University of Oregon, RICHARD ROSS, Indiana University, Indianapolis, and BILL WIECEK, Syracuse University.

Special thanks go to the Local Arrangements Committee, STAN KATZ and DIRK HARTOG, both of Princeton. Stan was especially helpful in arranging to have the Woodrow Wilson School co-sponsor the Annual Lecture and the reception which followed STANLEY KUTLER's delightful presentation, "An Historian's Adventures with the Law."

The Society is also grateful for the help with registration and other administrative details received from ROB SMITH, Bowling Green State University, MITRA SHARAFI, graduate student at Princeton, and ANDY GAIES, undergraduate student at Princeton.

2000 Annual Meeting, Board of Directors

The full minutes of the Board of Directors meeting are posted on the Society's web page. Key announcements made at the meeting were these:

The Board voted special thanks for service to the Society to Don Nieman, who had concluded his term as Secretary-Treasurer. In addition, the Board unanimously approved this resolution: "We hereby express our immense gratitude to Frances Hurst for her extraordinarily generous support of our ongoing effort to extend the great influence of Willard Hurst and his work through the Willard Hurst Legal History Institute." Finally, the Board authorized the Society to make a gift of life membership to Lewis Bateman in gratitude to him for his efforts and many years of service with the Society's program for publication of its Studies in Legal History.

Graduate Student on Board of Directors

The Board approved a resolution calling for one position on the Board to be reserved for a graduate or law student. The middle of this newsletter contains the ballot needed to amend the Society's bylaws to effect that change. The full text of the bylaws is on the web.

Surrency Prize

The 2000 Surrency Prize went to NORMA LANDAU for her article "Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth-Century Quarter Sessions," in volume 17 of the *Law and History Review*. The committee reported:

> Landau's study of prosecutions in eighteenth century England's Quarter Sessions is as compelling as a detective novel and an impressive piece of historical research to boot. We loved her title, and her thesis, that these prosecutions used the criminal process to mask an attempt to corruptly siphon money from civil litigants. And her presentation is so clear and accessible we could hardly believe she is working in such an obscure body of records (records that one of us has worked in and to whose obscurity on several levels she readily attests!). Landau makes the excruciatingly difficult task of making such records meaningful to legal historians today seem easy.

Sutherland Prize

The 2000 Sutherland Prize went to JOHN H. LANGBEIN for his article "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: the Appearance of Solicitors," which appeared in the *Cambridge Law Journal* vol. 58, part 2. Because of the number of excellent articles under final consideration, the committee decided to award an honorable mention citation to NORMA LANDAU's article "Indictment for Fun and Profit: a Prosecutor's Reward at Eighteenth Century Quarter Sessions," which appeared in the *Law and History Review*, vol. 17, no. 3.

> The citations for the awards read as follows:
>
> The Sutherland Prize Committee has made the unanimous decision to award the 2000 Prize to Professor John H. Langbein for his article "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: the Appearance of Solicitors" which appeared in the *Cambridge Law Journal* for July, 1999. Continuing his long-term examination of the development of procedure in criminal cases, Professor Langbein gives a persuasive explanation for the decision of judges in the 1730s to reverse the practice of centuries and permit admission of defense council in non-treason cases. The article utilizes extensive research in reports of State Trials, Old Bailey Sessions Papers, and contemporary tract literature to argue that it was pretrial practice, not the use of prosecution counsel at trial, which occasioned the change: increased use of prosecuting solicitors and the reward system led judges to attempt to even the balance between prosecution and defendant. Through his work, Professor Langbein has once again enlightened us on the ways in which informal or unofficial alterations in practice may lead to widespread change in the entire structure of an institution.
>
> Using samples of Middlesex Bills of Indictment from across the eighteenth century, Professor Landau shows that many actions for nonfelonious offenses against the person, brought as criminal suits, had as their objection compensation or apology or both and were in fact treated by both prosecutor and the court of Quarter Sessions as essentially civil actions. The article compels a rethinking of modern categories of "crime" and "criminal" as applied to the eighteenth century, illustrating the lack of definitive distinction between criminal and civil in the minds of both prosecutors and judges.

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2000 Annual Meeting Sessions

Reports from the chairs of sessions at the 2000 Annual Meeting are reprinted below to provide a summary of the work currently being done across the range of the Society's membership.

Family Law in the Ancient World	**Legal Cultures of Colonialism and Nationalism**	**American Criminal Justice in the Early 20th Century**	**Land Expropriation and Proof of Possession**	**Canada and Australia: Sister Colonies with (Somewhat) Divergent Legal Histories**
		The People's		

Before and Beside the Common Law	**Law and Society in Imperial Russia**	**The People's Sovereignty in 19th-Century Constitutional Politics**	**The Economic Analysis of Legal History**	**The Genealogy of Inequality**
South Carolina Redeemers in Court	**Law, Learning, and Judgment in Early Stuart England**	**Natural Law Thought in British North America**	**Money, Contract, and Capitalism in Early America**	**Truth, Justice, and the Carolingian Way**
Freedom and Slavery on the American Frontier	**The Bill of Rights and the Uses of History**	**Lawyers in the American West, 1820-1920**		

Family Law in the Ancient World

EDWARD HARRIS, Department of Classics, Brooklyn College, reports: JUDITH EVANS GRUBBS, Department of Classical Studies Sweet Briar College, reviewed Constantine's rulings about the sale of children into slavery. The emperor legalized the sale of newborn infants and encouraged the rescue of abandoned children. Although the sale of older children was illegal, parents could still lease out their children's labor until they reached adulthood. She then examined the non-legal evidence, which shows that parents might indeed sell the services of their children. She also interpreted two documents preserved from Egypt as evidence for the sale of abandoned infants into slavery.

EVA CANTARELLA, New York University Law School, began by contrasting the traditional view of the Roman paterfamilias with the revisionist view. According to the traditional view, the roman paterfamilias was a stern patriarch, who demanded absolute obedience and ruled with an iron hand. The newer view stresses the role of *pietas* (familial obligation) in relations between fathers and sons and finds evidence for mutual affection and respect. Professor Cantarella criticized the new view in two ways. First, she drew attention to the economic powers fathers exerted over their sons. Despite the rules about the *peculium* (personal fund) that sons could control, these restrictions were a considerable burden and created considerable resentment. Second, Professor Cantarella pointed to the pervasive concern about patricide, which she attributed to the frustration felt by sons about their fathers' powers over them.

Return to program grid.

Legal Cultures of Colonialism and Nationalism

BRIAN OWENSBY, Department of History, University of Virginia, reports: The three of us and ten or so hardy souls met for an early morning session to find common ground between South American Andrés Bello's efforts to establish newly independent Spanish American republics in the concert of nations through international law, and Edmund Burke's case for impeaching Warren Hastings, captain general of the East India Company, for misdemeanors while in office.

MS. LILIANA OBREGÓN, Harvard Law School, spoke first and discussed the dilemmas faced by Latin American intellectuals in the period immediately following independence in the early 19th century. Through a close reading of jurist, political theorist, poet, and historian Andrés Bello, MS. OBREGÓN discussed the dilemmas facing Latin American intellectuals who had to find ways of being different enough from Spain to justify independence and yet similar enough to Europeans more generally to justify a claim to being among the civilized nations of the modern world. Bello sought to do so by sharply distinguishing civilization from barbarism, providing jurisprudential support for an idea that found literary expression in the writings of Domingo Sarmiento and other Argentines of the Generation of '37. OBREGÓN argued that Bello sought to respond to the double bind of being part of a Europeanized elite that had to rule a populace which, from a European perspective, embodied a barbarian and dark-skinned "other." He did so, OBREGÓN concludes, by displacing the contradictions and anxieties of his position onto the footnotes of his learned texts, the only place they could reside without subverting his effort to insert newly independent Spanish American republics into the emerging universalized jurisprudential discourse of the modern concert of nations, with its seat in

Europe.

MS. MITHI MUKHURJEE, University of Chicago, spoke second and shone light on the paradoxes of Edmund Burke's speeches favoring the impeachment of Warren Hastings. Burke's problem, she argued, was that Hastings' defense amounted to a denial of British jurisdiction over India. Hastings claimed that since the Indian people were ungovernable and since the East Indian Company had received the right to rule from the Moghuls, Moghul law and custom, rather than British law, applied in the instant case. Hastings, on this argument, stood outside British jurisdiction and could not be tried by Parliament sitting as a court of Britain. Burke, MUKHURJEE claims, understood that this amounted to a complete denial of British legal authority in India, and so insisted on the existence of a universal natural law that bound all, irrespective of cultural particularity. This amounted to a profound challenge to the Imperial binary of Empire (Britain)-Subject (India), transforming it into a three-way relationship among Empire-Subject-Impartial Third Party. British political and legal structures were not designed to accommodate such a problem, which finally led Parliament to split itself into two distinct parts, one to represent the Empire, and one to represent the natural law.

I offered a brief comment on the issue of universality and particularity to which both papers spoke. For all their differences—Bello's effort to find the basis for regional and national identities in the context of a universalizing international law and Burke's claim for universal natural law to allow Britain to settle a local dispute—the two cases serve to illuminate the twists and involutions the Western discourse of universality is so often forced into when confronted by particularities, be they national, regional, cultural, or religious.

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American Criminal Justice in the Early 20th Century

RICHARD HAMM, Department of History, SUNY Albany, reports: ALLEN STEINBERG, University of Iowa, spoke at length on the politics of criminal law in progressive era New York. Steinberg showed how the construction of bad copy by both reformers and Tammany politicians was essential to the political infighting of the progressive era -- and how these debates illuminated the role of police in the modern state. I commented, asking him to broaden his sources to include cultural source and to push his analysis both forward and backward in time. About 25 people were in the crowd, a good size for 7:30 on the first day.

Return to program grid.

Land Expropriation and Proof of Possession

STEVEN WILF, University of Connecticut Law School, reports: This session dealt with the idea of property as an instrument of state formation. It shows how formal rules reflect both underlying legal ideologies and the identified goals of those in control of the state apparatus.

FREDERICK KATZ (University of Chicago, History) discussed land patters from the colonial period to the Mexican Revolution of 1910. This sweeping synthesis of a large literature begins by contrasting central Mexico, with its communal land structures and land organization inherited from the pre-Conquest period, with northern Mexican property relations, where the population was less dense, there was little communal land, and military colonies were established. The paper discusses the sharp departure from existing property organization with the liberal assumption of power in 1856-7. Liberals sought to attract yeoman farmers from Europe, and to both expropriate Church land and put an end to communal ownership. The continuing land expropriation of the *Porfiriato* in the end of the nineteenth century -- for the benefit of large landowners and railroads -- were among the most important sources of unrest leading to the Mexican Revolution.

MARIA MONTOYA (University of Michigan, History) examined the Maxwell Land Grant of the 1870s, culminating in the Supreme Court decision *U.S. v. Maxwell Land Grant Company* (1889), where competing Mexican and U.S. conceptions of property might be most clearly understood. Mexican land law diverged from U.S. law in the power of governors to grant enormous tracts with little constraint upon their discretion; and the privileging of community and state interests in establishing land patterns for the purpose of settlement, national defense, and border control. U.S. property law included an aspiration of equality, as might be seen in the Homestead Act (1862), which valorized the creation of a class of yeoman farmers. Moreover, Mexican tracts often followed the local geography, but appeared haphazard to the ordered system which characterized parcels in U.S. settlement. The paper continues to discuss how these differences were reconciled in the Supreme Court's decision.

ALEXANDER KEDAR's (University of Haifa, Law) well-researched paper examines the land rules adopted by the Israeli state in its earliest years. He shows how these rules diminished the likelihood of finding property right disputes in favor of the Arab possessors. In a most intriguing section of the paper, he discussed how under Ottoman law the person who worked unused or waste land might be considered as having acquired title in it while Israeli law

law the person who worked unused or waste land might be considered as having acquired title in it while Israeli law required formal procedures for acquisition. This procedure might render a lawful possessor under Ottoman law a trespasser under Israeli law. Kedar also discussed the significance of the Jewish state's national and security interests in determining the precise boundaries of Arab village land.

These papers all discuss the way property rules are altered in the service of some ideological or state interest. In each, a new set of property rules -- set by Mexican liberals; U.S. courts infused with republican thinking; or Zionist proponents of agricultural settlement -- altered the rules for the benefit of one group over another. Rules which often appear formal, such as registration, might be used to determine the large-scale distribution of land. Both Gregory Alexander (Cornell University, Law) and Carol Rose (Yale University, Law) unpacked the differences between existing and second-in-time property regimes. Carol Rose, one of the commentators, has put the themes of these papers so very well: "Acts of possession are a text, and the common law [or any other legal regime] rewards the author of the text."

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Canada and Australia: Sister Colonies with (Somewhat) Divergent Legal Histories

IAN HOLLOWAY, Faculty of Law, University of Western Ontario, reports: I chaired the session entitled "Canada and Australia: Sister Colonies with (Somewhat) Divergent Legal Histories". The panel comprised Professors Wes Pue of the University of British Columbia, Constance Backhouse of the University of Ottawa, and Carolyn Strange of the University of Toronto.

All three papers had comparative Australian-Canadian focus, and all three presenters were people whose research straddles the Pacific ocean. WES PUE spoke in lawyers' professional cultures in Canada and Australia - making the point that in Canada, there seems to be a greater tendency to link lawyers and the legal profession to the values of the British constitution. CONSTANCE BACKHOUSE spoke on the perverse effect of the corroboration rule in child rape cases - she engaged in a comparative study of two cases, one from Western Australia and one from Manitoba.

CAROLYN STRANGE spoke on the last men hanged in Canada and Australia - her point being that in Australia, unlike Canada, the last hanging has acquired a romanticized status which fed into the debate over the abolition of capital punishment. In a sense, her argument inverted the argument made by Wes Pue.

All papers were VERY good, and afterwards there was a wonderful discussion period.

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Before and Beside the Common Law

CYNTHIA NEVILLE, Department of History, Dalhousie University, reports: This session brought together three papers that examined medieval ideas about the power and authority of written laws, the attitudes of the people whom the laws were meant to govern, and the problems inherent in using written records often regarded as impenetrable in attempting to understand medieval representations of legal beliefs and norms. All three papers complemented each other, and all generated much enthusiastic response.

BRUCE O'BRIEN (Mary Washington College), spoke on the subject of 'A Common Law Mentality in Anglo-Saxon England?' In this paper Bruce O'Brien searches for early manifestations in medieval England of what scholars occasionally refer to as a 'common law mentality'. The author attempts here to elucidate the first traces of a new mode of thought about the efficacy of, and a new manner of receiving, royal commandments about the law. These, he argues, can be found as early as the reign of King Æthelstan (925-939). Dr. O'Brien's definition of a 'common law assumes acceptance of assumptions that legal scholars have, for the most part, identified closely with the so-called legal revolution of the twelfth century, notably the notion that a common law based on royal fiat was superior to local custom, that it was widely available, and that there was little variation in its rules and application. The most significant aspect of the paper, however, is the arguments it offers in respect of the preconditions necessary for the development of a 'common law mentality' under Æthelstan: the establishment of political conditions identifiable collectively (if still embryonically) as a 'kingdom', the respect that a successful national figure might engender in the context of tenth-century notions of royal authority, specifically the maintenance of law and order (with a concomitant uniformity of expectations on the part of that same royal figure) and, finally, the willingness on the part of the inhabitants of a region to consider marginalizing their own legal customs and practices. All are present in Dr. O'Brien's assessment of the reign of King Æthelstan. There is no claim here that the origins of the common law – whatever those may have been – should be pushed back in time from the twelfth to the tenth century. The importance of Dr. O'Brien's paper lies, rather, in its supposition that the most important challenge facing historians of the common law lies not in locating precisely a single elusive moment of birth for the genesis of the common law, but

more particularly in tracing the notional and psychological foundations upon which something approximating the common law system was subsequently established.

In a paper entitled 'Law as Theatre in Early Medieval Ireland', ROBIN STACEY (University of Washington) seeks to explore early Irish assumptions about the law, its authority, its effectiveness and, above all, its ability to regulate everyday activities. The author argues that historians have an obligation to seek to recover those assumptions even in respect of periods and of regions that have traditionally been marginalized as dark and unknowable. Dr. Stacey acknowledges openly the difficulties of drawing firm links between the highly stylized texts of early law codes (rendered more complex still by the fact that many survive only in later recensions) and the ritualized actions of the people who lived and experienced those laws. Her paper offers much more than a review of the complex rituals by which early Irish people gave expression to legal custom, or yet another examination of the quaint and curious actions by which pre-literate peoples struggled to impose order on their lives. It also argues that ritual simultaneously reflected, shaped and mediated social behavior and cultural beliefs. By means of its discussion of the elaborate ceremonies associated with distraint, claims to disputed land, and sick maintenance the paper shows too that Irish litigants engaged in much more than a set of rituals intended to portray in performance concepts that could not be expressed by reference to written procedures. In her examination of the chronological, spatial and conceptual milieus in which Irish litigants prosecuted their grievances Dr. Stacey demonstrates the vitality of the early Irish law codes, once regarded as little more than the fossilized voices of a group of literati unique in the extent of their learning but of little relevance to the society in which they lived.

EMILY TABUTEAU (Michigan State University), gave a paper entitled 'Was Norman Law Common Law?' This work also deals with the general question of the origins of the common law, but has as its focus the duchy of Normandy in the eleventh and twelfth centuries. Her definition is at once broad and ambiguous: it takes for granted the existence of a 'common law mentality' in Normandy, in that the prerequisites traditionally associated with the common law were present: a unitary state of some sort, a royal (or in this case ducal) personage with power and authority to create an impose laws, and a population willing (or perhaps, in the case of Normandy, compelled) to confer primacy on the pronouncements of such a figure. Dr. Tabuteau further acknowledges that a common law was one that was both applied and recognized across a wide region. Dr. Tabuteau, however, argues for the persistence in Normandy of the memory and the effect of local custom, and her conclusions suggest that rather than a common law in Normandy in the period between 1066 and 1204 there existed side by side two or more different common laws. The achievement of the dukes of Normandy in the course of the eleventh and twelfth centuries was, in her opinion, modest but promising: if they had not yet succeeded in creating and maintaining a single system of common law they were nevertheless well on the way towards convincing their subjects that ducal pronouncements must take precedence over local mores and practices.

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Law and Society in Imperial Russia

WILLIAM G. WAGNER, Department of History, Williams College, reports: Examining the procedure followed by state officials in soliciting public responses to the Basic Principles formulated in 1862 for the Russian judicial reform, CHERI WILSON (Department of History, Loyola University, Baltimore) concluded that the reform commission sought primarily the views of provincial judicial and administrative officials on how the future reform might be implemented in local areas. The overwhelming majority of the comments received by the commission consequently were submitted by such officials. According to Wilson, the comments provide a revealing picture both of the administration of justice in local areas prior to the reform and of life in Russian localities generally. As an example, Wilson discussed responses to the proposed qualifications for election to the new position of justice of the peace, noting especially the frequent reference to the lack of qualified candidates in most local areas.

Discussing the efforts of Russian lawyers after the judicial reform of 1864 to establish a positive public image and professional identity, SUSAN RUPP (Department of History, Wake Forest University) examined the criteria and procedure for disciplining members developed by the bar associations created as a result of the reform. Rupp noted that only a minority of lawyers participated actively in these efforts, with the majority of lawyers ignoring them. Disciplinary efforts focused on the "moral' qualities and behavior of lawyers and were much less concerned with questions of professional competence and complaints by clients. Rupp concluded that activist lawyers generally failed to create a positive public image for lawyers in general or to establish effective professional autonomy prior to the Revolution of 1917.

Tracing the emergence of the discipline of criminology in late 19th-century imperial Russia, RON BIALKOWSKI (Department of History, University of California at Berkeley) argued that the particular political context of late imperial Russia significantly influenced both the development of criminological ideas and theories and the reception in Russia of ideas and theories from Western Europe. Bialkowski cited in particular the rejection of Lombroso's theories in favor of conceptions of crime that emphasized sociological causes. Bialkowski also noted

Lombroso's theories in favor of conceptions of crime that emphasized sociological causes. Blaikewell also noted that liberal Russian criminologists initially attempted to work with the state in promoting progressive criminal and penal reform and then sought to pursue reform autonomously through professional and philanthropic organizations. But the state's unresponsiveness to their efforts and to reform generally ultimately pushed liberal and radical criminologists into overt political opposition to the tsarist regime.

In my comments on the papers, I observed that taken together the three papers effectively demonstrated several important themes in the social, cultural, and institutional history of Russian law during the late imperial period. The papers showed, for example, the way in which the process of reform shifted between the 1860s and 1914 from an overwhelmingly state-led and state-dominated one to a much more complicated pattern of pressure from and interaction between the imperial state and a variety of social and professional groups, among the latter of which legal professionals figured prominently. They also demonstrated the growth and the increasingly complex character, as well as the fragility and vulnerability, of the prerevolutionary Russian legal profession. In addition, the papers revealed the tensions and contradictions within the fledgling Russian legal profession, as well as not infrequently within individual members. Finally, the papers demonstrated how the particular Russian political, institutional, and cultural contexts often led to important differences between parallel developments or institutions in imperial Russia on the one hand and in Western Europe and the U.S. on the other.

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The People's Sovereignty in 19th-Century Constitutional Politics

KEITH E. WHITTINGTON, Department of Politics, Princeton University, reports: This panel attracted a large and interested audience and presented a gratifyingly coherent set of papers examining the interaction between constitutional forms and constitutional politics.

CHRISTIAN G. FRITZ of the University of New Mexico ("The Struggle Over the People's Sovereignty Before the Civil War) offered material from his current book project examining the contested nature of popular sovereignty prior to the Civil War. Although it was broadly accepted that the American government was a popular government, there was violent disagreement as to what government by the people entailed. The "Whiskey Rebellion" of 1791 provides one example of those disagreements, as the Federalist administration and the Pennsylvania protestors radically disagreed about the legitimacy and constitutional status of popular meeting and protest and the appropriate channels through which and times when "the people" may speak.

WAYNE D. MOORE of Virginia Polytechnic Institute and State University ("Reconceiving the Fourteenth Amendment's Founding") argued for a fluid notion of constitutional legitimacy in the particular context of the

Fourteenth Amendment. The problematic drafting and ratification of the Fourteenth Amendment under Article V procedures provides an opening for considering the generally complicated relationship between the "we the people" as constitutional authors and as constitutional subjects. The authority of the Fourteenth Amendment developed through its subsequent application and constitutional development, and not simply through a single decisive moment of legislation.

ADAM WINKLER of the University of California at Los Angeles ("A Revolution Too Soon: Woman Suffragists, the Right to Vote and the Living Constitution, 1869-1874") contended that a notion of the "living constitution" emerged earlier than usually assumed in American constitutional history. He argued that a number of suffragists adopted a version of the living constitutionalism in order to advance legal challenges to the disenfranchisement of women after the adoption of the Reconstruction Amendments.

MARK E. BRANDON of the University of Michigan and TONY A. FREYER of the University of Alabama offered valuable commentary on the papers, elaborating their logic and significance and suggesting some additional points to be explored and clarified.

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The Economic Analysis of Legal History

GEOFFREY P. MILLER, New York University Law School, began the session by identifying four reasons why law-and-economics, as a discipline, has not generally concerned itself with the field of legal history. First, the neoclassical methodology employed by many law-and-economics scholars purports to be a-historical and context-free: the rational profit maximizers who populate law-and-economics papers are culture-less, gender-less, past-less, class-less utility functions. Second, law-and-economics has lacked a concern for history because it has had so

much else to do, starting with the fundamental re-interpretation of all the basic areas of the common law. Third, doing history is time-consuming and difficult; since the payoffs were greater in the realm of applying economic theory to legal doctrine, the first generation of law-and-economics scholars avoided it. Finally, professional historians found the theoretical approach of the founding generation of law-and-economics scholars to be brash, presumptuous, and politically unpalatable. Miller observed that these conditions are beginning to change. Recent law-and-economics scholarship has been concerned with contextual and cultural factors; the easy theoretical questions have nearly all been addressed; the payoffs for theory relative to empirical work are lower; and law-and-economics scholars are more moderate in their commitment to free-market ideas. Miller suggested that, in light of these changes, there may now be opportunities for a fruitful intersection between law-and-economics and legal history.

RON HARRIS, of Tel Aviv University, followed with a paper entitled "Drifting Apart? Legal History, Economic History, Law & Economic Analysis." Harris observed that over the past forty years, the fields of history, economics, and law have generated three cross-disciplinary approaches: legal history (combining history and law), economic history (combining economics and history), and law and economics (combining law and economics). To date, he argued, there has been little interaction between these three dual-discipline fields. Harris offered an intellectual history of the disciplines to explain this lack of interaction. He argued that prospects for future interaction are brighter. In law-and-economics, the neoclassical paradigm is being adjusted in such a way as to allow a turn toward history in that discipline. As for

DAN KLERMAN, of University of Southern California, presented a paper on "The Selection of Thirteenth Century Criminal Disputes for Litigation." Klerman examined Thirteenth-Century English private prosecutions in which the courts required a jury verdict even if the parties settled. Because the data set includes both the settlement and a jury verdict, it provides unique information that can be used to assess the predictions of the Priest-Klein hypothesis on the selection of disputes for litigation. Priest and Klein predicted (among other things) that parties with larger stakes in a case are likely to prevail more often in litigated outcomes when engaged in disputes with parties with lower stakes. Klerman's study provides qualified support for the implications of the theory: defendants were found guilty much more often in settled cases than in litigated ones.

JENNY BOURNE WAHL, of Carleton College, presented a talk based on her book, "The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery." She argued that the law of slavery developed by Southern judges in the antebellum era satisfied, in general, the standards of efficiency from the standpoint of slave masters. That is, the common law of slavery served to maximize the wealth of slave owners by developing rules that served their welfare ex ante. Wahl surveyed a number of areas of Southern slave jurisprudence, including liability for breach of warranty as to the character of slaves, allocation of risk of harm to slaves who were hired out to others, and cases about the liability of common carriers for the escape of slaves. Wahl observed, however, that the apparent efficiency of these rules was hardly an argument in their favor, since the result was to sustain a deeply immoral and inhumane system.

WILLIAM W. FISHER, III, of Harvard University, offered comments on the three presentations. Among other points, he expressed misgivings as to the possible extension of law-and-economics into the field of history if the result would be the privileging of functional over historical explanations. He found Klerman's data to be intriguing, but raised several questions about the interpretation. He commended the extraordinary research in Wahl's paper but questioned the analytical methodology as being overly doctrinal and somewhat too centered in the work of the founding generation of law-and-economic scholars.

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The Genealogy of Inequality

STANLEY N. KATZ, Woodrow Wilson School of Public and International Affairs, Princeton University, reports: This session was attending by more than fifty members, and provided a lively occasion for exchange, since the authors kept strictly to their time allotments, and there was no formal comment -- Reva Siegel, alas had to remain in New Haven with a bad case of the flu. The Chair simply opened the discussion by asking the first question.

ROBERT COTTROL, George Washington University Law School, made a sophisticated case that racial equality in the United States can only be understood in the context of alternative ideas and practices of equality elsewhere in the Americas. He situated our absolutist legal response to race to other more flexible and permeable legal approaches in the countries to our south. In retrospect, only the Canadian experience was neglected. LINDA KERBER, University of Iowa, followed up the arguments of her recent prize-winning book on the obligations of citizenship for women. She examined the ironic context of recent immigration caselaw in which the foreign-born children of U.S. male citizens have great difficulty in becoming U.S. citizens, whereas the children of our female citizens are, in effect, privileged in this respect by statute and caselaw. Thus the context for the lengthy audience discussion was the problem of equality in both race and gender, and also up and down the length of the continent. It was unusual and gratifying to find questioners coming from very different intellectual, legal and geographical

was unusual and gratifying to find questioners coming from very different intellectual, legal and geographical perspectives in one session. Altogether, this was an admirable and satisfying session.

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South Carolina Redeemers in Court: The Criminal Justice System and the Establishment of White Supremacy

CHRISTOPHER WALDREP, Department of History, San Francisco State University, reports: This panel brought together two scholars interested in South Carolina Reconstruction and Redemption. Their papers showed how white supremacists misused and abused the law as they seized power.

In a paper entitled “The 1878 Election Cases and the Collapse of Federal Enforcement Efforts in South Carolina,” LOU FALKNER WILLIAMS (Kansas State University) examined federal efforts to combat white supremacists’ election fraud. These efforts failed, Williams showed, due to the intransigence of South Carolina jurors and the incompetence of the United States Attorney. W. LEWIS BURKE (University of South Carolina) presented a richly researched narrative of the South Carolina state prosecution of Francis Lewis Cardozo. State prosecutors violated contemporary conflict of interest rules, used perjured testimony, may have improperly influenced jurors, and relied on a prejudiced judge to win a conviction. Cardozo was almost certainly innocent. Cardozo died penniless.

In a brief comment, I praised both authors for their fascinating look at Redeemer justice and suggested both papers could be used to challenge Eric Foner’s ruling paradigm. The role of law in restoring white supremacy at the end of Reconstruction was critical. Though this was an early morning session, some fifteen stalwarts turned out for what proved a fascinating panel.

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Law, Learning, and Judgment in Early Stuart England: Reading "Measure for Measure."

ALLEN D. BOYER, New York Stock Exchange, Enforcements Division, reports: On Saturday morning, in a well-attended presentation, Jacobean drama and Jacobean jurisprudence were held up as mirrors to the other.

CATHERINE MCCAULIFF (Seton Hall University) opened with "Hypotheticals in Measure for Measure" This focused on two of Shakespeare's characters, Claudio and Juliet, but more broadly discussed the pairs of lovers who figure in Measure for Measure -- couples who are not quite married in the eyes of the church and state (having consummated their union while postponing the ceremony, pending delivery of a dowry; having broken a marriage contract because a dowry could not be delivered; having produced issue outside wedlock, etc). She argued that these couples, each of which is bound together in ways which differ, slightly but significantly, from the other couples in the play, help illustrate Shakespeare's ideas about the definition and function of marriage, just as hypothetical cases help focus classroom discussions (whether in contemporary law schools or in the Inns of Court known by Shakespeare and his audience).

LOUISE HALPER (Washington & Lee University) presented "Measure for Measure and Its Political Moment" This emphasized the close parallels between Shakespeare's fictional city of Vienna and the political world of Jacobean England. She noted that, just as the play's Duke Vincentio chooses to manipulate other characters secretly, while disguised as a friar, so James I was fond of personally stage-managing political events. (Most notably, at Winchester early in James' reign, when Sir Walter Raleigh and others faced execution for treason, the king remitted the prisoners' sentences only after they had been brought to the scaffold). She used these likenesses to suggest that Shakespeare, as a playwright who enjoyed royal favor, used Measure for Measure to present a dramatic situation in which a ruler operated in opposition to the law -- a situation in which James increasingly found himself, as his desire for personal rule conflicted with the desire of Parliamentarians and judges for a commonwealth governed by the authority of the common law.

PENELOPE PETHER (American University) presented a different perspective in "Measured Judgments? Histories, Possibilities, and the Possibility of Equity." She drew upon the writings of Hayden White and the suggestions of various New Historicist writers to argue that legal education should challenge the continuing dominance of "Langdellian" doctrinal analysis. She suggested that Measure for Measure, because it leaves unresolved the question of whether Isabella chooses to marry the Duke -- therein reflecting a broader rejection of neat and simple endings -- is a play uniquely able to raise open-ended discussion about what values the law should reflect.

Commentary and closing remarks were provided by DAVID MILLON (Washington & Lee University) and the chairman. Dean Millon highlighted the other side of the debate over the "King James version" of Measure for Measure, pointing out that the play may have been written or produced before James's accession to the English throne. He concluded by observing that, nonetheless, the numerous pardons which are issued in the last scene of

Measure for Measure provide good grounds to link Vienna with Winchester and the Viennese duke with the British monarch. The chairman outlined the religious background in which Shakespeare grew up (with a father who whitewashed mural paintings in the church at Stratford, in good Protestant fashion, but later seems to have returned to the Roman church), and speculated that such religious strains may have shaped the playwright's vision.

LAURIE BENTON, NJIT and Rutgers University, Newark, reports: This was an interesting panel comprised of papers on different geographic areas with thematic and theoretical connections among them. About twenty people attended, and there was a lively discussion afterwards and good audience participation. A summary of the papers and commentary follows.

JEREMY ADELMAN, Princeton University: Adelman's paper explored the intellectual origins of Argentine constitutionalism in the middle of the nineteenth-century. Focusing on Juan Bautista Alberdi, he traced to shift from a classical form of early nineteenth-century liberalism, to one which espoused a more locally-attuned and less universalistic road to the rule of law. Alberdi and others shifted the idea of a constitution away from a document to protect and create liberties, to one which defended and upheld social and political order. This shift provided the intellectual conditions for the Constitution of 1853 and its dominant interpretive framework.

LAUREN BENTON, NJIT and Rutgers University, Newark: Benton's paper argued that captive redemption across the Atlantic world helped to reproduce a familiar legal framework. While captivity narratives emphasized the differences between "civilized" captives and "barbarous" captors, the subtext of these accounts was that shared understandings and established routines made responses to captivity – in particular, redemption – possible. The experience of Europeans in redeeming captives of Barbary pirates was especially important in shaping responses to captive taking elsewhere in the Atlantic world. Information circulated widely about how to succeed at redemption in Barbary states, where negotiations and ransom-paying became increasingly institutionalized. New World accounts showed that Europeans held similar expectations about the possibilities and rituals of redemption. Through negotiations, ransom-paying, and release, "savages" and "pirates" took on the unmistakable marks of legal authority, political order, and diplomacy.

HERMAN L. BENNETT, Rutgers University: In his essay "Which Law and Culture?" Professor Bennett offered a re-examination of the initial encounters between Iberians and Africans. His essay questioned the historiographical tradition that reduced the early modern encounter to a conquest of "the land of Guinea." By looking closely at the series of fifteenth-century chronicles, Bennett suggested that diplomacy between Iberians and African sovereigns shaped the encounter and would subsequently enable the emergence of the slave trade in which sovereignless peoples were deemed as slaves. The essay on the basis of ecclesiastical sources went on to question the role that Roman law played in shaping master-slave relations in the Americas, suggesting that ecclesiastical law (canon law) had a significant, if not dominated role in defining the slave experience.

Commentary: LAWRENCE ROSEN commented not so much on the details of each paper as on the broader themes they raised for comparative legal history. He noted that the range of variation in colonized people's responses to legal impositions to outside forces, like the range of their indigenous practices, demonstrates an enormous vitality that has often been submerged in simplistic ideas about colonialism. Similarly, he commented on the ways in which it may now be possible, based on studies like these, to develop more sophisticated concepts of the range of sovereign powers and their specific legal implementation in a post-colonial world.

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Natural Law Thought in British North America

RICHARD ROSS reports: This panel investigated the multiple roles of natural law thought in early America. All three papers stressed how the protean qualities of natural law and its simultaneous integration with positive law, religion, and conscience made it central to colonial legal culture.

GREGG ROEBER, Pennsylvania State University, explored how, in the Middle Colonies, natural law influenced popular understandings of the duties of conscience. The colonists derived from natural law and conscience a set of practical duties, such as doing justice to kin and close neighbors, honoring one's word, and tempering legal rigor with mercy.

DAVID KONIG, Washington University, used natural law as key to finding unity in the otherwise elusive thought of Thomas Jefferson. A variety of Jefferson's intellectual commitments could be tied together once one sees their shared dependence on a natural law foundation. These commitments included: a conception of social life as a pairing of rights and duties; defense of retrograde gender relations and tortured compromises with slavery; and

a bounded optimism about the ability of reason to enlighten the populace-bounded because Jefferson thought that the debilitated state of popular rational faculties justified press censorship and heavy handed tutelage by an enlightened elite.

CRAIG YIRUSH, Johns Hopkins University, argued that historians have undervalued the centrality of natural thought in eighteenth century political argument. Given the uncertainty of positive law in the British empire, the colonists found natural law a useful ally in combating proprietors and in justifying land transfers from native Americans.

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Money, Contract, and Capitalism in Early America

HARRY N. SCHEIBER, University of California, Berkeley, School of Law, reports: CLAIRE PRIEST's (Yale University) paper offered a reinterpretation of the relation of legal and economic development in colonial New England. She emphasized the impact of government paper money experiments in prescribing the conditions under which individuals contracted and litigated in the colonial period. Colonial contractual obligations and debt litigation trends reflected an economic revolution from a society based principally on barter relations to a more modern cash economy. Priest contended that the "law" of colonial contractual relations was as much generated by power struggles over currency policy between the colonies and England, by political controversies within colonial legislatures, and by currency fluctuations and market instability, as it was the product of individual promises and common law rules.

CHRISTINE DESAN's (Harvard Law School) paper explored the changing relationship between public authority and the market in the American 18th century by contrasting the different currencies used over that time for economic exchange. Systems based on politically managed paper money gave way late in the Critical Period, she argued , to an approach based on hard money and interest-bearing debt; long-standing practices that defined public contract, legislative authority, and notions of freedom and coercion changed at the same time. The result realigned the way government related to its citizens, assimilating

Comments by SEAN WILENTZ and CHRIS TOMLINS placed the papers in the context of ideological as well as institutional conflict of the colonial era and early Republic. Harry N. Scheiber served as session chair.

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Truth, Justice, and the Carolingian Way: Courts and the Articulation of Power in Early Medieval Europe

THOMAS FRANCIS HEAD, Department of History, Hunter College, reports: In a paper entitled “Why Go To a Court? Self-interest and the Courts in Early Carolingian Bavaria,” WARREN BROWN of the California Institute of Technology examined how and why nobles, both secular and ecclesiastical, brought disputes over land tenure into courts in light of the evidence provided by the documents in the charter collection of the cathedral church of Freising. Brown focused on the decades following the Carolingian conquest of Bavaria in 787, when the courts overseen by royal representatives or *missi* were novel. Deftly determining the kinship and institutional ties of the litigants, Brown showed how certain nobles used the new juridical procedures to lay fuller claim to their properties. His emphasis on the importance and nature of self-interest among the Bavarian nobles significantly helps to further current scholarship about Carolingian law courts begun by such scholars as Paul Fouracre and Wendy Davies.

Where Brown provided depth and color to a current school of interpretation, GEOFFREY KOZIOL of the University of California, Berkeley questioned the very underpinnings of current interpretations of Carolingian legal procedures in an intentionally provocative paper entitled “Black Holes and Case Law, or What Charters Can’t Tell Us about Carolingian Legal Practice.” He pointed out how the evidence for legal practice in the Carolingian period is largely divided into traditional laws, such as *Lex Salica*, and charters. The former give evidence about the theory of the law and treat mostly criminal matters; the latter give evidence about the adjudication of disputes and concern mostly matters of land holding. In short, they provide two very different and incomplete pictures of the legal process. Koziol argued that virtually all current theories about Carolingian law are flawed because they use only one type of evidence and fail to comprehend how the evidence was itself produced. He went on to outline how future scholarly inquiry might proceed and some forms of other evidence, hitherto ignored, which might be adduced.

As ADAM KOSTO of Columbia University noted in his comment, Koziol thus implicitly questioned the very underpinnings of Brown’s paper. Kosto pointed out that the two papers were incommensurate: the first was a rich description of the evidence with little in the way of methodological reflection, while the latter was almost entirely methodological with little explicit exposition of the evidence. Kosto attempted to show how the two papers were, in

methodological with little explicit exposition of the evidence. Roots attempted to show how the two papers were, in fact, less removed from one another than they might appear at first glance. During the discussion, Brown and Koziol themselves appeared to be in agreement. The conclusion of the session appeared to be that new interpretations of charter evidence have drastically reshaped our picture of Carolingian legal practice, but that it is now time to go on to a reinterpretation of other forms of evidence as well.

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Freedom and Slavery on the American Frontier

SALLY GORDON (Penn Law School and History Department) reports: This was a lively and well-attended session, which successfully brought together a variety of perspectives on slavery and freedom that have previously been overlooked in legal historiography. Questions from the audience confirmed that slavery on the frontier is a fruitful area of historical inquiry.

LEA VANDERVELDE (University of Iowa Law School) presented “Slaves in Free Territory,’ a study of the practice of buying and keeping slaves in the northwest territories, especially among military officers. ANTHONY BAKER (Campbell University Law School) presented a paper on the ‘intellectual frontier’ of constitutional theory and the popular press, “‘The Authors of All our Troubles’: The Press, the supreme court and the Civil War.” LESLIE SCHWALM (University of Iowa, History Department) analyzed the conflict over the migration of slaves into Midwestern states after emancipation in “The Wartime conflict over Slavery and Freedom in the Midwest.’

Commentator ARIELA GROSS (University of Southern California Law School) observed that each of the papers broke new ground, making important contributions to our knowledge of the legal past. She also gave a series of constructive comments on the three papers, urging the authors to integrate the history of slavery with that of other ethnicities, including Indian and Irish, as well as the history of the Northeast. Spirited and thought-provoking questions from the audience followed.

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The Bill of Rights and the Uses of History

SANDRA F. VANBURKLEO, Department of History, Wayne State University, reports: The panel proved to be a particularly vigorous and fruitful intellectual experience. DONALD LUTZ (University of Houston) explored the content of Bill of Rights scholarship in the wake of the Bicentennial, from the point of view especially of political scientists and historians. AKHIL AMAR (Yale Law School) followed with a provocative examination of the ways in which historians’ and lawyers’ accounts of the path of constitutional law necessarily differ. In lucid comments, LES BENEDICT (Ohio State University) and KERMIT HALL (North Carolina State University) laid out, in different but complementary ways, how constitutional historians’ taste for ambiguity, change, and complexity provide not only “context” for lawyers as they set about tracing the path of the law, or compiling briefs in constitutional cases, but also provide an invaluable corrective for the unitary conclusions that lawyers often present (legal “truth”). In some respects, the discussion period was the most valuable part of the session. Members of the audience ruminated at length about whether historians should offer their services as signators to amicus briefs or as expert witnesses in constitutional cases. On the one hand, historians could be influential and shape the course of public policy, and seem to be doing such things more often than in the past; on the other hand, historians then were forced to deal in the methods and unitary “truth” statements that characterize legal discourse, and seemed as well to be abandoning all pretense of objectivity. Participants in the conversation found these alternatives deeply troubling, if only because every available choice threatened to delegitimize historians: Those who refused to enter public conversations, in courtrooms and in newspaper columns, would not be heard at all; those who chose to participate might be perceived as tainted by the partisan fray, and by the adoption of the lawyers’ unambiguous sense of unitary “truths.” ASLH has sponsored sessions in the past that examined tensions between law and history; but this session, unlike some earlier ones, began to move onto fresh terrain, particularly in the rather close discussion of the nature of historical and legal discourse, and in talk about the historians’ perhaps-post-modern fascination with ambiguity. In the past, Morty Horwitz reminded us, historians had no trouble speaking “the truth,” and as a result enjoyed a popularity that they have not experienced since. Conversation persisted well beyond the assigned time.

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Lawyers in the American West, 1820-1920

GORDON BAKKEN, Department of History, California State University, Fullerton, reports: CHRISTOPHER BRYANT, University of Nevada, Las Vegas Boyd School of Law, explored the legal apprenticeship system operating in the office of Calvin Fletcher in frontier Indianapolis, Indiana. In addition to reading law in the traditional modes of drafting documents, researching points and authorities, and studying Blackstone, Fletcher regularly quizzed his students on the law. His students performed clerical duties including, but not limited to serving papers, traveling great distances to attend to cases, and transporting documents. The frontier forced lawyers to work with primitive transportation system, but did not materially force change in Indianapolis practice.

ANDREW P. MORRIS, Case Western University, School of Law, discussed the impact of Decius S. Wade upon law in territorial Montana. Wade was Chief Justice of the Montana Supreme Court and one of the most significant authors of the Montana Code. Despite Wade's belief in the efficacy of codification, his common-law craftsmanship proved to be far more important in the legal development of Montana.

BARBARA ALLEN BABCOCK, Stanford University, School of Law, presented her findings regarding the work of Clara Foltz and others in the creation of the public defender. Women won admittance to the bar in the West in the 1870s, but found clients hard to attract. Yet women started defending the criminally accused and won seemingly impossible cases. Women defenders forced female prosecutors to appear to give parity in Victorian minds despite the fact that women were infrequently on juries. These pioneer lawyers forged the path leading to the creation of the public defenders office and afforded women access to clients and trial experience. Professor Babcock's website <http://www-leland.stanford.edu/group/WLHP> is a rich source for the study of women at the bar.

GORDON MORRIS BAKKEN, California State University, Fullerton, presented a brief comment calling for greater contextualizing of the field to raise issue of interest to the New Western Historians. Professor Bakken also noted that all four of the papers would be published in the *Nevada Law Journal*.

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