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A Message from Harry Scheiber

It's been an exciting and rewarding time to be a director and officer of our Society, since I took office as president (with trepidation about following on illustrious predecessors) in fall 2003. It's a pleasure to report now that the last fifteen months have seen some wonderful initiatives that bode well for the Society's future and for the field of legal history.

First, there is a smooth and successful transition in progress in the editorship of *Law and History Review* from Chris Tomlins at ABF to David Tanenhaus as University of Nevada, Las Vegas. We owe warm thanks to the American Bar Foundation for their support of Chris and his board over so many years, and thanks now to UNLV's officers and faculty for the fine support they are extending to the journal as it settles into its new home. Those of you who were at Austin joined in expressing our deep appreciation for the vision, skill, and sensitivity with which Chris and his associates have made the journal an acknowledged leader not only in America but globally among scholarly periodicals in the fields of history and law. We also are grateful to the University

of Illinois Press, publisher, for a journal that is as handsome in production as it is important in content.

Second, the Austin meeting was all that one could have hoped. Roy Mersky and his local arrangements committee provided a venue in historic downtown hotels, a lively barbecue event, and in general wonderful hospitality. The enthusiasm on all sides was infectious: I'm not embarrassed to use the old standby, "A great time was had by all." Members are grateful indeed to the many presenters and critics who put on one fine panel after another. Victoria Saker Woeste and her program committee did outstanding work in managing a large number of applications from potential presenters, and also in soliciting panels that gave balance to the program and enlivened it in so many ways. The prize committees gave much time to their choices, recognizing important new research, and the Society thanks them as well.

Further, the book series under editorship of Tom Green and Dan Ernst (with former co-editor Dirk Hartog continuing to contribute in preparation of books on which he's already been involved) has gone forward in sustaining its tradition of distinction. Not only has the series produced a remarkable number of prize-winning books; it also has kept up a standard of quality that is a source of pride to the Society and the profession. Moreover, as I can attest from knowing many of the authors well, the series reflects a level of imaginative and sensitive editing that is hard indeed to find today, even in the world of scholarly publishing. The University of North Carolina Press has been a partner in the very best sense, giving the books great care in production nd providing substantial support from its endowment funds over many years. Thank you all!

Finally, since last March the board and your officers have turned out attention in an intensive way to the question of the Society's financial future. Under leadership of Sarah (Sally) Gordon of Penn Law School as chair, a committee was formed last March, as we have informed all members in a recent mailing, and launched a "Campaign for the Future of the Society." A set of long-time members and former officers who served on this committee undertook to put the campaign on a solid basis through personal pledges ranging in amounts from $2,500 to $25,000 over five years; and subsequent phone appeals to other members long associated as committee chairs and in other capacities produced a remarkable second wave of contributions. With more than $300,000 pledged for a five-year campaign aimed at an endowment of $500,000, we are well under way. But the Society very much needs the support of all its members.

I urge you to give attention to the recent mailing and to consider a pledge at whatever level is appropriate. The higher the percentage and the aggregate amount of pledges from our members, the better we can meet our commitment to the future for sustained excellence in all the Society's activities, including our publications, support for travel and research, recognition of special accomplishments in research, and maintenance of quality of the annual meetings. Furthermore, the higher the percentage of participation by members, the better our argument for outside support when we seek funds from foundations or other donors.

We anticipate and welcome gifts that are earmarked for income or term endowment (specified period of years), expenditure for specific purposes, and even more so gifts for permanent endowment that will carry the Society forward in these tough days when the university presses are strapped and it has become difficult to find outlets for publication. We also hope to avoid the need for further increases in annual dues, following on the very generous reception of the increase that was necessary last year.

Another important way to contribute to the Society's long-term future is for existing members to purchase gift student memberships for younger scholars. Many of us have done so with our doctoral or advanced law students interested in legal and constitutional history, or in "law and society" studies, and our board joins me in hopes you will consider such gifts this year.

The percentage of gift recipients who remain members, on their own, is very high and helps to give scholars relatively new to the field a sense of how their work and their careers can benefit from the Society's meetings and other functions.

Jack Pratt, our secretary-treasurer, and Sally Gordon, past-president Bob Gordon, and president-elect Charles Donahue have been stalwart friends and colleagues. So too have been the members who have served on our many committees in the past year. Rather than a long list of the other names – for the list would indeed be lengthy were it to be fair – I will simply say a deeply felt personal thanks to those who offered me advice and counsel, who worked closely on the fund campaign for the Society's future, and who on all fronts carried forward the work of the Society with such dedication and distinction on all fronts in the past year.

Harry N. Scheiber

2005 Annual Meeting, Cincinnati, Ohio

The Society's thirty-fifth annual meeting will be held November 10-12, in Cincinnati, Ohio. The host hotel will be the Hilton Netherland Plaza. Additional information about the meeting will be available on the Society's web page at <http://www.aslh.net/>.

2004 Annual Meeting, Austin, Texas

The Society's thirty-fourth annual meeting was held October 28-31, in Austin, Texas. Special thanks go to colleagues from the Jamail Center for Legal Research Tarlton Law Library at the University of Texas at Austin School of Law – ROY MERSKY, KUMAR PERCY, and MICHAEL WIDENER – and MARIA ALLEN, who works in the Law School's Special Events Office – along with JOSIAH DANIEL of Vinson & Elkins in Houston.

Thanks also go to the Program Committee: VICTORIA SAKER WOESTE, American Bar Foundation (chair); BARRY CUSHMAN, University of Virginia; LAURA EDWARDS, Duke University; NORMA LANDAU, University of California at Davis; LAURENT MAYALI, University of California at Berkeley; MARTHA UMPHREY, Amherst College; and JIM WHITMAN, Yale University.

2004 Annual Meeting, Board of Directors

The full minutes of the Board of Directors meeting are posted on the Society's web page <http://www.aslh.net/>.

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Surrency Prize

The Surrency Prize for 2004 for the best article appearing in volume 21, *Law and History Review*, was awarded jointly to DANIEL J. HULSEBOSCH, for "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence" and to SARAH HANLEY, for "'The Jurisprudence of the Arrêts': Marital Union, Civil Society, and State Formation in France, 1550-1650." The citation for Professor Hulsebosch's award was this:

> Professor Hulsebosch surveys afresh Sir Edward Coke's constitutional jurisprudence, in order to clarify Coke's views of the rights and liberties of the King's subjects in Britain and in the overseas empire, and to contrast Coke's actual views with the later uses made of them by rebellious American colonists. He gives us a Coke still immersed in seventeenth-century ideas of common law as one of many jurisdictions, as applying to England rather than to British subjects, and as jurisdictional – tied to specific remedies in specific courts – rather than a substantive jurisprudence of principle. But he also shows how, through mediaeval-sounding doctrines such as personal ligeance of subjects to their King, Coke unintentionally pioneered a free-floating jurisprudence of English liberty. Eighteenth-century colonial lawyers pried the arguments loose from their original local and institutional matrix to convert them to a law of fundamental rights

enforceable by subjects abroad even without English courts to enforce them in. Written with grace and vigor, the article brings bright new light to old debates over the constitution of empire.

The citation for Professor Hanley's award was this:

> Professor Hanley tells, from previously unexplored sources, the fascinating story of how early-modern French jurists built up a body of decisions (arrêts) on marital law that aggressively challenged and revised canon law doctrines and jurisdiction, especially by repudiating those church doctrines that permitted clandestine marriages. The jurists had their decisions ratified and reinforced by a series of statutes (Ordinances) that sought to displace church law – by means of bringing criminal charges against abettors of marriages they deemed illicit and granting appeals to those who sought escape from them – with a distinctively French "Marital Law Compact". Only public marriages, they argued, recognized by a public jurisprudence of arrêts in civil courts could form the families that in turn would constitute French civil society and the French nation. Closely argued and carefully supported, this remarkably original and eye-opening article convincingly demonstrates how secular jurists deployed marriage law as an instrument of state-building.

Sutherland Prize

The Sutherland Prize for 2004 was shared between Professor ELIGA GOULD, of the University of New Hampshire, for his article, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," 60 *William and Mary Quarterly* 471-510 (2003), and Professor DANIEL KLERMAN, of the University of Southern California, for his article, "Was the Jury Ever Self-Informing?" 77 *Southern California Law Review* 123-149 (2003).

The citation for Professor Gould was this:

> Professor Gould's article charts the legal geography of the Atlantic portions of the British Empire. The article skillfully weaves together two important threads in recent scholarship: the rise of Atlantic history and the emergence of legal geography as an analytical category. The cartological metaphor hearkens back to Blackstone, who saw his Commentaries as a map of English law. The article successfully deploys the metaphor to illuminate the tensions between the Empire's center and periphery, and the recurring violence within the Atlantic world. Indeed, as the article persuasively demonstrates, the legal pluralism of that world was itself the source of conflict.

The citation for Professor Klerman was this:

> Professor Klerman's article addresses a question of fundamental importance to the history of the jury. Recent scholarship, focusing on the fourteenth and fifteenth centuries, has questioned whether the medieval jury was ever self-informing. Drawing on an extensive array of primary sources from the twelfth

and thirteenth centuries, the article convincingly answers the question in the affirmative. Jurors in the thirteenth century primarily gained information in advance of trial; there were instances of witness testimony, but these were uncommon. Why then did the self-informing jury decline? The article points, among other factors, to two changes in criminal procedure: the transition from infrequent eyre to twice-yearly jail delivery, which made it hard to recruit local jurors, and the exclusion of presenting jurors from the trial jury, which deprived the latter body of the people most knowledgeable about the accusation. Self-informing, as Professor Klerman persuasively explains, was a matter of degree: largely present in the thirteenth century, noticeably more absent by the fifteenth.

2004 Annual Meeting Sessions

Reports from the chairs of sessions at the 2004 Annual Meeting are reprinted below to provide a summary of the work currently being done across the range of the Society's membership.

Race, Citizenship, and Liberty in Global Contexts

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AUGUSTINE-ADAMS examined racial classifications in Mexico's 1930 census. The National Statistics Department eliminated questions about race from the forms and census takers asked no specific questions about race. Instead, the Mexican government measured national integration by asking linguistic questions. Augustine-Adams found that these questions about languages spoken could not compensate for the missing racial questions. Race proved too important a classification scheme to be eliminated by governmental fiat.

MUKHERJEE looked at the Gandhian movement for independence. Though normally viewed as a nationalist effort, Mukherjee finds the Gandhians rooted their thinking in traditional Indian discourse of transcendental freedom. In 1919 Gandhi shifted position and began articulating the enunciative position of the samnyasin or renouncer. For masses of Indians only the "renouncer" spoke the true language of religion, truly detached from the affairs of the world. Far from promoting nationalism, Gandhi rejected politics and favored enlightened anarchy instead. Freedom came not from law but from the renunciation of desire and of identity. Gandhi played a key role in gaining independence for his nation, but his philosophy made him irrelevant to the state building that came after 1947.

Examining nineteenth-century Chile, MAUREIRA finds that Chilean conservatives created a culture of constitutionalism and respect for the law. Chilean conservatives dominated from 1830 until 1861. Liberal values flourished after the Conservative era closed and Maureira argues that the Conservatives promoted values necessary for the Liberal to flourish. Chile gained independence in 1818 and immediately scrambled to try an establish a national identity. The conservative 1833 constitution put order ahead of liberty and disfranchised most Chileans. Despite this, Maureira argues the Conservatives did not believe in despotism or trample civil liberties.

Commentator THOMAS J. DAVIS of Arizona State University discussed all three papers, raising questions about the connection between citizenship and citizenship rights. He urged the authors to disentangle the self from the state. While citizenship is not often seen as fragile, Davis noted that all three papers suggested that citizenship could be tenuous indeed. In the case of Mexico, merely getting married could alter citizenship. From this point, Davis moved on to probe the relationship between gender and citizenship.

Marriage, Sexuality, and Women's Rights in American History

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In "'Immoral Purposes': Prostitution, Concubinage, and Legal Definitions of Morality," ARIELA DUBLER (Columbia University Law School) draws on two early twentieth-century pieces of federal legislation and their adjudication to explore how federal law attempted to create a line between licit and illicit sex. The first, the 1907 amendment to the 1875 immigration act, brought Congress into the business of regulating the entry of prostitutes by prohibiting females from coming to the U.S. for prostitution or "other immoral purpose;" the second, the 1910 White Slave Traffic Act (or Mann Act), prohibited the movement of women across state boundaries for prostitution or "other immoral purposes." Dubler argues that when courts were confronted with defining "immoral purposes" and were, therefore, forced to make sense of the legal relationship among various forms of nonmarital sex, they were unable to draw clear distinctions between licit and illicit sex. What, for example, was the difference between prostitution and concubinage, and what was the role of consensual, non-commodified, non-marital sex? Not even marriage, the theoretical "cure" for addressing the illicit behavior in these statutes, she notes, could work as an antidote against offenses committed under the Mann Act or the amended immigration act. In her conclusion Dubler suggests that the law's deep ambivalence about the relationship between marriage and illicit sex offers a useful perspective to the contemporary debate over the meaning of marriage and its relationship to illicit and licit sex.

In "Bentham in America (At Last): Married Women's Property Rights and the Reform of the Common Law," KATHLEEN S. SULLIVAN (Ohio University) compares and contrasts the first nineteenth-century codification debate (1824-1840) with the later one (1881-1886) to illustrate the differences created by married women's property rights. In the earlier stage of the discourse over codification, she argues, common lawyers successfully questioned and resisted the legal positivism that informed the reforms of Bentham and his supporters, but in the later stage, after the married women's statutes ameliorated the rules of coverture, they failed to mount the same kind of resistance to Bentham's theories. The shifts in marriage law, insists Sullivan, lay at the heart of this change largely because the husband-wife relationship served as a critical component of the later supporters of codification. And whereas common lawyers resisting the first efforts at codification had once argued for the common law's modernity and flexibility and defended it as a source of freedom, they now celebrated it instead for maintaining the status quo and providing a bulwark against change. Their failure to confront codification's underpinnings, she suggests, or explore equity as a source of reform deprived American legal theory of an alternative to the codifiers' abstract and uncontextualized notions of equality. Sullivan views the loss of a viable common law voice in these debates as the loss of an alternative premise to women's rights.

In "Marriage and the American Constitutional Order: 1900-1950," GRETCHEN RITTER (University of Texas at Austin) explores the broad effect of the Nineteenth Amendment on the link between marriage and women's civic status. Although the Nineteenth Amendment provided women with a claim to an identity as engaged citizens and distinct legal persons, Ritter demonstrates how marriage remained a defining element of the civic status of both women and men. Revisiting *Muller v. Oregon* and *Bunting v. Oregon*, Ritter notes that *Muller* upheld protective labor legislation for women because they were not full citizens while *Bunting* upheld it for men precisely because they were. *Bunting*, then, suggests that suffrage might have been used to transform not only women's citizenship but also the constitutional structure of citizenship in general in the direction of civic equality and positive rights for both women and men. Yet in *Adkins v. Children's Hospital*, the court recognized the transformation in women's civic status at the cost of bringing them into the same negative rights regime occupied by men. Ritter argues that the Cable Act, despite its concern with the rights of individuals, including married women, exemplifies why women's incorporation into the voting citizenry should not be understood only as an expansion of the principle of inclusion since it denied rights to immigrant women and those who married "ineligible aliens." State cases in the 1930's, moreover, show the continuing resilience of the common law rules on domicile while the role of men as workers and providers provided the basis for the organization of Social Security and veterans' benefits. Ritter concludes that as gender relations moved from the realm of coverture to liberal individualism, implicit and explicit recognition of marital status provided an alternative means for preserving gender hierarchy.

JULIE NOVKOV (University of Oregon), the Discussant, underscored marriage as a common thread in the papers along with the significance of the family as a fundamental unit of the state. Novkov noted that by elaborating on the law's efforts to establish clear dichotomies, Dubler illuminated the inherent slipperiness of defining licit and illicit, but she wanted to see more on state-by-state definitions of marriage. Sullivan, Novkov observed, drew on the married women's property rights to reveal a change in the posture of common lawyers, but she wondered about the lack of good legal reporting and questioned the centrality of "the woman question." Ritter, she observed, significantly complicated the teleological narrative of the move from women's common law status to independent civil status.

Perspectives on Latin American Legal History

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CHARLES R. VENATOR SANTIAGO, Ithaca College, reports: The panel offered three nuanced readings of the character of law in Colonial Spanish America (1500-1700s), 19th century Mexico, and contemporary Brazil to a captive audience of approximately 20 people. One of the unifying threads of the panel was an emphasis on an understanding of law comprised of norms stemming from multiple legal traditions.

The discussant for the panel, PETER REICH, Whittier Law School, read parts of VICTOR URIBE-URAN's paper, "Iglesia me llamo: Church Asylum, Crime, Law, and Daily Life in Colonial Latin America, 1500s-1700s." Professor Uribe-Uran, Florida International University, was unable to attend the conference. His paper addressed the relationship of Church asylum law

to the Spanish-Colonial legal regime during the colonial period in the Spanish empire. The paper addressed some of the ways in which outlaws and other criminals invoked the expression "Iglesia me llamo" (my name is church) in order to receive shelter/asylum at local churches during the Spanish colonial period. Some of the questions raised by the audience inquired whether Professor Uribe-Uran's paper addressed this issue within the context of the North American Spanish colonies.

This presentation was followed by MATHEW C. MIRROW, Florida International University, whose paper titled "Case Decisions as Sources in Mexican Legal History," addressed the development of jurisprudence in 19th century Mexican legal law. His presentation emphasized a discussion of the Amparo Act of 1882 and the Federal Code of Civil Procedure of 1908 paying particular attention to the codification of jurisprudence in Mexican legal history. The audience was quite interested in Professor Mirrow's arguments regarding the influence of U.S. jurisprudence in the development of Mexican law and jurisprudence.

The final paper was presented by ROBERT J. COTTROL, George Washington University, and was titled "Lei Afonso Arinos and Brown v. Board of Education: Comparative Perspectives on Brazilian and US Civil Rights Law at the Half Century Mark." Earlier versions of this article were presented as papers at the symposium "Brown v. Board of Education: Commemorate the Turning Point [Fiftieth Anniversary Symposium]" at the University of Pittsburgh School of Law, February 6th 2004 and at the annual meeting of the American Society for Legal History, October 29th 2004. This paper provided a comparative examination of two landmark developments in the civil rights law of Brazil and the United States. The Brazilian statute Lei Afonso Arinos and the *Brown* decision by the U.S. Supreme Court marked the beginnings of new national commitments to racial equality before the law on the part of both nations. The paper explored how national civil rights law has fared in both nations in the ensuing half century and legal and social reasons for a less successful regime, to date, of civil rights protection in Brazil.

Social Science and Legal Pragmatism in the New Deal and World War II

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SALLY CLARKE, University of Texas, reports: While I was not at the session and while the commentator JOHN HENRY SCHLEGEL kindly took my place as chair, I can submit this note. The session focused on the professional capabilities of lawyers and state building during the 1930s and early 1940s. JESSICA WANG (UCLA) examined the influence of legal pragmatists at the Securities Exchange Commission (SEC) and the National Labor Relations Board (NLRB) during their formative years. Legal pragmatism thrived at the SEC where James Landis promoted what Wang called a "looser approach to regulation," seeing "law as a process and ongoing experiment." (p. 11) William Douglas brought from Yale his interest in empirical research as reflected in his efforts to move beyond "local community" surveys and collect data on firms and market relations. Wang cites Douglas's work at the SEC for "revealing legal pragmatism's uncertain footing in the realm of scientific investigation and the multiple directions that empiricism could take as a form of inquiry." (p. 18) In contrast to some legal realists' desire for finding

"rigid scientific methods," Douglas joined Landis in his support of "looser forms of empiricism." (p. 23) Their efforts were rewarded: they sustained an "expert-driven model of administrative statecraft that defined securities regulation under the New Deal, and as a technological project, it achieved regulatory success." (p. 24) At the NLRB, by contrast, the experts "clashed," revealing serious conflicts between lawyers and social scientists. Wang finds that the labor economist William Leiserson, much like the "SEC's legal pragmatists," sought to create a flexible method for assessing labor relations, but that he ran up against a split within the NLRB based not only on politics but also on their differences for "ascertaining truth." As played out over conflicts about the purpose of hearings, the split revealed one faction favoring "adversarial legal methods" (meaning, a "judicial forum") and the other invoking social science studies meant to "understand the social reality" before reaching a proposed action and remaining flexible to "custom." (p. 29, 31) In conclusion, Wang emphasizes that there was no single optimal method to the social sciences and law. As she notes, "There was a world of difference between the legal pragmatism of the SEC and the formalism of earlier jurisprudential traditions." (p. 37) While staying focused on lawyers' professional capabilities, DANIEL ERNST (Georgetown Law Center) examined not their role in implementing policies but their single effort to create an independent board to examine potential applicants for positions as government lawyers. When the proposal came to place government lawyers under civil service requirements for hiring, Ernst reports that "[t]he chief law officers immediately rebelled," and FDR decided to put together a committee (known as the Reed committee) to study the matter. Rather than recommend a return to the old approach, Felix Frankfurter proposed to give lawyers the independence to determine who would be the new crop of lawyers hired for federal agency positions. The selection process was intended to be a merit system, since individuals were placed on the unranked roster through a public examination. Frankfurter prevailed among members of the committee, and just as the federal government began mobilizing for the war, FDR gave his nod to the launching of the Board of Legal Examiners. Yet, the board was driven out of business by the mid-1940s, thanks to the attacks of hostile politicians caught in their "party competition." (p. 16) In his reflections, Ernst observes that agency lawyers had followed the lead of legal realists during the late 1930s, trying to "defend their authority in functionalist terms." Wary critics, however, had wanted a selection process that would sustain "a narrow, technical view of lawyers' authority." While the Board of Legal Examiners ultimately failed, it is worth noting that except the political hardships of the early 1940s, the board's legal advisors, led by the young Herbert Wechsler, had succeeded in convincing their own colleagues as well as many other interested parties of granting them this independent authority. John Henry Schlegel provided this summary of the third paper: "John Baltz told about the very public work of Morris Ernst, a prominent New York lawyer famous for his civil liberties work in the years before World War II, in defending individuals prosecuted for their involvement in the birth control movement. Ernst attempted to use social science evidence in support of his client's defense in both cases. I one case, the more newsworthy, a prosecution of Margaret Sanger, where publicity was more intense, the trial judge refused to admit Ernst's evidence and his client was convicted. In a later case, brought against a less prominent participant in the movement, the evidence was admitted and the client acquitted."

Federal Tax Policy in the Great Depression

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JOSEPH J. THORNDIKE (Tax Analysts), reports: This panel explored key issues in federal taxation during the 1930s. As a group, the panel stressed the importance of this decade in the history of the federal tax system. While riven by conflict and marked by relatively few legislative landmarks (at least when compared to the following decade), it featured vital debates on the nature and scope of federal taxation. STEVEN A. BANK (University of California at Los Angeles, Law) began the session with "Tax, Corporate Governance, and Norms: Lessons from the New Deal." Bank contrasted two corporate tax reforms of the New Deal era: the overhaul of the tax-free reorganization provisions in 1934 and the undistributed profits tax of 1936. Noting that the latter was far more controversial and much less durable than the former, he concluded that tax provisions are most successful as a tool for corporate governance when used to reinforce existing norms of corporate behavior rather than to introduce new ones. MARJORIE KORNHAUSER (Vanderbilt University, Law) presented "The Rise and Fall of Publicity of Income Tax Information in the 1930s," highlighting the era's brief flirtation with personal income tax disclosure. Kornhauser described the intense opposition surrounding this legislative innovation, emphasizing the small but intense campaign of a few key opponents. DENNIS J. VENTRY, JR. (O'Melveny & Myers LLP) concluded the panel with "Tax Justice New Deal Style: FDR, the Treasury Department, and Family Taxation in the 1930s." Focusing on the Supreme Court and its decisions regarding family taxation, Ventry contended that the Court continued a trend it had begun in the late 1920s and early 1930s, looking beyond legal tests of title as exclusive indicators of ownership and taxability. Instead, the court examined incidents of ownership while downplaying technical property law concepts of vesting, expectancy, and agency. CHARLOTTE CRANE (Northwestern, Law) offered comments on all the papers, noting the centrality of tax avoidance worries in most of the tax debates of the 1930s. She also stressed the important role that New Deal opponents played in shaping 1930s tax policy, dooming innovations like the undistributed profits tax and the publicity of income tax information.

Comparative Perspectives on the Evolution of Corporate Governance

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Our panel offered a lively interdisciplinary look at both new developments and ongoing fundamental problems in the division of power and wealth among corporate stakeholders. STEPHEN BANK (UCLA) and BRAIN CHEFFINS (Cambridge) argued in their paper that corporate dividend policy in the UK proved politically indeterminate and that neither left nor conservative governments led corporations to distribute rather than to retain profits. Notwithstanding later audience skepticism, they stood their ground. CAROLINE FOHLIN (Johns Hopkins) next addressed the classic German debate on the role of banks and interlocking boards and argued that new evidence suggested no bank dominance of large German corporations either pre-1933 or post-1945. Here too the audience later proved a bit skeptical. Finally, DAVID SKEEL (Penn) elaborated an Icarus metaphor –overdone ambition leading to meltdowns and crashes—for recent managerial-board wrangles. The metaphor itself was well received, though the substance subjected to lively questioning. Finally, ADAM WINKLER (UCLA) offered

incisive, well-informed criticism that introduced a lively debate, one which indicated a hankering for more politically suggestive analayses.

Adaptations to Romano-canonical Procedure in the Middle Ages: Customary Law, Inquisitio and Lombard Law

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An astonishing number of the Society's members, more than thirty of them, gallantly turned out for this session at 8:30 on Saturday morning.

RICHARD L. KEYSER (History, Western Kentucky University) opened the presentations with a close analysis of the evidence concerning the ways in which features of Romano-canonical procedure came to supplant customary forms of dispute settlement in the County of Champagne during the late twelfth and the early thirteenth centuries. Drawing upon extensive research in unpublished archival records, Keyser argued that papal judges-delegate played a key role in helping to introduce the new procedural system, along with the ius commune style of arbitration, into use in Champagne. At the same time, when courts in that region handed down decisions they commenced to cite local customary law more regularly than they had previously done. The rise of the learned laws, Keyser concluded, thus helped to legitimize and crystalise local customary law, which as it increasingly began to be set down in written form also commenced to develop greater coherence.

Turning from customary procedure in northern France to inquisitorial procedure in the territories of the Crown of Aragon, MARIE KELLEHER (History, California State University in Long Beach) centered her presentation on a case study of an unpublished record of a preliminary inquest into allegations of the rape of a nine-year-old girl in fourteenth-century Catalonia. Kelleher analyzed the problems that the testimony of minor children, and female children in particular, presented to courts in that region. She emphasized the procedural complications that this situation presented and the consequent reliance by the court upon fama, or general public knowledge and belief about the events involved in this situation.

JASONNE GRABHER O'BRIEN (History, Fairleigh-Dickinson University) then drew our attention to northern Italy. Her analysis of the treatment of judicial duels in the work of an eminent fourteenth-century jurist, Giovanni da Legnano, indicated that the survival of trial by battle in the later Middle Ages was not merely the survival of a procedural relic. Giovanni treated judicial duels as a species of war. This in turn allowed him to argue that the same criteria that justified war between rulers served to justify combat between the parties as a legitimate means of settling disputes. She noted that at times Giovanni also drew upon Lombard law as an authority, but that he did so within the context of the Romano-canonical procedural system. His treatment of duels thus illustrates once again the ways in which ius commune procedures might blend with customary norms during the later Middle Ages.

DICK HELMHOLZ (University of Chicago Law School) opened the discussion by posing one question to each of the panelists. Why, he asked Dr. Keyser, was there apparently so little conflict among the lawyers involved in the cases he discussed over the propriety of using Romano-canonical procedure rather than the established customary processes of the region? What was the point, he wanted Dr. Kelleher to tell him, of initiating an inquest into the assault on that

nine-year-old girl when the alleged assailant had already disappeared from the vicinity? What differences, if any, he asked Dr. O'Brien, were there between war and single combat between the parties to a dispute? With those questions as a starting point, such a lively discussion ensued that your moderator was at length forced to call a halt to allow the following session to commence.

Naming Needs, Redefining Rights: Reform, Reaction, and the Politics of Work and Family in the Twentieth-century U.S.

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First thing in the morning of the second day of the meeting, 34 people attended the session. They heard three excellent papers from junior scholars, each drawing on dissertation research in progress at Yale University, followed by a stirring and very appreciative commentary from former ASLH president LAURA KALMAN. The session, which was extremely well constructed, was designed to focus our attention on specific twentieth-century struggles to mobilize national state capacities in the service of realizing progressive and liberal rights claims whose implications cut against an established structure of social institutions predicated on traditional ideologies of household ascendancy deeply embedded in modern American political and legal discourse. The three papers complemented each other in a very satisfying fashion that allowed clear themes to become established throughout the session: the power of the discourse of public and private; its social-institutional embodiments; the resilience across time, in different guises, of household ideologies; the intersection in the struggles under examination of gender, race and the less-spoken but nonetheless clearly present class, both as social categories and as standpoints for action that refract rights talk.

We heard first from DEBORAH DINNER, whose paper entitled "Transforming Family and State: Women's Vision for Universal Childcare, 1966-1971" examined the mobilization of rights claims in the campaign for universal child care, culminating in struggles over the Comprehensive Child Development Act of 1971. Deborah Dinner is currently in her fourth year of a joint-degree program in law and U.S. history at Yale University. She has served as a law student intern at the Jerome Frank Legal Services Organization in New Haven, and she has worked as a summer associate at Relman, a plaintiff-side civil rights law firm in Washington, D.C. Her research interests include the relationship between social movements and constitutional law in the twentieth-century; legal history; feminist theory; and property.

Our next panellist, SERENA MAYERI, broadened the ambit of the panel to consider the intersection of discourses of gender, race, and family in American political and legal debate during the sixteen years from 1964 to 1980 - from Great Society to Great Communicator. Serena's paper was entitled "Gender, Race, and the Family in the Affirmative Action Debates, 1964-1980." Serena Mayeri received her law degree from Yale in 2001, where she is now a Ph.D. candidate in history and, currently, a Golieb fellow in legal history at New York University law school. Her dissertation is entitled "Reasoning from Race: The Civil Rights Paradigm and American Legal Feminism, 1960-1982." It examines how lawyers, judges, activists, politicians, and ordinary citizens reasoned about the relationship between racial and gender inequality during the 1960s and 1970s. Elements of the project have already been published in the *California Law Review* and *Yale Law Journal*.

The panel's final paper, "Routing Progressive Constitutionalism? Family-Based Republicanism in 1920s Law and Public Policy," was delivered by REBECCA RIX. Following two papers that had very appropriately identified the 1970s as the crucial, fiscally-wracked end-days for the view of the state molded by conflict during the New Deal and elevated to conventional wisdom during the quarter-century of relative consensus following World War Two, Rix's paper offered a fascinating analysis of a significant watershed moment in the story of that state form's beginnings, the Supreme Court's decision in *Frothingham v. Mellon* (1923). Particularly interesting for purposes of historical perspective on the phenomena examined in all three papers, the "matrix" as Rix puts it "of status relations and law related to governing social welfare," that organizes her account of origins is largely the same matrix that our first two participants' accounts placed at the center of their accounts of end-days. Old habits die hard. In

effects of emancipation. This court is usually referred to as the "Semicolon Court," a derisive title referring to its most famous case, which turned on the interpretation of the punctuation of a statute. As the terms of the judges of that court terminated in 1873, a new court of five judges was appointed pursuant to constitutional amendment. This new court served from 1874 to the end of Reconstruction in 1876, when a fourth (elected) court of three judges was put in place under a new Constitution which also put criminal appeals under a separate court. Though assisted by new intermediate appellate courts, the new court was unable to cope with its heavy docket and had to be relieved of part of it in 1879 by voluntary access of litigants to a Commission of Arbitration which became a Commission of Appeals in 1881.

By 1882 railroad litigation was a considerable element in the docket of the court and two decades later that pattern remained. MARK E. STEINER (South Texas College of Law) discusses the period from 1900 to January, 1911 when Chief Justice Gaines died. Railroad cases amounted to just under a quarter of the courts dockets. During that period the court was made up of three able, congenial, and like-minded judges. By that time a system of intermediate appellate courts had developed and the number of appeals to the Supreme Court had declined by over three-quarters, including instances in which an intermediate court had certified a succinct question to the court. In the intermediate courts the railroads were the usual appellants and the same pattern was repeated in railroad cases before the Supreme Court. In those cases the railroads prevailed in about six instances out of ten. The court was in apparent agreement on almost all of these cases: In over three hundred cases there were only two dissents. This seeming unanimity also prevailed in other subject matter, but these results might well be explained by the feeling of a potential dissentient that his colleagues' opinion was not sufficiently awry to take issue in print. There were only six dissenting opinions in nearly fourteen hundred decisions during eleven years.

From the statistics it is apparent that during this time the trial courts had held a railroad answerable in damages approximately 2750 times. It was the policy of many of the defendants to appeal any finding of liability over $500. It is also apparent that the Legislature was much concerned with railroad injuries to the pubic and their livestock as well as to shippers of property. Legislation was also enacted to protect injured workmen from the defenses of contributory negligence, assumed risk, and the fellow-servant doctrine. With respect to the last of these the court's interpretation of statutory language was uneven. Several legislative acts concerning railroad injuries were held invalid under both the state and federal constitutions, but the Legislature promptly repaired them.

During the period 1900-1911 the railroads seem to have dodged state courts in taking their dissatisfaction with decisions of the Texas Railroad Commission to the federal courts. After all, Justice Brown had taken a very active part in setting up the Commission as a member of the Texas Legislature and had represented the Commission in meeting some early challenges of the law. The railroads' appellate policy of dodging the Supreme Court's supervision in this regard was generally successful.

In negligence cases the court generally supported a jury verdict supported by some evidence in favor of the plaintiff, but railroad lawyers took advantage of all instances of errors in jury charges. The holdings of the court were by no means always in favor of plaintiffs against the railways, but the court occasionally expressed seeming regret at having to rule in favor of the defendants. With respect to cases concerning a railroad employee's release for injuries suffered, in three out of four cases the releases were treated as valid. But through its long course the court overruled no pre-1900 precedent in relation to ordinary common law disputes involving a railroad.

New Meanings of Property in Legal History

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ROBERT HOME's paper "Squatters or Settlers?: British Colonial Land Settlement and Peri-Urban Development in Africa and the Caribbean" takes issue with the ideas of the influential property theorists Hernando De Soto. In the book *The Mystery of Capital* Hernando De Soto argues that the secret to unleashing the wealth of the working poor in developing countries is to give them legal access to formal legal title for their informally held property. Home's research into the history of Colonial land-titling practices raises doubts about the effectiveness of De Soto's proposal. Home's historical research shows that the spread of regularized land titling by British Colonial administrators formalized the power of the British over the natives. By instituting formal private property and protecting that property with a system of title registration, the British colonials restricted and devalued the natives customary land rights. Home compares the establishment of formal title in the colonies to the enclosure movement in England and finds the loss of common rights under enclosure similar to the natives' loss of customary property rights in the colonies. Home concludes that "the state's protection of property rights often reinforces irregularities in land ownership and adds to the insecurity, indebtedness and landlessness of the poor."

DYLAN PENNINGROTH presented a paper entitled "A Question of Belonging: Servile Claims to Property and Family in the Southern Gold Coast and the U.S. South." His comparative analysis of slavery in the southern US and the Gold Coast of Africa highlights the importance of both property and kinship in understanding the slave systems of both regions. In particular, Penningroth argues that a comparative history helps historians break out of the prevailing model of US slavery studies in which masters and slaves struggled over the scope of autonomy that the slave could exercise within the system. The Gold Coast example shows that kin and community, not just relative autonomy, is also an appropriate way to analyze the slave experience. Race did not define Gold Coast slavery instead it was defined by the slave's lack of kin ties. This definition of slavery allowed slaves to own property and inherit from each other, and in a few cases, actually become richer than their masters. In fact, some slaves had an interest in affirming their slave status because the status gave them a kin link to their masters and, sometimes, a claim to property. By highlighting the importance of kin to the Gold Coast slaves, Penningroth allows historians of United States Southern slavery to reconsider the meaning of kinship and property within the Southern system. Particularly after emancipation, Southern blacks developed networks of kin that allowed them to accumulate property against the wishes of their former masters. Penningroth's provocative comparison of Gold Coast slavery and Southern slavery points the way towards a reconceptualization of the slaves' understanding of their life experience as being about their relations among themselves and not only about their relations with their white masters.

Roundtable: Ethical Problems and Legal Rules Surrounding the Use of Lawyers' Papers as Historical Sources

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VICTORIA SAKER WOESTE reports: This session was greeted by a large and lively Saturday first-time-slot audience, and the participants sought not to disappoint the impressive showing of interest in the topic. As chair, I started us off by explaining how the session had originated in Kirsch's query to me some months prior to the meeting. I then described my research into lawyers' papers relating to a famous defendant in a 1927 libel lawsuit, and I briefly recounted my efforts to learn what ethical obligations attached to my use of these papers. None of the collections has any use restrictions imposed by the holding institutions; neither has any client in any of the cases at issue signed a waiver of privilege. When everyone involved is dead, including those who donated the papers to public archives, there is tremendous disincentive on the part of the researcher to walk away. For non-lawyers this is perhaps less problematic than it is for lawyers; regardless, we as researchers and historians want to do the right thing by our work and by our historical subjects.

Next, RAY SOLOMON, dean of the Rutgers University-Camden Law School, described the work of the ASLH committee on lawyers' papers, which began in 1982 under Stan Katz. Initially, the committee considered a query posed to the District of Columbia Bar Association: could a government attorney donate papers to a private archive? Its answer was that without an express consent from the client, the lawyer could not; the requirement for confidentiality was absolute and could not be waived indirectly or by third parties. The ASLH committee discussed this problem and began working out ideas about the how to open lawyers' papers for historical research purposes. In 1991, the OAH appointed a committee to work on the same topic; it consisted of Kermit Hall, Stan Katz, Natalie Hull, and Paul Finkelman. The OAH committee came out with a major recommendation: lawyers' records should be sealed for fifty years from the end of the file or the death of the client, whichever was later. The reaction from historians was decidedly negative, as their associations had just persuaded Congress to release national security records twenty-five years after their declassification. In view of the objections to the fifty-year rule, the OAH sent the report back to the committee, and no suggested standard was announced.

The two committees then began a joint project, collecting anecdotal evidence of historians' experience with these kinds of sources. On the whole, the committee found that most historians got access when they wanted it. The committee decided not to stir up trouble, especially in light of the Vince Foster case (holding that privilege survives the death of the client), and so did not ask the organized bar for clarification. The committee's goal was to preserve existing norms by which historians gained access. The OAH and ASLH committees continue in existence, but are essentially inactive, and the fifty-year rule technically remains the last statement on the matter by the historical professional associations.

We then heard from SUSAN CARLE, a legal ethicist at the American University Law School, who has written widely on the origins and development of legal ethical canons during the 20th century. Carle also sits on the committee of the D.C. Bar Association that rendered the decision Solomon discussed, but she hastened to point out that she joined it after that decision was rendered. Her main worry about this problem is that the existing bright-line rule is both too overinclusive and underinclusive. The issue differs substantively for different groups of people:

archivists, lawyers, and researchers all have different stakes in, and different ethical obligations to, lawyers and clients. Carle pointed out that what we are dealing with here is not privilege but confidentiality, which is a matter of privacy. Confidentiality rules are generally very broad, binding lawyers not to release anything. Foster deals with privilege, which survives the client; Carle believes that confidentiality, too, survives clients.

Carle then told us that she is writing a new opinion for the D.C. Bar. She plans to incorporate Ray's point that the key is to do no harm is paramount and recommend that there be investigations to determine whether test opinions could be obtained that would preserve existing ways of obtaining access and, perhaps, make them more available.

Carle then observed that lawyers who are archivists or historians have some obligations regarding confidentiality that are not shared by non-lawyers; she thinks that clarification of these obligations is needed, and the courts are, perhaps not surprisingly, conflicted. Non-lawyer historians and archivists are not bound by obligations of confidentiality and thus are not liable to clients whose papers are released without their consent. She then offered three practical suggestions: 1) state committees should work on reviewing and clarifying the rules; 2) archivists should get to presume that donations of lawyers' papers have been legitimately done; and 3) archivists should not have to be subject to lawyers' role morality.

As archivist of the University of Texas Law Library, MIKE WIDENER was pleased to hear Carle's suggestions, particularly the third one. He noted that the major professional organization for archivists, the Society of American Archivists, is revising its 1992 code that governs professional decisions in such matters. The 1992 code includes a duty to respect the privacy of those unwittingly affected by the accession of any collection; it also calls upon archivists to advocate for better access to collections. These requirements sometimes create conflicts for archivists. For them, any set of rules needs to promote clarity and predictability in order to be of real service; they have neither the time nor the resources to chase down clients and obtain waivers. Archivists know that lawyers' papers present unique privacy issues, and would be grateful for guidance from the legal community in resolving these issues.

DAVID KIRSCH, a business historian, is building a digital archive of the dot-com era, and one of the centerpieces in his archive is the files of Brobeck Pfegler, a now-defunct law firm that once held a prominent practice in San Francisco. He noted that building a digital archive raises the question of what tools to use with these collections; many documents now never reach paper, and electronic formats change so rapidly that maintaining them in an accessible digital state is a serious problem. The institutional arrangements, he argued, need to change with the technology, or entire periods of history will be lost.

ANTHONY RAMIREZ, a faculty research associate at Maryland, is employed through a grant Kirsch received from the Library of Congress. Ramirez's assignment is to evaluate how the problems of archiving and access translate into the digital age. He pointed out that it was important that we not wait until lawyers retire or their clients die before getting them to address the possibility of archiving the case files. We need to be proactive, he said; if we confront the confidentiality obligations now, we'll be prepared when the time comes to make these papers available. He noted that the American Law Institute has said that it is all right for lawyers to aid researchers when no harm results to the client. (Of course, sometimes a client's idea of what constitutes harm can change over time.)

This series of informal talks, many of which were interrupted by relevant and thoughtful questions from the audience, was then followed by a series of exchanges between members of the panel and nearly everyone in the room. David Langum suggested a 100-year statute of limitations, an idea that met with some critical reaction. Mary Bilder asked whether scholars who used

lawyers' records from two and three centuries ago needed to worry about these rules; she was reassured that she need not, as no one would treat antiquarian records in the same way as more modern records generated in the last century. Sally Gordon brought the discussion back to the present, suggesting that the best way to capture post-1950s law practice was through oral interviews and oral histories. The discussion could certainly have continued well into the day, and the panelists plan to continue their conversations as events warrant.

The Making of Civil Rights Law Revisited

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DAVISON DOUGLAS (William and Mary Law School) reports: RISA GOLUBOFF (University of Virginia Law School) presented a paper, "The Work of Civil Rights in the 1940s," that is a section of a book that she is writing on the construction of civil rights law prior to the *Brown v. Board of Education* decision. In this paper, Goluboff explores the NAACP's declining interest in labor-related issues over the course of the 1940s. Goluboff ties this in to her work exploring the changing conception of "civil rights" during the late 1930s and 1940s from more of a labor focus to a race focus. Because the NAACP played such an important role in civil rights litigation during this time period, the organization's focus on racial discrimination and racial segregation cases helped alter the meaning of "civil rights" during the decade prior to the *Brown* decision.

KENNETH MACK (Harvard Law School) presented a paper, "Rethinking the Origins of the Civil Rights Lawyer," which is also part of a larger project. This paper explores the "classical generation of civil rights lawyers" of the interwar years, such as Charles Hamilton Houston and Raymond Pace Alexander. Mack disputes the notion that civil rights lawyers during these years were uniformly seeking "the creation of a juridically-cognizable right to be free from discrimination in state institutions." Instead, Mack argues, their history "is not nearly as coherent" as many have assumed. According to Mack's "counter-history" of the civil rights lawyers of the interwar years, generalizations about their goals and strategies are difficult to make and hence their story is far more subtle and complex than previously noted.

MARTHA BIONDI (Northwestern University, Departments of African American Studies and History), who has recently published a book on civil rights in postwar New York City – *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City*, offered commentary on both papers as did Mark Tushnet (Georgetown Law Center), who has published several books on civil rights history. In fact, the session took its title from Tushnet's biography of Thurgood Marshall -- *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*. An audience of 40-50 persons attended the session, asking a number of pertinent questions of the presenters.

Moral Judiciary in the Gilded Age

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FELICE BATLAN, Tulane Law School, reports: Our panel, "The Moral Judiciary in the Gilded Age," was extremely well attended. The papers all complicated our understanding of late-nineteenth century law. RENEE LETTOW LERNER began with a discussion of the late nineteenth century debate in New York regarding elected judges. She argued that in the post-bellum period, New York City had an elected judiciary that was corrupt and incompetent, creating fears of social and economic collapse. In response, the elite bar launched a campaign for judicial appointment and sought to "clean up" the judiciary. LEWIS GROSS' talk explored James Coolidge Carter's vision of law and his campaign against legal codification. Gross posits that Carter, as compared to Christopher Langdell placed morality at the center of his legal vision. His desire to preserve the common law was driven by concern for justice in the individual case rather than for a desire to create abstract legal rules. The last presenter was DAVID E. BERNSTEIN who spoke on early-twentieth century substantive due process, arguing that Supreme Court justices employed a natural rights/historicist perspective. This understanding emphasized the unwritten constitutional that guaranteed fundamental substantive rights. By the time, the Supreme Court decided *Lochner*, there existed a broad consensus that the Fourteenth Amendment's Due Process Clause protected fundamental rights from government intrusion. ROBERT GORDON concluded with insightful remarks regarding what these papers added to our knowledge of late-nineteenth century law.

English Justice and its Problems in the Fifteenth Century

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VICTORIA LIST (Washington & Jefferson College) reports: The fifteenth-century panel featured two papers. DAVID SEIPP gave a deeply informed and witty overview on litigation as reflected in the Year Books, arguing that one can find in these reported cases a sense of legitimacy in the common law courts of the period. JONATHAN ROSE's closely reasoned presentation on a particular litigant further illuminated the sometimes murky fifteenth century legal picture. HAMILTON BRYCE, who kindly stepped in at the last moment, offered a well-framed commentary in which he pointed out the usefulness of both the macro and micro approaches. He concluded by hoping that the audience would respond, and respond they did. It was in light of the lively questioning by the audience that the panel demonstrated how well the two very different papers meshed. It was an enjoyable and enlightening discussion

The Bloody Code: its Relation to Reform of the Criminal Law and Reformers

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The panel featured three papers that examined separate developments in English criminal justice in the period preceding the reform of Britain's "Bloody Code", each of which raised important questions concerning the interpretation of this reform episode. PETER KING ("Remaking Justice from the Margins 1750-1850") identified and explored the significance of the many changes in the practice of the criminal law that occurred through the initiatives of summary courts, without the direction (and at times (apparently) against the policies) of Parliament and the central courts of Westminster Hall. JOHN BEATTIE ("Bow Street and the policing of London in the late eighteenth century") reconstructed in detail the organization and practices of the Bow Street runners, revealing the emphasis on criminal detection and persecution that preceded the alternative model of police surveillance and crime prevention enshrined in Peel's 1829 Metropolitan Police program. SIMON DEVEREAUX ("The Condemned of the Old Bailey 1714-1837: Some Statistical Perspectives") offered a four-fold periodization of capital punishment in London and Middlesex during the entire Hanoverian era. In contrast to the often-noted general decline in the rate of actual executions for those convicted of capital crimes, Devereaux's analysis stressed the importance of changing patterns concerning the total number of executions, the frequency of executions, and the particular capital felonies which generated the highest number of executions.

In her incisive comments, NORMA LANDAU matched both the substance and sophistication of the legal history presented by the three paper-givers.

Texts and Evidence in Medieval Contexts

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DANIEL KLERMAN (University of Southern California) reports: CHRISTOPHER GARDNER presented "Torture and the Medieval City: Evidence from Toulouse." The most persuasive evidence of torture comes from illustrations and glosses to the 1286 Customs of Toulouse. A gloss notes that Consuls were immune from torture, both during and after their terms of office. Even their sons were immune. The gloss supports this assertion both with citation to the Digest and with references to two recent Toulousian cases. The manuscript also contains two illustrations which seem to portray torture. BRUCE BRASINGTON presented "Summa est: Analysis of Glosses on Legal Procedure and Terminology in a Cambridge Manuscript of Ivo of Chartres' Panormia (UL Ff iv 41)" This paper explored a late twelfth or early thirteenth century manuscript of Ivo's classic collection of canonical material. The manuscript contained a number of marginal and interlinear notes, which can be classified as lexical, suppletive or commentary. One puzzle of the manuscript is its creation in the first place. It is usually believed that Gratian's Decretum eclipsed earlier collections, like Ivo's. This manuscript and its gloss suggest that, at least in some places, the older texts remained useful and important. TRISHA OLSON provided a sweeping synthetic history of sanctuary in "Of the Worshipful Warrior: Sanctuary and Punishment in the Middle Ages." In the early middle ages, sanctuary was not simply a location where suspects fled to avoid revenge, prosecution or punishment. Rather, it was expected that the suspect would do penance while in sanctuary and that the person who ran the sanctuary, such as the bishop, would intercede on the penitent's behalf, both to God and to those pursuing him. Sanctuary thus provided a means of reconciling the suspect to the community and to God. In the twelfth and thirteenth centuries, the

church's new criminal law jurisprudence began to put more emphasis on deterrence and retribution than on reconciliation. As a result, sanctuary became an embarrassing anomaly and was gradually restricted.

Still Embarrassing after All These Years? The Future of Second Amendment Scholarship

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"Still Embarrassing" addressed the future of Second Amendment historical scholarship by assessing the current state of that scholarship within the paradigm-challenging model suggested by SANFORD LEVINSON in his 1989 *Yale Law Journal* article. Levinson's article was "embarrassing" in its argument that the Framer's belief in "the right of the people to keep and bear arms" included an insurrectionary right of "the people" to resist and replace tyrannical government, and to exercise that right without the sanction of state or federal authorities. Without directly evaluating Levinson's article, two of the three papers revisited the major scholarly arguments that it provoked, including their own. The third broke from that model by offering a case study of the way the Second Amendment was invoked nearly a century after its ratification and, in the process, reinvented its meaning.

SAUL CORNELL (Professor of History at the Ohio State University), whose book on the "dissenting tradition" of antifederalism is one of the most prominent works to address the historical forces identified by Levinson as contributing to the "embarrassing" implications of the Amendment, reprised his general overview of the period from the 1780s through the 1820s in his paper, "Embarrassing Interpretations of the Second Amendment: Beyond the Myth of Constitutional Consensus." He disputed the use of the term "standard model" affixed to a personal right to keep and bear arms since 1989. Moreover, he reiterated his argument that those who asserted such insurrectionary rights in the early years of the Republic were staking out, at most, a marginal position. For Cornell - and for many scholars whose work has appeared since 1989 -- the Revolutionary context was a richly nuanced one, but one whose basic contours can be identified; within them, the "insurrectionary" model remains less than compelling.

ROBERT H. CHURCHILL (Assistant Professor of Humanities at the University of Hartford), whose articles have traced the continuity of popular ideology concerning the right to keep and bear arms, placed himself firmly within the Levinson paradigm with his paper, "Whose is the Embarrassment? The Framers and their Historians confront the Right of Revolution." In it he argued that the "limit on colonial and early state regulation of arms ownership outlined a significant zone of immunity around the private arms of the individual citizen, both from the civil powers of the state and increasingly from its military powers." Contrary to scholars such as Cornell and Jack Rakove, Churchill emphasized the seriousness with which many of the Founders continued to accept the right of armed insurrection. Turning to Madison's militia discussion in Federalist No. 46, Churchill rejected interpretations that have labeled it "ridicule." Instead, he argued that a careful re-examination "should lead us to conclude that the ridicule was born in rhetorical defensiveness rather than laughter."

CAROLE EMBERTON (Ph.D. candidate, Northwestern University History Department) provided the close case study needed to test the Levinson model in practice by examining "The Embarrassment of Reconstruction: The Second Amendment and State Formation After the Civil

War." The "embarrassment" she spoke of was the dilemma of Reconstruction Republicans to attempt to justify disarming the insurrectionary "White Leagues" that terrorized the freedpeople of Louisiana while at the same time enabling pro-Reconstruction militias to keep the peace. "Republican efforts to define the state's prerogative to disarm those elements of society it deemed 'disloyal' or otherwise dangerous to the public good," she explained, "and to re-arm other portions of the population in its defense has become a forgotten aspect of Reconstruction, one that bore a significant impact on the era's outcome and its legacy." Claiming to be "the people," the White Leagues of New Orleans used their armed force to oust the Republican state government in 1874 in the infamous "Battle of Liberty Place." With their coup d'état cloaked in Second Amendment rhetoric, she concluded, "The Battle of Liberty Place became the post-war South's Battle of Concord. The `Spirit of '74' infused the previously uncoordinated paramilitary groups throughout the South with a vital new ideology."

PROFESSOR DAVID KONIG (Professor of History and Law, Washington University in St. Louis), introduced Professor Levinson who, in the words of a colleague, "stimulates everyone around him to rethink their position." Professor Levinson rose to the occasion and provided a gracious review of the debate he prompted in 1989.

Regulation and Political Economy in the Telephone Industry

Catherine Fisk; Law, University of Southern California; cfisk@law.usc.edu
Richard John; History, University of Illinois at Chicago; rjohn@uic.edu
Christopher Beauchamp; History, Cambridge University, England; crb27@cam.ac.uk
George Priest; Law, Yale University; george.priest@yale.edu
Milton Mueller; School of Information Studies, Syracuse University; mueller@syr.edu

CATHERINE FISK (Duke University School of Law) reports: RICHARD JOHN (History, University of Illinois at Chicago) presented his paper, "Nickel-in-the-Slot: The Political Economy of Urban Telephony, 1894-1907," to a surprisingly good-sized crowd, given that this was the last session. The paper is based on his study of the previously little-studied records of the Chicago Telephone Company, one of the large and important local telephone companies in that era. John gave a lively description and assessment of the development and impact of early pay telephones and other innovations in local telephone service, and made a compelling case for the importance of studying local phone companies to understand the early-20th century history of technology. The paper was a felicitous and successful combination of social and business history.

CHRISTOPHER BEAUCHAMP (History, Cambridge University) presented a section of his dissertation, a paper called "The Second Industrial Revolution in Court: Building and Attacking National Patent Monopolies in the Telephone Industry, 1876-1897." This is an important comparative piece assessing the impact of patent monopolies and patent litigation on the path of development of the telephone industries in the U.S. and the U.K. The paper suggests the important role that differences in the bench and bar may have had in affecting the growth of patent law, and the telephone industry, in the U.S. and Britain. The paper was of interest both to historians with a primary interest in law and to those whose primary interest is in business or technology history.

GEORGE PRIEST (Law, Yale University), delivered very thoughtful and probing commentary on the papers and did an excellent job synthesizing the two papers while also providing comments that will be useful to each panelist in his future work.

MILTON MUELLER (Information Studies, Syracuse University) was unable to attend but prepared written comments that were delivered, appropriately edited, by the chair. In addition, he

prepared lengthy written comments for the panelists, who appreciated his hard work in critiquing their work.

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CROMWELL FOUNDATION INITIATIVE

The William Nelson Cromwell Foundation announces the availability of a number of awards for 2005, intended to support research and writing in American legal history. The number of awards to be made, and their value, is at the discretion of the Foundation. Preference will be given scholars at an early stage of their careers.

Applicants will be required to submit a description of a proposed project, a budget, timeline, and two letters of recommendation from academic referees.

Applications must be received no later than June 30th . Successful applicants will be notified by mid-November, and an announcement of the awards will also be made at the annual meeting of the American Society of Legal History.

To request an application form, write to:

Professor Barbara Aronstein Black
Columbia Law School
435 W. 116th Street
New York, NY 10027

Cromwell Prize

The William Nelson Cromwell Foundation will award a $5000 annual prize for excellence in scholarship in the field of American Legal History by a junior scholar, beginning in 2004.

The prize is designed to recognize and promote new work in the field by graduate students, law students, and faculty not yet tenured. The work may be in any area of American Legal History, including constitutional and comparative studies, but scholarship in the colonial and early national periods will receive some preference.

The prize will be awarded annually by the Foundation on the recommendation of a committee of the American Society for Legal History, which will consider all work published, or dissertations accepted, in the previous calendar year. It will announce the award at the annual meeting of the Society in the following autumn.

Candidates should send a hard copy version (no electronic submissions) to ***each*** member of the committee ***postmarked no later than July 15***:

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PAUL L. MURPHY AWARD

Applications are being accepted for the 2005 Paul L. Murphy Award, honoring the memory of Paul L. Murphy, late Professor of History and American Studies at the University of Minnesota and distinguished scholar of U.S. constitutional history and the history of American civil rights/civil liberties. The Murphy Award, an annual research grant of $1,500, is intended to assist the research and publication of scholars new to the field of U.S. constitutional history or the history of American civil rights/civil liberties. To be eligible for the Murphy Award, an applicant must possess the following qualifications: be engaged in significant research and writing on U.S. constitutional history or the history of civil rights/civil liberties in the United States, with preference accorded to applicants employing multi-disciplinary research approaches; hold the Ph.D. in History or a related discipline; and not yet have published a book-length work in U.S. constitutional history or the history of American civil rights/civil liberties. Public historians, unaffiliated scholars, as well as faculty at academic institutions are encouraged to apply. If employed by an institution of higher learning, an applicant must not be tenured at the time of the application. Applicants should submit a packet containing 4 copies of each of the following items: 1) a research project description of no more than 1000 words, 2) a tentative budget of anticipated expenses, and 3) a current curriculum vitae. In addition, applicants should request two referees to prepare confidential letters of recommendation. Applicant packets and letters of recommendation should be mailed to Professor John W. Johnson, Department of History, University of Northern Iowa, Cedar Falls, Iowa 50614-0701. All materials must be received no later than April 1, 2005. E-mail inquiries should be addressed to <john.johnson@uni.edu>.

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J. Willard Hurst Summer Institute in Legal History

The 2005 Hurst Summer Institute in Legal History, which will be co-chaired by Bob Gordon and Lawrence Friedman, will begin one week later than originally planned. The new dates are June 19 - July 1, 2005. All applicants will be notified separately. We regret any inconvenience this may cause. Pamela S. Hollenhorst, J.D., Associate Director, Institute for Legal Studies, University of Wisconsin Law School; 608/265-2804; fax: 608/262-5486; pshollen@wisc.edu

The Langum Project for Historical Literature

The Langum Project seeks to support the writing of history for the consumption of the general public. Such historians as Hubert Howe Bancroft, Francis Parkman, and Will and Ariel Durant wrote excellent histories that enjoyed widespread public readership. The Project seeks to encourage such writing by offering two annual David J. Langum, Sr. Prizes in the amounts of $1,000 each, for the best books published by a university press in the preceding year, as selected by the Langum Project Selection Committee, Prizes are awarded in two categories that meet the following requirements:

> Historical fiction set in the American colonial and national periods, that is both excellent fiction and excellent history, and that, to some extent makes a delineation between fiction and history.

American legal history or American legal biography that is accessible to the educated general public, rooted in sound scholarship, and with themes that touch upon matters of general concern to the American public, past or present.

The annual prizes are awarded in March of each year in a meeting at the Birmingham Public Library, sponsored jointly by the Friends of the Birmingham Public Library, the Birmingham Public Library, and the Langum Project.

More information is available on the web at <http://www.langumtrust.org/>

University of Texas Law Library Publishes Key Document of American Legal History

The catalogue of one of the great early American law libraries has been published in facsimile by the Jamail Center for Legal Research in its Tarlton Law Library Legal History Series.

The 1846 Auction Catalogue of Joseph Story's Library provides a detailed record of the private library of Justice Joseph Story. He was the dominant intellectual figure in antebellum American law, its most prolific author, and, at Harvard Law School, its leading educator. Story joined the U.S. Supreme Court in 1811, at age 32, and to this day remains the youngest person ever appointed to the Court. He is one of the great Supreme Court Justices of all time, and authored several of the Court's landmark decisions.

As Michael Hoeflich writes in his introduction, "the auction catalogue reprinted here provides a window on Story's world, a window through which most legal historians have yet to peer."

The Story auction catalogue was printed in 1846, shortly after he died, and lists almost a thousand titles. Only three copies survive. The Boston Public Library graciously granted the Jamail Center permission to reprint its copy in facsimile.

Of special value is the author-title index to the catalogue, prepared by Karen S. Beck of Boston College Law Library. "The 1846 catalogue is a chaotic list of often cryptic bibliographic citations," explained Roy Mersky, director of the Jamail Center. "Beck's index makes the catalogue usable for the first time."

"The Jamail Center is honored that Michael Hoeflich contributed the introductory essay," said Mersky. "His pioneering research in the history of law books and law libraries enriches our understanding of the growth of American law." Hoeflich is a professor and former dean at the University of Kansas School of Law, and will collaborate with the Jamail Center on several other early American law library catalogues. "Next will be the library of Gustavus Schmidt (1795-1877), the outstanding New Orleans lawyer and legal scholar," Mersky said.

This publication (and all other Jamail Center publications) can be ordered online at <http://tarlton.law.utexas.edu/pubs.html>. Or, contact Abigail Schultz, Publications Coordinator (Jamail Center for Legal Research,University of Texas School of Law, 727 East Dean Keeton St., Austin, TX 78705-3224; phone 512/471-7726; fax 512/471-0243, e-mail aschultz@law.utexas.edu).

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Tarlton Law Library Legal History Series, No. 5
CATALOGUES OF EARLY AMERICAN LAW LIBRARIES: THE 1846 AUCTION CATALOGUE OF JOSEPH STORY'S LIBRARY. Introduction by Michael H. Hoeflich, index by Karen S. Beck. With a facsimile reproduction of the original 1846 catalogue, courtesy of the

Boston Public Library. Austin, Tex.: Jamail Center for Legal Research, 2004. ISBN: 0-935630-58-9. vi, 74 pages. Price: $40.00

***The Journal of Legal History* Student Prize**

The Journal of Legal History, published by Routledge, is pleased to announce that in 2006 it will be awarding a prize for an article, publishable in the journal, by a person who has not previously published, or had work accepted for publication, in a refereed journal or similar publication. The value of the prize will be £500. If you wish to enter for the prize please communicate with the Editor in writing - Dr Neil Jones, Magdalene College, Cambridge, CB3 0AG, UK (Fax: +44 (0)1223 332833; email: ngj10@hermes.cam.ac.uk). The deadline for receipt of submissions will be 1st December 2005.

For further information, please visit: <http://www.tandf.co.uk/journals/titles/01440365.asp>