
ASLH NEWSLETTER



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STUDIES IN LEGAL HISTORY Co-EDITORSHIP

After ten years of exceptional service, Dirk Hartog has decided to step down as co-editor of the Studies in Legal History series, which is sponsored jointly by the American Society for Legal History and the University of North Carolina Press. Fortunately, Tom Green will remain as co-editor. The ASLH Publications Committee invites applications for Dirk's position. Applicants should be members of the Society who are accomplished scholars in American legal history, have the range to work with manuscripts from different periods, are conversant with both law and history, and are committed to working with other scholars to help them develop their manuscripts. The departmental or institutional support required for the position is modest, as is the honorarium provided by the Society.

Interested scholars should send a current c.v. and a statement of what they would like to accomplish as co-editor of the Series by April 15, 2002, to the Chair of the Publications Committee, Bruce H. Mann, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia, Pennsylvania 19104.

2002 Annual Meeting, San Diego

The Society's thirty-second annual meeting will be held November 7-10, in San Diego. The host hotel will be the U.S. Grant. Co-chairs of the local arrangements committee are Michael Belknap <mrb@cwsf.edu>, Professor of Law, California Western School of Law and Adjunct Professor of History, University of California, San Diego, and Michael Parrish, <mparrish@ucsd.edu>, Professor of History, University of California, San Diego, and Adjunct Professor of Law at California Western School of Law. David Rabban, Law, University of Texas, chair of the Program Committee <drabban@mail.law.utexas.edu>. Additional information about the meeting will be available on the web at <<http://www2.h-net.msu.edu/~law/Sandiego.html>>.

2001 Annual Meeting, Chicago

The Society held its thirty-first annual meeting in Chicago, Illinois, November 8-11, 2001. Special thanks go to the Program Committee: BILL NOVAK, History, University of Chicago, American Bar Foundation, Chair; MARY SARAH BILDER, Law, Boston College; HOWARD GILLMAN, Political Science, University of Southern California; JULIUS KIRSHNER, History, University of Chicago; DAN KLERMAN, Law, University of Southern California; FELICIA KORNBLUH, History, Duke University; KEN LEDFORD, History, Case Western Reserve University; MARIA ELENA MARTINEZ, History, American Bar Foundation; JENNIFER MNOOKIN, Law, University of Virginia; DALIA TSUK, Law University of Arizona; BARBARA WELKE, History, University of Minnesota; and MICHAEL WILLRICH, History, Brandeis University.

Special thanks also go to the Local Arrangements Committee, VICTORIA WOESTE, American Bar Foundation, Chair; BEN BROWN, John Marshall Law School; DAVID MORRISON, Coordinator of the Illinois Campaign for Political Reform; SUE SHERIDAN-WALKER, Northeastern Illinois University; and STEPHEN SIEGEL, DePaul Law School.

The Society is also grateful for the help with registration and other administrative details received from these students from the University of Chicago: Justine Buck, Ariana Hernandez-Reguant, and, Alice Colombi, all of whom are graduate students in Anthropology; Katherine Hannaford, a graduate student in Historical Geography; and Kyle Lakin, a junior..

2001 Annual Meeting, Board of Directors

The full minutes of the Board of Directors meeting are posted on the Society's web page <<http://www2.h-net.msu.edu/~law/>>. Key announcements made at the meeting were these:

Approval of the following:

1. Payment of up to \$1500 to the secretary/treasurer to defray expenses associated with attending the annual meeting (as part of that decision, the allocation of any complimentary rooms in the annual meeting hotel should be in this order: secretary/treasurer, president, president-elect);
2. Payment of up to \$1500 for the editor of the *Law and History Review* to attend the quarterly meetings of the History Cooperative;
3. A one-time payment of \$500 to the University of Illinois Press for making available a "pre-print" service that allowed access through the web to manuscripts of articles prior to their publication;
4. Payment of up to \$600 per annum to the graduate student member of the Board to defray expenses associated with attending the annual meeting;
5. The expenditure of \$140 as a one-time expenditure to augment the Murphy Award;
6. Increased the annual dues for institutional members from \$75 to \$85; and
7. Provision of up to \$5,000 for the Program Committee (each year) to help scholars from abroad with travel/hotel costs associated with our annual meeting, assuming the scholars are on the program. The hope is to develop more relationships with foreign scholars and to enable the Society to develop more relationships with legal history organizations abroad.

The next Willard Hurst Legal History Institute will be held in Madison, Wisconsin, June 15-28, 2003. (There is no Institute in 2002.)

Surrency Prize

The 2001 Surrency Prize went to Professor JAMES JAFFE for his article "Industrial Arbitration, Equity, and Authority in England, 1800-1850," which appeared in volume 18 of the *Law and History Review*. The citation read:

Jaffe examines the variegated forms of arbitration used in English industrial trades in the nineteenth century. Through a detailed exploration of the practices of the mining, pottery, and printing industries, Jaffe demonstrates how a voluntary system of arbitration grew up in individual trades alongside Parliamentary efforts to encourage arbitration as public policy. Voluntary industrial arbitration not only resolved disputes, but helped establish working rules for entire trades. Aware of the importance of arbitration, employers and workers struggled to implement and control arbitration systems to their own advantage. In telling this story with clarity, insight and precision, Jaffe has brought legal history, social history, and labor history into fruitful dialogue.

Sutherland Prize

The 2001 Sutherland Prize went to Dr. Robert Shoemaker, University of Sheffield, for his article, "The Decline of Public Insult in London 1660-1800," which appeared in *Past and Present*, no. 169, 2000: 97-131. The citation follows:

This ambitious article makes thorough and technically knowledgeable use of ecclesiastical court records, correlated with the experience of other courts, to persuasively argue that the total number of actions for defamation declined in the course of the eighteenth century, and that the character and language of the cases that were prosecuted also changed significantly. It suggests that the decline in litigation reflected a real decline of public insult and was part of a broader cultural shift, in which the power and significance of the spoken insult was being undermined. His is a fresh and exciting approach to these legal records, exploring them as not only technical and specific documents (which of course they were) but as also participants in the cultural and social life of their time. In this article Dr. Shoemaker has impressively utilized legal records to present a strong case for a broader transformation of social life.

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2001 Annual Meeting Sessions

Reports from the chairs of sessions at the 2001 Annual Meeting are reprinted below to provide a summary of the work currently being done across the range of the Society's membership.

Roundtable: Political Science and the New Supreme Court Histories

HOWARD GILLMAN (USC) chaired this roundtable, which asked whether there is such thing as a distinctive political science contribution to our understanding of the history of the U.S. Supreme Court. The roundtable took as its point of departure more recent work by law professors such as Sandy Levinson, Scot Powe, Michael Klarman (and others) that explicitly draws on theoretical assumptions within political science; it also addressed similar recent work within political science, including work by some of the assembled panelists.

MARK GRABER (Univ. of Maryland) spoke about some differences between the way political scientists and law professors do legal history. Everyone does law office history in the sense that most history has a present moral. Law professors, with important exceptions, tend to have a policy moral. Thus, constitutional history shows why the Court's decision in such-and-such a case was right (or wrong). Political scientists tend to have more institutional

morals, focusing on why an institution functions the way it does, or why we speak in these sorts of ways than other sorts of ways.

JULIE NOVKOV (Univ. of Oregon) emphasized that the new institutionalism in political science draws attention, not only to the ways in which the distinctive institutional character of the Court shapes judicial decision-making, but also how the Court's behavior is a by-product of other political, social, or doctrinal contexts.

SCOT POWE (Univ. Texas, Austin) explained that in writing *The Warren Court and American Politics* (Harvard/Belknap 2000) he self-consciously set out to write in the genre of Edward Corwin, Alpheas Thomas Mason, Robert G. McCloskey and the early Walter Murphy, and place the Supreme Court squarely in the context of American politics and culture. He was not influenced by the "new political science" although as an academic (and periodically practicing) constitutional lawyer there are echoes of it in his work. Nevertheless, it was the pre-1960s political science from which he drew his inspiration.

KEITH WHITTINGTON (Princeton) discussed how the new institutionalism in political science was especially concerned about institutional interactions and effects, and thus gives less attention to the intellectual history of doctrine per se, than to the consequences through time of peculiar institutional features of the Court and the ways in which the Court is situated within and interacts with a broader institutional context. One consequence of this orientation was that the new institutionalism is unlikely to encourage political scientists to return to judicial biographies.

The presentations were followed by thoughtful exchanges between the panelists and the audience that lasted until the room had to be cleared for the next panel.

Making and Enforcing Medieval English Statutes

JANET LOENGARD, Moravian College, reports: The session on "Making and Enforcing Medieval English Statutes" met at 8:45 on Friday morning. Dr. CHRISTOPHER McNALL of Cardiff Law School analyzed the nature of the tenancy in the lands of a defaulting creditor which arose under the provisions of the 1285 Statute of Merchants. He argued that this interest, akin to a lease or a 'live' gage, hovers between the realms of property and contract and that cases drawn from the plea rolls and Year Books demonstrate uncertainty among contemporary practitioners as to the nature of the tenancy -- particularly as to whether it conferred a certain term on the creditor.

Dr. GWEN SEABOURNE of the University of Bristol discussed measures enacted by medieval English kings and governments to govern the terms of subjects' sales and purchases of goods. It concentrated on the light which such measures shed on the techniques and limits of medieval law-making and on the sometimes complex relationship between royal and local law-making. The paper used as its reference point the national assize of bread and London variations on it, describing ways in which London authorities extended and refined the laws while at times ignoring them.

Dr. PAUL BRAND of All Souls College, Oxford demonstrated the importance of investigating the contemporary context for our understanding of thirteenth century English statutes. His example was chapter 6 of the Statute of Marlborough of 1267, which has been seen as intended to safeguard lords' rights of wardship against two commonly used conveyancing arrangements intended to deprive them of these rights. However, investigation shows that neither arrangement had the defrauding as its primary purpose and only one was in common use prior to 1267. Brand's evidence shows that chapter 6 was in fact a response to two particular cases involving these devices, one then in the courts and the other heard some five years earlier.

Professor RICHARD HELMHOLZ of the University of Chicago as commentator observed that the three papers showed the connections of the common law with the ius commune, canon law, and modern law. In speaking of Dr. McNall's paper, he wondered if the tenancy under the Statute of Merchants was seen as a freehold in order to keep it out of the jurisdiction of canon law in the event of the death of the creditor holding the tenancy. In connection with Dr. Seabourne's paper, he commented on the canon law theory of just price and asked whether the legislators were not acting on such a theory. The law of the church, however, endorsed a market solution while the London law endorsed the hand of the state in regulation. With regard to chapter 6 of the Statute of Marlborough, Professor Helmholtz commented on modern tax avoidance and the statutory closing of loopholes, which led him to question whether general legislation was usually directed at a general problem. It was not in Roman or local law and maybe the more normal pattern was legislation in response to particular cases, as Dr. Brand suggests was the case with chapter 6. Possibly in the provisions one could also see an attempt to avoid church court intervention in leases.

Roundtable: Morton Horwitz's *Transformation of American Law* – 25 Years Later

MICHAEL WILLRICH (Brandeis University, History) reports: Before a capacity ballroom crowd, the panelists delivered three compelling perspectives on this seminal text in the field of American legal history.

LAURA KALMAN (University of California at Santa Barbara, History), on leave as a Fulbright Research Scholar in Israel, could not be present. Sarah Barringer Gordon (University of Pennsylvania Law School) delivered Kalman's paper, which was at once a passionate recounting of the effect of *Transformation of American Law* on Kalman's own career as a historian and a critical analysis of the angry reception the book triggered when it first appeared in 1977. Kalman argued that lawyers and legal historians reacted so strongly to *Transformation* because it confirmed their "darkest suspicions and fears" about the American legal system in the post-Watergate era. Liberal legal scholars, in particular, "saw Horwitz's demolition of process jurisprudence and the rule of law . . . as an attack on their own legal liberalism, their faith that federal courts could achieve positive social change."

CHRISTOPHER L. TOMLINS (American Bar Foundation) considered the book's place in the canon of American legal history. Tomlins conceded the book's enduring significance for the practice of legal history. But he argued that the book, by tracing the relationship between law

and economic development in the nineteenth century, cleaved to the periodization and themes staked out by Willard Hurst. Tomlins went on to make a forceful case for taking the field in a new direction -- toward a critical historical examination of law's role in violent conquest and colonization of North America. As Tomlins put it, "Not the release of energy but colonization's possession of the continent, and of what lay beyond it, and the means to effect that possession, is in my view what gives American legal history its foundational and enduring meaning."

In a similar spirit, AMY DRU STANLEY (University of Chicago, History) praised *Transformation* while suggesting how greater attention to the social and legal institution of slavery would have altered Horwitz's narrative. Stanley emphasized the importance of keeping the legal history of freedom and the legal history of slavery both in view when studying nineteenth-century America.

The panel concluded with Morton Horwitz himself delivering a rousing call from the dais to young legal historians. He advised them to follow their bliss and blaze new trails without fearing criticism from their senior colleagues in the field.

New Perspectives on Corporate Development

GREGORY MARK (Rutgers Law School - Newark) reports: This panel explored the intersection of law, market and management in the development of the corporate entity and its place in American political culture.

RICHARD R. JOHN (University of Illinois, Chicago) presented "Riding the Leviathan: Western Union's Gilded Age," a paper which dealt with the corporate embodiment of the history of the telegraph to address several themes in American economic and political development, 1) reactions to and justifications for monopoly and monopolizing enterprises, 2) explanations of monopolies that are historically contingent as opposed to demonstrations of economic theory, and 3) attitudes towards governmental enterprise in an era in which our received clichés suggest that such enterprise would be anathema. Professor John's paper exploited a rich variety of sources, enlivened its discussion with the personalities of competing Western Union officials, demonstrated the halting ways in which understanding of monopoly was developing, and suggested that a lively debate existed about the potential for a nationalized telegraph system.

NAOMI LAMOREAUX (U.C.L.A.) presented "Partnership, Corporations, and the Problem of Legal Personhood in American History." This sophisticated paper lies at the intersection of law, history and economics, drawing on all three fields and challenging basic assumptions taken for granted within each of them. Ultimately, the paper asks a core question, why corporations exist and why they became the dominant form of economic enterprise in America. The paper demonstrates that given legal forms do matter, that legal personhood had an ambiguous utility for entrepreneurs, even though the corporate person came to dominate the economic landscape, and that historians and economists would do well to explore the differing histories of partnerships, small or closely held corporations, and public corporations, rather than assuming that the public corporate model best exemplifies the history of organized enterprise.

ADAM WINKLER (U.C.L.A.) presented "Corporate Contribution Bans and the Separation of Ownership and Control in the Early 20th Century." Winkler argues convincingly that corporate contribution bans of the early part of the twentieth century are properly viewed as part of the private law of the corporation rather than as part of the public law governing political campaigns. However much the modern focus on such contributions demonstrates the potential corruptions to the political process, the contemporary focus was on the abuse of managerial discretion and the misuse of shareholder capital. The paper makes two important contributions: first, it suggests that contemporary regulation bolstered (or attempted to bolster) the development of a robust conception of fiduciary duty, and second, it destabilizes our understanding of the laws of campaign finance, suggesting that corporate contributions had an ambiguous character within capitalism and that a debate existed about whether managerial prerogative to deploy corporate assets should be narrowly aimed at the business at hand or broadly aimed at corporate success in the larger political economy, with all the potential for abuse that might carry with it.

Count All the Cases? Quantitative Methods and Court Contexts

CHRISTOPHER W. BROOKS, University of Durham, UK, reports: Unfortunately, only two of the three panelists scheduled to participate in this session were able to do so, but they ably and instructively filled the time available. LYNN LAUFENBERG's (History, Sweet Briar College) paper on 'Gender, Criminality, and Criminal Prosecution in Early Renaissance Florence' gave a fascinating account of her path-breaking quantitative study of the records of the court of the chief judicial magistrate of the Republic, the Podesta. Based on a sample of approximately 2500 sentences dating from the period 1340 to 1415, the talk concentrated on an analysis of the types of crime (ranging from sexual offences to assault, theft and homicide) that were committed by married and unmarried women during the period.

DELLOYD GUTH's (Law, University of Manitoba) paper on 'Smugglers and Statute violators in Late-Medieval England's Exchequer' began with an amusing account of a single case involving the illicit importation of 'ffrensshcappes' (condoms) as well as interesting remarks comparing the doctrinal approach to legal history with that which uses quantitative methods to consider the typicality of particular cases and the general workings of courts. Basing the body of his paper on the study of 1804 cases enrolled in the court of Exchequer King's Remembrancer Plea Rolls during the reign of Henry VII (1485-1509), he concluded that Exchequer generally served as an effective tribunal during this period.

There was no commentary, but a lively discussion was generated from the floor. Both presenters stressed the importance of combining quantitative analyses with micro-historical contextualisation of the court business being studied, and a number of questions followed up these points. There was also discussion of the possible procedural strategies that were open to defendants and prosecutors, and some consideration of the pitfalls created by the fact that court records sometimes give a misleading indication of what was actually at issue in the cause concerned.

Law and Literacy in Ancient Greece

EDWARD M. HARRIS, CUNY, reports: Professor MICHAEL GAGARIN (Texas) discussed the role of writing and literacy in Athenian law and legal procedure. Gagarin began by arguing that Athenian legal procedure required no experts and contrasted it with the system of writs in Medieval England and the formulary system in Roman Law, both of which required the assistance of experts. Despite the lack of experts, the Athenian legal system made abundant use of writing both for the publication and display of laws and for legal documents such as wills and contracts. On the other hand, Gagarin argued the Athenians made little use of written laws at trials where the relevant laws were often not read out and where litigants often appealed to general notions of justice rather than the law. This combination of written legislation and oral procedure helped to make the law available to all citizens and also to keep the language of law open, flexible, and communal.

Professor James Sickinger (Florida) began by surveying views about the extent of literacy and its effect on law in Ancient Greece. In recent years several scholars have argued that literacy was restricted to a small privileged group. This meant that few had access to written laws. The few laws that did exist contained numerous gaps and were often contradictory and vague. As a result, written laws played a small role in Greek courts. Sickinger challenges this pessimistic view by examining several legal procedures aimed at removing contradictions between laws. Commissions were appointed to remove conflicting laws and entrenchment clauses aimed to prevent the passage of new laws that clashed with old ones. New laws often contained clarifications and additions to earlier legislation designed to remove ambiguities or make corrections. Some laws reveal an awareness that existing laws may not cover all possible situations, but grant judges wide discretion only in rare, exceptional cases. In the extant courts speeches from Athens, all litigants base their cases on written laws, not some general notion of fairness.

Ex-Slaves and the Law

ARIELA GROSS, University of Southern California, reports: Despite heavy competition, a lively audience of about 25 attended the session on ex-slaves and the law, which brought together three interesting papers on marriage, family and citizenship during Reconstruction.

BARBARA KRAUTHAMER's paper on freed people and the question of citizenship in the Choctaw and Chickasaw nations explored the relationship between legal rights and racial identity for the African Americans in Indian territory after the Civil War. Freed people repeatedly called on the Federal government to grant them full citizenship in the Indian nations, on the basis of their shared history, culture and language. The Choctaw and Chickasaw National Councils, on the other hand, argued that their sovereignty and the kinship basis of citizenship would be undermined by allowing Congress to dictate whom the Nations must "adopt" as members. In making their case to Congress, the freed people increasingly relied on racialized notions of "the Indian character" as a lawless people -- at the same time as they demanded that the government recognize their own racial distinctiveness as Indians.

ELIZABETH REGOSIN presented a paper on "Citizenship and Identity: Former Slaves' Civil War Pension Claims," which told the story of one man's claim to citizenship based on his supposed family ties. Pension claims for relatives of ex-slave Union soldiers required proof of one's family relationships. In the particular case narrated, John Robinson sought to prove that he was the only surviving child of Private Elias Robinson and his wife Adaline. Professor Regosin compared the "return" of John Robinson to DeKalb County to claim his family connections to the return of Martin Guerre in sixteenth century France in order to highlight the instability of identity during Reconstruction, and the links between family and citizenship.

Finally, JOHN WERTHEIMER presented a collaborative research project that grew out of his legal history seminar at Davidson College, in which he and his students worked together to produce a single research paper, the story of an interracial marriage between ex-slave Pinkney Ross and his (originally) white wife, Sarah, on the Carolina borderlands during Reconstruction. Their "bottom-up" history of this marriage chronicled the couple's efforts to elude legal sanction by marrying in South Carolina (which had no interracial marriage ban) and then to defend that marriage against a North Carolina Democratic campaign of "F& A" (fornication and adultery) prosecutions of interracial couples. The Rosses won their case by convincing a jury that they were "domiciled" in South Carolina when they were married, that their South Carolina marriage was therefore bona fide, and that North Carolina should recognize the marriage as a matter of comity.

KATHERINE FRANKE's excellent commentary noted that all of these papers were linked by the importance of geographic mobility -- that space made the difference for all of the individuals' ability to claim citizenship or marriage rights. She had thoughtful and useful suggestions for each of the individual papers, and a lively discussion followed.

Crime and Procedure in 18th and 19th Century England

JAMES OLDHAM, Georgetown University, reports: The following three papers were presented in this session: (1) TOM GALLANIS, "Adversarial Culture, Adversarial Doctrine: Criminal Defense Counsel and Leading Questions in the 'State Trials on CD-ROM'"; (2) ALLYSON MAY, "A Metropolitan Practice: The Old Bailey's Bar, 1780-1850"; and (3) BRUCE SMITH, "The Presumption of Guilt in Anglo-American Criminal Law." Tom Gallanis demonstrated persuasively that much can be learned by word-searches that can be done with ease when trial transcripts or reports become available in CD-ROM format. As a dramatic example, he discovered clear invocations of the leading question doctrine well over a century before the rule is revealed by the standard textbooks on evidence. Allyson May in her paper gave a sample of in-depth work she has done on the Old Bailey bar of the late 18th and early 19th centuries, showing how these practitioners combined Old Bailey work with appearances in the local courts, and presenting useful information about the scope and nature of the extensive business conducted in the local courts, as well as the personalities and lives of some of the better-known Old Bailey barristers. Bruce Smith contributed a new perspective on the fundamental proposition that in Anglo-American criminal law, an accused is presumed innocent until proven guilty. He showed how this proposition was turned upside down for those accused of petty crime by statutes

requiring criminal defendants to account for suspicious goods found in their possession. Commentary on the three papers was given by JIM OLDHAM.

Law and Social Control in the Colonial American South

A. Gregg Roeber, Penn State University, reports: Three scholars presented papers inviting renewed attention to the roles of courts and juries in helping to form and perpetuate cultures of deference and obligation in both colonial Virginia and South Carolina. JASON BARRETT's paper concentrated on how civil litigation tied to a competitive mercantile network could still reenforce deference and dependence. In a skillful analysis of Northern Neck Virginia causes, Barrett examined petitions, trespass on the case, and explicit actions for debt, arguing that debt issues reveal how the stability of relationships could be reaffirmed in a market society where deferential relationships could easily be damaged through economic misfortune. HOLLY BREWER's paper ranged more discursively over the broad question of whether the emergence of slavery in colonial America should not best be placed in the context of late seventeenth-century English legal attitudes toward kidnapped children and servants. Brewer's paper advanced some of the arguments she has already explicated in published form on land tenure issues and argued that legal cultures only vaguely aware of the rights of the marginal laboring poor and dependent children found little difficulty extrapolating those attitudes toward permanently enslaved Africans. The international context of legal attitudes toward the socially marginal, and the real possibility of a revitalization of "feudal" relationships, she argues, should be taken seriously in assessing the emergence of southern legal cultures. SALLY HADDEN's paper concentrated on the peculiar moral authority exercised by grand juries in South Carolina. Those juries, dominated by members of the wealthiest families, shaped the social values jurors thought South Carolina's courts should be enforcing. Misbehavior of slaves, perhaps not surprisingly, preoccupied these jurors, but so did the pursuit of gentility and protest against the rougher aspects of South Carolina society, particularly given the lack of legal institutions outside Charleston. Hadden argued that serious limits limited the social control legal officers and jurors could actually impose in the colony. In his comments, GREGG ROEBER pointed out that perhaps Barrett and Brewer make stronger cases for interpenetration of gentry/planter values in Virginia with the indebted and entailed than was possible in the South Carolina context. Queries from the floor to all three panelists continued through the allotted time.

Ancient Near Eastern Law: Administration and Adjudication

The session on "Ancient Near Eastern Law: Administration and Adjudication" went extremely well. GEOFFREY MILLER, of the New York University Law School, discussed the political, legal, and religious reforms that took place in Judah in the seventh century B.C.E. He pointed out how a number of the facets of this reform effort are analogous to elements in the golden calf narrative in Exodus 32. The latter seems to have been produced by the reformers as a way of revising their nation's historical traditions in order to legitimate their effort to alter their society's fundamental law. F. RACHEL MAGDALENE, of Towson University, presented an overview of trial procedure in ancient Mesopotamia during the seventh to fifth centuries B.C.E. Her findings, which were based on an examination of approximately 250 trial records, showed

this system of procedure to be sophisticated, yet flexible enough to accommodate the needs of a complex society. BRUCE WELLS, a doctoral student at Johns Hopkins University, explored in detail one of the features of the legal system that Magdalene presented. He looked at the use of conditional verdicts by the Mesopotamian courts of the mid-first millennium B.C.E. This was a strategy the courts employed in the face of insufficient or ambiguous evidence. Both Magdalene and Wells demonstrated that, during this period in Mesopotamia, there was a shift from supra-rational to more rational means of deciding judicial disputes. MARTHA ROTH, of the University of Chicago, gave the response. She insightfully noted how each of the papers points the way to further research, and she highlighted several efforts, some still in progress, that complement the work presented in this session.

Courtrooms, Classrooms, and Cautionary Tales: Law and the Shaping of American Identities in the Early Republic

DAVID KONIG, Washington University, reports: This session provided two papers concerned with the emergence of American legal identities in the early republic. D. KURT GRAHAM examined the jurisprudence of the lower federal courts, and ELLEN HOLMES PEARSON addressed the scholarship of historical writing on the common law. Their papers, as well as the discussion that followed, drew sharply differing conclusions, which attested to the varieties of legal identities in the United States from its very beginnings as a sovereign nation.

Pearson's paper examined the process of "Revising Custom, Embracing Choice: Early National Legal Scholars as Historians of the Common Law." Paying particularly close attention to the way American legists confronted Sir William Blackstone's treatment of Calvin's Case, she demonstrated how they reinterpreted the history of colonization to provide an American entitlement to the common law. But almost as soon as American legal scholars had used the common law to assert the legal parity of the colonies with England and, therefore, to reject Crown prerogative, they emphasized what Blackstone had identified as the common law's "custom which carries ... internal evidence of freedom" for localistic legal self-determination. The result was the creation, through historical reinterpretation, of a tradition of protecting local legal variations from any uniform national common law.

D. Kurt Graham examined the creation of a competing tradition of legal identity: namely, a national one, as manifested in "The Nationalizing Influence of the Lower Federal Courts: Rhode Island, 1790-1812." Rhode Island would seem an unlikely example for demonstrating the process of nationalization, what with its determined resistance to ratification and, before that, to cooperation with the government of the Articles. Nonetheless, Graham provided an alternative perspective, that of focusing upon the actual operation of the inferior federal courts. Graham emphasized the local nature of government, but placed the federal courts well within that system: "the federal courts empowered the local citizenry, were staffed by local people, and functioned alongside state and local institutions in ways that often made them indistinguishable." Federal officials, in fact, might hold local office at the same time.

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The commentator, Professor Alfred Brophy, offered many suggestions and connections for the two presenters to follow up. In a vigorous exchange that followed the formal presentations, the "national" nature of Rhode Island political culture became a matter of lively controversy. Many of the nearly twenty in the audience participated and contributed their own competing interpretations of Early National events.

Intellectual Property Law and American Economic Development: The Role of Law, Litigation, and Courts

The panel Intellectual Property Law and American Economic Development: The Role of Law, Litigation, and Courts was surprisingly well attended for a Sunday morning. Although the scheduled chair/discussant, Greg Alexander (Cornell), had to cancel at the last minute, Professor GREG MARK (Rutgers- Newark Law School) graciously agreed not only to chair, but also to read the papers overnight and to prepare comments, which he did extremely well.

Professor ZORINA KHAN (Economics, Bowdoin College) delivered a paper, "U.S. Copyright in Historical Perspective," analyzing the development of copyright law in the late-eighteenth and nineteenth century U.S. Professor Khan's paper argues that the differences between patent and copyright laws, and the unique features of copyright law were economically efficient and the development of legal rights promoted welfare maximization.

Professor CATHERINE FISK (Loyola Law School, Los Angeles) delivered a paper, "Authors at Work: The Origins of the Work for Hire Doctrine in Copyright Law," analyzing the development of the legal rule that the employer is the legal "author" of a copyrighted work created by the employee. Professor Fisk's paper argues that the rhetoric associated with intellectual property and authorship influenced the development of 19th century law such that creative employees retained greater ownership interests in their copyrighted works than one would expect, given the generally employer-friendly features of 19th-century master-servant law.

Professor Mark's commentary noted the differences between Fisk's and Khan's explanations for the development of 19th-century copyright law and queried whether each author's explanatory emphasis may be attributed to different primary resources (copyright registrations as opposed to judicial opinions). Professor Mark highlighted different conclusions that might be reached depending on whether one emphasizes quantitative and longitudinal analysis, as is characteristic of an economics approach to legal history, or analysis of judicial opinions and treatises, as is characteristic of a lawyer's approach.

Lawyering and Legal Strategies Across Legal Systems

Professor MARY SARAH BILDER of Boston College reports: This session brought together scholars interested in comparative lawyering and legal practice. The papers discussed the style of legal argument available in the English legal system in three different periods and institutions: (1) in the Anglo-Norman courts of William the Conqueror; (2) in the courts of the medieval *ius commune*; and (3) in the courts recorded in the Yearbooks.

Professor ROBIN FLEMING of Boston College presented a fascinating paper entitled, "Making Legal Arguments in William the Conqueror's Reign." Fleming discussed the legal strategies used by eleventh-century landholders based on a careful reading of Domesday Book and the Christ Church cartulary. She persuasively demonstrated that secular landholders founded their claims on various legal arguments based on the theory of a royal grant. They chose specific arguments based on which were most advantageous in different circumstances; consequently, certain landholders can be found making contradictory claims in successive cases. Fleming provocatively suggested that the desire to base land claims on a royal grant helps to explain two puzzling aspects of the Anglo-Norman legal record. First, the Christ Church cartulary has royal dues and services interpolated into charters and other documents where they do not belong. Second, at the Domesday inquest landholders cheerfully admitted large tax liabilities. Fleming persuasively argued that both instances were strategies designed to support land claims in the Anglo-Norman legal system.

The panel then moved forward two centuries as Professor JAMES BRUNDAGE of the University of Kansas presented his delightful paper, "The Practice of Advocacy in the Middle Ages: Lawyering in the Courts of the *Ius Commune*." Brundage discussed the legal strategies used by advocates in the courts of the medieval *ius commune* in the privacy of their studies and in public court. Brundage described this world through the eyes of a hypothetical advocate confronted by the case of William Smith, a young man accused of having exchanged marriage vows with a young servant named Alice. Brundage's young advocate initially lost Will's case; however, he eventually triumphed on appeal when the examiners noted, among other things, that Will had ten male witnesses in support of his defense, while Alice had only four women in support of her claim. Through a close reading of procedural manuals and practitioner handbooks, Brundage painted a detailed picture of the life of the young advocate—his difficulties with advertising, his small home study, his education. Brundage showed that the advocate had to be concerned about mundane areas of legal practice: the possibility of that a client would lie to the advocate; the need to insure against a client's future recriminations if the case were lost; and the difficulty of negotiating the fee. Brundage pointed out how thoughtfully the advocates considered each aspect of the profession from the importance of dress—"If you don't dress the part, you'll get no ovations, / No matter how learned be your orations"—to the importance of ending with the strongest argument last so that it would be "lodged in the memory." Brundage perceptively reminded the audience that the specialized academic advocates of the *ius commune* were participating in the social practice of lawyering.

Moving forward another two hundred years, Professor DAVID SEIPP of Boston University Law School presented his splendid paper, "Year Book Pleading and Argument (and a New Index)." Seipp's paper drew on his remarkable current project for the Ames Foundation of a new abstract and index of the 6,358 printed Year Book cases for 1399-1535. Relying on cases described in the Year Books from 1399-1435, Seipp brought to life the world of lawyering in the Year Books. He pointed out that the legal strategy seemed to be not how to win a case but "how else" to win a case. In a random sample of 200 cases, only one-third involved the merits of the case; two-thirds were devoted to "strategies of delay, diversion, or obstruction." The writs recorded in these cases suggest a world in which there existed substantial choice among writs in

framing the property dispute. Seipp noted interestingly that 20 cases even used the ancient writ of right with wager of battle or grand assize. Describing the style of argument used by the pleaders, Seipp pointed out that the preferred style involved analogy and distinction. Hypotheticals seemed to abound and references to prior "holdings" were "rare and vague." Seipp explained that lawyers thought it was better "to suffer a mischief than an inconvenience" (a mischief being an unjust outcome in the real or hypothetical case whereas an inconvenience was an inconsistency in the legal rules). Seipp concluded by commenting that the world of the Year Books involved the elevation of procedural fairness and consistency over substantive justice—a world somewhat unfamiliar to modern eyes.

Our fearless commentator, Professor JOHN LANGBEIN of Yale Law School, pulled these three papers together in a provocative and witty comment. Langbein praised the three presenters for papers that so well-articulated the fundamental underlying legal strategies of these different legal systems. Langbein drew on the examples put forward in the papers to cast certain well-deserved disparagement on the Anglo-American common law system. Although acknowledging that the Roman system had a head start, Langbein pointed out that it retained a figure unrecognizable to the common law system: a truth-seeking judge. Langbein argued that only systems in England that were interested in truth-seeking were those such as the *ius commune* that inherited Roman law. He suggested that the common law system as demonstrated in Anglo-Norman times and Year Book times seemed unwilling to investigate fact well and took a certain joy in procrastination and technicality. The audience—substantial both in numbers and in knowledge—warmly received the papers and comments. The questions were excellent and, although some (including this chair) had to leave for the airport promptly at 10:30, others remained long afterwards to discuss the papers with the presenters.

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