Law, War, and History: A Special Issue

The articles in this symposium issue are revised and double-blind peer-reviewed versions of papers presented at a conference on Law, War, and History, at the Institute for Legal Research in the School of Law, University of California, Berkeley in February 2007. The conference was co-sponsored by the Institute for Legal Research and the Office of Dean Christopher Edley, Jr. at UC Berkeley School of Law, and the Office of Dean Richard J. Morgan at the William S. Boyd School of Law, University of Nevada, Las Vegas. Harry N. Scheiber and I served as conference organizers, with assistance from Lena Salaymeh, Karen Chin, and Toni Mendicino. This issue is published in an expanded form, beyond the regular issue format, with the assistance of a designated gift by Jane L. Scheiber and Harry N. Scheiber to the current American Society for Legal History fund drive, and a gift by the Office of Dean John V. White at the William S. Boyd School of Law, UNLV.

Although I believe that editors should remain invisible, I would like to thank my students and colleagues, especially Raquel Aldana, Christopher Blakesley, Joseph "Andy" Fry, Michael S. Green, David Holland, Arthur Kramer, Yuma Totani, and Mary Wammack, who all taught me to appreciate the importance of law, history, and war. Their interest led me to believe that *Law and History Review* should address the relationship among these topics in a special issue. Lena Salaymeh and David Lieberman deserve credit for suggesting that Berkeley would be a fitting place for such a symposium. Harry Scheiber's vision, intellect, and energy were the necessary ingredients (combined with generous support from our respective institutions) to put together the memorable conference on which this special issue builds.

This symposium issue of *Law and History Review* examines legal histories of law and war from the ancient world to modern times. Our examination proceeds in four parts. First, we revisit the conduct of war in the ancient world and early Islamic history. Second, we see the generative role of war in shaping religious and legal thought during the Protestant Reformation and later the American Civil War. Third, we explore the governing of space in international law, including colonized and occupied lands as well as the law of the seas. Fourth, we investigate the relationship among law, war,

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and human rights from the Nuremberg Trial to the on-going "Global War on Terror."

Our first article by Adriaan Lanni surveys what is known about the law of war in ancient Greece, addressing the law's sources, content, and enforcement mechanisms. She argues that the law of war was relatively effective, but it did not encompass humanitarian ideals. Instead, it focused on protecting sacred objects and observances. Despite the central role played by religion and honor, the Greek laws of war were indifferent to considerations of mercy and the protection of noncombatants. She next asks what insight the evidence from ancient Greece might give us into the continuing debate over whether international law can ever truly restrain states. Although the traditional scholarly account of the Greek law of war would support the realist position, Lanni argues that the Greek example, which includes instances in which Greek states observed international norms that were clearly contrary to their interests, suggests one time and place where international law served as a meaningful check on state behavior.

In our second article, Clifford Ando moves us gracefully from Greece to Rome. As he observes, early in its history, Rome treated with, and made war against, states of similar linguistic and cultural background. This accidental parallelism rapidly ceased to obtain, though later Roman sources—all written much later—present its subsequent wars of conquest as waged within mutually recognized frameworks of international law and diplomatic conduct. Instead, Ando argues that these accounts reflect conceptions of the empire as a state, existing within a network of homologous yet sovereign states that developed and long remained immanent in practice. Like much of what the Romans called "public law," conceptions of sovereignty and international law existed in legal theory without robust articulation and theoretical elaboration. Their force and content must therefore be reconstructed by examining the multiple areas of doctrinal dispute and case law where their normative force was invoked. He focuses on fetial law, namely, the regulations governing declarations of war and the striking of treaties, the conduct of negotiations with foreign powers, doctrine regarding the status of prisoners of war, and religious law on the status of land. Though their testimony is not univocal, he contends that the high Roman empire represents an important and largely unexplored moment in the history of sovereignty and the state.

Our third article, by Lena Salaymeh, concludes our investigation into early histories of the conduct of war. She examines the treatment of prisoners of war in a key decade of Islamic history and compares this historical evidence with juristic rulings formulated over several centuries. Changes in dominant juristic opinions concerning war prisoners, she argues, corresponded to shifting historiographical interpretations of events (particularly

battles) from this significant period in Islamic history. By focusing on the contrast between historical narratives and juristic discourse, she illustrates the complicated role of historical-legal precedent in Islamic jurisprudence. As a case study, the legal issue of prisoners of war suggests that labeling some legal opinions as outcome-determinative may oversimplify a complex process in which jurists "construct" legal-historical precedents from a multi-layered tradition.

Our next article by John Witte, Jr. demonstrates how early modern Protestants, especially followers of John Calvin such as Theodore Beza, developed a theory of fundamental rights as part and product of a broader constitutional theory of resistance and military revolt against tyranny. He situates the development of this pre-Enlightenment rights talk in the sixteenth-century French wars of religion and suggests their later influence within and beyond the Protestant tradition.

Continuing the theme of religion and law across the Atlantic, David F. Holland highlights the similarities between constitutional and scriptural reasoning and applies available concepts of constitutional change to a critical episode in American religious history—the long debate over the sinfulness of slavery. He argues that, during the sectional crisis, a strong sense of God's providential involvement in the destiny of the United States could complement a very restricted application of the sacred Scripture—one that could block the looser readings of both proslavery and abolitionist disputants. He then proceeds to analyze the relationship between these two prominent features of the era's religious culture. The results of that analysis provide a new perspective on the remarkable eagerness with which many Americans looked to the Civil War as a moment of divine intervention into history. He also offers reasons why war might serve a particular theological function in the religious traditions that have shaped the culture of the United States. After using the work of constitutional theorists to shed light on American religious history, he concludes by suggesting that American religious history can offer some clarifying perspective on current developments in constitutional theory.

In her article, Lauren Benton analyzes the governing of subordinated space by examining the tensions between international law and imperial constitutions. As she notes, in their efforts to define "quasi-sovereignty" in the late nineteenth century, colonial officials referred to principles of international law but also increasingly predicted the absorption of imperial sub-polities into a single legal order. Simultaneously, their efforts began to shape an understanding of "imperial law" as a distinctive kind of law. She examines how colonial officials attempted to define quasi-sovereignty in the context of a crisis in the 1870s involving the "trial" of an Indian ruler for plotting to poison a British Resident in Baroda. The case shows that

conflicts over jurisdiction, border disputes, and other tensions preoccupied colonial officials and led them to devise increasingly complex typologies of legal territory and to propose new rationales for the suspension of law. She then traces similar trends in Basutoland in southern Africa and U.S. Indian law in the United States, showing the global circulation of ideas about quasi-sovereignty. "Imperial law," she suggests, is best understood as a variant of constitutional law centered on the problems of describing the limits of law and defining new categories of legal distinction for subordinate territories and polities.

Eyal Benvenisti contributes to our analysis of the creation of new legal categories to govern occupied space. As he notes, the law of occupation imposes two kinds of obligations on an army that seizes control of enemy land during war: protecting the lives and property of the invaded population and respecting the sovereign rights of the ousted government. These two principles—which reflect the private and public aspects of the law—stem from unrelated intellectual, social, and political roots. He tracks the parallel yet separate evolution of these two aspects of the law until they merged in the text of the 1899 Hague Regulations. The private aspect, the principle of immunity of private property of enemy nationals, first raised by Vattel and Rousseau in the second half of the eighteenth century, extended the basic distinction between combatants and non-combatants. The public aspect, which reflected the crystallization of the idea of sovereignty as a collective claim for exclusive control over territory and nationals, drew inspiration from the ideas of the French Revolution and support from the balance of power that emerged in Europe at the time. He traces the development of the notion of belligerent occupation as a regime distinct from conquest and its transformation from an idea into a norm of general international law.

Harry Scheiber moves our analysis not only from land to sea, but also from the nineteenth century into the twentieth. Through an analysis of Stanford law professor Joseph Walter Bingham (1878–1973), Scheiber demonstrates how a largely forgotten contributor to the history of Legal Realism made important contributions to American jurisprudence and the reform of modern ocean law. He appraises how Bingham took into the arena of law and policy discourse in international law the same antiformalism and reformist philosophical approach that had marked his early writings and demonstrates how the core idea of his reform agenda was ultimately incorporated formally into international law in 1982. It is now a key element in the new global legal order for the oceans.

Our final two articles address the relationship among law, war, and human rights. In her article, Elizabeth Borgwardt makes a historiographical argument and a normative argument about the Nuremberg Trial. First, she discusses *how* we might resituate the Nuremberg trial, arguing that a

textured and detailed inquiry into its broader policy context might yield a few mildly prescriptive guidelines about the possibilities for using legal ideas and institutions to move a polity beyond an era of mass atrocities. She describes the pluralist, "New Deal" nature of the trial, using that label in the looser sense defined by the philosopher Isaiah Berlin, as a general sensibility of a cohort of reformers who prided themselves on being hard-headed and practical, without bothering much about conceptual niceties. Second, she contends that such a contextual approach highlights the limits of a search for an overarching theory of "transitional justice," positing that a more promising path may be to show concretely the role of norms and rules in what the article calls the "thickening" of the international politics of the 1940s. She concludes by offering one such specific example, contrasting Nuremberg with the virtually contemporaneous Tokyo trial. Tokyo's troubled legitimacy suggests both the power of small differences and the force of a wider rule of law ideology in developing and consolidating evolving norms for international justice.

In our concluding article, Rosemary Foot addresses the problem of American exceptionalism in global politics. Explanations for American exceptionalist behavior, she argues, cover a broad range of factors from the cultural/historical, the institutional, and the power-political. In her article, she focuses predominantly on the first of these factors and the role such ideas play in underpinning the U.S. belief in its special qualities as a nation and custodial role in global politics. She asks how ideas related to exceptionalism can help us better understand the Bush administration's decision to fight a *war* on terror, as well as to launch an assault on the laws of war and human rights. She first provides examples of U.S. exceptionalist behavior since the terrorist attacks in September 2001, before entering more fully into an explanation of why the Bush administration has tried to rewrite the rules in a counter-terrorist era. She draws on the idea of exceptionalism to aid in the explanation. Next, she assesses some of the consequences this has had for U.S. moral authority, comparing America's gradual loss of that status during the 1960s and early 1970s with the rapid and deep decline experienced in the contemporary period. Finally, she briefly considers what it might take for the United States to regain some of that standing.

This special issue, which begins with a quotation from Thucydides' history of the Peloponnesian War and concludes with a statement by Senator John McCain in 2005 about the Army Field Manual, reaches across time and space to help scholars address the challenges and possibilities that war poses for the field of legal history.

As always, this issue concludes with a comprehensive selection of book reviews. We also encourage readers to explore and contribute to the ASLH's

electronic discussion list, H-Law, and visit the society's website at http://www.hnet.msu.edu/~law/ASLH/aslh.htm. Readers are also encouraged to investigate the *LHR* on the web, at www.historycooperative.org, where they may read and search every issue published since January 1999 (Volume 17, No. 1), including this one. In addition, the *LHR*'s web site, at www.press.uillinois.edu/journals/lhr.html, enables readers to browse the contents of forthcoming issues, including abstracts and, in almost all cases, full-text PDF "pre-prints" of articles. Finally, I invite all of our readers to examine our administration system at http://lhr.law.unlv.edu/, which facilitates the submission, refereeing, and editorial management of manuscripts.

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